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

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

- and -

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

Defendants

COSTS SUBMISSIONS OF THE DEFENDANTS TENNENBAUM CAPITAL PARTNERS LLC, 64NM HOLDINGS GP LLC, 64NM HOLDINGS LP AND LG CAPITAL INVESTORS LLC

May 30, 2018

BLAKE, CASSELS & GRAYDON LLP
Barristers & Solicitors
199 Bay Street
Suite 4000, Commerce Court West
Toronto ON M5L 1A9

Michael Barrack LSUC #21941W
Tel: 416-863-5280
michael.barrack@blakes.com

Kiran Patel LSUC #58398H
Tel: 416-863-2205
kiran.patel@blakes.com

Daniel Szirmak LSUC #70163O
Tel: 416-863-2548
Fax: 416-863-2653
daniel.szirmak@blakes.com

Lawyers for the defendants,
Tennenbaum Capital Partners LLC, 64NM Holdings GP LLC, 64NM Holdings LP and LG Capital Investors LLC

TO: **MOORE BARRISTERS**
Barristers and Solicitors
393 University Avenue, Suite 1600
Toronto ON M5G 1E6

David C. Moore LSUC #16996
Tel: 416-581-1818 Ext. 222
Fax: 416-581-1279
david@moorebarristers.ca

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

Orestes Pasparakis LSUC #36851T
Tel: 416-216-4815
orestes.pasparakis@nortonrosefulbright.com

Rahool P. Agarwal LSUC #54528I
Tel: 416-216-3943
rahool.agarwal@nortonrosefulbright.com

Michael Bookman LSUC #65047W
Tel: 416-216-2492
Fax: 416-216-3930
michael.bookman@nortonrosefullbright.com

Lawyers for the defendant,
Vimpelcom Ltd.

AND TO: **BORDEN LADNER GERVAIS LLP**
Barristers and Solicitors
Scotia Plaza
40 King Street West,
44th Floor
Toronto ON M5H 3Y4

James D.G. Douglas LSUC #20569H
Tel: 416-367-6029
JDouglas@blg.com

Caitlin Sainsbury LSUC #54122D
Tel: 416-367-6438
CSainsbury@blg.com

Graham Splawski LSUC #68589T
Tel: 416-367-6206
Fax: 416-367-6749
gsplawski@blg.com

Lawyers for the defendant,
Globalive Capital Inc.

AND TO: **STIKEMAN ELLIOTT LLP**
Barristers and Solicitors
5300 Commerce Court West
199 Bay Street
Toronto ON M5L 1B9

David R. Byers LSUC #22992W
Tel: 416-869-5697
dbyers@stikeman.com

Daniel Murdoch LSUC #53123L
Tel: 416-869-5529
dmurdoch@stikeman.com

Vanessa Voakes LSUC #58486L
Tel: 416-869-5538
Fax: 416-947-0866
vvoakes@stikeman.com

Lawyers for the defendant,
UBS Securities Canada Inc.

AND TO: **LERNERS LLP**
Barristers and Solicitors
130 Adelaide Street West
Suite 2400
Toronto ON M5H 3P5

Lucas E. Lung LSUC #52595C
Tel: 416-601-2673
llung@lerners.ca

Jameel Madhany
Tel: 416-601-2640
Fax: 416-601-2745
jmadhany@lerners.ca

Lawyers for the defendant,
Serruya Private Equity Inc.

AND TO: **MCCARTHY TETRAULT**
Suite 5300
Toronto Dominion Bank Tower
Toronto ON M5K 1E6

Junior Sirivar LSUC #47939H
Tel: 416-601-7750
jsirivar@mccarthy.ca

Jacqueline Cole LSUC #65454L
Tel: 416-601-7704
Fax: 416-868-0673
jcole@mccarthy.ca

Lawyers for the defendant,
Novus Wireless Communications Inc.

AND TO: **DAVIES WARD PHILLIPS & VINEBERG LLP**
Barristers and Solicitors
155 Wellington Street West
37th Floor
Toronto ON M5V 3J7

Kent E. Thomson LSUC #24264J
Tel: 416-863-5566
KentThomson@dwpv.com

Matthew Milne-Smith LSUC #44266P
Tel: 416-863-5595
mmilne-smith@dwpv.com

Andrew Carlson LSUC #58850N
Tel: 416-367-7437
Fax: 416-863-0871
acarlson@dwpv.com

Lawyers for the defendant,
West Face Capital Inc.

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

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

- and -

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

Defendants

COST SUBMISSIONS OF THE DEFENDANTS/MOVING PARTIES TENNENBAUM CAPITAL PARTNERS LLC, 64NM HOLDINGS GP LLC, 64NM HOLDINGS LP AND LG CAPITAL INVESTORS LLC

PART I - OVERVIEW

1. The defendants Tennenbaum Capital Partners LLC, 64NM Holdings GP LLC, G4NM Holdings LP and LG Capital Investors LLC (collectively, the "**U.S. Investors**") deliver these costs submissions following their successful motion dismissing this action against them in its entirety. As set out in this Court's Reasons for Decision dated April 18, 2018 (the "**Motion Decision**"),[1] the claim of the plaintiff The Catalyst Capital Group Inc. ("**Catalyst**") as against the U.S. Investors constituted an abuse of process and was precluded by issue estoppel and cause of action estoppel.

[1] *The Catalyst Capital Group Inc. v. Vimpelcom Ltd. et al.* [the "Motion Decision"], 2018 ONSC 2471 (Schedule "B", Tab 1).

2. The U.S. Investors were entirely successful on each of the grounds put forward on the motion in respect of a claim that should never have been brought. Given their complete success on the motion, the U.S. Investors seek an Order requiring Catalyst to pay the U.S. Investors' costs in the amount of $194,076.01, calculated on a substantial indemnity basis (inclusive of fees, disbursements and applicable taxes).[2] Details regarding the calculation of the amount sought are set out in the U.S. Investors' costs outline attached as **Schedule "A"**.

PART II - LAW AND ARGUMENT

General Legal Principles Governing the Law of Costs in Ontario

3. The fixing of costs is a discretionary decision of the Court pursuant to Section 131(1) of the *Courts of Justice Act*.[3] In fixing costs, courts strive to fix an amount that is fair and reasonable for the successful party.[4] The goal of the exercise is a global costs award that takes into account all relevant factors, including the factors set out in subrule 57.01(1) of the *Rules of Civil Procedure.*[5]

4. Both the *Rules of Civil Procedure* and Ontario jurisprudence confirm the Court's authority to award costs calculated on a substantial indemnity basis in appropriate circumstances.[6] In *Davies v. Clarington*, the Court of Appeal for Ontario clarified that such costs are warranted "where there has been reprehensible, scandalous or outrageous conduct of one of the parties" and "in rare and exceptional cases to mark the court's disapproval of the

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[2] In the alternative that this Court determines that substantial indemnity costs are not warranted, the U.S. Investors seek costs in the amount of $125,213.25 (inclusive of fees, disbursements and applicable taxes) calculated on a partial indemnity basis.

[3] R.S.O. 1990, c. C.43, s. 131(1).

[4] *Boucher v. Public Accountants Council for the Province of Ontario*, (2004), 71 O.R. (3d) 291 (C.A.) at paras. 24, 26 and 38 (Schedule "B", Tab 2).

[5] *J.M.B. Cattle Corp. v. 2144032 Ontario Inc*., 2016 ONSC 2150 at paras. 10 to 11 (Schedule "B", Tab 3); R.R.O. 1990, Reg. 194.

[6] Rule 57.01(4) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

conduct of a party."[7] As set out in further detail below, Ontario courts have found such conduct to include cases where a plaintiff's action was found by the Court to be an abuse of process and where the plaintiff made unfounded allegations of improper conduct that were prejudicial to the character or reputation of the defendants. The U.S. Investors submit that both of these circumstances apply to Catalyst's claim and each independently warrants a costs award on a substantial indemnity basis in this case.

This Court's Finding that Catalyst's Action Constituted an Abuse of Process Justifies the U.S. Investors' Claim for Costs Calculated on a Substantial Indemnity Basis

5. Defendants are entitled to substantial indemnity costs on the basis of a successful motion to dismiss an action as an abuse of process, particularly where defendants have been forced to respond to a plaintiff's attempt to re-litigate a previously decided issue or claim.[8] Awarding substantial indemnity costs recognizes that the defendants incurred unnecessary costs in defending actions that should not have been brought in the first place.[9]

6. Courts have also noted that substantial indemnity costs awards are intended to deter other litigants from engaging in similar conduct. As the Ontario Superior Court stated in *Rousseau v. Scotia Mortgage Corp*:

> An award of substantial indemnity costs, or the threat of it, can ideally function as a tool available to prevent or control frivolous or needless litigation. Making such an award in the proper circumstances enhances access to justice for other litigants.[10]

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[7] *Davies v. Clarington*, 2009 ONCA 722 at paras. 29 to 30 (Schedule "B", Tab 4), quoting *Young v. Young*, [1993] 4 S.C.R. 3 (S.C.C.) at p. 134 and *Mortimer v. Cameron* (1994), 17 O.R. (3rd) 1 (Ont. C.A.) at p. 23.

[8] *Said v. University of Ottawa* ["*Said*"] 2014 ONSC 771 at para. 5 (Schedule "B", Tab 5), quoting *Rousseau v. Scotia Mortgage Corp* ["*Rousseau*"], 2013 ONSC 677 at para. 23 (Schedule "B", Tab 6). Notably, whether a party took steps in a proceeding which were "improper, vexatious or unnecessary" is listed as a factor under Rule 57.01(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[9] *Rousseau* at para. 36 (Schedule "B", Tab 6).

[10] *Rousseau* at para. 23; see also para. 26 (Schedule "B", Tab 6).

7. In this case, significant judicial resources were expended to address Catalyst's unfounded allegations. An award of substantial indemnity costs would represent a warranted rebuke of Catalyst's attempt to re-litigate previously decided issues and serve as a deterrent against similar conduct by future litigants.

Catalyst's Unfounded Allegations of Improper Conduct Justify the U.S. Investors' Claim for Costs on a Substantial Indemnity Basis

8. Ontario courts have also held that a defendant is entitled to substantial indemnity costs in cases where the plaintiff made unfounded or unproven allegations of improper conduct which are prejudicial to a defendant's reputation or character.[11]

9. Significantly, such considerations were already engaged in the related Moyse Litigation in respect of Catalyst's allegations in that case that West Face knowingly solicited confidential information and used it against Catalyst in its successful effort to acquire WIND Mobile Corp along with other members of the Consortium.[12] In that case, the Court found this allegation to be one that "attacked the integrity of West Face and its executives", and noted that attack to be especially egregious given the importance of personal integrity to members of the investment community.[13] In awarding costs to West Face on a substantial indemnity basis, the Court also found that Catalyst's allegations challenged the honesty of West Face's representatives since, in order prove its allegations, Catalyst had to establish that West Face's witnesses were lying about not having obtained and used its confidential information.[14]

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[11] See, e.g., *The Catalyst Capital Group Inc. v. Moyse et al.*, 2016 ONSC 6285 ["Moyse Costs Decision"] at para. 3 (Schedule "B", Tab 7), leave to appeal ref'd, 2018 ONCA 283; *Said* at paras. 8 to 11 (Schedule "B", Tab 5); *Thoughtcorp Systems Inc. v. Tanju*, [2009] O.J. No. 1856 at para. 21 (Schedule "B", Tab 8).

[12] Moyse Costs Decision at paras. 2 to 14 (Schedule "B", Tab 7). Capitalized terms not defined herein have the same meaning as ascribed to them in the U.S. Investors' factum in this motion.

[13] *Ibid.* at para. 6 (Schedule "B", Tab 7).

[14] *Ibid.* at paras. 7 to 9 (Schedule "B", Tab 7).

10. The *Said* case also provides some guidance. In that case, the plaintiff's wide-ranging claims against the defendants – which included claims for intentional interference with economic interests and conspiracy – had been dismissed by the Court as an abuse of process. In its costs decision, the Court found that the plaintiff's claims amounted to allegations that the defendants engaged in intentional misconduct which in turn were "seriously prejudicial to the character and reputation of the [defendants] within the academic and medical community."[15] The Court awarded substantial indemnity costs to the defendants both on this basis and on the grounds that the plaintiff's claims constituted an abuse of process. Notably, the nature of the plaintiff's claims led the Court to award substantial indemnity costs even though these claims had not been directly addressed by the Court in a decision on the merits.[16]

11. In this case, the nature of Catalyst's claims against the U.S. Investors warrants a costs award in favour of the U.S. Investors on a substantial indemnity basis. Notably, Catalyst's claims for misuse of confidential information, conspiracy and inducement of breach of contract were more expansive and more suggestive of intentional misconduct than the claim advanced by Catalyst against West Face in the Moyse Litigation (in which, as noted above, substantial indemnity costs were awarded). Catalyst's claims in this case are also particularly worthy of sanction given that a fundamental premise underlying each of them – that the U.S. Investors and other members of the Consortium had knowledge of confidential information pertaining to Catalyst's negotiations with VimpelCom and acquisition strategy – had already been rejected in the Moyse Litigation.[17]

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[15] *Said* at paras. 8 to 11 (Schedule "B", Tab 5).

[16] *Ibid.* at paras. 4 and 17 (Schedule "B", Tab 5).

[17] *The Catalyst Capital Group Inc. v. Moyse et al.*, 2016 ONSC 5271 ("Moyse Decision") at paras. 114 to 117 (Schedule "B", Tab 9). See also Motion Decision at paras. 65 to 67 (Schedule "B", Tab 1) and *The Catalyst Capital*

12. Finally, like its allegations against West Face in the Moyse Litigation, Catalyst's allegations against the U.S. Investors challenged the honesty of their representatives, as Catalyst would have had to disprove their sworn testimony confirming that the U.S. Investors were not in possession of Catalyst's confidential information. The fact that this testimony was already accepted by the Court in the Moyse Litigation renders Catalyst's unwarranted attack on the honesty of the U.S. Investors' representatives in this action especially egregious.[18]

Catalyst Should Have Reasonably Expected to Pay a High Quantum of Costs on a Substantial Indemnity Basis

13. Among the relevant factors listed in subrule 57.01(1) are the unsuccessful party's reasonable expectations regarding costs and the amount claimed by the plaintiff in the action. Ontario courts have repeatedly held that litigants can reasonably expect adverse costs consequences – including costs on a substantial indemnity scale – when they engage in high-stakes litigation involving significant amounts claimed in damages.

14. For instance, in its decision awarding substantial indemnity costs in *Bieberstein v. Kirchbirger*, the Court explained that in light of the "very large [$10 million] claim" made by the plaintiff and the allegations of deliberate misconduct levelled against the defendants, "the plaintiff had to know that a full and spirited defence would be advanced and that it would be expensive."[19]

15. Similarly, in *Said*, the Court found that as a result of the $50.6 million claimed in damages combined with the plaintiff's allegations of intentional misconduct, the defendants were

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Group Inc. v. Moyse et al., 2018 ONCA 283 at paras. 41 to 42 (Schedule "B", Tab 10), wherein the fact that Justice Newbould heard and addressed a significant amount of evidence pertaining to the Consortium's interactions with WIND is acknowledged.

[18] See Moyse Decision at paras. 114 to 117 (Schedule "B", Tab 9).

[19] *Bieberstein v. Kirchberger*, 2015 ONSC 6136 at paras. 7 and 15 (Schedule "B", Tab 11).

"justified in vigorously defending the action."[20] This finding informed the Court's decision to award significant substantial indemnity costs to the defendants notwithstanding the fact that the matter had been dispensed with through a half-day motion.[21]

16. As a sophisticated party engaging in complex, high-stakes commercial litigation, Catalyst ought to have expected that the U.S. Investors and other moving parties would vigorously defend themselves against Catalyst's $1.3 billion action and the deeply prejudicial claims underlying it. Accordingly, the substantial indemnity costs sought by the U.S. Investors following a complete victory on this motion were or should have been within the reasonable contemplation of Catalyst when it decided to pursue this action.

The Costs Award Sought by the U.S. Investors is Also Fair and Reasonable Having Regard to Other Additional Factors Noted Under Rule 57.01

17. The costs award sought by the U.S. Investors is also fair and reasonable given (i) the complexity of the proceeding; (ii) the importance of the issues raised to the U.S. Investors; (iii) actions taken by Catalyst following the hearing of the motion which unnecessarily increased the duration and costs of the proceeding; and (iv) the efforts of the U.S. Investors and other moving parties to reduce the costs and duration of the proceeding.[22]

Complexity

18. This was a factually and legally complex proceeding involving a sophisticated commercial transaction that included a number of parties and stakeholders. In defending this action and bringing this motion, the U.S. Investors were required to review a voluminous amount

[20] *Said* at para. 13 (Schedule "B", Tab 5).

[21] *Ibid.* at paras. 4 and 17 (Schedule "B", Tab 5).

[22] These considerations each correspond to factors listed under Rule 57.01(1) of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

of documents and correspondence relating to the Moyse Litigation as well as the related plan of arrangement proceeding concerning the Consortium's sale of WIND (the "**POA Litigation**").[23] The motion also required the U.S. Investors and other parties to consider and address a number of distinct and complex legal doctrines and issues under the *res judicata* framework. As reflected in both the U.S. Investors' 32-page factum and the 32-page Motion Decision, the U.S. Investors put forward a number of independent arguments given their unique position with respect to the Moyse Litigation. The U.S. Investors successfully established that they were privies of West Face in the Moyse Litigation, which required careful consideration of the testimony of their representatives in the Moyse Litigation and POA Litigation.

Importance of the Issues

19. The substantial amount claimed in the proceeding and the serious misconduct alleged by Catalyst against the U.S. Investors rendered the issues raised in the proceeding of paramount importance to the U.S. Investors. Ensuring a successful result on this motion was also critical to preserve the U.S. Investors' reputation and financial viability and to prevent any further resultant impact on their ability to conduct business.

Catalyst's Unnecessary Supplemental Submissions

20. The supplemental submissions made by Catalyst in April 2018 following the release of the Court of Appeal's decision dismissing Catalyst's appeal of the Moyse Litigation (the "**Moyse Appeal Decision**") were particularly without merit and unnecessarily delayed the resolution of the motion while requiring the U.S. Investors to incur additional legal costs. As set out in the

[23] West Face's motion record which was relied on by all of the moving parties contained 87 documents totaling 8,349 pages, while the joint document compendium of the moving parties contained 72 documents totaling 1,399 pages. Many of the documents included in West Face's motion record – including the testimony of the U.S. Investors' representatives Michael Leitner and Hamish Burt in both the Moyse Litigation and POA Litigation – were referenced in the U.S. Investors' factum.

responding submissions of West Face dated April 12, 2018, Catalyst's submissions were based on fundamental mischaracterizations of the Moyse Appeal Decision, which was ultimately only referenced in the Motion Decision in ways that supported the moving parties' arguments.[24] The costs sought by the U.S. Investors properly reflect the legal expenses they were required to incur in addressing Catalyst's unnecessary supplemental submissions.

The Efforts of the U.S. Investors and other Moving Parties to Coordinate Their Efforts and Reduce the Costs and Duration of the Proceeding

21. While the U.S. Investors and other moving parties advanced their own positions and arguments in support of their respective motions, the defendants took deliberate steps throughout the course of the proceeding to coordinate their efforts and to minimize duplication of effort where possible. This included the submission of a joint document compendium and book of authorities for the motion as well as the coordination of their respective oral submissions to ensure that any overlapping arguments were advanced in an efficient manner.

PART III - ORDER REQUESTED

22. For the reasons set out above, the U.S. Investors respectfully request an Order requiring Catalyst to pay the U.S. Investors' costs in the amount of $194,076.01.

[24] See Motion Decision at para. 66 (Schedule "B", Tab 1).

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of May, 2018.

Michael Barrack / Kiran Patel / Daniel Szirmak

BLAKE, CASSELS & GRAYDON LLP
Barristers & Solicitors
199 Bay Street
Suite 4000, Commerce Court West
Toronto ON M5L 1A9

Michael Barrack LSUC #21941W
Tel: 416-863-5280
michael.barrack@blakes.com

Kiran Patel LSUC #58398H
Tel: 416-863-2205
kiran.patel@blakes.com

Daniel Szirmak LSUC #701630
Tel: 416-863-2548
Fax: 416-863-2653
daniel.szirmak@blakes.com

Lawyers for the defendants,
Tennenbaum Capital Partners LLC, 64NM Holdings GP LLC, 64NM Holdings LP and LG Capital Investors LLC

SCHEDULE "A"

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

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Defendants

COSTS OUTLINE OF THE DEFENDANTS TENNENBAUM CAPITAL PARTNERS LLC, 64NM HOLDINGS GP LLC, 64NM HOLDINGS LP AND LG CAPITAL INVESTORS LLC

The defendants Tennenbaum Capital Partners LLC, 64NM Holdings GP LLC, G4NM Holdings LP and LG Capital Investors LLC (collectively, the **"U.S. Investors"**) provide the following outline in support of the costs they are seeking:

	Partial Indemnity	**Substantial Indemnity**
Fees (as described below)	$103,207.50	$160,718.00
Counsel Fee	$ 6,862.50	$ 10,292.50
Disbursements *(see appendix of disbursements attached)*	$ 834.15	$ 834.15
HST (on fees only)	$ 14,309.10	$ 22,231.36
Total	**$125,213.25**	**$194,076.01**

The following points are made in support of the costs sought with reference to the factors set out in subrule 57.01(1):

- **the amount claimed and the amount recovered in the proceeding**

  The plaintiffs claimed against the defendants collectively damages in the amount of $1.3 billion and punitive damages in the amount of $1 million plus costs and interests.

- **the complexity of the proceeding**

  This was a complex proceeding which involved a sophisticated commercial transaction and required the review and consideration of a voluminous amount of documents and correspondence. A large number of defendants were also named in the action, the majority of whom were required to review the record in the Moyse Litigation and prepare their own arguments.

- **the importance of the issues**

  Given the amount claimed in the proceeding, the issues raised therein were of significant importance to the U.S. Investors. The plaintiff also alleged serious misconduct on the part of the U.S. Investors which, had they been accepted by the Court, would have had a profound impact on their reputation in the investment community and ability to conduct business.

- **the result of the proceeding**

  The U.S. Investors were entirely successful in their motion and successfully asserted each of the independent grounds they put forward in support of their motion to dismiss or permanently stay the plaintiff's action.

- **the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding**

  The U.S. Investors brought this motion to avoid the expense of advancing this proceeding through documentary and oral discovery, both pre-trial and trial.

  The plaintiff's insistence on making additional submissions following the release of the Court of Appeal for Ontario's reasons for dismissing the plaintiff's appeal in the Moyse Litigation (which were of no assistance to the plaintiff whatsoever) unnecessarily lengthened the duration of this proceeding and resulted in additional costs for the U.S. Investors.

- **whether any step in the proceeding was improper, vexatious or unnecessary or taken through negligence, mistake or excessive caution**

  This action should never have been commenced by the plaintiff. As reflected this Court's Reasons for Decision dated April 18, 2018, the action was precluded by the doctrines of issue estoppel and cause of action estoppel and constituted an abuse of process.

- **the experience of the party's lawyer**

  Michael Barrack was admitted to the Ontario Bar in 1982, Kiran Patel was admitted in 2010, and Daniel Szirmak was admitted in 2016. This motion was appropriately staffed throughout, with the lawyers with suitable levels of experience performing tasks appropriate to that level of experience.

- **any other matter relevant to the question of costs**

  Actual time spent exceeds the time shown above, but consistent with the approach recommended in *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.), not all docketed time has been included in order to account for duplication of effort between counsels and to reasonably reflect what is appropriate, fair and reasonable having regard to all the relevant factors. A significant amount of time spent by articling students has been excluded.

  The hourly rates claimed are in line with the Rule Committee's Information to the Profession, adjusted for inflation as approved in *First Capital (Canholdings) Corp. v. North American Property Group*, 2012 ONSC 1359.

- **the hours spent, the rates sought for costs and the rate actually charged by the party's lawyer**

	PERSONS	HOURS	PARTIAL INDEMNITY RATE	PARTIAL RATE (with inflation factor)[25]	SUBSTANTIAL INDEMNITY RATE[26] (with inflation factor)	ACTUAL RATE	AMOUNT CLAIMED (Inflation factor on S.I. rate)
Reviewing and analyzing Statement of Claim and subsequent amendments and preparing Statement of Defence. Bringing motion to dismiss or permanently stay plaintiff's action, including preparing Notice of Motion, conducting legal research, reviewing documents, pleadings and reasons in the previous proceeding brought by the plaintiff against West Face Capital Inc. and Brandon Moyse, preparing for and attending case conference before Justice Hainey on January 27 and April 19, 2017, drafting and revising factum and conducting additional legal research in connection therewith, preparing for and attending June 28, 2017 cross-examinations on affidavits submitted in connection with motion, preparing and	M. Barrack	49.3 hrs.	$350./hr.	$430./hr.	$645./hr.	$1,100./hr.	$31,798.50
	K. Patel	196.0 hrs.	$195./hr.	$235./hr.	$352./hr.	$ 665./hr.	$68,992.00
	D. Szirmak	134.4 hrs.	$175./hr.	$215./hr.	$320./hr.	$ 465./hr.	$43,008.00
	Law Clerk	2.0 hrs.	$ 80./hr.	$ 95./hr.	$142./hr.	$ 385./hr.	$ 284.00
							$144,082.50

[25] Partial indemnity rate is adjusted for inflation as approved in *First Capital (Canholdings) Corp v North American Property Group*, 2012 ONSC 1359, 2012 Carswell Ont 2609, 40 CPC (7th) 46, [2012] OJ No 885 (SCJ)

[26] Substantial Indemnity rate is 1.5 times the Partial Indemnity rate pursuant to rule 1.03

	PERSONS	HOURS	PARTIAL INDEMNITY RATE	PARTIAL RATE (with inflation factor)[25]	SUBSTANTIAL INDEMNITY RATE[26] (with inflation factor)	ACTUAL RATE	AMOUNT CLAIMED (Inflation factor on S.I. rate)
reviewing Joint Book of Authorities and Joint Compendium of the moving parties, corresponding with counsel and the Court in connection with motion, reviewing responding party's factum and Book of Authorities, preparing costs outline and all other preparation for the motion heard on August 16, 17 and 18, 2017.							
Counsel fee for motion (two and one half days) on August 16, 17 & 18, 2017	M. Barrack K. Patel D. Szirmak		$1,000./day $ 750./day $ 500./day	$1,220./day $ 915./day $ 610./day	$1,830./day $1,372./day $ 915./day		$ 4,575.00 $ 3,430.00 $ 2,287.50 $10,292.50

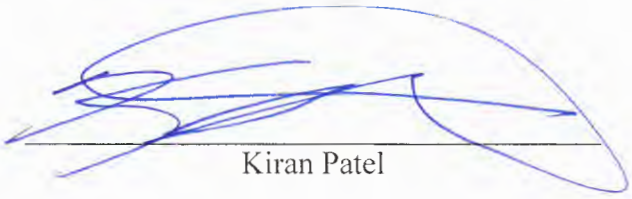
	PERSONS	HOURS	PARTIAL INDEMNITY RATE	PARTIAL RATE (with inflation factor)[25]	SUBSTANTIAL INDEMNITY RATE[26] (with inflation factor)	ACTUAL RATE	AMOUNT CLAIMED (Inflation factor on S.I. rate)
Fees incurred after the motion appearance including, scheduling an appointment before Justice Hainey, preparation for and attendance on October 13/17, further preparation and attendance on October 25/17, correspondence regarding further submissions following Court of Appeal decision, preparation for and attendance on April 3/18, review Catalyst supplemental submissions, review responding submissions, prepare for and attend in court on April 16/18 before Hainey, J.	M. Barrack K. Patel D. Szirmak	4.3 hrs. 29.2 hrs. 3.0 hrs.	$350./hr. $195./hr. $175./hr.	$430./hr. $235./hr. $215./hr.	$645./hr. $352./hr. $320./hr.		$ 2,773.50 $10,278.40 $ 960.00 $14,011.50
Costs submissions including preparation of submission and update Cost Outline.	K. Patel D. Szirmak	2.0 hrs. 6.0 hrs.	$195./hr. $175./hr.	$235./hr. $215./hr.	$352./hr. $320./hr.		$ 704.00 $1,920.00 $2,624.00
SUMMARY OF FEES							**$171,010.50**

Partial Indemnity Total (preparation, counsel fee and fees incurred after hearing) **$114,327.80**

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.

May 30, 2018



Kiran Patel

Appendix "A"

Disbursements

Duplicating	$547.75
Court fee	$144.00
TOTAL DISBURSEMENTS	$691.75
HST (excluding court fee)	$ 71.20
TOTAL	**$834.15**

SCHEDULE "B"

AUTHORITIES

Tab

1. *The Catalyst Capital Group Inc. v. Vimpelcom Ltd. et al.*, 2018 ONSC 2471
2. *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.)
3. *J.M.B. Cattle Corp. v. 2144032 Ontario Inc*., 2016 ONSC 2150
4. *Davies v. Clarington*, 2009 ONCA 722
5. *Said v. University of Ottawa*, 2014 ONSC 771
6. *Rousseau v. Scotia Mortgage Corp*., 2013 ONSC 677
7. *The Catalyst Capital Group Inc. v. Moyse et al.*, 2016 ONSC 6285
8. *Thoughtcorp Systems Inc. v. Tanju*, [2009] O.J. No. 1856
9. *The Catalyst Capital Group Inc. v. Moyse et al.*, 2016 ONSC 5271
10. *The Catalyst Capital Group Inc. v. Moyse et al.*, 2018 ONCA 283
11. *Bieberstein v. Kirchberger*, 2015 ONSC 6136

TAB 1

CITATION: The Catalyst Capital Group Inc. v. VimpelCom Ltd., 2018 ONSC 2471
COURT FILE NO.: CV-16-11595-00CL
DATE: 20180418

ONTARIO

SUPERIOR COURT OF JUSTICE

(COMMERCIAL LIST)

BETWEEN:	
THE CATALYST CAPITAL GROUP INC. Plaintiff/Responding Party	*Rocco DiPucchio, Andrew Winton, Brad Vermeersch* and *David Moore* for The Catalyst Capital Group Inc.
– and –	
VIMPELCOM LTD., GLOBALIVE CAPITAL INC., UBS SECURITIES CANADA INC., TENNENBAUM CAPITAL PARTNERS LLC, 64NM HOLDINGS GP LLC, 64NM HOLDINGS LP, LG CAPITAL INVESTORS LLC, SERRUYA PRIVATE EQUITY INC., NOVUS WIRELESS COMMUNICATIONS INC., WEST FACE CAPITAL INC., and MID-BOWLINE GROUP CORP. Defendants/Moving Parties	*Kent Thomson, Matthew Milne-Smith* and *Andrew Carlson*, for West Face Capital Inc. *James D.G. Douglas, Caitlin R. Sainsbury* and *Graham Splawski*, for Globalive Capital Inc. *Orestes Pasparakis, Rahool Agarwal* and *Michael Bookman*, for VimpelCom Ltd. *Michael Barrack, Kiran Patel* and *Daniel Szirmak*, for Tennenbaum Capital Partners LLC, 64NM Holdings GP LLC, 64NM Holdings LP, LG Capital Investors LLC *Junior Sirivar* and *Jacqueline Cole*, for Novus Wireless Communications Inc. *Daniel S. Murdoch*, for UBS Securities Canada Inc. *Jameel Madhany*, for Serruya Private Equity Inc. **HEARD:** August 16-18, 2017 and April 16, 2018

HAINEY J.

Table of Contents

REASONS FOR DECISION

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.

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

[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

---

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

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.

---

[3] *Catalyst Capital Group Inc. v. Moyse*, 2016 ONSC 5271, [2016] O.J. No. 4367, [*Moyse/West Face decision"*].

[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.

---

[4] *Catalyst Capital Group Inc. v. Moyse*, 2016 ONSC 6285, [2016] O.J. No. 5210.
[5] *The Catalyst Capital Group Inc. v. Moyse*, 2018 ONCA 283, 130 O.R. (3d) 675, [*Court of Appeal's decision*].

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*[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,

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[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, [*Danyluk*].

> (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

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[8] *Martin v. Goldfarb*, [2006] O.J. No. 2768, [2006] O.T.C. 629 (Ont. S.C.).
[9] *Dableh v. Ontario* Hydro, [1994] O.J. No. 2771, 51 A.C.W.S. (3d) 836 (Gen. Div.), [*Dableh*].

> 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

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[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.*

> 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

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[15] *Court of Appeal's decision, supra* note 5.
[16] *Foreman v.* Niven, 2009 BCSC 1476, [2009] B.C.J. No. 2148.

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

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[17] *Court of Appeal's decision, supra* note 5.
[18] *Henderson v. Henderson* (1843), 67 E.R. 313 (Eng. V.-C).

> 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

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[19] *Las Vegas Strip Ltd. v. Toronto (City)* (1996), 30 O.R. (3d) 286, [*Las Vegas Strip*].
[20] *Las Vegas Strip Ltd. v. Toronto (City)* (1997), 32 O.R. (3d) 651 (C.A.).

> 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:

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

> ... 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.

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[22] *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local* 79, 2003 SCC 63, [2003] S.C.R. 77.

[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.
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> ...
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> 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'.

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[23] *Gonzalez v. Gonzalez*, 2016 BCCA 376, [2016] B.C.L.R. (5th) 221.
[24] *Privacy Act*, R.S.B.C. 1996, c. 373.

[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

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[25] *Rasanen v. Rosemount Instruments Ltd.*, 17 O.R. (3d) 267 (C.A.).
[26] *Ibid* at para. 47.

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.
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> ... 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

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

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

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[28] *Supra* note 6.
[29] *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, [*Sattva*].

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.

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[30] *Ibid* at para. 50.

[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.

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[31] *McCarthy Corp. PLC v. KPMG LLP*, [2007] O.J. No. 32 (S.C.J.).
[32] *Napev Construction Ltd. v. Lebedinsky*, [1984] O.J. No. 1129, 25 A.C.W.S. (2d) 149 (Ont. H.C.).

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.

HAINEY J.

Released: April 18, 2018

CITATION: The Catalyst Capital Group Inc. v. VimpelCom Ltd., 2018 ONSC 2471
COURT FILE NO.: CV-16-11595-00CL
DATE: 20180418

ONTARIO

SUPERIOR COURT OF JUSTICE

(COMMERCIAL LIST)

BETWEEN:

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

REASONS FOR DECISION

HAINEY J.

Released: April 18, 2018

TAB 2

2004 CarswellOnt 2521
Ontario Court of Appeal

Boucher v. Public Accountants Council (Ontario)

2004 CarswellOnt 2521, [2004] O.J. No. 2634, 132 A.C.W.S. (3d) 15, 188 O.A.C. 201, 48 C.P.C. (5th) 56, 71 O.R. (3d) 291

SALLY ANNE BOUCHER, RANDOLPH BROWN, PAUL TURNER, DAVID VENN (Applicants / Appellants) and PUBLIC ACCOUNTANTS COUNCIL FOR THE PROVINCE OF ONTARIO, DOUGLAS J. WHYTE, ALASTAIR SKINNER, GILBERT H. RIOU, RALPH T. NEVILLE, RONALD W. MIKULA, BARRY G. BLAY, DAVID H. ATKINS, JENNIFER L. FISHER, JERALD D. WHELAN, PRISCILLA M. RANDOLPH, BRYAN D. MEYER, THOMAS A. HARDS and THE INSTITUTE OF CHARTERED ACCOUNTANTS OF ONTARIO (Respondents / Respondents in Appeal)

Abella, Armstrong, Cronk JJ.A.

Heard: December 15, 2003
Judgment: June 22, 2004
Docket: CA C40044

Proceedings: varying *Boucher v. Public Accountants Council (Ontario)* (2002), 2002 CarswellOnt 4142, 166 O.A.C. 281, 28 C.P.C. (5th) 25 (Ont. Div. Ct.)

Counsel: David E. Wires for Appellants
Michael D. Lipton, Q.C. for Public Accountants Council for the Province of Ontario
Cynthia Amsterdam for Douglas J. Whyte, Alastair Skinner, Gilbert H. Riou, Ralph T. Neville, Ronald W. Mikula, Barry G. Blay, David H. Atkins, Jennifer L. Fisher, Jerald D. Whelan, Priscilla M. Randolph, Bryan D. Meyer, Thomas A. Hards
Robert D. Peck for Institute of Chartered Accountants of Ontario

Subject: Civil Practice and Procedure; Family

Table of Authorities

Cases considered by *Armstrong J.A.*:

Boucher v. Public Accountants Council (Ontario) (2000), 2000 CarswellOnt 2951 (Ont. S.C.J.) — referred to

Canadian Pacific Ltd. v. Matsqui Indian Band (1995), 26 Admin. L.R. (2d) 1, (sub nom. *Matsqui Indian Band v. Canadian Pacific Ltd.*) [1995] 2 C.N.L.R. 92, 122 D.L.R. (4th) 129, 85 F.T.R. 79 (note), [1995] 1 S.C.R. 3, 177 N.R. 325, 1995 CarswellNat 264, 1995 CarswellNat 700 (S.C.C.) — considered

Hamilton v. Open Window Bakery Ltd. (2003), 2004 SCC 9, 2003 CarswellOnt 5591, 2003 CarswellOnt 5592, 316 N.R. 265, 184 O.A.C. 209, 2004 C.L.L.C. 210-025, 40 B.L.R. (3d) 1, 235 D.L.R. (4th) 193 (S.C.C.) — considered

Lawyers' Professional Indemnity Co. v. Geto Investments Ltd. (2002), 2002 CarswellOnt 769, 17 C.P.C. (5th) 334 (Ont. S.C.J.) — considered

Murano v. Bank of Montreal (1998), 111 O.A.C. 242, 163 D.L.R. (4th) 21, 1998 CarswellOnt 2841, 22 C.P.C. (4th) 235, 41 B.L.R. (2d) 10, 41 O.R. (3d) 222, 5 C.B.R. (4th) 57 (Ont. C.A.) — followed

Stellarbridge Management Inc. v. Magna International Inc. (2004), 2004 CarswellOnt 2065 (Ont. C.A.) — followed

Toronto (City) v. First Ontario Realty Corp. (2002), 59 O.R. (3d) 568 (Ont. S.C.J.) — referred to

Wasserman, Arsenault Ltd. v. Sone (2002), 2002 CarswellOnt 3230, 164 O.A.C. 195, 38 C.B.R. (4th) 119 (Ont. C.A.) — referred to

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

Statutes considered:

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

s. 131 — referred to

Public Accountancy Act, R.S.O. 1990, c. P.37

Generally — referred to

Public Officers Act, R.S.O. 1990, c. P.45

Generally — referred to

Rules considered:

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

Generally — referred to

R. 37.09(3) — considered

R. 57.01 — referred to

R. 57.01(1) — referred to

R. 57.01(3) — referred to

R. 57.01(3.1) [en. O. Reg. 284/01] — referred to

R. 58 — referred to

APPEAL from judgment reported at *Boucher v. Public Accountants Council (Ontario)* (2002), 2002 CarswellOnt 4142, 166 O.A.C. 281, 28 C.P.C. (5th) 25 (Ont. Div. Ct.), awarding costs of abandoned application for judicial review.

***Armstrong J.A.*:**

1 This case is another chapter in the long simmering dispute between the Certified General Accountants and the Chartered Accountants concerning the practice of public accounting in Ontario. At issue in this litigation was the control of the licensing granting authority, the Public Accountants Council for the Province of Ontario, by a majority of members who were Chartered Accountants.

2 The appellants, who are Certified General Accountants, brought an application for judicial review against the Public Accountants Council. The appellants alleged reasonable apprehension of bias against the Council in its review of applications for licences to practise public accounting by members of the Certified General Accountants Association of Ontario.

3 Before the appellants' application was heard it was abandoned. The respondents then moved to have their costs fixed by a judge of the Divisional Court on a substantial indemnity basis. After a two-day hearing, Epstein J. fixed the respondents' costs, on a partial indemnity basis, at $187,682.51 inclusive of disbursements and Goods and Services Tax. The appellants now appeal from this costs order pursuant to leave granted by this court on May 22, 2003.

Background of the Proceedings

4 The judicial review application had its genesis in the prior proceeding of *Boucher v. Public Accountants Council (Ontario)*, [2000] O.J. No. 3126 (Ont. S.C.J.) before Lax J. of the Superior Court. In the earlier proceeding, the appellants and two other parties sought to have the court appoint disinterested persons to hear the appellants' applications for public accounting licences. The appellants claimed that the court could do so under the *Public Officers Act*, R.S.O. 1990, c. P.45. The proceeding was stayed by Lax J. on the basis that the court lacked jurisdiction under the *Public Officers Act* to make the order requested.

5 In granting the stay, Lax J. said in *obiter dicta*:

> The particulars of bias described by the applicants are sympathetic, compelling and disturbing. They are offensive to fundamental notions of fairness. They invoke a primordial judicial instinct to intervene and second-guess what appears to be a flawed legislative scheme and what is a flawed process.
>
> Professional discipline is not in issue here, but professional licensure by an apparently biased tribunal is. Although the Court lacks jurisdiction to grant the proposed remedy under section 16 of the *Public Officers Act*, there may be other creative ways for the applicants to have their concerns addressed.

6 Lax J. suggested that the appellants had other specific courses of action available to them which they could pursue.

7 The appellants then commenced their judicial review application, naming as parties the same respondents with the addition of the Institute of Chartered Accountants of Ontario who had been an intervenor before Lax J. In their application, the appellants sought a broad range of remedies, including a declaration that the Public Accountants Council is institutionally biased in its granting of licences to practise public accounting. Central to the appellant's allegations of reasonable apprehension of bias is the fact that the *Public Accountancy Act*, R.S.O. 1990, c. P. 37 authorizes the Institute of Chartered Accountants of Ontario to appoint 12 of the 15 members of Council.

8 At the request of the appellants, Lax J. made an order that the materials used in the application before her should be filed in the judicial review application in the Divisional Court. However, this judicial review application was not one of the courses of action suggested by Lax J.

9 The respondents moved to quash or stay the judicial review application as being premature on the basis that the appellants' applications for licence before the Public Accountants Council had not yet been adjudicated on the merits.

10 The appellants then brought a motion to consolidate the motions to quash with two pending statutory appeals arising from the Council's refusal to grant licences. The consolidation motion was dismissed.

11 The motions to quash were scheduled to be heard on May 27, 28 and 29, 2002. On May 8, 2002, counsel for the appellants advised by letter that they had received instructions to withdraw the application for judicial review and agree to the dismissal of the motions to quash on a without costs basis. The respondents insisted on the payment of their costs of the application and the motions to quash and advised that they would continue to prepare for the motions to quash pending resolution of the matter. The appellants served their notice of abandonment on May 17, 2002. The respondents then brought their motion to have their costs fixed.

12 The motions judge fixed the costs of the application for judicial review and the motions to quash on a partial indemnity basis including disbursements and GST as follows:

Public Accountants Council of Ontario	$ 88,896.45
Individual Respondents	$ 60,033.96
Institute of Chartered Accountants of Ontario	$ 38,752.10
Total	$187,682.51

Grounds of Appeal

13 The appellants raise the following grounds of appeal:

> (i) the motions judge erred in fixing the costs of the abandoned application rather than referring them for assessment; and

(ii) the costs awarded are excessive in that they are approximately 178% of the costs awarded in the proceedings before Lax J. that involved substantially the same parties and issues without deduction for any amount claimed.

Did the motions judge err in fixing costs?

14 The appellants accept that the respondents are entitled to their costs of the abandoned application pursuant to rule 37.09(3) of the *Rules of Civil Procedure* which provides:

37.09(3) Where a motion is abandoned or is deemed to have been abandoned, a responding party on whom the notice of motion was served is entitled to the costs of the motion forthwith, unless the court orders otherwise.

However, the appellants submit that those costs ought not to be fixed by a judge in accordance with the costs grid established by rule 57.01(3). The appellants rely upon rule 57.01(3.1) which states:

Despite subrule (3), in an exceptional case the court may refer costs for assessment under Rule 58.

Rule 58 sets out a code of procedure for the assessment of costs by an assessment officer.

15 The motions judge concluded, correctly in my view, that there is now a presumption that costs shall be fixed by the court unless the court is satisfied that it has before it an exceptional case. The appellants submitted to the motions court and to this court that the case at bar is such a case. The motions judge, in deciding that this was not an exceptional case, said:

Only if the assessment process will be more suited to effect procedural and substantive justice should the Court refer the matter for assessment. There must be some element to the case that is out of the ordinary or unusual that would warrant deviating from the presumption that costs are to be fixed. Neither complex litigation nor significant amounts in legal fees will be enough for a case to be exceptional. The judge should be able to fix costs with a reasonable review of the work completed without having to scrutinize each and every docket. If that type of scrutinizing analysis is required, then perhaps, the matter would fall within the exception and be referred to assessment: *BNY Financial corp.-Canada v. National Automotive Warehousing Inc.*, [1999] O.J. No. 1273(Commercial List, Gen. Div.) (*BNY Financial*).

16 I agree with the motions judge that if a judge is able to effect procedural and substantive justice in fixing costs, she ought to do so. See *Murano v. Bank of Montreal* (1998), 41 O.R. (3d) 222 (Ont. C.A.), at 245 *per* Morden A.C.J.O.

17 The appellants argued before us that an abandoned motion falls into the category of an exceptional case because the judge fixing the costs does not have the benefit of a hearing involving the presentation of evidence and legal argument. While there is no doubt that the judge who has heard a case is in the best position to determine a just costs award, it does not follow, that in the circumstances which exist here, the motions judge was obliged to decline the task.

18 I also observe that rule 57.01(3.1) is discretionary. It provides that in an exceptional case, the trial judge *may* refer costs for assessment. It is not required that she do so. This is a somewhat complex case with several parties and a number of counsel, including one party with two senior counsel. Although another judge might have exercised his or her discretion under rule 57.01(3.1) differently, I see no basis upon which to interfere with the motions judge's discretion not to refer the costs for assessment.

Was the costs award excessive?

19 The motions judge's decision is entitled to a high degree of deference. The standard of review for interfering with the exercise of the discretion by a judge of first instance was articulated by Lamer, C.J.C. in *Canadian Pacific Ltd. v. Matsqui Indian Band*, 1995 CarswellNat 264 (S.C.C.) at p. 32:

> This discretionary determination should not be taken lightly by reviewing courts. It was Joyal J.'s discretion to exercise, and unless he considered irrelevant factors, failed to consider relevant factors, or reached an unreasonable conclusion, then his decision should be respected. To quote Lord Diplock in *Hadmor Productions Ltd. v. Hamilton*, [1982] 1 All E.R. 1042, at p. 1046, an appellate court "must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently".

20 In a more recent case, Arbour J. said in *Hamilton v. Open Window Bakery Ltd.* (2003), 2004 SCC 9 (S.C.C.) at para. 27:

> A court should set aside a costs award on appeal only if the trial judge has made an error in principle or if the costs award is plainly wrong (*Duong v. NN Life Insurance Company of Canada* (2001), 141 O.A.C. 307, at para. 14).

21 The appellants point out that the costs awarded in these proceedings are approximately 178% of the costs awarded in the proceedings before Lax J. that involved the same parties and similar issues. The respondents, on the other hand, argue that the proceedings before Lax J. were significantly different from the abandoned judicial review application. However, it is to be noted that the same record was used in the judicial review application. When pressed in argument, counsel for the respondents had some difficulty in explaining the extent to which the factual substrata of the two applications differed. At the heart of both applications is the assertion that the Public Accountants Council of Ontario is effectively controlled by the Institute of Chartered Accountants of Ontario.

22 Counsel for the appellants submitted that there was much duplication of the work done by the three sets of counsel for the respondents. They also drew attention to the fact that the Public Accountants Council retained another senior counsel to prepare their factum, resulting in a duplication of services. We were assured by counsel for the respondents that the bills of costs submitted to the motions judge were appropriately adjusted to take into account such duplication.

23 The respondents also submitted that the appellants were the authors of their own misfortune. The appellants said that they abandoned their application for judicial review because the Ontario Red Tape Commission recommended changes to the *Public Accountancy Act*; and a panel appointed under the Agreement on Internal Trade found that the Act offended provisions of the Agreement. The appellants claimed that the reports of these two bodies addressed the issues of concern to them, causing them to abandon their application for judicial review. However, the respondents observed that the report of the panel appointed under the Agreement on Internal Trade was released on October 5, 2001 and the Red Tape Commission report was released on December 10, 2001. It was several months later that the appellants abandoned their application. The respondents submit that the lion's share of the costs were generated in this period of delay, and particularly after February 2002 when the dates for the motion to quash were fixed for May 2002. Although this delay caused some concern to the motions judge, she concluded that:

> In the circumstances of this case I do not find that the timing of the events that took place in the spring of 2002 leading up to the abandonment of the application was in bad faith or amounted to an abuse of the process of the court.

24 The appellants submit that the motions judge accepted the bills of costs that were presented to her without any deductions. The bills were prepared in accordance with the calculation of hours times dollar rates provided by the costs grid. While it is appropriate to do the costs grid calculation, 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. This approach was sanctioned by this court in *Zesta Engineering Ltd. v. Cloutier* (2002), 21 C.C.E.L. (3d) 161 (Ont. C.A.) at para. 4 where it said:

> 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.

See also *Stellarbridge Management Inc. v. Magna International Inc.*, [2004] O.J. No. 2102 (Ont. C.A.) para. 97.

25 *Zesta Engineering Ltd.* and *Stellarbridge Management Inc.* simply confirmed a well settled approach to the fixing of costs prior to the establishment of the costs grid as articulated by Morden A.C.J.O. in *Murano v. Bank of Montreal* at p. 249:

> The short point is that the total amount to be awarded in a protracted proceeding of some complexity cannot be reasonably determined without some critical examination of the parts which comprised the proceeding. This does not mean, of course, that the award must necessarily equal the sum of the parts. An overall sense of what is reasonable may be factored in to determine the ultimate award. This overall sense, however, cannot be a properly informed one before the parts are critically examined.

26 It is important to bear in mind that rule 57.01(3), which established the costs grid, provides:

> When the court awards costs, it shall fix them in accordance with subrule (1) and the Tariffs.

Subrule (1) lists a broad range of factors that the court may consider in exercising its discretion to award costs under s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43. The express language of rule 57.01(3) makes it clear that the fixing of costs is not simply a mechanical exercise. In particular, the rule makes clear that the fixing of costs does not begin and end with a calculation of hours times rates. The introduction of a costs grid was not meant to produce that result, but rather to signal that this is one factor in the assessment process, together with the other factors in rule 57.01. Overall, as this court has said, 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.

27 In considering whether the amounts claimed in the bills of costs were appropriate, the motions judge said:

> Here there is another point of departure between the applicants and the respondents. The respondents take the position that they are entitled to claim reimbursement for all the time spent and disbursements incurred in responding to the application for judicial review and in preparing the motion to quash. Conversely, the applicants contend that the factual background and the issues raised in the judicial review and the motion to quash are the same, or at least nearly the same, as those fully argued before Lax J. As a result, the time necessary for the respondents to respond to the judicial review application and to prepare for the motion to quash was, [or] should have been, minimal. It follows that the costs fixed should similarly be minimal.
>
> While it is apparent that the various proceedings have centred on the same complaints about the same licensing regime, the issues in each proceeding have differed. For example, the relief claimed in the matter before Lax J. was different than that claimed in the judicial review application. This different perspective requires a different analysis and different research. In addition, the various proceedings were spread over time and each new matter necessitated new preparation even in respect to issues that were the same or similar as those raised in earlier challenges to the licensing system. In these circumstances I do not consider it appropriate effectively to give the applicants a credit for costs ordered and paid in earlier proceedings .
>
> I agree with what Nordheimer J. said in *Basedo v. University Health Network*, [2002] O.J. No. 597 (Sup. Ct.) that "it is not the role of the court to second-guess the time spent by counsel unless it is manifestly unreasonable in the sense that the total time spent is clearly excessive or the matter has been overly lawyered." As mentioned earlier, counsel for the respondents filed substantial material in support of the detailed bills of costs. In addition, they took me through the various entries, in a general fashion, to explain the nature of the work done and why it was necessary. I have conducted my own detailed review of the functions performed, time spent and amounts claimed. In my view, the amounts for fees and disbursements, on a partial indemnity basis, are appropriate.

28 With respect, I disagree with the motions judge. The total amount of $187,682.51 was not a fair and reasonable sum to award in the circumstances of this case, even given the respondents' separate bills of costs, which produced totals

of $88,896.45, $60,033.96, and $38,752.10. It is my view that the costs awards in this case are so excessive as to call for appellate interference.

29 While I accept that the bills of costs accurately reflect the time spent by all of the lawyers in this matter, it is inconceivable to me that the total amounts claimed are justifiable. In this regard, I accept the submission of the appellants that:

(a) the record in this application was the same record filed in the earlier proceedings;

(b) the respondents filed no evidence;

(c) the respondents conducted no cross-examination of any witness;

(d) the notices of motion to stay filed by the respondents were substantially the same; and

(e) the arguments to be advanced on the return of the motions to quash were substantially the same.

30 In addition, I note that the amount claimed on a substantial indemnity scale, including disbursements and Goods and Services Tax, was in total only $14,528.86 more than the total partial indemnity award. In the result, the respondents received an award which is tantamount to a substantial indemnity award. This is significant in view of the fact that the motions judge expressly rejected the respondents' submission that they be awarded their costs on a substantial indemnity basis.

31 The similarity of the amounts claimed on a substantial indemnity basis and on a partial indemnity basis appears to arise because the hourly rates applied were not significantly different on either scale.

32 The Public Accountants Council employed four lawyers. One of the two senior counsel on the file charged three different hourly rates on a substantial indemnity basis -$350, $385 and $425. On a partial indemnity basis, he claimed $350 per hour. The time spent by the other senior counsel was listed at a rate of $300 per hour on both a substantial indemnity scale and on a partial indemnity scale. In addition, one of the two junior counsel charged the same rate on both a substantial indemnity basis and on a partial indemnity basis. The second junior counsel docketed only 17 hours and the difference between the two rates produced a total differential of only $295.

33 Counsel for the Institute of Chartered Accountants charged his time on the substantial indemnity scale at $400 per hour and at $350 per hour on the partial indemnity scale.

34 There were three counsel for the individual respondents. The senior counsel charged hourly rates on a substantial indemnity basis of $330 and $350. Her partial indemnity rate was $300. For the first junior, the substantial indemnity rate was $230 and the partial indemnity rate was $225. The second junior had minimal time on the file and her time was claimed at rates of $85 on a substantial indemnity basis and $60 on a partial indemnity basis.

35 In *Wasserman, Arsenault Ltd. v. Sone* (2002), 164 O.A.C. 195 (Ont. C.A.) at para. 4, this court referred to a judgment of the Superior Court in *Lawyers' Professional Indemnity Co. v. Geto Investments Ltd.* (2002), 17 C.P.C. (5th) 334 (Ont. S.C.J.), where Nordheimer J. observed at paragraph 16:

> As a further direct consequence of the application of the indemnity principle, when deciding on the appropriate hourly rates when fixing costs on a partial indemnity basis, the court should set those rates at a level that is proportionate to the actual rate being charged to the client in order to ensure that the court does not, inadvertently, fix an amount for costs that would be the equivalent of costs on a substantial indemnity basis when the court is, in fact, intending to make an award on a partial indemnity basis.

36 In my view, the granting of an award of costs said to be on a partial indemnity basis that is virtually the same as an award on a substantial indemnity basis constitutes an error in principle in the exercise of the motions judge's

discretion, particularly when the judge rejected a claim for a substantial indemnity award. This court took a similar view in *Stellarbridge Management Inc.* at para. 96.

37 The failure to refer, in assessing costs, to the overriding principle of reason-ableness, can produce a result that is contrary to the fundamental objective of access to justice. The costs system is incorporated into the *Rules of Civil Procedure*, which exist to facilitate access to justice. There are obviously cases where the prospect of an award of costs against the losing party will operate as a reality check for the litigant and assist in discouraging frivolous or unnecessary litigation. However, in my view, the chilling effect of a costs award of the magnitude of the award in this case generally exceeds any fair and reasonable expectation of the parties.

38 In deciding what is fair and reasonable, as suggested above, the expectation of the parties concerning the quantum of a costs award is a relevant factor. See *Toronto (City) v. First Ontario Realty Corp.* (2002), 59 O.R. (3d) 568 (Ont. S.C.J.), at 574. I refrain from attempting to articulate a more detailed or formulaic approach. The notions of fairness and reasonableness are embedded in the common law. Judges have been applying these notions for centuries to the factual matrix of particular cases.

39 Turning to what the quantum should be in this case, I would give consideration to the fact that the costs in the earlier proceeding were fixed in the amount of $97,563 by Lax J. While I accept, as the motions judge did, that there were differences between the two proceedings, the foundation upon which the two applications were prosecuted was based on the control of the Public Accountants Council of Ontario by the Chartered Accountants. The fact that all parties were satisfied to have the same evidentiary record in both cases suggests that there was much in common between the two applications.

40 No doubt there was much more work to be done in respect of the second application. However, having expended partial indemnity costs of nearly $100,000 in response to the first application, I am confident that counsel were not starting *tabula rasa* when served with the application for judicial review. They would have been fully informed of the licensing application procedure, the make up and operation of the Public Accountants Council, the statutory regime and the issues that divided the Institute of Chartered Accountants for Ontario and the Certified General Accountants of Ontario. I simply cannot accept that counsel for the respondents did not take advantage of the work already done on the first application to better inform themselves in their approach to the second.

41 I also take into account the other factors referred to in paragraph 29 above, i.e. the respondents filed no evidence; conducted no cross-examination; and advanced substantially the same arguments in support of the motions to quash.

42 Finally, I consider that there is no proportionality between the costs claimed on a substantial indemnity scale and a partial indemnity scale.

43 These factors suggest that the amounts claimed on a partial indemnity basis call for a significant reduction. The appellants submitted that the award to each of the three groupings of respondents should be $2,500 for a total of $7,500. I do not accept that submission.

44 In my view, a fair and reasonable award, taking into consideration all the factors discussed above, would be:

Public Accountants Council of Ontario	$ 30,000.00
Individual Respondents	$ 20,000.00
Institute of Chartered Accountants of Ontario	$ 13,000.00
Total	$ 63,000.00

These figures are inclusive of disbursements and Goods and Services Tax.

Disposition

45 In the result, I would allow the appeal, set aside the costs award of the motions judge and in its place substitute the award set out in paragraph 44 above.

46 I would also order that the appellants are entitled to their costs of the motion for leave to appeal and the appeal, fixed on a partial indemnity basis in the total amount of $12,000, including disbursements and Goods and Services Tax.

***Abella J.A.*:**

I agree.

***Cronk J.A.*:**

I agree.

Appeal allowed; amount awarded varied.

TAB 3

2016 ONSC 2150
Ontario Superior Court of Justice

J.M.B. Cattle Corp. v. 2144032 Ontario Inc.

2016 CarswellOnt 4941, 2016 ONSC 2150, 264 A.C.W.S. (3d) 867

J.M.B. Cattle Corp., Applicant and 2144032 Ontario Inc. & Thomas Kaufman, Estate Trustee of the Estate of William H. Kaufman, Respondents

Price J.

Heard: July 9, 2015
Judgment: March 30, 2016
Docket: Owen Sound 15-086

Proceedings: additional reasons to *J.M.B. Cattle Corp. v. 2144032 Ontario Inc.* (2015), 62 R.P.R. (5th) 298, 2015 CarswellOnt 17935, 2015 ONSC 7372, Price J. (Ont. S.C.J.)

Counsel: Peter T. Fallis, Alexandra Ferrier, for Applicant
Judy Fowler Byrne, for Respondents

Subject: Civil Practice and Procedure; Contracts; Property

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s. 131 — considered

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R. 1.04(1.1) [en. O. Reg. 438/08] — considered

R. 49.10 — considered

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R. 49.10(2)(c) — considered

R. 49.13 — considered

R. 57 — considered

R. 57.01 — considered

R. 57.01(1) — considered

R. 57.01(4) — considered

R. 57.01(4)(c) — considered

Tariffs considered:

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ADDITIONAL REASONS to judgment reported at *J.M.B. Cattle Corp. v. 2144032 Ontario Inc.* (2015), 2015 ONSC 7372, 2015 CarswellOnt 17935, 62 R.P.R. (5th) 298 (Ont. S.C.J.), concerning costs.

***Price J.*:**

Nature of Proceeding

1 When the Municipal Planning Board in Parry Sound refused J.M.B. Cattle Corp.'s ("JMB") application for severance of property that JMB had agreed to buy from 2144032 Ontario Inc. ("214") and the Estate of William H. Kaufman ("the Estate") from other property owned by the Estate, and the sellers refused to extend the deadline for severance approval contained in the Agreement of Purchase and Sale ("APS"), JMB applied to this court for a declaration that it alone had a right to terminate the APS. Pending the hearing of its application, JMB obtained a Certificate of Pending Litigation, preventing the sellers from selling the property to anyone else.

2 Following a hearing, the court found that:

(a) The APS was a valid and binding contract.

(b) The APS imposed a deadline of March 10, 2015, for JMB to obtain severance approval, and the sellers were within their rights in refusing JMB's request to extend that deadline.

(c) JMB was not entitled to insist unilaterally that the property not be sold to anyone else until it had exhausted its rights of appeal from the planning board's decision.

(d) The sellers were not estopped from terminating the APS.

(e) JMB had no interest in the property that entitled it to a Certificate of Pending Litigation.

3 The parties were unable to agree on the costs of the application. This endorsement addresses that issue.

Issues

4 The court must determine whether JMB should pay the costs of 214 and the Estate and, if so, the amount of those costs.

Positions of the Parties

5 214 and the Estate claim their costs in the amount of $15,859.77. They base their claim on a calculation of their costs on a partial indemnity scale to the date when they served an Offer to Settle on JMB, and of their costs on a substantial indemnity scale from that date forward. JMB does not dispute the right of 214 and the Estate to an award of costs, but submits that the costs claimed are excessive, and that 214 and the Estate should be disqualified from being awarded any costs on a substantial indemnity scale by reason of what it characterizes as "the growing despication and distain (sic) that [they] have for [JMB]", as evidenced, it says, by their failure to support JMB's application for severance.

Analysis and Law

a) General principles

6 The court's determination of costs is governed by section 131 of the *Courts of Justice Act*, [1] and by Rule 57.01 of the *Rules of Civil Procedure*. [2] Section 131 provides for the general discretion to fix costs. Rule 57.01 provides guidance as to the exercise of that discretion, by enumerating certain factors that the court may consider when assessing costs.

7 Among the factors set out in Rule 57.01(1) are the following:

(i) The complexity of the proceeding;

(ii) The importance of the issues;

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

(iv) Any offers to settle;

(v) The principle of indemnity;

(vi) The concept of proportionality, which includes at least two factors:

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

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

(vii) Any other matter relevant to the question of costs.

8 Justice Perell summarized the purposes of costs orders in *394 Lakeshore Oakville Holdings Inc. v. Misek*, in 2010. He stated:

> Modern costs rules are designed to advance five purposes in the administration of justice: (1) to indemnify successful litigants for the costs of litigation, although not necessarily completely; (2) to facilitate access to justice, including access for impecunious litigants; (3) to discourage frivolous claims and defences; (4) to discourage the sanctioning of inappropriate behaviour by litigants in their conduct of the proceedings; and (5) to encourage settlements. [3] *(internal citations omitted)*.

9 The court's role in assessing costs is not necessarily to reimburse a litigant for every dollar spent on legal fees. As the Court of Appeal pointed out in *Boucher et al. v. Public Accountants Council for the Province of Ontario*, in 2004, the award of costs must be fixed in an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceedings rather than an exact measure of actual costs to the successful litigant. [4]

10 In reviewing a claim for costs, the court does not undertake a line by line analysis of the hours claimed, and should not second-guess the amount claimed, unless it is clearly excessive or overreaching. It considers what is reasonable in the circumstances and, taking into account all the relevant factors, awards costs in a global fashion. [5]

11 Ultimately, in determining the amount of costs to be awarded, the court applies fairness and reasonableness as overriding principles. It does not engage in a mechanical exercise but, rather, takes a contextual approach, applying the principles and factors discussed above, and setting a figure that is fair and reasonable in all the circumstances. Rule 1.04(1.1) requires the court to consider proportionality; that is, the amount of costs ordered should be proportional to the amount of money and other interests at stake in the proceeding.

12 The general rule is that costs follow the event and will be awarded on a partial indemnity scale. [6] In special circumstances, costs may be withheld from the successful party or be ordered to be paid to the unsuccessful party, and

the scale of costs may be higher, but those cases are exceptional and generally involve circumstances where one party to the litigation has behaved in an abusive manner, brought proceedings wholly devoid of merit, and/or has unnecessarily run up the costs of litigation. [7]

b) Entitlement to costs

Reasonableness and offers to settle

13 As noted above, the general rule is that costs follow the event, and are awarded on a partial indemnity scale. [8] In special circumstances, costs may be awarded on a higher scale, but those cases are exceptional and generally involve circumstances where one party to the litigation has behaved in an abusive manner, brought proceedings wholly devoid of merit, and/or unnecessarily run up the costs of the litigation. [9]

14 None of the parties in the present case engaged in conduct so unreasonable as to justify depriving 214 and the Estate of the costs to which they are presumptively entitled or, apart from considerations arising from offers to settle, that entitle them to recover costs on a higher than usual scale. JMB's application was unsuccessful but was not wholly devoid of merit. It raised legitimate issues to be determined, and it cannot reasonably be said that it should have been able to predict the outcome from the outset.

15 On June 15, 2014, 214 and the Estate served an Offer to settle on JMB pursuant to Rule 49.10. They offered to settle the proceeding by agreeing to a dismissal of the application and a discharge of the Certificate of Pending Litigation without costs. Had JMB accepted that offer, the parties would not have had to expend further legal costs, and 214 and the Estate would not have been further delayed in selling their property. The offer was not accepted, and 214 and the Estate eventually obtained an outcome that was as favourable as the one that would have resulted from acceptance of their offer. On this basis, 214 and the Estate are entitled to their costs from the date they served their offer onward on a substantial indemnity scale.

Indemnification - The hourly rates charged

16 In determining the appropriate hourly rates to be applied to the time spent by the lawyers for 214 and the Estate, the court follows the approach taken by Aitkin J. in *Geographic Resources*. [10] That is, the starting point is the successor of the Costs Grid, namely, the "Information for the Profession" bulletin from the Costs Sub-Committee of the Rules Committee (the "*Costs Bulletin*"), which can be found immediately before Rule 57 in the Carthy or Watson & McGowan edition of the *Rules*, which sets out maximum partial indemnity hourly rates for counsel of various levels of experience.

17 The *Costs Bulletin* suggests maximum hourly rates (on a partial indemnity scale) of $80 for law clerks, $225 for lawyers of less than 10 years' experience, $300 for lawyers of between 10 and 20 years' experience, and $350 for lawyers with 20 years' experience or more. [11] The upper limits in the *Costs Bulletin* are generally intended for the most complex and important of cases.

18 214 and the Estate acknowledge that the issues in the application were not very complex. The main issue was the interpretation of the Agreement of Purchase and Sale following a series of changes made in the exchange of offers and counter-offers, and whether JMB was entitled to prevent the sale of the property until it had exhausted its appeals from the planning board's refusal of its application for severance, or whether its rights ended with the deadline contained in the APS for obtaining final severance approval.

19 The *Costs Bulletin*, published in 2005, is now dated. Aitkin J. considered adjusting the Costs Subcommittee's hourly rates for inflation, as Smith J. did in *First Capital (Canholdings) Corp. v. North American Property Group*, [12] but the unadjusted rates of the lawyers in her case were only slightly less than the actual fees they charged, so she elected to use

their unadjusted rates. Normally, however, it is appropriate to adjust the hourly rates in the *Costs Bulletin* to account for inflation since 2005.

20 Based on the Bank of Canada *Inflation Calculator*, available online at http://www.bankofcanada.ca/rates/related/inflation-calculator/, the 2015 equivalent of the hourly rates in the *Costs Bulletin* are $94.43 for law clerks, $265.60 for lawyers of under 10 years' experience, $354.13 for lawyers of between 10 and 20 years' experience, and $413.15 for lawyers of over 20 years' experience.

21 The court is guided by the rates in the *Costs Bulletin*, not the actual hourly rates charged. The Costs Subcommittee's rates apply to all lawyers and all cases, so everyone of the same level of experience starts at the same rate. The actual rates charged are relevant only as a limiting factor, in preventing the costs awarded from exceeding the actual fees charged.

22 The court adjusts the total fees arrived at by applying the inflation-adjusted hourly rates of the lawyers to the time spent, to reflect unique features of the case, including the complexity of the proceeding, the importance of the issues, and the other factors set out in Rule 57.01(1). If an excessive amount of time was spent, or too many lawyers worked on the file, the court reduces the resulting amount of fees accordingly. As long as the resulting amount does not exceed the amount actually charged to the client, the actual fee that the client agreed to pay is irrelevant.

23 Judy Byrne, the principal lawyer for 214 and the Estate, was called to the Bar in Ontario in 1994. She had practiced law for 21 years when this application was heard. Based on the *Costs Bulletin*, adjusted for inflation, she was entitled to claim a maximum hourly rate of $413.15, on a partial indemnity scale, for the time she spent on the case in 2015. She claims $225. I find this to be conservative.

24 Ms. Byrne was assisted by Stephen Cameron, who was called to the Bar in 1968, Andrew Roth, who was called in 2004, and Maseeh Sidky, who was called in 2013. They had practiced law for 47 years, 11 years, and 2 years, respectively, when the application was heard. Their maximum inflation-adjusted hourly rates, according to the *Costs Bulletin*, were $413.15 for Mr. Cameron, $354.13 for Mr. Roth, and $265.60 for Mr. Sidky, respectively. Mr. Roth claims $200 and Mr. Sidky claims $225. Again, I find these rates to be conservative.

25 214 and the Estate claim their costs from the date of service of their Offer to Settle on a substantial liability scale. Rule 49.10 provides:

> 49.10(2) ***Where an offer to settle,***
>
> (a) ***is made by a defendant at least seven days before the commencement of the hearing***;
>
> (b) ***is not withdrawn and does not expire before the commencement of the hearing; and***
>
> (c) ***is not accepted by the plaintiff,***
>
> ***and the plaintiff obtains a judgment as favourable as or less favourable than the terms of the offer to settle***, the plaintiff is entitled to partial indemnity costs to the date the offer was served and ***the defendant is entitled to partial indemnity costs from that date, unless the court orders otherwise***.

26 Rule 57.01 provides, in part:

> 57.01(4) ***Nothing in this rule*** or rules 57.02 to 57.07 ***affects the authority of the court under section 131 of the Courts of Justice Act***,
>
> (a) to award or refuse costs in respect of a particular issue or part of a proceeding;
>
> (b) to award a percentage of assessed costs or award assessed costs up to or from a particular stage of a proceeding;

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

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

(e) to award costs to a party acting in person.

27 The Court of Appeal, in *S & A Strasser Ltd. v. Richmond Hill (Town)*, in 1990, appeared to suggest that in cases where a successful defendant had made a prior offer to settle, Rules 49.13 and 57.01 could operate to permit the award of partial indemnity costs prior to the offer and substantial indemnity costs thereafter. [13] A number of cases followed this principle. [14]

28 The Court of Appeal later clarified the principles set out in *Strasser*. In *Davies v. Clarington (Municipality)*, in 2009, [15] Epstein J.A. noted that Austin J.A. had restricted *Strasser's* broad nature in *Scapillati v. A. Potvin Construction Ltd.*, in 1999, [16] and appeared to indicate that substantial indemnity costs against an unsuccessful plaintiff (or applicant) was justified only when that party was found to have conducted himself in an egregious manner.

29 To end any doubts on the issue, Epstein J.A. stated, in *Davies v. Clarington (Municipality)*:

> In summary, while fixing costs is a discretionary exercise, attracting a high level of deference, it must be on a principled basis. The judicial discretion under rules 49.13 and 57.01 is not so broad as to permit a fundamental change to the law that governs the award of an elevated level of costs. Apart from the operation of rule 49.10, elevated costs should only be awarded on a clear finding of reprehensible conduct on the part of the party against which the cost award is being made. As Austin J.A. established in Scapilliti, Strasser should be interpreted to fit within this framework - as a case where the trial judge implicitly found such egregious behaviour, deserving of sanction. [17]

30 Justice Brown, in *3574423 Canada Inc. v. Baton Rouge Restaurants Inc.*, in 2012, stated:

> Although Rule 49.10(2) of the *Rules of Civil Procedure* does not speak in terms of awards of substantial indemnity costs to defendants who "better" their offers to settle when the plaintiff's action is dismissed, the BRRC Defendants submit that the case law entitles a court to make such a discretionary award. Yes and no. The decision of the Court of Appeal in *St. Elizabeth Home Society v. Hamilton (City)* re-iterated that ***substantial*** indemnity ***costs*** are only awarded in "rare and ***exceptional*** cases", and that it would be an error for a trial judge to rely on offers to settle to award successful defendants ***substantial*** indemnity **costs** absent conduct by a plaintiff which supported a finding of reprehensible conduct. [18] As I stated above, I do not regard the conduct of the plaintiff as egregious or reprehensible, therefore I see no basis for an award of substantial indemnity costs in favour of the defendants. [19]

31 Justice Matheson came to a similar conclusion in *Harte-Eichmanis v. Fernandes*, in 2012. [20] It seems to this court that Rule 49.10, as interpreted above, favours plaintiffs/applicants and diminishes the court's ability to reward the efforts of defendants/respondents to settle proceedings by making timely offers to settle. While the expansion of the court's discretion in family law cases, reflected in cases such as *Osmar v. Osmar*, in 2000, [21] and *Sordi v. Sordi*, in 2001, [22] which recognize a continuum of costs orders, from the awarding of nominal costs to the awarding of full indemnity costs, may permit the court in such cases to award costs on a substantial indemnity scale to reward timely offers to settle and punish the conduct of a party who unreasonably refuses an offer to settle, and to employ an award of costs on a full indemnity scale to punish truly egregious conduct, such as intentionally misleading the court or making scandalous accusations against the court or officers of the court, a similar approach by the court in civil actions appears to require the consideration of a change in Rule 49.10 by the Rules Committee.

32 Rule 1 of the *Rules of Civil Procedure* defines substantial indemnity costs as meaning "costs awarded in an amount that is 1.5 times what would otherwise be allowable in accordance with Part I of Tariff A" - i.e. 1.5 times the

partial indemnity rate.[23] Costs calculated on a substantial indemnity scale, obviously, represent something less than full indemnity.

33 On a substantial indemnity scale, the maximum inflation-adjusted hourly rates of the lawyers for 214 and the Estate are $620 for Ms. Byrne and Mr. Cameron ($413.15 1.5), $531 for Mr. Roth ($354.13 1.5), and $398.40 for Mr. Sidky ($265.60 1.5). While 214 and the Estate, on the authority of *St. Elizabeth Home Society v. Hamilton (City)*, are not entitled to claim these rates for their lawyers, they should be entitled to their lawyers' adjusted hourly rates on a partial indemnity scale.

34 Given that Ms. Byrne had 21 years' experience, and that the maximum rate for lawyers with 15 to 20 years' experience is $354.13, and the maximum rate for lawyers with over 20 years' experience is $413.15, I allow her rate at $370. Given that Mr. Roth had 11 years' experience, I allow his rate at $270, being $10 above the maximum rate for lawyers with under 10 years' experience. Given that Mr. Sidky had 2 years' experience, I allow his rate at $165 per hour, being $70 above the maximum allowed for a law clerk and $100 less than the maximum rate of $265.60 allowed for lawyers with under 10 years' experience.

35 JMB submits that the claim for Ms. Byrne's fees for 16.2 hours spent by her in the preparation of motion materials, legal research, and drafting a factum and Offer to Settle is excessive and should be reduced to 12 hours, that her travel time from Toronto to Owen Sound should be reduced to 7.5 hours, and that the .4 hours spent by Mr. Cameron in the preparation of argument of the application and motion was unnecessary, and that the additional time claimed for the filing of a copy of the respondents' factum should be disallowed.

36 JMB did not submit a Costs Outline setting out the time that its own lawyer spent on the application. The court is therefore unable to compare the time spent by JMB's lawyer with the time spent by the lawyers of 214 and the Estate on any given task in order to assess the reasonableness of the time spent by the latter.

37 This court has held, on several occasions, that when one party attacks another's costs as excessive, but does not put its own dockets before the court, the attack "is no more than an attack in the air." In *Risorto v. State Farm Mutual Automobile Insurance Co.*, in 2003, Winkler J., then a motion judge, stated:

> ***The attack on the quantum of costs, insofar as the allegations of excess are concerned, in the present circumstances is no more than an attack in the air.*** I note that State Farm has not put the dockets of its counsel before the court in support of its submission. ***Although such information is not required under Rule 57 in its present form, and the rule enumerates certain factors which would have to be considered in exercising the discretion with respect to the fixing of costs in any event, it might still provide some useful context for the process if the court had before it the bills of all counsel when allegations of excess and "unwarranted over-lawyering" are made***. In that regard, the court is also entitled to consider "any other matter relevant to the question of costs". (See Rule 57.01(1)(i). ***In my view, the relative expenditures, at least in terms of time, by adversaries on opposite sides of a motion, while not conclusive as to the appropriate award of costs, is still, nonetheless, a relevant consideration where there is an allegation of excess in respect of a particular matter.***[24]
>
> [Emphasis added.]

38 For this reason, I am not prepared to reduce the time claimed by the lawyers for 214 and the Estate except for the time claimed for travel, which involves considerations of principle.

39 As for the appropriate hourly rate, courts have not been unanimous as to whether counsel's hourly rates should be allowed, denied, or reduced, for travel time. Spies J., in *Rosen v. Slovan-Rosen* held that travel time should not be included in recoverable costs on a partial indemnity scale.[25] Zisman J., in the Ontario Court, came to the same conclusion in *Wilson v. Marchand*.[26] While other judges have allowed costs for travel time, they have differed as to whether counsel's

hourly rates should be reduced for such time. Their difference of opinion on this issue is evident in *Gatta Homes Inc. v. St. Catharines (City)*. In that case, Taliano J. stated:

> Counsel for the plaintiff takes the position that travel time should not be permitted. Counsel for the defendant relies on *Mallory v. Mallory*, [1998] O.J. No 41 where my learned colleague, ***Quinn J., held that travel time should not only be permitted but should be allowed at counsel's full chargeable hourly rate without discount since counsel while travelling, "is representing hislher client to the exclusion of all other clients and their needs." He went on to conclude that to discount counsel's hourly rate would ignore the harsh fiscal reality of the business of law. My view is that, although travel time which is necessary to the performance of counsel's duties should be compensable, the rate of compensation should be reduced to reflect the fact that the litigator's skills are not generally engaged during travel time***. That being the case, a lower rate of compensation is more appropriate. In this case, I would allow travel time at 50% of the substantial indemnity rate and I would therefore reduce the full indemnity bill by $4,219. [27]

40 The weight of authority favours a reduction of counsel's hourly rate for travel time by 50%, at least where costs are awarded on a partial indemnity scale. Orkin, in *The Law of Costs*, states:

> Where a solicitor's retainer requires him to travel on behalf of the client he is not entitled to be paid at the same rate for traveling time as he is for solicitor's work....Full rates charged for traveling time have been reduced on assessment, either by a reduction in the amount of time to be allowed or by allowing the full amount of time recorded but reducing the rate substantially below the solicitor's normal billing rates...." [28]

41 It is common practice for courts to reduce counsel's hourly rate for travel. Arrell J., in awarding partial indemnity costs in *Brantford (City) v. Montour*, allowed travel time but found that "full rates" should not be allowed for it. [29] Flynn J. allowed travel time at half of counsel's regular partial indemnity hourly rate in *Paonessa v. Burke* [30] as did Pierce J. in *MacRae v. Santa* [31] Sproat J., in *Daurio v. Cameron* [32] and Wein J., in *Fraser v. UBS Global Asset Management*. [33]

42 Based on these authorities, I am reducing the hourly rate applied to Ms. Byrne's travel time, at 3.5 hours, being the time that JMB attributes to reasonable travel time from Toronto to Owen Sound and return, to half Ms. Byrne's maximum hourly rate on an inflation-adjusted partial indemnity scale.

Other factors - Disbursements

43 It further submits that the disbursement of $215.71 claimed for service of the Notice of Termination of Seller, should be disallowed on the ground that it was not an expense related to the application. I agree, and would disallow this disbursement. The remaining disbursements of $772.83 are not disputed. I find those disbursements to be reasonable and would allow them at the amounts claimed.

Proportionality and the reasonable expectation of the unsuccessful parties

44 Based on the foregoing, the costs of 214 and the Estate would be as follows:

A. Roth:	2 hrs $270 =		$540.00
J. Byrne:	33.7 hrs (37.2 - 3.5 travel) $370 =		$12,469.00
	3.5 hrs travel $185 =		$647.50
M. Sidky:	8 hrs $165 =		$1,320.00
S. Cameron:	1.2 hrs $413.15 =		$495.78
		Total:	$15,472.28
		HST on fees: (13%):	$2,011.40
		Disbursements:	$772.83
HST on taxable disbursements (13% 543.83):			$70.70

Total Fees and Disbursements (inclusive of HST):	$18,327.21

45 It would not be fair to award costs to 214 and the Estate in an amount that exceeds the amount they claim. However, based on the fact that, as I find, 214 and the Estate would be entitled to costs, even on a partial indemnity scale, exceeding those they have claimed, I am allowing their costs in the amount they have claimed, although based on a different rationale than they advance in their submissions.

46 The costs claimed by 214 and the Estate are proportional to the amounts that were at stake in the application, which concerned a property that JMB had sought to purchase for $800,000. The amount is also within the range of what JMB should reasonably have expected to pay if unsuccessful, and was likely similar to the costs that it incurred itself, based on the time that its lawyer, Peter T. Fallis, would have to have spent, and his experience (called to the Bar in Ontario in 1971).

Conclusion and Order

47 For the foregoing reasons, it is ordered that:

1. JMB shall pay to 2144032 Ontario Inc. and Thomas Kaufman, Estate Trustee of the Estate of William H. Kaufman, their costs in the amount of $15,859.77, inclusive of fees, disbursements, and H.S.T., payable forthwith.

Order accordingly.

Footnotes

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

2 *Rules of Civil Procedure*, RRO 1990, Reg 194

3 *394 Lakeshore Oakville Holdings Inc. v. Misek*, [2010] O.J. No. 5692 (S.C.J.), para. 10

4 *Boucher v. Public Accountants Council (Ontario)*, 2004 ONCA 14579 (Ont. C.A.) (CanLII), (2004), 71 O.R. (3d) 291, [2004] O.J. No. 2634 (Ont. C.A.)

5 See the cases referenced in *Fazio v. Cusumano*, 2005 CarswellOnt 4518 (Ont. S.C.J.), at para. 8.

6 *Bell Canada v. Olympia & York Developments Ltd.*, 1994 ONCA 239 (Ont. C.A.) (CanLII), (1994), 17 O.R. (3d) 135 (Ont. C.A.)

7 *Standard Life Assurance Co. v. Elliott*, 2007 CanLII 18579, (2007), 86 O.R. (3d) 221 (Ont. S.C.J.)

8 *Bell Canada v. Olympia & York Developments Ltd.*, 1994 ONCA 239 (Ont. C.A.) (CanLII), (1994), 17 O.R. (3d) 135 (Ont. C.A.)

9 *Standard Life Assurance Co. v. Elliott*, 2007 CanLII 18579, (2007), 86 O.R. (3d) 221 (Ont. S.C.J.)

10 *Geographic Resources Integrated Data Solutions Ltd. v. Peterson*, 2013 ONSC 1041 (Ont. Div. Ct.) (CanLII), paras. 7 and 11 to 16

11 "Information for the Profession" bulletin ("the Costs Bulletin") from the Costs Sub-Committee of the Rules Committee (that the Costs Sub-Committee of the Rules Committee issued to replace the Costs Grid, which it repealed in 2005). The Costs Bulletin has advisory status only and not statutory authority, as it was not included in the Regulation that repealed the Costs Grid.

12 *First Capital (Canholdings) Corp. v. North American Property Group*, 2012 ONSC 1359 (Ont. S.C.J.) (CanLII), 2012 ONSC 1359 (Ont. S.C.J.)

13 *S & A Strasser Ltd. v. Richmond Hill (Town)*, 1990 CanLII 6856, (1990), 1 O.R. (3d) 243 (Ont. C.A.)

14 *H.L. Staebler Co. v. Allan*, 2008 CanLII 64396, (2008), 92 O.R. (3d) 788 (Ont. S.C.J.); *Dunstan v. Flying J Travel Plaza*, [2007] O.J. No. 4089 (Ont. S.C.J.); *Alie v. Bertrand & Frère Construction Co.* (2002), 62 O.R. (3d) 345 (Ont. C.A.).

15 *Davies v. Clarington (Municipality)*, 2009 ONCA 722 (Ont. C.A.) (CanLII)

16 *Scapillati v. A. Potvin Construction Ltd.*, 1999 CanLII 1473, (1999), 44 O.R. (3d) 737 (Ont. C.A.)

17 *Davies v. Clarington (Municipality)*, para. 40

18 *St. Elizabeth Home Society v. Hamilton (City)*, 2010 ONCA 280 (Ont. C.A.) (CanLII), para. 90

19 *3574423 Canada Inc. v. Baton Rouge Restaurants Inc.*, 2012 ONSC 296 (Ont. S.C.J. [Commercial List]) (CanLII), para. 8

20 *Harte-Eichmanis v. Fernandes*, 2012 ONSC 2079 (Ont. S.C.J.) (CanLII), para. 16

21 *Osmar v. Osmar*, 2000 CanLII 20380, [2000] O.J. No. 2504, 8 R.F.L. (5th) 387 (Ont. C.A.)

22 *Sordi v. Sordi*, [2011] O.J. No. 4681, 2011 ONCA 665 (Ont. C.A.) (CanLII)

23 See *Hanis v. University of Western Ontario*, 2006 CanLII 23155, [2006] O.J. No. 2763 (Ont. S.C.J.), per Power J.

24 *Risorto v. State Farm Mutual Automobile Insurance Co.*, 2003 CanLII 43566, 2003 ONSC 43566 (Ont. S.C.J.) (CanLII), (2003), 64 O.R. (3d) 135 (Ont. S.C.J.), at para. 10, per Winkler J., cited in *Springer v. Aird & Berlis LLP*, 2009 CanLII 26608, 2009 ONSC 26608 (Ont. S.C.J.) (CanLII), (2009), 74 C.C.E.L. (3d) 243 (Ont. S.C.J.), at paras. 10-17.

25 *Rosen v. Slovan-Rosen*, 2010 ONSC 2145 (Ont. S.C.J.) (CanLII), per Spies J., at para. 12

26 *Wilson v. Marchand*, 2007 ONCJ 455 (Ont. C.J.) (CanLII), per Zisman J., at para. 9

27 *Gatta Homes Inc. v. St. Catharines (City)*, 2010 ONSC 6721 (Ont. S.C.J.) (CanLII), para. 16

28 Orkin in *The Law of Costs* (Canada Law Book, 2d ed.), para. 311.1(5)

29 *Brantford (City) v. Montour*, 2013 ONSC 1219 (Ont. S.C.J.) (CanLII), per Arrell J., para. 34

30 *Paonessa v. Burke*, 2003 ONSC 31373 (Ont. S.C.J.) (CanLII), per Flynn J., at para. 23

31 *MacRae v. Santa*, 2003 ONSC 3937 (Ont. S.C.J.) (CanLII), per Pierce J., para. 13

32 *Daurio v. Cameron* [2005 CarswellOnt 2922 (Ont. S.C.J.)], 2005 CanLII 24256, per Sproat J., at para. 26

33 *Fraser v. UBS Global Asset Management*, 2012 ONSC 128 (Ont. S.C.J.) (CanLII), per Wein J., para. 9

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TAB 4

2009 ONCA 722
Ontario Court of Appeal

Davies v. Clarington (Municipality)

2009 CarswellOnt 6185, 2009 ONCA 722, [2009] O.J. No. 4236, 100 O.R. (3d) 66, 182 A.C.W.S. (3d) 291, 254 O.A.C. 356, 312 D.L.R. (4th) 278, 77 C.P.C. (6th) 1

Bonnie Davies (Plaintiff) and The Corporation of the Municipality of Clarington, VIA Rail Canada Inc., Canadian National Railway Company, Timothy Garnham, The BLM Group Inc., Apache Specialized Equipment Inc., Apache Transportation Services Inc. (Defendants / Appellants) and Blue Circle Canada Inc. (Defendant / Respondent) and Hydro One Networks Inc. (Defendant / Appellant)

S.T. Goudge, Robert Sharpe, Gloria Epstein JJ.A.

Heard: June 18, 2009
Judgment: October 16, 2009
Docket: CA C49139

Proceedings: varying *Davies v. Clarington (Municipality)* (2007), 2007 CarswellOnt 7413 (Ont. S.C.J.); additional reasons to *Davies v. Clarington (Municipality)* (2006), 2006 CarswellOnt 2020, 266 D.L.R. (4th) 375 (Ont. S.C.J.)

Counsel: James M. Regan for Appellants
Brian J.E. Brock, Q.C., Roseanna R. Ansell-Vaughan for Respondent

Subject: Torts; Civil Practice and Procedure

Table of Authorities

Cases considered by *Gloria Epstein J.A.*:

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

Apotex Inc. v. Egis Pharmaceuticals (1990), 2 O.R. (3d) 126, 1990 CarswellOnt 2702, 32 C.P.R. (3d) 559 at 568 (Ont. Gen. Div.) — considered

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

Boucher v. Public Accountants Council (Ontario) (2004), 48 C.P.C. (5th) 56, 2004 CarswellOnt 2521, 188 O.A.C. 201, (sub nom. *Boucher v. Public Accountants Council for the Province of Ontario)* 71 O.R. (3d) 291 (Ont. C.A.) — considered

Coldmatic Refrigeration of Canada Ltd. v. Leveltek Processing LLC (2005), 2005 CarswellOnt 189, 5 C.P.C. (6th) 258, 75 O.R. (3d) 638 (Ont. C.A.) — referred to

Dyer v. Mekinda Snyder Partnership Inc. (1998), 1998 CarswellOnt 2283, 40 O.R. (3d) 180, 61 O.T.C. 390 (Ont. Gen. Div.) — referred to

Foulis v. Robinson (1978), 1978 CarswellOnt 466, 21 O.R. (2d) 769, 92 D.L.R. (3d) 134, 8 C.P.C. 198 (Ont. C.A.) — considered

Hamilton v. Open Window Bakery Ltd. (2003), 2004 SCC 9, 316 N.R. 265, 235 D.L.R. (4th) 193, 2003 CarswellOnt 5591, 2003 CarswellOnt 5592, 2004 C.L.L.C. 210-025, 184 O.A.C. 209, [2004] 1 S.C.R. 303, 70 O.R. (3d) 255 (note), 40 B.L.R. (3d) 1 (S.C.C.) — considered

McBride Metal Fabricating Corp. v. H & W Sales Co. (2002), 19 C.P.R. (4th) 440, 158 O.A.C. 214, 59 O.R. (3d) 97, 2002 CarswellOnt 1200 (Ont. C.A.) — considered

Moon v. Sher (2004), 2004 CarswellOnt 4702, 192 O.A.C. 222, 246 D.L.R. (4th) 440 (Ont. C.A.) — referred to

Mortimer v. Cameron (1994), 111 D.L.R. (4th) 428, 19 M.P.L.R. (2d) 286, 17 O.R. (3d) 1, 68 O.A.C. 332, 1994 CarswellOnt 601 (Ont. C.A.) — considered

Murano v. Bank of Montreal (1998), 163 D.L.R. (4th) 21, 22 C.P.C. (4th) 235, 1998 CarswellOnt 2841, 111 O.A.C. 242, 5 C.B.R. (4th) 57, 41 O.R. (3d) 222, 41 B.L.R. (2d) 10 (Ont. C.A.) — referred to

Réno-Dépôt Inc. v. Wonderland Commercial Centre Inc. (2008), 2008 ONCA 786, 2008 CarswellOnt 6888 (Ont. C.A.) — referred to

S & A Strasser Ltd. v. Richmond Hill (Town) (1990), 1990 CarswellOnt 435, 49 C.P.C. (2d) 234, 1 O.R. (3d) 243, 45 O.A.C. 394 (Ont. C.A.) — considered

Scapillati v. A. Potvin Construction Ltd. (1999), 46 C.C.E.L. (2d) 16, 1999 CarswellOnt 1844, 44 O.R. (3d) 737, 122 O.A.C. 327, 175 D.L.R. (4th) 169 (Ont. C.A.) — considered

St. Louis-Lalonde v. Carleton Condominium Corp. No. 12 (2005), 2005 CarswellOnt 2731 (Ont. S.C.J.) — referred to

Walker v. Ritchie (2005), 2005 CarswellOnt 1574, 197 O.A.C. 81, 31 C.C.L.T. (3d) 205, 25 C.C.L.I. (4th) 60, 12 C.P.C. (6th) 51 (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.) — considered

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

Statutes considered:

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

s. 131 — considered

Rules considered:

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

R. 1.03(1) "substantial indemnity costs" — considered

R. 1.04 — referred to

R. 49 — considered

R. 49.02(1) — considered

R. 49.10 — considered

R. 49.10(1) — considered

R. 49.10(2) — considered

R. 49.13 — considered

R. 57.01 — considered

R. 57.01(1) — considered

R. 57.01(1)(0.a) [en. O. Reg. 42/05] — considered

R. 57.01(1)(0.b) [en. O. Reg. 42/05] — considered

R. 57.01(1)(c) — considered

R. 57.01(1)(e) — considered

R. 57.01(4) — considered

R. 57.01(4)(c) — considered

R. 57.01(4)(d) — considered

Tariffs considered:

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

Tariff A, Pt. I — referred to

APPEAL of judgment reported at *Davies v. Clarington (Municipality)* (2007), 2007 CarswellOnt 7413 (Ont. S.C.J.).

***Gloria Epstein J.A.*:**

1 The primary issue in this appeal involves the limits of the court's discretion to award costs on either a substantial indemnity or full indemnity scale. This court is asked to consider a costs award in the amount of $509,452.18, payable by a number of defendants in this action to a defendant against which the action was dismissed. The award is notable not only for its considerable quantum, but also for the trial judge's decision to fix a large portion of the costs on a full indemnity basis absent a finding of sanction-worthy conduct on the part of the party against which the cost order was made. Specifically, full indemnity costs were ordered for the period following the delivery of an offer to settle the claims of the plaintiff and other defendants on a without-costs basis.

2 For the reasons that follow, I would grant leave to appeal, allow the appeal, set aside the costs award below, and substitute an award in the amount of $300,000 plus disbursements and Goods and Services Tax.

I. Background Facts

3 This action, commenced on September 5, 2000, arose out of a train derailment that took place in Bowmanville on November 23, 1999.

4 On April 10, 2002, Blue Circle Canada Inc., one of the defendants and the respondent in this appeal, delivered a non-severable offer to settle consenting to a dismissal of the claim and all counterclaims and cross-claims, without costs. This offer remained open for acceptance for 30 days. On February 1, 2005, Blue Circle delivered a second offer on the same terms (the "February 2005 offer"). This offer was never revoked and was open for acceptance at the time of trial.

5 The trial, on the issue of liability only, began in April 2005 and continued for almost 11 weeks. In this complex action, eight parties advanced claims, counterclaims, and cross-claims in contract and in tort. Prior to closing arguments, settlement discussions took place, at the end of which the defendants/appellants in this appeal, the Corporation of the Municipality of Clarington, Via Rail Canada Inc., Canadian National Railway Company, The BLM Group Inc., Timothy Garnham, Apache Specialized Equipment Inc., Apache Transportation Services Inc., and Hydro One Networks Inc. (collectively, the "settling defendants"), settled with the plaintiff.

6 In the course of the settlement discussions, Blue Circle offered to accept $250,000 from the settling defendants in relation to costs it incurred in defending their cross-claims. It subsequently reduced this amount to $200,000. This offer was not accepted and consequently Blue Circle did not participate in the settlement.

7 As a result, the trial judge had to determine Blue Circle's liability, if any, for damages arising from the derailment. On April 5, 2006, after hearing final arguments, the trial judge dismissed the action against Blue Circle.

8 Blue Circle then sought costs against the settling defendants on a partial indemnity scale from the commencement of the litigation to the February 2005 offer and on a substantial indemnity basis thereafter.

9 On November 19, 2007, upon considering written argument, the trial judge ordered the settling defendants to pay Blue Circle's costs in the amount of $509,452.18 plus disbursements of $26,276.77.

II. The Applicable Rules

10 The award of costs is governed by section 131 of the *Courts of Justice Act* R.S.O. 1990, c.43 and by rules 49 and 57.01 of the *Rules of Civil Procedure* R.R.O. 1990, Reg. 194.

11 The general source of judicial discretion to award costs is found under s.131 of the *Courts of Justice Act*, as expanded by rule 57.01.

12 Section 131 of the *Courts of Justice Act* says:

> Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

13 Rule 57.01 reads as follows:

> In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding *and any offer to settle or to contribute made in writing*,
>
> (0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;
>
> (0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
>
> . . . . .
>
> (c) the complexity of the proceeding;
>
> . . . . .
>
> (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding. (Emphasis added.)

14 Rule 57.01(4) allows for elevated levels of costs:

> 57.01(4) Nothing in this rule or rules 57.02 to 57.07 affects the authority of the court under section 131 of the Courts of Justice Act,
>
> . . . . .
>
> (c) to award all or part of the costs on a substantial indemnity basis;
>
> (d) to award costs in an amount that represents full indemnity.

15 "Substantial indemnity costs" is defined in rule 1.03 as "costs awarded in an amount that is 1.5 times what would otherwise be awarded in accordance with Part I of Tariff A". This part of Tariff A was once the prescribed grid for "partial indemnity costs", but is no longer in effect. "Full indemnity costs" is not a defined term but is generally considered to be complete reimbursement of all amounts a client has had to pay to his or her lawyer in relation to the litigation: see M. Orkin, *The Law of Costs*, looseleaf, 2nd ed. (Aurora, Ont.: Canada Law Book, 1993) at para. 219.05.

16 Rule 49 deals with a specific aspect of costs: it is a self-contained scheme that addresses the manner in which offers to settle are brought into play. Its objective is to promote an offer of compromise and visit a cost consequence upon an offeree who rejects an offer that turns out to be as favourable as or more favourable than the judgment awarded to a plaintiff at trial. The parts of rule 49 relevant to this analysis are:

49.02(1) A party to a proceeding may serve on any other party an offer to settle any one or more of the claims in the proceeding on the terms specified in the offer to settle

. . . . .

Costs Consequences of Failure to Accept

Plaintiff's Offer

49.10(1) Where an offer to settle,

(a) is made by a plaintiff at least seven days before the commencement of the hearing;

(b) is not withdrawn and does not expire before the commencement of the hearing; and

(c) is not accepted by the defendant, and the plaintiff obtains a judgment as favourable as or more favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer to settle was served and substantial indemnity costs from that date, unless the court orders otherwise.

Defendant's Offer

(2) Where an offer to settle,

(a) is made by a defendant at least seven days before the commencement of the hearing;

(b) is not withdrawn and does not expire before the commencement of the hearing; and

(c) is not accepted by the plaintiff, and the plaintiff obtains a judgment as favourable as or less favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer was served and the defendant is entitled to partial indemnity costs from that date, unless the court orders otherwise.

. . . . .

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.

III. Reasons of the Trial Judge Regarding Blue Circle's Costs

17 In her endorsement relating to Blue Circle's costs, the trial judge briefly set out the nature and history of the proceedings.

18 After completing her assessment of Blue Circle's disbursements that were in issue, the trial judge turned to Blue Circle's submissions concerning fees. She noted Blue Circle's two offers to consent to a dismissal of the claims and cross-claims on a without-costs basis and its offers made to the settling defendants during the course of the settlement discussions.

19 The trial judge identified the principles and authorities upon which Blue Circle relied in support of its claim for partial indemnity costs to the date of the February 2005 offer and substantial indemnity costs thereafter. Blue Circle relied upon the wide discretionary power in s. 131 of the *Courts of Justice Act* and rules 49.13 and 57.01(1) and (4) of the *Rules of Civil Procedure* as well as this court's decisions in *S & A Strasser Ltd. v. Richmond Hill (Town)* (1990), 1 O.R. (3d) 243 (Ont. C.A.), and the Ontario Court (General Division) decision in *Apotex Inc. v. Egis Pharmaceuticals* (1990), 2 O.R. (3d) 126 (Ont. Gen. Div.).

20 In her analysis, the trial judge identified the principles established in the two well-known cases of *Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (Ont. C.A.), and *Moon v. Sher* (2004), 246 D.L.R. (4th) 440 (Ont. C.A.). The principles are that the fixing of costs is not merely a mechanical exercise; that the result of applying the costs grid must be considered, in particular whether in all the circumstances the result is fair and reasonable [1] ; and that in deciding what is fair and reasonable, the expectation of the parties is a relevant factor.

21 At para. 22 of her reasons, the trial judge analyzed the factors set out in rule 57.01(1) that she considered relevant to her determination as to costs:

> I am now going to look at the 57.01(1) factors applicable to this case:
>
> (0.a) The lawyers were all senior experienced members of the bar - no doubt the best in this area of law. The rates charged and the hours expended are reasonable. There is no reason why there should not be full indemnity following the service of the offer and partial indemnity of the earlier fees.
>
> (0.b) The amount of costs being sought by Blue Circle would have been reasonably expected by the parties.
>
> . . . . .
>
> (c) The case was very complex. Even the sole issue which had to be determined in the end was very complex.
>
> . . . . .
>
> (e) The conduct of Blue Circle - I agree that counsel for Blue Circle often played a mediating role. Difficult issues erupted at the trial and usually Mr. Brock, who was not involved in the "erupting" issue, offered some practical and helpful thoughts. I was not present in the settlement discussions but have no doubt that he was an integral part in arriving at the settlement.

22 Then, in paras. 23 and 24, the trial judge fixed Blue Circle's costs as follows:

> 1. "Partial indemnity costs" from the commencement of the action to February 1, 2005, in the amount of $53,867.10; and
>
> 2. "Substantial indemnity costs" from February 1, 2005 to the date of the costs decision, in the amount of $455,585.08.

23 In her reasons the trial judge used the terms "substantial" and "full" interchangeably with respect to the scale of costs. However, the $455,585.08 awarded is the aggregate of all of the invoices Blue Circle paid its counsel for fees incurred after February 2005. Thus, while the trial judge appears to have intended to order Blue Circle its costs on a substantial indemnity basis, the amount awarded was on a full indemnity scale. Although this amounts to an error, it has no bearing on my analysis or the outcome of this appeal. For simplicity, throughout the rest of my reasons I will refer to both full and substantial indemnity costs generically as "elevated costs".

IV. The Issues

24 The settling defendants appeal on a narrow basis. They take the position that Blue Circle is entitled to its costs throughout, on a partial indemnity basis, and to the disbursements awarded by the trial judge. Their complaint lies in the trial judge's having awarded Blue Circle elevated costs from the February 2005 offer to the date of judgment as well as in the overall amount of the award.

25 The settling defendants submit that the trial judge erred in the exercise of her discretion in awarding elevated costs for this period, in two respects:

> (a) in effectively treating Blue Circle's February 2005 offer to settle as though it were a rule 49.10 offer; and,

(b) in relying on *Strasser* in support of her conclusion that Blue Circle was entitled to elevated costs from the February 2005 offer forward.

26 The settling defendants further argue that the trial judge erred in ordering costs in an amount that is not "fair and reasonable" according to the principles set out in *Boucher.*

V. Analysis

27 The parties take no issue with the general principles applicable to appellate review of costs decisions. The Supreme Court has made it clear that a costs award should be set aside on appeal only if the trial judge erred in principle or if the award was plainly wrong: see *Hamilton v. Open Window Bakery Ltd.* (2003), [2004] 1 S.C.R. 303 (S.C.C.), at para. 27.

(1) The Costs Award on an Elevated Scale

The Jurisprudential Framework

28 The first issue is whether the trial judge erred in relying on the February 2005 offer as justification for an elevated costs award. This court, following the principle established by the Supreme Court, has repeatedly said that elevated costs are warranted in only two circumstances. The first involves the operation of an offer to settle under rule 49.10, where substantial indemnity costs are explicitly authorized. The second is where the losing party has engaged in behaviour worthy of sanction.

29 In *Young v. Young*, [1993] 4 S.C.R. 3 (S.C.C.), at p. 134, McLachlin J., described the circumstances when elevated costs are warranted as "only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties."

30 The same principle was expanded upon in *Mortimer v. Cameron* (1994), 17 O.R. (3d) 1 (Ont. C.A.), at p. 23, where Robins J. A., speaking for the court, set out the restricted circumstances in which a higher costs scale is appropriate with reference to Orkin at para. 219.

> An award of costs on the solicitor-and-client scale, it has been said, is ordered only in rare and exceptional cases to mark 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 in the proceedings, which makes such costs desirable as a form of chastisement. [2]

31 The narrow grounds justifying a higher costs scale were further reinforced by Abella J.A. in *McBride Metal Fabricating Corp. v. H & W Sales Co.* (2002), 59 O.R. (3d) 97 (Ont. C.A.) where, at para. 39, she said:

> Apart from the operation of Rule 49.10 (introduced to promote settlement offers), only conduct of a reprehensible nature has been held to give rise to an award of solicitor-and-client costs. In the cases in which they were awarded there were specific acts or a series of acts that clearly indicated an abuse of process, thus warranting costs as a form of chastisement.

See also: *Walker v. Ritchie* (2005), 197 O.A.C. 81 (Ont. C.A.) at para. 105, reversed on other grounds, [2006] 2 S.C.R. 428 (S.C.C.).

32 At para. 14 of the reasons, the trial judge acknowledges the parties' agreement that rule 49 was not applicable to Blue Circle's February offer.

33 This leaves egregious conduct, specifically the question whether in the circumstances of this case the settling defendants engaged in conduct worthy of sanction.

Strasser

34 This takes me to *Strasser*, the case upon which the trial judge relied in awarding an elevated scale of costs following the February 2005 offer to settle and upon which Blue Circle heavily relies in this appeal.

35 In *Strasser*, the plaintiff had originally claimed $1,000,000. After discovery, the defendant offered to pay $30,000. The plaintiff then reduced the claim to $70,000. The action was ultimately dismissed. In those circumstances, the trial judge awarded the defendant solicitor-and-client costs, throughout.

36 In the plaintiff's appeal of the costs award, Carthy J.A., for the court, noted that although the defendant's offer was not a rule 49.10 offer, the language of rules 49.13 and 57.01 gives the trial judge discretion with respect to costs, and rule 49.13 specifically invites the judge exercising discretion to take into account any offer to settle made in writing. Carthy J.A. went on, however, to hold that the offer in *Strasser* could not, standing on its own, justify an award of solicitor-and-client costs. While the trial judge did not identify any evidence of reprehensible conduct, Carthy J.A., in upholding the award, was careful to note that during the costs submissions the trial judge did say "I think this case, in these circumstances, screams for solicitor-and-client costs:" p. 246.

37 This court sought to clarify *Strasser* in *Scapillati v. A. Potvin Construction Ltd.* (1999), 44 O.R. (3d) 737 (Ont. C.A.), a case in which the defendant had served an offer to settle on the basis that the action be dismissed without costs and the trial judge subsequently dismissed the plaintiff's claim. Purportedly following *Strasser*, the trial judge awarded party-and-party costs to the date of the offer and solicitor-and-client costs thereafter.

38 On appeal, this court started its analysis of the defendant's appeal of the costs award by observing, once again, that as the plaintiff's claim had failed, rule 49.10 had no application. Then, at p. 750, turning to *Strasser*, Austin J.A. had this to say:

> [T]he principle upon which solicitor and client costs were awarded in *Strasser* is a very narrow one. The plaintiff had made a claim for $1 million, the defendant made an offer after discovery of $30,000 and the action was dismissed at trial. In the instant case, no similar offer was made. While the trial judge in the instant case made an award of solicitor and client costs, it does not appear from the record that she felt as strongly about it as the trial judge in *Strasser* who said "I think this case, in these circumstances, screams for solicitor and client costs."

39 Thus interpreting *Strasser* as a case where egregious conduct was implicitly found, this court allowed the appeal as to costs, set aside the original costs award and substituted an award of costs on a party-and-party basis. For other cases in which comments have been made on the limited application of *Strasser*, see *St. Louis-Lalonde v. Carleton Condominium Corp. No. 12* [2005 CarswellOnt 2731 (Ont. S.C.J.)], 142 A.C.W.S. (3d) 934 aff'd 155 A.C.W.S. (3d) 479 (C.A.), at para. 15, *Dyer v. Mekinda Snyder Partnership Inc.* (1998), 40 O.R. (3d) 180 (Ont. Gen. Div.).

40 In summary, while fixing costs is a discretionary exercise, attracting a high level of deference, it must be on a principled basis. The judicial discretion under rules 49.13 and 57.01 is not so broad as to permit a fundamental change to the law that governs the award of an elevated level of costs. Apart from the operation of rule 49.10, elevated costs should *only* be awarded on a clear finding of reprehensible conduct on the part of the party against which the cost award is being made. As Austin J.A. established in *Scapillati*, *Strasser* should be interpreted to fit within this framework - as a case where the trial judge implicitly found such egregious behaviour, deserving of sanction.

Application to the Facts

41 Here, the circumstances are similar to those found in *Scapillati.* There was no rule 49.10 offer and no finding by the trial judge that the settling defendants conducted themselves in a reprehensible or egregious fashion.

42 Blue Circle submits that notwithstanding the trial judge's failure to make such a finding in her reasons as to costs, her reasons dismissing the claim against it demonstrate that the settling defendants' conduct in relentlessly pursuing their claims against Blue Circle, in the face of the apparent weakness of their position, is conduct that justifiably attracted an elevated scale of costs.

43 I have considerable difficulty with this argument.

44 Blue Circle's submission in this respect is contrary to the principle Dubin J.A. expressed in *Foulis v. Robinson* (1978), 21 O.R. (2d) 769 (Ont. C.A.) at p. 776 that "Under our system defendants are entitled to put the plaintiff to the proof, and there is no obligation to settle an action."

45 Of course, a distinction must be made between hard-fought litigation that turns out to have been misguided, on the one hand, and malicious counterproductive conduct, on the other. The former, the thrust and parry of the adversary system, does not warrant sanction: the latter well may. In *Apotex Inc. v. Egis Pharmaceuticals* (1991), 4 O.R. (3d) 321 (Ont. S.C.J.), substantial indemnity costs were justified as a means "to discourage harassment of another party by the pursuit of fruitless litigation...particularly where a party has conducted itself improperly in the view of this court." For other examples of abuses of process leading to elevated costs, see *Dyer* at pp.184 - 85.

46 Here, there is no finding or evidence in the record of "harassment...by the pursuit of fruitless litigation". The settling defendants were entitled to advance their position; they were not required to settle. In the end, the trial judge did not agree with their position but the settling defendants did nothing to abuse the process of the court. In short, there was no wrongdoing on the part of the settling defendants that warranted a rebuke from the court.

47 *Apotex* (1990) does not assist Blue Circle in trying to make out a case for misconduct on the part of the settling defendants. That case involved meritless claims of fraud, deceit, and dishonesty based on pure speculation. First, the trial judge did not make such a link between this case and *Apotex* (1990) on this basis. Second, unsubstantiated allegations of the nature advanced in *Apotex* (1990) represent a form of egregious conduct commonly accepted as a basis for attracting a higher costs award: see *131843 Canada Inc. v. Double "R" (Toronto) Ltd.* (1992), 7 C.P.C. (3d) 15 (Ont. Gen. Div.); *Réno-Dépôt Inc. v. Wonderland Commercial Centre Inc.* (2008), 2008 ONCA 786 (Ont. C.A.) (award of costs on a substantial indemnity basis warranted only from the point in time when allegations of fraud and dishonesty were made). This is not the nature of the allegations made against the settling defendants.

48 Before turning to the settling defendants' second argument, I make one final comment. In cases such as *Beresford-Last (Litigation Guardian of) v. Dworak* (2000), 101 A.C.W.S. (3d) 696 (Ont. Sup. Ct.), and *Marcella v. Integrated Management and Investments Inc.* (2007), 157 A.C.W.S. (3d) 51 (Ont. Sup. Ct.), trial judges have expressed the view that denying elevated costs to defendants who submit an offer to settle, which is later revealed to be more favourable than the result at trial, acts as a disincentive to defendants to make reasonable offers to settle. This view, while understandable, is contrary to the wording, spirit and intent of rule 49. Rules cannot be incrementally changed through jurisprudence. Any change in the rules to take into account the position of defendants who legitimately try to curtail what turns out to be unnecessary litigation is a matter for the Rules Committee.

49 In my view, there is no basis to justify anything other than a partial indemnity costs award in favour of Blue Circle.

(2) Whether the costs award is "fair and reasonable"

50 While this conclusion is sufficient to set aside the costs award, I would add that, in my view, the award was otherwise not fair and reasonable.

51 In *Andersen v. St. Jude Medical Inc.* (2006), 264 D.L.R. (4th) 557 (Ont. Div. Ct.), the Divisional Court set out several principles that must be considered when awarding costs:

1. The discretion of the court must be exercised in light of the specific facts and circumstances of the case in relation to the factors set out in rule 57.01(1): *Boucher*, *Moon*, and *Coldmatic Refrigeration of Canada Ltd. v. Leveltek Processing LLC* (2005), 75 O.R. (3d) 638 (Ont. C.A.).

2. A consideration of experience, rates charged and hours spent is appropriate, but is subject to the overriding principle of reasonableness as applied to the factual matrix of the particular case: *Boucher*. The quantum should reflect an amount the court considers to be fair and reasonable rather than any exact measure of the actual costs to the successful litigant: *Zesta Engineering Ltd. v. Cloutier* (2002), 119 A.C.W.S. (3d) 341 (Ont. C.A.), at para. 4.

3. The reasonable expectation of the unsuccessful party is one of the factors to be considered in determining an amount that is fair and reasonable: rule 57.01(1)(0.b).

4. The court should seek to avoid inconsistency with comparable awards in other cases. "Like cases, [if they can be found], should conclude with like substantive results": *Murano v. Bank of Montreal* (1998), 41 O.R. (3d) 222 (Ont. C.A.), at p. 249.

5. The court should seek to balance the indemnity principle with the fundamental objective of access to justice: *Boucher*.

52 As can be seen, the overriding principle is reasonableness. If the judge fails to consider the reasonableness of the costs award, then the result can be contrary to the fundamental objective of access to justice. Rather than engage in a purely mathematical exercise, the judge awarding costs should reflect on what the court views as a reasonable amount that should be paid by the unsuccessful party rather than any exact measure of the actual costs of the successful litigant. In *Boucher*, this court emphasized the importance of fixing costs in an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding at para. 37, where Armstrong J.A. said "[t]he failure to refer, in assessing costs, to the overriding principle of reasonableness, can produce a result that is contrary to the fundamental objective of access to justice."

53 Here, while the trial judge identified the importance of a reasonableness assessment, with respect, in arriving at a costs award of $509,452.18 her reasons do not indicate that she conducted an assessment or at least a sufficient one, in accordance the requirements set out in Boucher. Furthermore, although the trial judge did find that the parties would have reasonably expected Blue Circle to have *claimed* costs of this magnitude, she was, according to *Boucher* at para. 38, obliged to consider the expectations of the parties concerning the quantum of the costs *award*.

54 It is difficult to accept that the settling defendants would have expected that they would be faced with an award against them of this magnitude particularly in the light of Blue Circle's limited involvement in the proceedings. Blue Circle did not participate in the examination or cross-examination of any witnesses. In Blue Circle's own costs submissions, it is acknowledged that their case took two hours in total to put in. The parties could not have expected that the trial judge would treat the costs incurred after the February 2005 offer in the manner she did. They could not have expected that, through an elevated costs award, the trial judge would effectively reward Blue Circle for the assistance its counsel provided during the settlement discussions.[3] Further, in considering the expectations of the parties, it is appropriate to compare the costs claimed by and awarded to the various parties. The trial judge awarded Blue Circle an amount in legal fees that was almost double those that were received by the plaintiffs. The settling defendants could not have anticipated a disparity of this nature.

55 The results of this "fair and reasonable" analysis demonstrate that appellate intervention is warranted.

56 Turning to quantum, taking into consideration the circumstances of this case and applying to them the relevant factors set out in rule 57.01, and the fair and reasonable test expressed in Boucher, in my view the amount of $300,000 would be appropriate.

VI. Disposition

57 I would therefore allow the appeal and set aside the trial judge's cost award in relation to fees only and in its place substitute the amount of $300,000.

58 Upon the agreement of the parties, the settling defendants are entitled to their costs of this appeal and the motion for leave to appeal, fixed in the amount of $10,000 including disbursements and Goods and Services Tax.

***S.T. Goudge J.A.*:**

I agree.

***Robert Sharpe J.A.*:**

I agree.

Appeal allowed; costs order varied.

Footnotes

1 The costs grid has since been removed from the rules, but the general point is clear; the result of a costs award formula must be scrutinized for fairness and reasonableness.

2 Note the discrepancy in language between the former terminology, "solicitor and client costs" and the newer terminology of "substantial indemnity." The two terms indicate the same costs scale. Rule 1.04 identifies the two terms as follows: "If a statute, regulation or other document refers to solicitor and client costs, these rules apply as if the reference were to substantial indemnity costs."

3 While the assistance of counsel for Blue Circle in the discussions that led to the settlement among all but Blue Circle is commendable, it is not, in my view, a basis upon which to make the settling defendants pay Blue Circle's costs on an elevated basis.

TAB 5

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

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.

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TAB 6

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

Table of Authorities

Cases considered by *Robert B. Reid J.*:

Benquesus v. Proskauer, Rose, LLP (2005), 2005 CarswellOnt 2464 (Ont. S.C.J.) — referred to

Carleton v. Beaverton Hotel (2009), 314 D.L.R. (4th) 566, 96 O.R. (3d) 391, 2009 CarswellOnt 6303 (Ont. Div. Ct.) — considered

DiBattista v. Wawanesa Mutual Insurance Co. (2005), 2005 CarswellOnt 6604, 78 O.R. (3d) 445 (Ont. S.C.J.) — referred to

Galganov v. Russell (Township) (2012), 2012 ONCA 410, 2012 CarswellOnt 7400, 350 D.L.R. (4th) 679, 294 O.A.C. 13 (Ont. C.A.) — considered

Hoystead v. Commissioner of Taxation (1925), [1925] All E.R. Rep. 56, [1926] 1 W.W.R. 286, [1926] A.C. 155, 1925 CarswellFor 5, 95 L.J.P.C. 79 (Australia P.C.) — considered

Las Vegas Strip Ltd. v. Toronto (City) (1996), 13 O.T.C. 308, 1996 CarswellOnt 3426, 34 M.P.L.R. (2d) 233, 38 C.R.R. (2d) 129, 30 O.R. (3d) 286 (Ont. Gen. Div.) — followed

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

Standard Life Assurance Co. v. Elliott (2007), 50 C.C.L.I. (4th) 288, 86 O.R. (3d) 221, 2007 CarswellOnt 3236 (Ont. S.C.J.) — referred to

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:

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 131 — referred to

Limitations Act, 2002, S.O. 2002, c. 24, Sched. B
Generally — referred to

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

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 7

CITATION: Catalyst Capital Group Inc. v. Moyse, 2016 ONSC 6285
COURT FILE NO.: CV-16-11272-00CL
DATE: 20161007

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

BETWEEN: THE CATALYST CAPITAL GROUP INC

Plaintiff

AND:

BRANDON MOYSE and WEST FACE CAPITAL INC

Defendants

BEFORE: Newbould J.

COUNSEL: *Rocco DiPucchio, Andrew Winton and Bradley Vermeersch*, for the plaintiffs

Robert A. Centa, Kris Borg-Olivier and Denise M. Cooney, for the defendant Brandon Moyse

Kent E. Thomson, Matthew Mile-Smith and Andrew Carlson, for the defendant West Face Capital Inc.

COST ENDORSEMENT

[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. 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 Company of Canada v. Ontario Municipal Employees Retirement Fund* (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 per Blair J. (as he then was). In *Re Bisyk (No. 2)* (1980), 32 O.R. (2d) 281; aff'd [1981] O.J. No. 1319 (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 (C.A.) at para. 47.

[4] In *Thoughtcorp Systems Inc. v. Tanju*, [2009] O.J. No. 1856, 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] I in no way impugn the integrity of Catalyst's lawyers who conducted the case in an entirely professional manner.

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.

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[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.

[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 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 (Div. Ct.), I fix the partial indemnity costs to be paid to Mr. Moyse by Catalyst at the amount claimed of $339,500.18.

Newbould J.

Date: October 7, 2016

TAB 8

2009 CarswellOnt 2450
Ontario Superior Court of Justice

Thoughtcorp Systems Inc. v. Tanju

2009 CarswellOnt 2450, [2009] O.J. No. 1856, 177 A.C.W.S. (3d) 55

Thoughtcorp Systems Inc. (Plaintiff) and Gokhan Tanju, 2081062 Ontario Inc., Turn Eight Ltd. and Janet Chiu (Defendants)

A. Hoy J.

Heard: March 6, 2009
Judgment: May 4, 2009
Docket: CV-08-781800CL

Counsel: Peter Ruby, Lauren Butti for Plaintiff
Ranjan Das for Defendant, Janet Chiu

Subject: Civil Practice and Procedure

Table of Authorities

Cases considered by *A. Hoy J.*:

Goulin v. Goulin (1995), 42 C.P.C. (3d) 194, 26 O.R. (3d) 472, 1995 CarswellOnt 1131 (Ont. Gen. Div.) — referred to
Longyear Canada, ULC v. 897173 Ontario Inc. (2008), 2008 CarswellOnt 464 (Ont. S.C.J.) — considered
Mele v. Thorne Riddell (1997), 32 O.R. (3d) 674, 1997 CarswellOnt 206, 26 O.T.C. 119 (Ont. Gen. Div.) — referred to
Schaer v. Haughton (2006), 2006 CarswellOnt 3783 (Ont. S.C.J.) — considered
1312217 Ontario Ltd. v. Atrens (2004), 2004 CarswellOnt 2548 (Ont. S.C.J.) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 1.03(1) "substantial indemnity costs" — referred to

R. 23.04 — referred to

R. 23.05 — referred to

Tariffs considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
Tariff A, Pt. I — referred to

***A. Hoy J.*:**

1 The defendant Janet Chui's motion to strike portions of the plaintiff Thoughtcorp Systems Inc.'s claim against her, and for particulars, was scheduled to be heard by me on April 15, 2009. On April 14, 2009, plaintiff's counsel contacted the Commercial List Office to advise that it would seek an adjournment, on the ground that it intended to seek an order compelling Ms. Chui to answer certain questions refused on her cross-examination. [1] Later that same day, the plaintiff discontinued its claim against Ms. Chui. Counsel for Ms. Chui had by this time prepared and filed a motion record, a factum and brief of authorities. At the plaintiff's request, Ms. Chui had been cross-examined.

2 The plaintiff wrote, "We are discontinuing on the basis of our client's conclusions about Ms. Chui's financial wherewithal to satisfy any substantial award against her and not for reasons related to the merits of the claim made against her."

3 Ms. Chui had not yet filed a statement of defence and pursuant to Rule 23.04 the discontinuance is not a defence to subsequent action.

4 The plaintiff acknowledges that pursuant to Rule 23.05 Ms. Chui is entitled to costs of the action as a result of its discontinuance.

5 The parties were unable to agree on costs, and this is the costs disposition arising out of the plaintiff's discontinuance.

6 Mr. Das, counsel for Ms. Chui, seeks costs on a substantial indemnity scale in the amount of $20,550. Mr. Das, who was sympathetic to Ms. Chui's plight, discounted his fees to her by over $4,000. The $20,550 amount is based on the amounts actually billed to Ms. Chui, and unbilled work in progress, and does not include the amount of the discount. Alternatively, Mr. Das proposes costs on a partial indemnity scale in the amount of $14,000, if the plaintiff provides a release of claims against Ms. Chui.

7 The plaintiff submits that, given the nature of the claims made against Ms. Chiu, there is no basis for departing from the usual practice of fixing costs on a partial indemnity scale. Moreover, the plaintiff notes, the amounts sought by Ms. Chui would amount to full, rather than substantial, indemnity. The plaintiff further argues that the quantum sought is excessive, given the early stage of the litigation, and that costs on a partial indemnity scale in the amount of $2,500 would be fair and reasonable. The plaintiff submits that Ms. Chui should not be entitled to costs in respect of settlement discussions.

8 The plaintiff directs me to an endorsement of Eberhard J. in *Schaer v. Haughton* [2006 CarswellOnt 3783 (Ont. S.C.J.)] (Barrie Court File No. : 01-B2743) dated June 22, 2006, where costs in the amount of $6,861.60 were fixed on a discontinuance as an indication of the magnitude of costs awarded in comparable matters. The scale of costs is not referred to in the endorsement, and I assume that costs were fixed on a partial indemnity scale.

9 In its Statement of Claim, the plaintiff pleads that it acquired its business from Gokhan Tanju for in excess of $3 Million. Mr. Tanju continued for a period of time thereafter as a director and employee.

10 In the action, the plaintiff claims general damages of $2,000,000, special damages in the amount of $415,000 and punitive damages in the amount of $400,000 against Mr. Tanju and against Ms. Chui, a former employee. The plaintiff alleges that Mr. Tanju formed a competing business, in breach of his fiduciary duties to the plaintiff and his non-competition agreement, and that sometime thereafter Ms. Chui became an employee of Mr. Tanju's new business, allegedly in breach of non-competition and non-solicitation clauses in her employment agreement. The plaintiff also alleges that Ms. Chui appropriated the plaintiff's confidential information.

11 The plaintiff further alleges that Ms. Chui knowingly participated in Mr. Tanju's breach of his fiduciary and other duties to the plaintiff, interfered with economic relations and unlawfully conspired with Mr. Tanju to the detriment of the plaintiff.

12 The undisputed evidence is that Ms. Chui is thirty years old, still lives at home with her parents and that her last salary at the plaintiff was $90,000 plus bonus. At that time, she was a "consultant" - the lowest echelon on the plaintiff's corporate structure. The aggregate of $2.185 Million in damages claimed against Ms. Chui is clearly a very significant amount to her. The plaintiff would presumably have been aware of Ms. Chui's financial circumstances before it commenced its claim against her. Ms. Chui estimates that the plaintiff's annual revenue is in the range of $20 to $25 Million.

13 Ms. Chui works in what she describes as the "trusted intelligence services field". Her evidence is that she wishes to continue to be employed in that field, and that the litigation is a major hindrance.

14 Ms. Chui initially tried to respond to the claim herself. She ultimately retained Mr. Das. Mr. Das attempted to have the claim against Ms. Chui dismissed, arguing that the plaintiff was proceeding against her only as a "lever" to get at Mr. Tanju.

15 Counsel for Ms. Chui sought particulars before bringing his motion and alerted the plaintiff that he would seek substantial indemnity costs because he had provided the plaintiff with several opportunities to provide the materials sought.

16 Settlement efforts failed, seemingly because the plaintiff was unwilling to provide a release to Ms. Chiu and pay costs.

17 Given that Ms. Chui's motion was to strike portions of the plaintiff's claim, and for particulars, it was surprising to me that the plaintiff found it necessary to cross-examine Ms. Chui in connection with her motion. Ms. Chui's motion appeared to provide the plaintiff the opportunity to seek information in relation to its claim.

18 From the materials before me, I am left with the impression that the plaintiff's claim against Ms. Chui was a strategic one, discontinued once the plaintiff had an opportunity to examine Ms. Chui.

19 In appropriate circumstances, costs can be awarded on a substantial indemnity basis following a discontinuance: *Goulin v. Goulin*, [1995] O.J. No. 3115 (Ont. Gen. Div.); *Mele v. Thorne Riddell*, [1997] O.J. No. 443 (Ont. Gen. Div.) (allegations of misrepresentation described as tantamount to allegations of civil fraud); and *1312217 Ontario Ltd. v. Atrens*, [2004] O.J. No. 2646 (Ont. S.C.J.) (allegations of breach of employment contract and breach of fiduciary duty which were found to impugn the defendants' integrity and analogous to allegations of fraud).

20 *Longyear Canada, ULC v. 897173 Ontario Inc.*, [2008] O.J. No. 374 (Ont. S.C.J.), which the plaintiff referred me to, notes that circumstances where costs on a substantial indemnity scale can be awarded include where there are unproven allegations of improper conduct seriously prejudicial to the character or reputation of the party or of breach of fiduciary duty

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 [2] 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.

22 I note that in *Atrens*, Kiteley J. awarded costs on a substantial indemnity scale, even though counsel had agreed that the discontinuance would constitute a bar to any subsequent action.

23 Subject to what is provided below, costs are accordingly fixed on a substantial indemnity scale in the amount of $16,500, inclusive of disbursements and GST. The plaintiff correctly notes that Ms. Chui is not entitled to full indemnity, and the amount fixed does not amount to full indemnity.

24 Rule 1.03 defines substantial indemnity costs as an amount 1.5 times what would otherwise be awarded in accordance with Part I of Tariff A of the Rules. I am aware that the amount I have fixed exceeds somewhat the 1.5 times the roughly $7,000 awarded almost three years ago as what I have assumed were partial indemnity costs in *Schaer* - the one case that the plaintiff has referred me to for guidance as to quantum. In that case a "brief" statement of defence had been delivered. There was no indication that the plaintiff in that case required the defendant to attend for cross-examination or that a factum had been prepared. [3] My impression in reading the short endorsement provided is that the scope of work undertaken by counsel for Ms. Chui in this case, before the Commercial List in Toronto, was more extensive.

25 If, within 30 days of the release of this endorsement, the plaintiff provides a full and final release to Ms. Chui, in a form satisfactory to her, acting reasonably, then in my view costs on a partial indemnity scale, rather than a substantial indemnity scale, would be appropriate. If such a release is provided, costs in the amount of $11,000 inclusive of GST and disbursements, and not the amount of $16,500 provided for above, shall be payable. A release would result in the serious allegations, which if left outstanding in my view warrant an award of substantial indemnity costs, coming to an end.

Footnotes

1 Plaintiff's counsel raised the issue of an adjournment with Ms. Chiu's counsel on April 9, 2009.

2 I understood from the materials that Ms. Chui is involved in date integration services and that job entails access to confidential information.

3 It appears that a motion alleging delay was prepared the day that the discontinuance arrived.

End of Document

TAB 9

2016 ONSC 5271
Ontario Superior Court of Justice [Commercial List]

Catalyst Capital Group Inc. v. Moyse

2016 CarswellOnt 13362, 2016 ONSC 5271, [2016] O.J. No. 4367, 270 A.C.W.S. (3d) 385, 35 C.C.E.L. (4th) 242

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

Newbould J.

Heard: June 6-10, 13, 2016
Judgment: August 18, 2016 *
Docket: CV-16-11272-00CL

Counsel: Rocco DiPucchio, Andrew Winton, Bradley Vermeersch, for Plaintiff
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: Corporate and Commercial; Evidence; Intellectual Property; Property; Public; Restitution; Torts; Employment

Table of Authorities

Cases considered by *Newbould J.*:

Cadbury Schweppes Inc. v. FBI Foods Ltd. (1999), 167 D.L.R. (4th) 577, 1999 CarswellBC 77, 1999 CarswellBC 78, 83 C.P.R. (3d) 289, 235 N.R. 30, 42 B.L.R. (2d) 159, 117 B.C.A.C. 161, 191 W.A.C. 161, 59 B.C.L.R. (3d) 1, [1999] 5 W.W.R. 751, [1999] 1 S.C.R. 142, [2000] F.S.R. 491, 43 B.L.R. (2d) 159 (S.C.C.) — followed

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.) — followed

International Corona Resources Ltd. v. LAC Minerals Ltd. (1989), 6 R.P.R. (2d) 1, 44 B.L.R. 1, 35 E.T.R. 1, *(*sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.)* 69 O.R. (2d) 287, *(*sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.)* 26 C.P.R. (3d) 97, *(*sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.)* 61 D.L.R. (4th) 14, 101 N.R. 239, 36 O.A.C. 57, *(*sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.)* [1989] 2 S.C.R. 574, 1989 CarswellOnt 126, 1989 CarswellOnt 965, 69 O.R. (2d) 287 (note) (S.C.C.) — referred to

Lysko v. Braley (2006), 2006 CarswellOnt 1758, 49 C.C.E.L. (3d) 124, 79 O.R. (3d) 721, 212 O.A.C. 159 (Ont. C.A.) — referred to

McDougall v. Black & Decker Canada Inc. (2008), 2008 ABCA 353, 2008 CarswellAlta 1686, 97 Alta. L.R. (4th) 199, [2009] 1 W.W.R. 257, 61 C.C.L.T. (3d) 96, 62 C.P.C. (6th) 293, 440 A.R. 253, 438 W.A.C. 235, 302 D.L.R. (4th) 661 (Alta. C.A.) — referred to

Parris v. Laidley (2012), 2012 ONCA 755, 2012 CarswellOnt 13841 (Ont. C.A.) — referred to

R. c. Jolivet (2000), 2000 SCC 29, 2000 CarswellQue 805, 2000 CarswellQue 806, *(*sub nom. *R. v. Jolivet)* 144 C.C.C. (3d) 97, 33 C.R. (5th) 1, *(*sub nom. *R. v. Jolivet)* 185 D.L.R. (4th) 626, [2000] 1 S.C.R. 751, *(*sub nom. *R. v. Jolivet)* 254 N.R. 1 (S.C.C.) — referred to

R. v. Lapensee (2009), 2009 ONCA 646, 2009 CarswellOnt 5275, 247 C.C.C. (3d) 21, 85 M.V.R. (5th) 189, 70 C.R. (6th) 165, 254 O.A.C. 154, 99 O.R. (3d) 501, 197 C.R.R. (2d) 357 (Ont. C.A.) — referred to

R. v. Morrissey (1995), 38 C.R. (4th) 4, 22 O.R. (3d) 514, 97 C.C.C. (3d) 193, 80 O.A.C. 161, 1995 CarswellOnt 18 (Ont. C.A.) — considered

R. v. Pressley (1948), 7 C.R. 342, [1949] 1 W.W.R. 692, 94 C.C.C. 29, 1948 CarswellBC 123 (B.C. C.A.) — followed

Rodaro v. Royal Bank (2002), 2002 CarswellOnt 1047, 22 B.L.R. (3d) 274, 157 O.A.C. 203, 49 R.P.R. (3d) 227, 59 O.R. (3d) 74, [2002] O.T.C. 442 (Ont. C.A.) — referred to
Spasic Estate v. Imperial Tobacco Ltd. (2000), 2000 CarswellOnt 2522, 188 D.L.R. (4th) 577, 49 O.R. (3d) 699, 2 C.C.L.T. (3d) 43, 47 C.P.C. (4th) 12, 135 O.A.C. 126 (Ont. C.A.) — considered
Spasic Estate v. Imperial Tobacco Ltd. (2001), 2001 CarswellOnt 876, 2001 CarswellOnt 877, 269 N.R. 394 (note), 149 O.A.C. 400 (note), 196 D.L.R. (4th) vii (S.C.C.) — referred to

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to
Competition Act, R.S.C. 1985, c. C-34
Generally — referred to
Investment Canada Act, R.S.C. 1985, c. 28 (1st Supp.)
Generally — referred to

ACTION by company against defendant corporation and former employee, for damages from breach of confidence and spoliation.

***Newbould J.*:**

Nature of action

1 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.

2 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.

3 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.

4 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.

5 The consortium in which West Face was a member later sold West Face to Shaw Communications for approximately $1.6 billion. Catalyst claims an accounting of the profits made by West Face

6 Catalyst also claims against Mr. Moyse for an alleged spoliation of documents and claims against West Face for that spoliation on a theory of vicarious liability.

7 Catalyst acknowledges that it has no direct evidence that Mr. Moyse provided confidential information to West Face regarding WIND. It says that an inference should be drawn from all of the evidence that Mr. Moyse did so. It is therefore necessary to deal with the evidence in some detail. [1]

8 For the reasons that follow, the action is dismissed in its entirety.

Assessment of the evidence

9 In making credibility and reliability assessments, I find helpful the statement of O'Halloran J.A. in *R. v. Pressley* (1948), 94 C.C.C. 29 (B.C. C.A.) at p. 34:

> The Judge is not given a divine insight into the hearts and minds of the witnesses appearing before him. Justice does not descend automatically upon the best actor in the witness-box. The most satisfactory judicial test of truth lies in its harmony or lack of harmony with the preponderance of probabilities disclosed by the facts and circumstances in the conditions of the particular case.

10 In this case, the evidence in chief for all witnesses was given by way of affidavits, and all witnesses were cross-examined at the trial. There is great benefit in proceeding this way. What it can lead to in some cases however, as to some extent in this case, is the repetition of evidence by more than one witness. This occurred, for example, in Messrs. Glassman and De Alba of Catalyst both stating in their affidavits that Mr. Moyse "led the preparation" of a PowerPoint presentation that Catalyst used in making a presentation to Industry Canada in Ottawa. This evidence was given to support the assertion of the deep knowledge that Mr. Moyse possessed of the strategic position being taken by Catalyst with the Government and thus with the negotiating strategy that Catalyst was taking with VimpelCom Ltd. regarding the acquisition of WIND. As I will discuss, this evidence was an overstatement of what occurred.

11 Dealing first with the evidence of the witnesses for the plaintiff, I must say that I had considerable difficulty accepting as reliable much of the evidence of Mr. Newton Glassman. He was aggressive, argumentative, refused to make concessions that should have been made and contradicted his own statements made contemporaneously in emails. I viewed him more as a salesman than an objective witness. I will deal with only a few examples:

(a) It was put to Mr. Glassman on cross-examination that Catalyst's request to sell a fourth wireless carrier without restrictions after five years was crucial. His response was "I don't know what you mean by crucial. Very, very important." Yet his affidavit sworn shortly before the trial on May 27, 2016 said precisely what had been put to him: "Catalyst's request to sell the fourth wireless carrier without restriction after five years was crucial...". When this was pointed out to him, he stated "Crucial in the context of, yes, in my use of the word crucial, yes. As I said, I don't know what you mean by crucial."

(b) The presentation made to the Government of Canada on March 27, 2014 by Mr. Glassman stated that Catalyst was in advanced discussions with VimpelCom to gain control of WIND. Mr. Glassman refused to agree that this statement was misleading, when it surely was. Catalyst had by then had no access to the WIND data room, had not yet retained its financial advisor Morgan Stanley, had not yet retained a technical expert and had not exchanged any draft agreement with VimpelCom. Mr. Glassman would go no further than to say that you can have advanced discussions on an informal basis.

(c) A central point Mr. Glassman asserted in his evidence was that he had picked up from his discussions with Government officials that the Government would eventually grant the concessions wanted by Catalyst to the regulatory environment that would permit spectrum to be sold by new entrants such as WIND to one of the three incumbents Bell, Rogers or Telus. His position is that this belief would be of importance to a competing bidder and that it was told to West Face by Mr. Moyse. Mr. Glassman referred to the Governments "unofficial position" and "softening body language".

(d) Yet from the start Government officials had made clear that no such concessions would be given. Mr. Glassman's own email of May 7, 2014 stated that he had been told by Catalyst's public relations consultant Mr. Bruce Drysdale, who had extensive experience in working with the Government, that the Government would not give in writing the right to sell spectrum in five years and that this took his preferred option to set up a fourth retail carrier in Canada off the table. Catalyst's lawyers Faskens 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. Mr. Glassman's response was that he had more experience in this than the writer did, which was clearly not the case. On July 25, 2014 Mr. Drysdale said that Industry Canada reached out to him and said that seeking concessions was a dead end. Mr. Glassman's response was that he had more experience in this than Mr. Drysdale did, which was clearly not the case, and he went so far as to say that no one in Canada had the experience except him. On August 3, 2014 Mr. Drysdale told Mr. Glassman that Industry Canada, the PCO/PMO and Prime Minister Harper were entrenched on this. Mr. Glassman's response was that the email confirmed to him that the Government was trying desperately to set the table for future discussion about regulatory concessions. When pressed further on the email, Mr. Glassman said "with the greatest of respect, there is a big difference between people's words and people's actions. We were depending on people's actions. And that is a very telling development." There was no evidence of any Government action that could lead one to expect the Government would relent and grant concessions. Nor is there a single contemporaneous document evidencing Mr. Glassman's view of a softening of the Government's position or that eventually the Government would grant concessions.

12 Mr. Gabriel De Alba also overstated matters and refused to concede points that he should have. He also engaged in argument rather than answering questions. I have already referred to his statement that Mr. Moyse led the preparation of the PowerPoint presentation to the Government. His evidence was given, like Mr. Glassman's, to attempt to show how important Mr. Moyse was to the Catalyst WIND team and to show a deep understanding held by Mr. Moyse of the Catalyst WIND position. An example was a *pro-forma* of a combined WIND and Mobilicity done by Mr. Moyse under Mr. Michaud's supervision. It was a simple exercise based on public information or information already known to Catalyst and required no knowledge of Catalyst's WIND strategy. Mr. De Alba refused to acknowledge this and referred to things that could be implied from the fact of doing the work. He blew up by far what Mr. Moyse had done. In response to the fact that Mr. Glassman did not ask Mr. Moyse for a copy of the second presentation to be made to the Government, but rather asked other Catalyst persons and advisors involved, Mr. De Alba suggested it was because Mr. Glassman might not want to have overwhelmed Mr. Moyse with more pressure, which he said was the way Mr. Glassman treated analysts. This made no sense as Mr. Glassman made clear in his evidence that he put pressure on everyone, including his partners, to achieve his ends.

13 Mr. Riley's evidence was given in a straightforward manner. It is clear, however, that prior affidavits of his were mistaken and speculative in some measure.

14 I viewed the West Face witnesses as being straightforward. They were impressive and did not engage in overstatement. They were not any more argumentative than most intelligent witnesses although Mr. Griffin had a tendency from time to time to stray from the question. On all crucial points they were not shaken. I viewed the evidence of Mr. Leitner of Tennenbaum and Mr. Burt of 64NM Holdings in the same light. They are independent of West Face. The fact that their evidence was consistent with the evidence of the West Face witnesses supported the reliability of the West Face witnesses. A major argument of Catalyst was that a number of emails amongst West Face personnel and Messrs. Leitner and Burt referred to Catalyst as the bidder with VimpelCom for WIND, an indication that they had been told that Catalyst was the bidder, and that an email referred to their bid to VimpelCom being superior to any other offer, an indication that they had been told of the terms of the Catalyst offer to VimpelCom. That was a serious allegation. In the end I accepted their evidence that they thought for various reasons that the other bidder was Catalyst without knowing it and that they had not been told of the Catalyst bid terms. Of course, even if they had been told of these things, it does not mean that they were told that by Mr. Moyse, which is the central claim in this action.

15 Criticism is made by Catalyst of the truthfulness of the evidence of Mr. Moyse. He admittedly wiped his BlackBerry before giving it back to Catalyst. He deleted during the hiring process with West Face an email sent to West Face that included confidential Catalyst information not involving WIND. He wiped his internet browsing history from his personal computer before turning it over to his counsel to permit an image to be taken of his hard drive to look for any communications by him of confidential Catalyst information to West Face. He acknowledged at trial his error in doing these things, but it raised a question of why he had done those things and whether his explanations were to cover up

improper activity in providing confidential Catalyst information regarding WIND to West Face. I have therefore given a critical eye to all of Mr. Moyse's evidence. On the crucial point of the case I have accepted his evidence that he did not communicate anything about Catalyst's dealings regarding WIND to West Face.

16 Mr. Moyse made some errors in his initial affidavit sworn in July 2014 in response to the Catalyst motion for an injunction. Catalyst contends that the affidavit was purposely drawn to mislead the Court and is an indication that Mr. Moyse is a witness who should not be believed. I have given consideration to the Catalyst arguments but have concluded that Mr. Moyse did not intend to mislead the Court.

Brief history of WIND

17 WIND is a Canadian wireless telecommunications provider that was originally formed in 2008 pursuant to a joint venture between two parties: (1) AAL Corp. (now Globalive), which was the holding company of Anthony Lacavera; and (2) Orascom Telecom Holding S.A.E., a large Egyptian multi-national telecommunications company. AAL and Orascom held their interests in WIND indirectly through a corporation called Globalive Investment Holdings Corp. ("GIHC").

18 Due to regulatory restrictions on foreign ownership of Canadian telecommunications operators that existed at the time, AAL held a majority (66.68%) of the voting interests in GIHC (compared to 32.02% for Orascom), even though Orascom held a majority (65.08%) of the total equity interests (as compared to 34.25% for AAL). In 2008, WIND paid $442 million for the rights to use a portion of wireless spectrum for a wireless telecommunications service in an auction held by Industry Canada. The spectrum WIND acquired licenses to use at that time was known as AWS-1 (AWS stands for "advanced wireless services").

19 WIND's AWS-1 wireless spectrum was acquired in a "set aside" auction from which incumbent wireless carriers were excluded, and was subject to a restriction on transfer to incumbents for at least five years. In addition to this restriction, WIND's AWS-1 spectrum was at all times subject to numerous restrictions on transfer: (i) the Minister of Industry's unilateral discretion whether to permit transfer pursuant to the terms of license; (ii) *Competition Act* approval; (iii) *Investment Canada Act* approval; and (iv) CRTC approval.

20 The CRTC initially blocked WIND's launch on the basis that Orascom's involvement breached Canadian ownership requirements, and it took Federal Cabinet intervention to overrule the CRTC in this regard. In December 2009, WIND commenced operations, providing mobile data and voice services in the Greater Toronto and Hamilton Area in Ontario, and in Calgary, Alberta. WIND later expanded into Ottawa and parts of southern Ontario, as well as Edmonton, Alberta, and Vancouver, Abbotsford, and Whistler, British Columbia.

21 In 2011, VimpelCom Ltd. acquired the majority shareholder of Orascom, giving VimpelCom a controlling interest in Orascom and, indirectly, Orascom's investment in WIND. VimpelCom is a publicly-traded international telecommunications and technology business with more than 200 million customers. While it has been formally headquartered in the Netherlands since 2010, its principal shareholder is controlled by Russian interests.

22 Notwithstanding 2012 legislative amendments that loosened certain restrictions on foreign control of smaller telecommunications service providers like WIND, foreign ownership of the wireless industry in Canada remained heavily regulated. In 2012 VimpelCom and Globalive signed an agreement under which VimpelCom would acquire all of Globalive's interest in WIND. However, VimpelCom was unable to obtain regulatory approval notwithstanding the looser regulatory restrictions. This became known in the press.

23 VimpelCom became frustrated by the regulatory hurdles it faced in Canada, and this frustration drove its decision to divest its ownership of WIND.

24 In early 2013, following VimpelCom's inability to obtain regulatory approval to buy out Globalive, VimpelCom engaged UBS Securities to assist VimpelCom in its efforts to find a purchaser for its debt and equity interests in WIND, or for WIND in its entirety. Various parties expressed an interest in doing so.

25 Both Catalyst and West Face had a longstanding interest in the Canadian telecommunications industry. As early as 2009, Globalive separately approached Catalyst and West Face about the possibility of being a source of Canadian capital for WIND, and discussed WIND's capital structure and Globalive's role in it. Both Catalyst and West Face were therefore at all relevant times familiar with WIND's ownership structure.

26 Verizon was a bidder but chose in late 2013 not to pursue it. At this point, VimpelCom had grown increasingly frustrated with its inability to either acquire voting control of WIND or to conclude a transaction to allow it to exit the investment. In addition to its voting and non-voting shares, VimpelCom held (both directly and through Orascom) over $1.5 billion in debt owed by WIND, which WIND had no way of re-paying. WIND was also subject to approximately $150 million in third party vendor debt that was coming due on April 30, 2014. WIND's tenuous financial position at the time created a real risk that its creditors would call its debt, put WIND into insolvency, and allow its creditors to recover the proceeds from the sale of WIND's assets.

27 It became known in the marketplace that VimpelCom was willing to sell its interest in WIND based on an enterprise value of approximately $300 million, of which $150 million would satisfy the vendor finance debt and the remainder would go to VimpelCom and Globalive.

28 On November 4, 2013, Mr. Lacavera, the Chairman and CEO of WIND called West Face and advised them that VimpelCom was interested in selling its debt and equity interest in WIND and in arranging for the repayment of WIND's third party debt. West Face delivered an expression of interest to VimpelCom and AAL on November 8. Shortly after, on December 7, West Face entered into a confidentiality agreement with VimpelCom and Orascom and thus gained access to the WIND data room.

29 Catalyst began negotiating a potential investment in WIND with VimpelCom and UBS in late 2013. On January 2, 2014, Catalyst sent a letter of intent to VimpelCom that set out proposed terms of a WIND transaction. On March 22, 2014, Catalyst executed a confidentiality agreement with VimpelCom and Orascom.

30 Both West Face and Catalyst had negotiations with VimpelCom and its advisor UBS through the first half of 2014. On July 23, 2014 VimpelCom granted Catalyst an exclusive negotiating period to conclude a binding agreement for the acquisition of WIND. This period of exclusivity was extended several times to August 18, 2014 when VimpelCom refused to extend it further after Catalyst would not agree to a break fee of $5 to $20 million if regulatory approval was not granted within 60 days.

31 On August 7, 2014 Tennenbaum on behalf of itself and West Face and 64NM Holdings (the vehicle set up by LG Capital LLC for the WIND acquisition) sent a proposal to VimpelCom for the acquisition of VimpelCom's interest in WIND. On August 25, 2014, West Face's counsel delivered to VimpelCom's counsel an executed conditional financing commitment letter on behalf of a consortium of investors, including West Face, Tennenbaum Capital Partners LLC, 64NM Holdings LP, Globalive and two other investors. Ultimately a definitive purchase agreement was signed for the acquisition of VimpelCom's interest in WIND and the transaction closed on September 16, 2014.

Brandon Moyse's role at Catalyst

32 Mr. Moyse is currently 28 years old, and at the time of the events giving rise to this action, he was 26 years old. He lives in Toronto with his fiancée. He earned his Bachelor of Arts degree in Mathematics from the University of Pennsylvania.

33 Prior to working for Catalyst, Mr. Moyse was employed at Credit Suisse in New York and RBC Capital Markets in Toronto as a junior banker on their respective debt capital markets desks.

34 Mr. Moyse commenced work as an analyst at Catalyst on November 1, 2012. He resigned on May 24, 2014, and pursuant to the terms of his employment agreement, his employment ended on June 22, 2014.

35 Analysts are the lowest level of investment professionals at Catalyst. The investment professionals employed at Catalyst, and the hierarchy amongst them during the relevant period, was as follows: (i) partners: Mr. Glassman, Mr. De Alba, and Mr. Riley; (ii) vice-president: Zach Michaud; (iii) associate: Andrew Yeh, through early March 2014; and (iv) analysts: Mr. Moyse and Lorne Creighton.

36 As an analyst, Mr. Moyse performed financial and qualitative research both on Catalyst's potential investment opportunities, and on portfolio companies already owned by Catalyst. During his last six months at Catalyst, Mr. Moyse spent the majority of his time working on two Catalyst portfolio companies. His responsibilities on these portfolio companies required him to spend a significant amount of time outside the office, and he spent approximately half his time travelling throughout the United States.

37 There is a difference in the evidence given on behalf of Catalyst and given by Mr. Moyse as to the importance of the role of a young analyst such as Mr. Moyse at Catalyst. It may not be of crucial importance, as what Mr. Moyse did that is relied on by Catalyst is fairly clear. He worked on a PowerPoint presentation made by Catalyst to the federal Government that is heavily relied on by Catalyst. However, for reasons that will be explained, I much prefer the evidence of Mr. Moyse that his role was of far less importance or central to Catalyst's dealings regarding the potential WIND transaction than as articulated by Mr. Glassman and Mr. De Alba, two of the three original partners of Catalyst along with Jim Riley who later became a partner when he joined Catalyst.

38 Mr. De Alba's evidence was that Catalyst uses a very flat, entrepreneurial staffing model and that investments are reviewed by a "deal team", which typically consists of a partner, a vice-president and an analyst. His evidence was that analysts at Catalyst participate in every part of a deal and are intimately aware of Catalyst's strategies and negotiations. Mr. Glassman went so far as to say that no deal would be approved by him without the entire deal team agreeing with it. I take that with a large grain of salt. Mr. Glassman and Mr. De Alba were the founders of Catalyst with a great deal of experience in the investment world and in the telecommunications industry. It makes little sense that they would not agree to a deal if a junior analyst such as Mr. Moyse did not agree. The evidence of Mr. Riley, who later joined Catalyst as a partner in 2011, is more telling and accords with common sense. His evidence was that a decision on an investment would be made by the three partners of Catalyst but that the ultimate says would be by Mr. Glassman, the chief investment officer of Catalyst. Mr. Glassman described Mr. Moyse as the most junior member of the team and I do not accept his assertion that he would have effectively ceded control of an investment decision to a junior person such as Mr. Moyse.

39 In the case of the WIND project, it would not have been necessary for Mr. Moyse to be intimately involved in all of the strategic decisions and I do not think he was. Although Mr. Glassman testified that Mr. Moyse would have been involved in all discussions regarding strategy, and asserted that Mr. Moyse had the most knowledge of the WIND file, he admitted on cross-examination that Mr. De Alba, the chief negotiator on the WIND initiative, had more knowledge than Mr. Moyse on the WIND file. That is hardly surprising.

40 In late February or early March 2014, Mr. Moyse was assigned to Catalyst's "core" telecommunications deal team, as a result of the departure of an associate named Mr. Yeh from Catalyst. Before that, he knew that Catalyst had an investment in Mobilicity and was interested in building a fourth wireless carrier in Canada, potentially involving WIND and that Catalyst planned to bid for wireless spectrum in a forthcoming Canadian spectrum auction (which it later decided not to do)

41 On March 7 and 8, 2014, after he was assigned to the core telecommunications team, Mr. Moyse prepared a *pro-forma* statement that showed a combined WIND and Mobilicity entity. This was done under Mr. Michaud's supervision.

Mr. Moyse collected data which was either publicly available or known to Catalyst, and then performed basic arithmetic to yield the final product. Mr. Michaud identified the specific data inputs he wanted to assess for the combined entity (i.e. network value, spectrum value, subscribers). No knowledge of Catalyst's plans or strategy was required for Mr. Moyse to complete this assignment. Mr. De Alba has blown out of all proportion what this assignment involved.

42 Mr. Moyse's next contribution to Catalyst's telecommunications file while on the team occurred on March 26, 2014 in the afternoon and late into the night, when Catalyst prepared a PowerPoint slide deck for a presentation to be made to Industry Canada the following day. The PowerPoint was intended to be a framework for discussion with Government personnel. The PowerPoint outlined the existing regulatory environment and a number of options available to the Government, and the concessions that Catalyst believed would be required. Generally, the presentation set out three strategic options for the creation of a fourth national wireless carrier, being Option 1: a carrier focused on the retail market; Option 2: a carrier focused on the wholesale market; and Option 3: a litigation option.

43 Both Mr. Glassman's and Mr. De Alba's evidence was that Mr. Moyse "led the preparation" of the PowerPoint presentation that Catalyst used in Ottawa. This evidence was given to support the assertion of the deep knowledge that Mr. Moyse possessed of the strategic position being taken by Catalyst with the Government and thus with the negotiating strategy that Catalyst was taking with VimpelCom regarding the acquisition of WIND. Their evidence was an overstatement of what occurred.

44 Mr. Moyse's evidence was that his role was largely administrative. He said that Mr. De Alba, Mr. Riley, and Mr. Michaud generated the content and analysis which was contained in this presentation and gave him handwritten mock-ups of the slides which he then transposed into PowerPoint format. He testified that he was not involved in any discussions or debates involving these three persons to determine the content of the presentation. They did not ask for his input into the content of the slides and he did not provide any. Because the slides were required for a meeting in Ottawa the next day, the workplace was frantic. Mr. Moyse's contributions involved layout, data input and the creation of two tables based on publicly available information, one of which was the *pro-forma* which Mr. Moyse had prepared in March.

45 I accept Mr. Moyse's evidence. Mr. Glassman admitted on cross-examination that it was he and the partners of Catalyst, and not Mr. Moyse, who were the architects of the Catalyst strategy in dealing with the Government of Canada. Mr. Glassman said in his affidavit that he, Mr. De Alba and Mr. Riley gave Mr. Moyse notes to use in the preparation of the PowerPoint presentation, although on cross-examination he waffled on the point but acknowledged that he may have given Mr. Moyse notes and that he knew for a fact that Mr. De Alba did. He also said that for sure he would have participated in discussions and provided direction to Mr. Moyse. Mr. Riley in one affidavit said that Mr. Moyse "helped create" the PowerPoint presentation, which is much closer to the truth.

46 Nor do I accept Mr. Glassman's undocumented and unspecified assertion that Mr. Moyse was privy to all of Catalyst's deal priorities, internal conclusions, formal and informal discussions with Catalyst's advisors, and any advances Catalyst had made with the regulators on these issues leading up to the March 27, 2014 meeting with the Government of Canada. Great store by Catalyst witnesses is put on what were described as Monday morning meetings that were said to be required meetings at which it is said that full discussion of all aspects of the proposed WIND opportunity was regularly held. I have difficulty with this evidence. Mr. Glassman described them as Monday morning meetings in his affidavit but in evidence at trial said they were over lunch. He testified there was a schedule of what was to be discussed and that their proprietary software produced a package for everyone to take a copy of at the beginning of the meeting. Yet no notes of any kind have been produced by Catalyst regarding these Monday meetings and Mr. Glassman said he had no idea why they had not been. Mr. De Alba testified that only a one-page agenda was prepared for the meetings and that no written materials were generally prepared. He also testified that it would not be the general practice for any presentation regarding WIND to be prepared for the meetings. In answer to undertakings, Catalyst stated that Catalyst's investment team has reviewed all notebooks and notes and could not locate any existing notebooks or notes concerning WIND.

47 Mr. Moyse's evidence was that as an analyst, he had no direct input into Catalyst's investment decisions or strategy, but was instead assigned specific research projects by the partners, and vice-president. He said that given the junior nature of his position, he had very little knowledge of Catalyst's potential investments and its strategy for those investments. He regularly attended Catalyst's Monday meetings with the Catalyst investment team and other related individuals, including members of Catalyst's finance and accounting teams. The bulk of those meetings were spent discussing domestic and international economic issues. At most, but not all, Monday meetings, there would be discussion of Catalyst's portfolio companies, and less often, discussion of deals which Catalyst was actively pursuing. Mr. Moyse also said that while these meetings did at times feature some discussion of Catalyst's investment strategies, it was clear that these were premised on higher-level partners-only discussions that were taking place, to which he was not privy. Catalyst's partners would frequently discuss conversations or correspondence in front of the analysts without providing any context to him. They would also frequently gather after the meetings to discuss matters behind closed doors. Mr. Moyse testified that he could not recall specific discussions at a Monday meeting in which Catalyst's strategy with the Government or VimpelCom was discussed.

48 Mr. Moyse's evidence makes sense and neither Mr. Glassman nor Mr. De Alba gave evidence of any specific Monday meeting in which they informed Catalyst's WIND deal team in general, or Mr. Moyse in particular, of Catalyst's confidential regulatory strategy. Nor could they identify any particular meeting attended by Mr. Moyse in which any specific piece of information was allegedly discussed. I cannot find that Mr. Moyse was aware from meetings he attended at Catalyst of the negotiating strategy of Catalyst with the Government of Canada or with VimpelCom. [2]

49 The PowerPoint presentation to the Government stated that for options 1 and 2, Catalyst required the ability to transfer or license spectrum to incumbents (Telus, Rogers and Bell) and to exit the investment with no restrictions in five years. I take from the evidence that Mr. Moyse was aware when he prepared the PowerPoint presentation on May 26, 2014 of the concessions Catalyst would be looking for from the Government of Canada. How much knowledge or understanding he had other than what was stated in the presentation is very questionable and it is debatable how much Mr. Moyse continued to retain in his memory afterwards. The presentation, along with a second presentation prepared on May 12, 2014 and notes or drafts relating to them were later destroyed by Catalyst, said by Mr. Glassman to have been at the request of Government personnel. [3]

50 On May 6, 2014, Mr. Moyse found out that Catalyst would be actively pursuing a transaction involving WIND. After that, Catalyst's internal team of which he was a member focused on preparing the investment memorandum which would set out Catalyst's investment thesis, and which at the time of his departure from Catalyst did not contain any regulatory strategy, and reviewing the external advisors' work. He was also actively involved in Catalyst's early due diligence commencing on May 7, 2014. Although Mr. Glassman and Mr. De Alba asserted that Mr. Moyse was kept intimately apprised of Catalyst's strategy during this period, the documentary evidence does not support that evidence. The assertions are also contradicted by the admission of Mr. Glassman on cross-examination that Mr. De Alba, the chief negotiator on the WIND initiative, had more knowledge than Mr. Moyse on the WIND file.

51 Another PowerPoint presentation to the Government of Canada was prepared on May 12, 2014. The Catalyst evidence was that Mr. Moyse again "led" its preparation. Mr. Glassman testified that one reason Mr. Moyse prepared the PowerPoint was that of people at Catalyst, he had the most knowledge of the file. I do not accept that. The evidence of Mr. Moyse, which I accept, was that his role was largely administrative. He was instructed to re-create a modified version of the March slide deck. Messrs. De Alba, Michaud and Riley then marked up a hard copy of the March 24 presentation and provided him their comments and changes, which he inputted into a new PowerPoint file. Given the hurried manner in which it was created, and his largely administrative role, Mr. Moyse put little thought or analysis into the PowerPoint, and whatever work he did, he was instructed to do by one of Messrs. De Alba, Michaud or Riley.

52 Mr. Moyse left for Southeast Asia on a vacation on May 16, 2014. He resigned by email from Catalyst on May 24, 2014, the second last day of his vacation. He told Mr. De Alba when they met in person on May 26, 2014 that he was

going to work at West Face. Mr. Moyse was sent home by Mr. Riley on May 26, 2014, and he did no further Catalyst work after this date. Catalyst contacted its IT provider to revoke Mr. Moyse's access to Catalyst's servers.

Mr. Moyse's hiring by West Face

53 In 2012, West Face had commenced a recruitment drive for a number of analyst positions and Mr. Moyse submitted an application to Mr. Dea, a partner at West Face. On September 25, 2012, Mr. Moyse emailed Mr. Dea to tell him that he had been offered a position at Catalyst. Mr. Dea congratulated Mr. Moyse at that time, but told him that Catalyst had a reputation in the marketplace as a difficult place to work.

54 By late 2013, Mr. Moyse seriously started thinking about leaving Catalyst because he was not getting the learning opportunities he had set out to achieve when he joined the firm, and because he found the work environment to be oppressive, and lacking in common decency or respect for the individuals working there. This is not surprising evidence given the evidence of Mr. Glassman as to how he treated everyone at Catalyst, including his partners, with pressure on Catalyst people being his *modus operendi*. Mr. Moyse was concerned about how much time was taken at Catalyst with portfolio companies and his lack of responsibility.

55 On March 14, 2014, Mr. Moyse emailed Mr. Dea looking for a job in response to a West Face press release announcing the launch of its Alternative Credit Fund. West Face was looking to hire someone because it had just launched the Alternative Credit Fund, and West Face had a critical need for someone who had particular experience in all terms of credit to assist West Face in reviewing opportunities for this new fund.

56 Mr. Moyse met with Mr. Dea over a cup of coffee at a coffee shop on March 26, 2014. The conversation was general. They discussed the financial industry generally and Mr. Moyse told Mr. Dea of his goal of working in a role where his focus was on pursuing new investments rather than monitoring existing portfolio investments. Mr. Dea asked Mr. Moyse run-of-the-mill interview questions to get a sense of what kind of experience he had gained at Catalyst and at his other previous employers, RBC and Credit Suisse. The conversation was generic in nature and there was no discussion of specific things Mr. Moyse had worked on at Catalyst.

57 During that conversation, Mr. Dea asked Mr. Moyse to provide him with his resume, a deal sheet, and some writing samples to demonstrate his written communication skills. Mr. Dea and Mr. Moyse both testified that Mr. Dea explicitly instructed Mr. Moyse to redact any confidential information as necessary. Early the next morning at 1:47 a.m., at a time that Mr. Moyse had to be tired, Mr. Moyse sent to Mr. Dea an email which attached four investment memoranda he had prepared while at Catalyst involving four corporate opportunities. Three of the memoranda were marked as confidential. None involved the telecommunications industry. Mr. Moyse admitted in his evidence that it was an error in judgment to send these memoranda even though they were based on public information. He realized this shortly after he sent them and deleted the email from his computer. He acknowledged in his evidence that it was a mistake to have deleted the email. I do not take the fact that he sent the memoranda and quickly deleted it as indicating a cavalier attitude about confidentiality

58 Mr. Moyse had further interviews with West Face. On April 15, 2014, he met with Peter Fraser, Tony Griffin, and Yu-Jia Zhu for a series of short interviews. On April 28, 2014, he met with Greg Boland for a brief interview. On May 16, 2014 he received an oral offer from Mr. Dea and a written signed employment agreement on May 26, 2014. As Mr. Moyse had previously advised that he was subject to a 30-day notice period under his employment agreement with Catalyst, his employment with West Face was scheduled to begin on June 23, 2014.

59 Catalyst is quite critical of Mr. Moyse in sending the memoranda and of West Face in how it dealt with them, and invites inferences to be drawn from what it says is the cavalier way in which West Face treated confidential information. In general, I agree with West Face that this issue is a red herring with little or no substance regarding the alleged obtaining and misuse by West Face of confidential Catalyst information. The memoranda had nothing to do with WIND or the confidential Catalyst information alleged to have been obtained and used by West Face.

60 Moreover, West Face treated seriously the issue of the confidentiality of the memoranda sent by Mr. Moyse to Mr. Dea. Mr. Griffin raised concerns with Mr. Dea about the memoranda that Mr. Moyse had sent to Mr. Dea and wondered if it exhibited a character flaw. Mr. Dea's view was that Mr. Moyse had received very strong endorsements from people who had worked in the past with him and he thought that Mr. Moyse was a suitable candidate. Mr. Dea spoke to Mr. Alex Singh, West Face's general counsel, and asked him to speak to Mr. Moyse and impress upon him the obligation to keep in confidence any confidential information of West Face and of his previous employers. Mr. Singh spoke with Mr. Moyse around May 22, 2014. Mr. Singh impressed upon him that West Face takes matters of confidentiality very seriously and that he was not to disclose any information belonging to Catalyst. Around the same time Mr. Dea spoke to Mr. Moyse about the same thing and stressed that West Face took matters of confidentiality very seriously. Mr. Griffin decided to support hiring Mr. Moyse because he thought that there was no malicious intent on the part of Mr. Moyse in sending the memoranda and that it was an honest mistake of a young man.

61 On May 24, 2014 while on his vacation, Mr. Moyse gave notice to Catalyst that he was leaving Catalyst and on May 26, 2014, his first day back in the office, he told Catalyst that he was joining West Face. On that day he was sent home by Mr. Riley and completely cut off from Catalyst.

62 On May 30, 2014 counsel for Catalyst wrote to Mr. Boland, the CEO of West Face, and gave notice of a six month non-compete provision in Mr. Moyse's employment agreement with Catalyst and a confidentiality provision. The letter expressed concern that Mr. Moyse had or would be providing confidential Catalyst information to West Face. On June 3, 2014 employment counsel to West Face replied to counsel for Catalyst and took the position that the non-compete provision was unenforceable. The letter also stated that West Face had impressed on Mr. Moyse that he was not to divulge any confidential information he had obtained while employed at Catalyst.

63 During conversations between counsel on June 18, 2014, counsel to Catalyst informed counsel to West Face that Catalyst was particularly concerned about a specific transaction for which Catalyst and West Face had each submitted bids and identified this as a "telecom file". [4] As a result, West Face immediately established a confidentiality wall with respect to the WIND investment it was working on, which was the only telecom investment that West Face was working on at the time.

64 On June 19, 2014, the day after learning of Catalyst's concerns about a "telecom deal" and four days before Mr. Moyse began work at West Face, the Chief Compliance Officer at West Face erected a confidentiality wall with respect to WIND and Mr. Moyse. The confidentiality wall was disclosed to counsel for Catalyst the same day.

65 Pursuant to the confidentiality wall Mr. Moyse was forbidden from communicating with anyone at West Face about the ongoing WIND negotiations, and vice-versa, and West Face's IT group restricted access to all WIND-related documents so that Mr. Moyse could not access them. Notification of the confidentiality wall and its terms was circulated to all relevant personnel at West Face including its four partners. The chief compliance officer telephoned Mr. Moyse to discuss the terms of restrictions he would be under. In the call, Mr. Moyse was told that he was not to talk about WIND with anyone at West Face, to ask anyone at West Face about WIND, to disclose to anyone at West Face any information about WIND or to attempt to access any of West Face's files regarding WIND. Mr. Moyse indicated that he would comply. West Face's head of technology confirmed that Mr. Moyse was excluded from the computer directory containing WIND related documents. Once Mr. Moyse began working at West Face, the West Face WIND deal team only met in private, behind closed doors, and away from the trading floor area where Mr. Moyse was seated.

66 Mr. Moyse began working at West Face on Monday, June 23, 2014. Three and a half weeks later, on July 16, 2014, after Catalyst had brought a motion for interim relief prohibiting him from being employed at West Face for the balance of his non-compete agreement, the parties agreed to an interim consent order, pursuant to which Mr. Moyse was put on indefinite leave. Ultimately, Mr. Moyse remained on leave due to these proceedings, never returned to work at West Face, and never performed any more work for West Face before he and West Face mutually terminated his employment in August 2015.

67 During his period of active employment at West Face, Mr. Moyse was the most junior member of West Face's investment team other than a summer intern. He was not informed of the positions held by West Face funds, was not a member of West Face's investment committee, and did not participate in senior management meetings or have the authority to make investment decisions. Much of Mr. Moyse's three and a half week period at West Face was spent in orientation and training in order to acclimatize him to the West Face working environment. Mr. Moyse's substantive work was limited to performing some preliminary analyses on several potential investments that had nothing to do with WIND.

Test for breach of confidence

68 The elements of an action for breach of confidence are: (1) that the information conveyed was confidential; (2) that it was communicated in confidence; and (3) that it was misused by the party to whom it was communicated. See *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.) at para. 129.

69 Under the third element, misuse is any use of the information which is not authorized by the party who originally communicated it: see *Lac* at para. 139. Under this third branch, it is also necessary that the defendant's misuse of the information caused detriment to the plaintiff. See *Lac* at para. 161; *Lysko v. Braley* (2006), 79 O.R. (3d) 721 (Ont. C.A.) at para. 17 and *Rodaro v. Royal Bank* (2002), 59 O.R. (3d) 74 (Ont. C.A.) at para. 48.

70 Equity will pursue confidential information that comes into the hands of a third party who receives it with knowledge that it was communicated in breach of confidence. In *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142 (S.C.C.), the Supreme Court of Canada confirmed the principle by which third party recipients of confidential information may be held liable. In that case Justice Binnie stated:

> **19** Equity, as a court of conscience, directs itself to the behaviour of the person who has come into possession of information that is in fact confidential, and was accepted on that basis, either expressly or by implication. Equity will pursue the information into the hands of a third party who receives it with the knowledge that it was communicated in breach of confidence (or afterwards acquires notice of that fact even if innocent at the time of acquisition) and impose its remedies.

71 Thus, if West Face received confidential information of Catalyst from Mr. Moyse and used it in its acquisition of its interest in WIND to the detriment of Catalyst, relief would be available to Catalyst.

Was Catalyst information conveyed by Mr. Moyse to West Face?

72 The first hurdle faced by Catalyst is to establish on a balance of probabilities that West Face received any information from Mr. Moyse regarding Catalyst's involvement with WIND. Catalyst acknowledges that it cannot point to any direct evidence to demonstrate that Moyse transferred Catalyst's confidential information concerning WIND to West Face. It contends that the Court must look to the overall course of conduct of West Face to determine if it can be inferred that the transfer of confidential Catalyst information occurred.

73 Catalyst relies on a passage from *Gurry on Breach of Confidence*: *The Protection of Confidential Information*, 2d ed. (Oxford: Oxford University Press, 2012), at §15.02 which states that an inference of misuse may be drawn from an altered course of conduct on the part of the confidant which is explicable only by reference to the unauthorized use of confidential information. If that were the test, Catalyst's claim would woefully fail as there are explanations for West Face's conduct other than the use of confidential Catalyst information.

74 I accept the statement in Catalyst's written submissions as to when inferences may be drawn:

> The general rule with respect to inference drawing is that the inference must be reasonably and logically drawn from a fact or group of facts established by evidence. The first step in the inference-drawing process is that the primary

facts which provide the basis for the inference must be established by the evidence. Inferences can be drawn on the basis of reasonable probability.

75 It is necessary, however, to be careful not to engage in speculation. In *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (Ont. C.A.), Doherty J.A. stated at p. 530:

52. A trier of fact may draw factual inferences from the evidence. The inferences must, however, be ones which can be reasonably and logically drawn from a fact or group of facts established by the evidence. An inference which does not flow logically and reasonably from established facts cannot be made and is condemned as conjecture and speculation. As Chipman J.A. put it in *R. v. White* (1994), 89 C.C.C. (3d) 336 at p. 351, 28 C.R. (4th) 160 (Nfld. C.A.):

> These cases establish that there is a distinction between conjecture and speculation on the one hand and rational conclusions from the whole of the evidence on the other. The failure to observe the distinction involves an error on a question of law.

Allegation of breach of confidence

76 Catalyst contends that a number of things were confidential to it and that the confidential information was conveyed to West Face by Mr. Moyse. Catalyst contends that the information in its presentations to the Government contained key confidential information, including (i) that Catalyst was in advanced discussions with VimpelCom to gain control of WIND [5], (ii) that to build a fourth wireless carrier, which was the Government of Canada's stated goal, would require concessions from the Government including an unrestricted ability to sell the business to an incumbent (Rogers, Bell or Telus) in five years, and (iii) that if the Government did not agree to such concessions, litigation would likely follow against the Government (by someone other than Catalyst) caused by the Government's retroactive change to the 2008 spectrum licenses which would likely be successful and force the Government to give concessions. That retroactive change precluded new entrants from indefinitely selling its spectrum to an incumbent carrier. The earlier licences had permitted such a sale after five years.

77 Mr. Glassman's evidence was that while he was told by Industry Canada that the Government of Canada would not give any such concessions, he believed that it was just posturing and that he sensed that the Government was softening its view on concessions. He claimed that his knowledge of the softening of the Government's position on concessions was confidential to Catalyst and that Mr. Moyse was told of that. He asserted that knowledge of his analysis of the weakness of the Government's position, based on his knowledge of a U.S. case involving the *F.C.C v. NextWave*, would prove invaluable to any other potential bidder since it in essence would massively mitigate, if not entirely eliminate, their financial risk in bidding for WIND.

78 Catalyst contends that it would never acquire WIND without the Government's agreement that the business could be sold after five years to an incumbent. Mr. Glassman's view was that an independent fourth wireless carrier would not be viable or be able to survive without Government concessions permitting its spectrum to be sold to an incumbent and would be able only to compete in the short term with the incumbents on price and would be quickly squeezed out by the incumbents.

79 Catalyst claims that Mr. Moyse knew that Catalyst would not bid for WIND without the agreement being conditional on regulatory approval that provided concessions permitting WIND to sell its spectrum to an incumbent and that this information was provided to West Face. It claims that West Face and the consortium members used this information in making their acquisition of VimpelCom's interest in WIND without a condition requiring Government regulatory approval that would require concessions, which gave the consortium a leg up on Catalyst as it knew that VimpelCom did not want a conditional deal dependent on Government concessions and that Catalyst would not and could never make such a deal with VimpelCom.

80 Catalyst also claims that the fact that it was bidding on WIND and the amount bid was confidential. West Face and the consortium bid the same price as Catalyst, being an enterprise value of $300 million.

81 Catalyst has made an elaborate argument that changes made in the strategy of West Face to acquire WIND that led to an offer without any condition requiring Government concessions can reasonably be explained by West Face having obtained the confidential Catalyst information from Mr. Moyse and that an inference should be made that there was a transfer of such confidential information by Mr. Moyse to West Face. For the reasons that follow I reject this argument.

82 There is direct evidence that Mr. Moyse did not impart any information about Catalyst's initiative with WIND to anyone at West Face. Mr. Moyse himself testified that he never imparted any information about WIND that he had learned at Catalyst. The West Face witnesses who testified, being Mr. Dea who was instrumental in hiring Mr. Moyse, Mr. Griffin who had primary responsibility for the WIND transaction while Mr. Moyse was actively employed at West Face, Ms. Kapoor who was the chief compliance officer and Mr. Zhu who was the vice-president at West Face all denied any communications or discussions with Mr. Moyse about WIND. Their evidence was not shaken and there are no documents in existence that indicate otherwise. [6] I accept their evidence.

83 I have considered the evidence of Mr. Moyse carefully, particularly as he made some mistakes in providing confidential documents to West Face during his interview process and then deleted the email from his computer shortly afterwards when he realized it was a mistake to have done so. What he did later that has given rise to the spoliation allegation against him was done out of a personal concern not involving WIND or Catalyst and while it was a mistake which he acknowledges, I do not draw an inference of a general inclination to destroy relevant evidence or that his evidence should be disregarded. I viewed his evidence as being honestly given.

84 There is no reason not to accept the evidence of the other West Face witnesses who testified that Mr. Moyse never discussed WIND with them. The fact that West Face took pains to impress upon Mr. Moyse before he started at West Face that his obligations of confidentiality to Catalyst were to be respected and that it set up a confidentiality wall once it was made aware of Catalyst's concerns regarding a telecom file that Catalyst said both firms were working on is contrary to the notion that West Face was interested in acquiring information regarding Catalyst's involvement in WIND.

85 The evidence of Mr. Moyse and the West Face witnesses is also consistent with the evidence of the other members of the consortium who acquired their interests in WIND. Mr. Leitner of Tennenbaum, a most impressive witness and the senior partner leading Tennenbaum's technology/media/telecom business, testified that neither West Face nor Mr. Moyse nor anyone else ever communicated to Tennenbaum anything about Catalyst's involvement with WIND or Catalyst's regulatory strategy, that no such information was discussed among the investors and that until he read Mr. Glassman's affidavit he did not have any understanding of what that regulatory strategy of Catalyst was. Mr. Leitner also testified that no one at Tennenbaum knew the details of any offer made by Catalyst to VimpelCom during the period of exclusivity of Catalyst to negotiate with VimpelCom. Mr. Leitner's evidence was not shaken at all and I accept it.

86 The evidence of Hamish Burt, a member of 64NM, and also an impressive witness, was to the same effect as that of Mr. Leitner. His evidence was not shaken and I accept it as well.

87 This evidence of Messrs. Leitner and Burt is confirmatory of the evidence given by Mr. Moyse and the West Face witnesses. The strategy of the winning bid for WIND by the consortium was not the sole work of West Face and required input from all the consortium members who were making sizeable investments. In fact, the evidence makes clear that the idea for the structure of the ultimately successful bid for VimpelCom's interest in WIND was that of Mr. Guffey of LG Capital, a man who had a very long history of successful involvement in the telecommunications business. If West Face was acting on confidential Catalyst information in the formulation of the final bid to VimpelCom, the reason for having a bid unconditional on Governmental concessions would have obviously been discussed with the partners. The fact that there was no discussion about any Catalyst information is a strong indication that West Face did not have any such information.

88 There were reasons for West Face to make its bid that it did with the consortium other than acting on confidential Catalyst information obtained from Mr. Moyse.

89 Regarding West Face's view that Catalyst was a bidder for WIND, there was sufficient information in the marketplace for West Face to put two and two together to believe or presume that Catalyst was a bidder. There is no direct evidence that West Face or its consortium members knew that Catalyst was a bidder. Their evidence, which I accept, is that they thought from what they knew that Catalyst was a bidder but they never knew for sure. It was for that reason that in some emails they referred to Catalyst as being the bidder.

90 Mr. Griffin of West Face had seen press discussion in 2013 of an interest of Catalyst in Mobilicity and WIND and of combining them and Mr. De Alba acknowledged that by 2013 at the latest, there was public discussion of Catalyst's interest in merging Mobilicity and WIND. Mr. Griffin's evidence was that he assumed through a process of elimination that it was probable that Catalyst was the party but that he did not know for sure. I accept that evidence. Mr. Griffin's e-mail of June 4, 2014 to Mr. Lacavera makes clear that at that point Mr. Griffin was by no means certain that Catalyst was a real bidder for WIND. On June 18, 2014 after Mr. Moyse told Catalyst that he was leaving Catalyst and joining West Face, counsel to Catalyst informed counsel to West Face that Catalyst was particularly concerned about a specific transaction for which Catalyst and West Face had each submitted bids and identified this as a "telecom file". In the context of what was occurring in the marketplace at the time and the known desire of VimpelCom to quickly sell its interest in WIND, this was a very strong indication to West Face from Catalyst itself through its counsel that Catalyst had made a bid for WIND. On June 23, 2014 in response to a proposal from West Face to acquire WIND and draft agreements submitted to UBS, Mr. Turgeon of UBS responded negatively about the drafts and referred to the process as being competitive and said that others were further advanced on their due diligence and had less mark-up on the drafts of UBS. This was a clear indication from UBS that someone else was a bidder for WIND. On July 23, 2014 Mr. Friesel of Oak Hill Capital which was interested in WIND at that time emailed Tennenbaum, LG Capital and West Face and said that Mr. Herbst of UBS, the financial advisors to VimpelCom, had called him to say that VimpelCom had entered into a period of exclusivity at the reserve price. There is no evidence other than the email as to what UBS told Mr. Herbst that he was passing on, but it is obvious that there was a lot of market chatter at the time, none of which can be laid at the feet of Mr. Moyse who could not have known what Catalyst was doing at the time.

91 Mr. Leitner's evidence was that when he learned that VimpelCom had granted an exclusivity negotiating period to a party, he was fairly confident that the other party was Catalyst, given that Catalyst had been actively seeking financing in the market. He testified that Tennenbaum is a debt provider and that in that capacity had been told that there was a party looking for financing for an upstart wireless carrier in Canada and he presumed that to be Catalyst as it could not be West Face. Mr. Leitner was very knowledgeable of the wireless industry in North America and it would not have been a stretch for him to think that Catalyst was a bidder at the time for WIND. In an email of July 21, 2014 Mr. Leitner told Mr. Boland of West Face and said that he "heard Catalyst is seeking exclusivity this week". His evidence was that he was assuming without actual knowledge that Catalyst was a bidder and seeking exclusivity. I accept his evidence that he did not know for certain that Catalyst was a bidder. However, even if someone had told Mr. Leitner that week that Catalyst was seeking exclusivity, it would not have been information he got from West Face (or from Mr. Moyse through West Face) as he would have had no reason to email West Face to tell them what he had heard. The week in question was long after Mr. Moyse had left Catalyst on May 26, 2014 and Mr. Moyse was in no position to know in July what Catalyst was doing with VimpelCom.

92 Mr. Burt of 64NM testified that he had no definitive knowledge that Catalyst was a bidder for WIND but assumed it was in the process. They were aware that Catalyst was a potential bidder because it had been out in the market seeking financing with respect to the acquisition of WIND. He was not really challenged on this evidence and I accept it. He was one of two persons at LG Capital, the other being Mr. Guffey, who worked closely on this transaction and it would be highly improbable that Mr. Guffey would have had knowledge that Catalyst was a bidder for WIND or on what terms without discussing this with Mr. Burt.

93 I would not infer that Mr. Moyse told West Face that Catalyst was a bidder for WIND. I accept that the persons at West Face involved in the deal believed Catalyst was a bidder without actually knowing that.

94 Regarding the offer made by the consortium to acquire WIND based on an enterprise value of $300 million, this price was made known to the market place by VimpelCom as early as April, 2014. At that time, West Face was attempting to acquire WIND on its own without consortium partners. On April 21, 2014 Mr. Griffin, the lead partner on the WIND file for West Face, told Mr. Boland, the President and CEO of West Face, that he had had a discussion with Mr. Lacavera a few days before in which he was told that VimpelCom were sellers of their interest in WIND at a "$300 million EV". On May 4, 2014, West Face sent VimpelCom and the other shareholders of WIND a proposal to address VimpelCom's required deal terms that included a purchase of 100% of WIND's equity, based on the $300 million enterprise value that had been communicated by Mr. Lacavera of Globalive and by VimpelCom's financial advisor UBS Securities. On June 10, 2014 UBS again told West Face that the objective for VimpelCom was a clean exit at a $300 million enterprise value. On July 23, 2014 Mr. Friesel of Oak Hill, who at the time was interested in WIND, advised West Face, Tennenbaum and LG Capital that UBS had called to say that VimpelCom had entered into exclusivity at the reserve price of $150 million, which amount when added to the debt of $150 million resulted in an enterprise value of $300 million. It was also reported in the press on July 31, 2014 that VimpelCom had put a $300 million price tag on WIND.

95 I would not infer that Mr. Moyse told West Face that Catalyst was going to or had made a bid for WIND for $300 million.

96 There was reason why the structure of the agreement made by the consortium that succeeded in the acquisition of WIND did not contain a clause requiring Government concessions to permit spectrum acquired by WIND to be sold to an incumbent. Neither West Face nor the other consortium members held the view of Mr. Glassman that WIND would need such concessions in order to survive. No such condition was put in the West Face proposal of May 4, 2014 made to Globalive and the other shareholders of WIND to acquire WIND. It was conditional only on regulatory approval, i.e. Industry Canada and Competition Bureau approval.

97 Mr. Griffin's evidence is that West Face knew that any transaction involving a change of control of WIND and a transfer of its spectrum licenses would require regulatory approval, but West Face did not see the need for any concessions in terms of future transferability of spectrum. He said that based on West Face's due diligence efforts and analysis of WIND and the regulatory environment, West Face was confident Industry Canada would approve any sale to West Face. West Face concluded that the regulatory considerations were manageable and ultimately not a material risk to West Face's investment thesis. Mr. Griffin's evidence was that all that West Face wanted from Industry Canada was more certainty regarding when, how, and at what cost WIND would be able to acquire additional spectrum to upgrade its network from a 3G (third generation) wireless network to an LTE ("long term evolution" or fourth generation) network. Mr. Griffin testified that West Face did not believe that WIND or purchasers of WIND would need the ability to sell spectrum after five years. In his words, WIND was a business "that could stand on its own two feet with the right ownership structure and the right oversight from management. We knew this was a business that would turn into a solid business and a credit that arm's length parties would be willing to underwrite".

98 I accept Mr. Griffin's evidence on this. It is supported by the presentation made by West Face to Industry Canada on May 21, 2014, which was much different from the presentation made by Catalyst to Industry Canada. The presentation made by West Face to Industry Canada made clear that it was prepared to take business risks in its acquisition of WIND, but that it needed clarity and certainty regarding WIND's spectrum availability enabling its evolution to LTE. West Face did not ask Industry Canada for any concessions regarding roaming costs, tower sharing, or spectrum swapping, and did not ask for the ability to exit the investment with no restrictions in five years as Catalyst had. [7]

99 A further proposal by West Face to VimpelCom and the other shareholders of WIND made on June 3, 2014 provided for $160 million in bridge financing to fund the repayment of WIND's existing third party vendor debt and the entering into a share purchase agreement for 100% of WIND for deferred contingent consideration of $100 million,

payable to VimpelCom upon West Face obtaining sufficient spectrum within 12 months to support WIND's LTE rollout strategy. The response of UBS on behalf of VimpelCom was that VimpelCom wanted a clean exit at a $300 million enterprise value and that VimpelCom was not prepared to have any portion of the proceeds contingent on a future event such as the acquisition of spectrum.

100 The issue of the ability of WIND to acquire new spectrum to enable it to upgrade to a LTE or fourth generation network was resolved on July 7, 2014 when Industry Canada announced that a large, 30 MHz block of AWS-3 spectrum (of 50 MHz total) would be set aside and made available exclusively for new entrants like WIND. This ensured that WIND would have access to additional spectrum without having to bid against the incumbents Rogers, Telus and Bell. This announcement provided West Face with sufficient certainty regarding the ability to acquire the additional spectrum WIND needed to roll-out LTE.

101 Tennenbaum was one of the consortium members that acquired WIND. It had known of WIND and its business since 2012 when it had acquired approximately US$25 million in WIND's third party vendor debt. This came due on April 30, 2014 and was unpaid at that time, thus going into default. VimpelCom then reached out to Tennenbaum and there were discussions about a sale of WIND. Mr. Leitner knew that VimpelCom's priority was speed and certainty of closing, as VimpelCom had grown suspicious and mistrustful of the Canadian Government, and minimizing regulatory risk was paramount to it.

102 Tennenbaum signed a non-disclosure agreement and gained access to the WIND data room in early May, 2014. It reached out for partners and together with Blackstone and Oak Hill Capital, two U.S. equity firms, submitted an initial indication of interest to VimpelCom on or around May 30, 2014. Mr. Leitner testified that in discussions with the Canadian Government regarding WIND, they understood that an issue would be the acquisition of WIND by three foreign entities. Mr. Leitner testified that the only regulatory issue Tennenbaum discussed with the Canadian Government was the issue of WIND acquiring new spectrum and this was resolved by the July 7, 2014 announcement of an auction of spectrum available only to new entrants.

103 Tennenbaum then reached out to West Face as a potential debt financing party as Tennenbaum's $300 million proposal to VimpelCom had included the refinancing of the $150 million vendor debt. Tennenbaum had worked with West Face before and knew that West Face was a Canadian entity knowledgeable of the telecom sector in Canada and well known. In early June 2014, Tennenbaum had discussions with West Face but at that stage West Face was not interested in going in with Tennenbaum. In July 2014, Oak Hill Capital and Blackstone lost interest and so Tennenbaum again approached West Face. LG Capital, a U.S. firm, had earlier been in discussions with Tennenbaum and became a member of the consortium.

104 On August 7, 2014 a proposal to VimpelCom was made by Tennenbaum on behalf of the consortium consisting of Tennenbaum, LG Capital and West Face. The proposal was not to acquire WIND but rather to acquire VimpelCom's minority equity and debt interest in WIND at VimpelCom's price. Globalive's majority equity in WIND would be left in place and the consortium would simply step into the shoes of VimpelCom. This had the advantage of having no change of control of WIND and avoiding the need for regulatory approval of a change of control. It would permit a quick exit for VimpelCom which the parties understood was of paramount importance to VimpelCom. The parties knew from UBS that VimpelCom had entered into a period of exclusivity with a party, which was believed by them to be Catalyst, and the proposal was unsolicited and sent to VimpelCom without any substantive communications with VimpelCom since the exclusivity period had commenced on July 23, 2014.

105 The only condition to the proposal was that Globalive's consent was required. However the day the proposal was sent in, Mr. Lacavera of Globalive informed Tennenbaum that Globalive had earlier that day signed a support agreement with VimpelCom and was therefore unable to continue any discussions or consider any proposals relating to WIND. As a result, neither VimpelCom nor Globalive had any discussion with any of the consortium members who had made the proposal before the exclusivity period that VimpelCom had with Catalyst expired on August 18, 2014.

106 The intent of the proposal was that the acquisition of VimpelCom's interest in WIND was the first step of a two-step process. The second step would later be taken effectively to reorganize the entities that funded step one to become direct owners of WIND which would require regulatory approval as it would then have amounted to a change of control of WIND. Mr. Leitner's evidence was that this two-step process was proposed to him by Mr. Guffey of LG Capital and it was then discussed with the other members of the group [8].

107 Regarding the risks of the second step, Mr. Leitner's evidence was that their whole thesis was never predicated on regulatory concessions and Tennenbaum never needed regulatory concessions. The business model was based upon the value that Tennenbaum believed it could be achieved with WIND. This evidence is consistent with the evidence of Mr. Griffin of West Face that I have accepted. As it turned out, this thesis turned out to be correct. WIND performed very well after its acquisition by the consortium and went from losing money at the EBITDA line to making a substantial amount of money at the EBITDA line. Mr. Leitner testified that he never had any contact with Mr. Moyse, that West Face did not convey to Tennenbaum any information regarding Catalyst that it had obtained from Mr. Moyse or anything about Catalyst's strategies or negotiations and that he knew nothing of the details of Catalyst's regulatory strategy nor of the details of its offer or negotiations with VimpelCom.

108 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 that Tennenbaum 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 with Oak Hill Capital and Blackrock that was for control of WIND that would require Governmental approval. As I read Mr. Leitner's affidavit, his explanation makes sense and I accept it. He knew that VimpelCom wanted a deal with no risk of Governmental rejection and it was an advantage to VimpelCom to have an offer without such a condition. In any event, there is no evidence to support an inference that whatever the advantage was, Mr. Leitner obtained his information from Mr. Moyse.

109 Of course, the issue of requiring regulatory approval is not the same as requiring concessions from the Government permitting the transfer of spectrum to an incumbent after five years. There is no evidence at all that West Face thought there was any serious issue about obtaining Government regulatory approval to the transaction. There was no need for such a condition in the August 7, 2014 proposal to VimpelCom because no regulatory approval was required for that transaction. The transaction was structured that way because of the clear message from UBS that VimpelCom wanted a clean exit without regulatory issues getting in the way. It was not structured that way because of some knowledge allegedly obtained from Mr. Moyse that Catalyst had such a condition in its offer to VimpelCom. Moreover, Catalyst's argument that the proposal did not contain such a condition because it knew that Catalyst had such a condition and knew that Catalyst could not waive it makes little sense. If West Face had thought that regulatory approval was a concern, it would make no sense to ignore it just because Catalyst had such a condition, assuming it knew of that condition in the Catalyst bid. To do so to have a leg up on Catalyst and then acquire WIND with a concern that in the second step the Governmental regulatory approval might not occur would make little sense for the size of the investment made.

110 Tennenbaum and LG Capital were in a little different position as they were U.S. firms. However Mr. Leitner's evidence was that even when their initial group of just U.S. firms was investigating the acquisition, they discussed this with Investment Canada. [9] That situation changed of course when West Face became involved. Tennenbaum was expected to obtain a little under 30% of WIND after the second step. Mr. Leitner testified that they thought there was no serious risk that regulatory approval would not be granted. He also said that once the group acquired the shareholder loans of WIND from VimpelCom, they would have a path if necessary to full ownership of WIND through a CCAA proceeding. This fall-back position was based on a belief that ownership of the outstanding debt of WIND that was in default would end up in their obtaining equity ownership of WIND in an insolvency proceeding under the CCAA. Mr. Griffin shared this view.

111 In an email of August 1, 2014 to the consortium, Mr. Leitner said that he had heard that VimpelCom was taking the Catalyst share purchase agreement to its board that week-end. It would appear from the evidence that this information likely came to him from an advisor to Tennenbaum who may have obtained it from UBS. The email also referred to "feedback on price levels". He denied that it was feedback on the price that Catalyst had offered to VimpelCom. What the price levels referred to is unclear, but even if it was a reference to the price Catalyst had bid, there is no evidence that any such evidence came from West Face. The fact that the email was from Mr. Leitner to the consortium including West Face would indicate it came from some other source. It must be remembered that by this time Mr. Moyse was long gone from Catalyst and had no knowledge of the terms of any bid that had been made by Catalyst to VimpelCom. [10]

112 There is an email of August 6, 2014 from Mr. Leitner to VimpelCom and copied to West Face and LG Capital in which Mr. Leitner sent the outlines of the proposal made the next day to VimpelCom. His email referred to a "Superior Proposal" and said that "Our proposal will be superior to any other offer as our proposal will not require regulatory approval...". It further said that with the benefits of an immediate sign and close "our proposal will be economically superior to any other proposal by significantly reducing the accruing interest on the Company's Vendor Loans ...".

113 Catalyst lays great store on this email and contends that it could only have been written by Mr. Leitner with knowledge of the terms of the Catalyst offer to VimpelCom. Unfortunately this email was not put to Mr. Leitner on his cross-examination and it would be unfair to him to draw conclusions as to his knowledge and where it came from. Mr. Burt of 64NM testified that 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. Given that evidence, and the lack of cross-examination of Mr. Leitner on the email, I would not find that the statement of Mr. Leitner regarding the consortium's proposal being superior because it did not require regulatory approval was based on any knowledge by him of the Catalyst bid or that it came from Mr. Moyse. The same can be said for the balance of the email.

114 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 prospects 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.

115 The email of August 6, 2014 written by Mr. Leitner was put to Mr. Griffin on cross-examination. He testified that he and West Face had no role in drafting the email. He stated that the proposal was unique and not West Face's idea and agreed that the proposal was certainly superior to any proposal that West Face had submitted previously on its own behalf because of the structure that permitted VimpelCom a clean exit without the worry of a requirement for regulatory approval. He denied that West Face's view was based at all on information regarding Catalyst's offer to VimpelCom. I cannot find from the language in the email that West Face knew the terms of the offer from Catalyst to VimpelCom.

116 The evidence of Mr. Burt is to the same effect as Mr. Leitner. Mr. Burt worked with Mr. Guffey at LG Capital and was a member of the investment vehicle 64NM used to acquire the interest in WIND held by VimpelCom. He worked alongside Mr. Guffey on this acquisition. Their view was that there would be no issue with their participation in the consortium because they had discussed the idea previously with the Government. Their view was that with the set-aside AWS3 spectrum auction, WIND could be a viable stand-alone business. 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.

117 The inference which Catalyst asks to be drawn that West Face acquired from Mr. Moyse confidential Catalyst information about its interest and strategy to acquire WIND and about its regulatory strategy and that West Face passed

that information on to Tennenbaum and LG Capital/64NM would amount to several witnesses purposely giving false testimony. I cannot make any such finding. To the contrary, I find that Mr. Moyse never communicated to anyone at West Face, either in the interview process or later, anything about Catalyst's dealings with WIND or of Catalyst's regulatory or telecommunications industry strategy regarding its interest in WIND and that Tennenbaum and that LG Capital/64NM were never advised of any such information by West Face or Mr. Moyse.

118 On that basis, the action against West Face for breach of confidence must fail.

Did West Face make use of any Catalyst confidential information?

119 In light of the finding that no Catalyst confidential information was given by Mr. Moyse to West Face or passed on to the consortium members, it is not necessary to deal with this issue in any detail. I will deal with it briefly.

120 Assuming, without deciding, that some of the information said to have been passed on by Mr. Moyse to West Face was confidential [11] , I would not find that West Face made use of it.

121 The price of the bid by West Face and the consortium with an enterprise value of $300 million was based on what VimpelCom and its advisor UBS had made clear to West Face and others as to the amount that VimpelCom required. Even if Mr. Moyse had known and told West Face of the intention of Catalyst to bid at an enterprise value of $300 million, West Face made no use of such information.

122 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. West Face did not hold the same view regarding the need for concessions and held the view that so long as WIND would be able to acquire additional spectrum to upgrade its network from a 3G (third generation) wireless network to an LTE ("long term evolution" or fourth generation) network, which was made clear by the Industry Canada announcement on July 4, 2014, WIND would be a viable business. The other consortium members held the same view. [12]

123 For the same reason, even if Mr. Moyse disclosed to West Face the views of Mr. Glassman that the potential litigation by some other party against the Government would force the Government to grant concessions and that the Government was therefore softening its position on concessions, that disclosure played no part in the decision of West Face to make the bids that it did.

124 I accept the evidence of Mr. Griffin that West Face would never have based its strategy on the litigation that Mr. Glassman believed some unnamed party other than Catalyst would have pursued against the Federal Government over the regulatory restrictions that limited transferability of the 2008 spectrum licenses. His evidence was that based on its own discussions with Industry Canada, including during the May 21 meeting with Industry Canada, West Face believed that the Government was going to continue to maintain the existing restrictions on transfers of spectrum to incumbents. West Face never understood the Government's policy stance to be a bluff. Nor did Globalive, who told West Face on April 21, 2014 of its view that the Government would not change its policy. In spite of what Mr. Glassman asserted was his view of the potential litigation against the Government and the softening of the Government's position on concessions, the actions of Catalyst in its bid for WIND did not reflect a view that the Government's knowledge of the threat of litigation and the Government's body language demonstrating that it was softening its position regarding concessions would massively mitigate, if not entirely eliminate, the financial risk in bidding. Catalyst had no intention of closing a deal with VimpelCom if it could not obtain the concessions it was looking for from the Government. [13]

125 In summary, if Mr. Moyse provided to West Face any confidential Catalyst information, I find that such information was not used by West Face in its acquisition from VimpelCom of its interest in WIND or of its later

acquisition of its shareholding in WIND. For this reason too, the action for breach of confidence against West Face must fail.

Did Catalyst suffer any detriment or compensable damage?

126 Even if a case of misuse of confidential Catalyst information were made out, I cannot find that it caused Catalyst any detriment or damage.

127 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.

128 On August 11, 2014 the Chairman of the Board of VimpelCom advised Mr. De Alba 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 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."

129 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.

130 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.

131 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. [14]

Spoliation

132 Around June 17, 2014, Mr. Moyse wiped all contents from his BlackBerry before returning it to Catalyst. He said he did so to remove personal information from the device. He said he understood that all information belonging to Catalyst would still exist on Catalyst's server.

133 On July 16, 2014, an interim order was made in the proceedings brought by Catalyst to enjoin Mr. Moyse from working at West Face. The order, consented to by Mr. Moyse, contained a provision that the parties would preserve their records relating to Catalyst and/or related to their activities since March 27, 2014 and/or related to or was relevant to any of the matters raised in the Catalyst action. The order provided that Mr. Moyse was to turn over his personal computer to his legal counsel for the taking of a forensic image of the data stored on it, to be conducted by a professional firm as agreed by the parties, and that he deliver a sworn affidavit of documents setting out all documents in his power, possession or control that related to his employment with Catalyst. Prior to delivering his personal computer to his lawyer, Mr. Moyse deleted his internet browsing history. He said he did this because he was concerned that his internet browsing history would show that he had accessed adult entertainment websites and could become part of the public record. He says he did not think there was anything improper in doing so.

134 Catalyst says that Mr. Moyse engaged in spoliation of documents and that an inference should be drawn that the destroyed evidence would have been damaging to the defence of Mr. Moyse, and by extension West Face. It says the spoliation should detract from the reliability and credibility of Mr. Moyse.

135 Spoliation is an evidentiary rule that gives rise to a rebuttable presumption that destroyed evidence would be unfavourable to the party that destroyed it. Catalyst argues that spoliation in this case should be recognized as an independent tort. In argument Catalyst contended that damages could be assessed against Mr. Moyse and that an award covering the costs of the case would be appropriate. Catalyst also contended that West Face would be liable for the same amount on a theory of vicarious liability.

136 The parties agree that a finding of spoliation requires four elements to be established on a balance of probabilities, namely:

(1) the missing evidence must be relevant;

(2) the missing evidence must have been destroyed intentionally;

(3) at the time of destruction, litigation must have been ongoing or contemplated; and

(4) it must be reasonable to infer that the evidence was destroyed in order to affect the outcome of the litigation.

137 The drawing of an inference was described in *Spasic Estate v. Imperial Tobacco Ltd.* (2000), 49 O.R. (3d) 699 (Ont. C.A.), leave to appeal refused, (2001), [2000] S.C.C.A. No. 547 (Ont. C.A.), at para. 10 as:

> The spoliation inference represents a factual inference or a legal presumption that because a litigant destroyed a particular piece of evidence, that evidence would have been damaging to the litigant.

138 Thus there must be evidence of a particular piece of evidence that was destroyed.

139 Courts in Canada have permitted a pleading of a tort of spoliation to stand to proceed to trial on the basis articulated in *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.) that it was not plain and obvious that such an action could never succeed. See *Spasic*, *supra* and *McDougall v. Black & Decker Canada Inc.* (2008), 97 Alta. L.R. (4th) 199 (Alta. C.A.). I was referred to no case in which spoliation was recognized as a tort and I do not believe the tort of spoliation has been recognized in Canada. Catalyst contends that the tort should be recognized in this case.

140 I will deal with the various claims of spoliation made by Catalyst. The first has to do with Mr. Moyse deleting his browsing history from his personal computer.

141 Mr. Moyse's evidence is as follows. He understood that pursuant to the order of July 16, 2014, a forensic image would be created of his computer's hard drive for the purpose of determining what, if any, documents he had in his possession that related to Catalyst or to the issues raised in Catalyst's lawsuit. He was not concerned that his devices

would be reviewed to identify relevant documents that related to Catalyst or to the issues raised in Catalyst's lawsuit as he had good, reasonable explanations for every Catalyst-related document that would be found and intended to disclose all such documents in his affidavit of documents, as required under the order. He was troubled that Catalyst would have access to his personal internet browsing history, and in particular that he had accessed adult entertainment websites. He was concerned that it might become part of the public record in this litigation.

142 Mr. Moyse therefore decided that prior to delivering his computer to his counsel, he would attempt to delete his internet browsing history from his computer. He did not believe that there was anything improper about his doing so as the order did not require him to maintain his computer "as is" for the five days before he was to deliver the computer or to preserve clearly irrelevant files. The focus of the order was to maintain and preserve documents relevant to this action. If the order had required him to maintain the computer "as is", he would not have used it at all prior to the image being taken. He felt that by deleting his browsing history he was deleting personal information not relevant to the litigation.

143 He was aware that the mere act of deleting one's internet browsing history through the browser program itself does not fully erase the record, and that a forensic review of a computer would likely capture some or all recently deleted material. He did some internet searches on how to ensure a complete deletion of his internet browsing history, and many websites said that cleaning the registry following the deletion of the internet history would accomplish this. He purchased two software products from a company called Systweak. The first was software named RegCleanPro which he purchased online on Saturday, July 12, 2014, for the purpose of deleting his internet browser history. On Sunday July 20, 2014 the day before he was to deliver his computer to his lawyers, he ran RegCleanPro software to clean up the computer registry after he had deleted his internet browser history.

144 I accept Mr. Moyse's evidence as to why he deleted his internet browsing history. There is no evidence to contradict his statements as to why he deleted his internet browsing history. He was a young man at the time who had a very close relationship with his girlfriend who is now his fiancée. He did not want his internet searching to become part of the public record. In deleting this history, he did not intend to breach the order of July 16, 2014 or to destroy any evidence relevant to this litigation. This lack of intention to destroy relevant evidence precludes any finding of spoliation resulting from the deletion of his internet browsing history.

145 In closing argument, it was conceded on behalf of Catalyst that there is no evidence that Mr. Moyse destroyed documents that no longer exist either at Catalyst or West Face. Catalyst contends however that by wiping his browsing history, Mr. Moyse may have wiped evidence that he looked at Catalyst documents in his Dropbox account after deciding he was leaving Catalyst. Catalyst says that if those documents that he may have looked at in his Dropbox account included Catalyst documents involving WIND, it would be evidence that might suggest he wanted them to discuss with West Face.

146 There are difficulties with this contention. There is no evidence that Mr. Moyse ever transferred confidential Catalyst documents regarding WIND to his Dropbox account. Mr. Musters, the computer expert retained by Catalyst created a forensic image of Mr. Moyse's computer on June 21, 2014. The only time Mr. Moyse used his Dropbox account on his computer was on February 10, 2014 before Mr. Moyse was on the WIND team at Catalyst and long before he decided to leave Catalyst and go to West Face. There is no evidence what documents were in his Dropbox account that he accessed on that day. Moreover the timing does not lead to any cogent inference that documents accessed that day consisted of confidential Catalyst documents regarding WIND that Mr. Moyse wanted to discuss with West Face. To make such a finding would amount to speculation rather than reasonably making an inference.

147 Catalyst has not established that Mr. Moyse looked at any documents in his Dropbox account dealing with Catalyst's WIND initiative or that he did so in order to discuss them with West Face. Nor has Catalyst established that any evidence that might be relevant to this litigation was destroyed by the wiping of Mr. Moyse's internet browsing history.

148 On July 16, 2014, the day on which the interim order was made requiring his personal computer to be turned over to his counsel, Mr. Moyse purchased online from Systweak a second software product named Advanced System Optimizer ("ASO") advertised as an all in one PC tune-up suite containing many different programs, one of which was a program called Secure Delete.

149 On July 20, 2014, at 8:09 p.m., a folder called Secure Delete was created on Mr. Moyse's computer. Catalyst contends that although the forensic evidence does not conclusively establish that Moyse ran the Secure Delete program, the undisputed circumstances in which it was purchased, downloaded, and launched the night before his computer was scheduled to be forensically imaged lead to the logical and reasonable inference that Mr. Moyse ran it to delete relevant inculpatory evidence.

150 This contention is somewhat contrary to the concession made in closing argument that Catalyst is not contending that Mr. Moyse destroyed documents that no longer exist either at Catalyst or West Face. In any event, I cannot find that Mr. Moyse ran the Secure Delete program in order to destroy documents or that any documents were destroyed.

151 Mr. Moyse denies that he ever ran the Secure Delete program to delete any documents. His evidence is that he bought the ASO software because his computer was running slowly. On July 20, 2014, he opened both the RegCleanPro and the ASO software to see what they could do and he investigated what products the ASO offered and what the use of those products would entail. He did this by clicking on the various parts of the program. He said he was certain that he did not run the Secure Delete product or any other to delete any Catalyst documents or anything else from his computer that could have been relevant to this litigation and that since his computer was returned to him after the image was taken from it, he has used ASO a number of times to clean up his computer and optimize its functioning.

152 An Independent Supervising Solicitor ("ISS") was appointed to review the forensic images taken from Mr. Moyse's computer. The ISS's forensic expert reached the conclusion that it could not determine whether the Secure Delete function had been used to delete an individual file or files and that it accordingly could not express any conclusion on that possibility other than to note that it exists.

153 Although not the case from the start, the forensic experts retained by Catalyst and Mr. Moyse now agree on most of the forensic evidence. Mr. Musters, the expert for Catalyst, at first stated in his affidavit that a Secure Delete folder is not created merely by downloading the ASO software but is only created when a user runs the Secure Delete feature to delete a file or folder from the computer. He concluded from the existence of the Secure Delete folder on Mr. Moyse's computer that Mr. Moyse had deleted one or more files on his computer. The evidence of Mr. Lo, the computer expert for Mr. Moyse, was that the presence of a Secure Delete folder on Mr. Moyse's system is not evidence that he ran the Secure Delete program, or used it to delete any files.

154 At trial Mr. Musters acknowledged that he was wrong and that the presence of a Secure Delete folder does not mean that the function was used to delete a file. Both experts agreed that a Secure Delete folder, such as the one found on Mr. Moyse's computer, is created as soon as a user clicks Secure Delete on the ASO menu, but before the product is used for any purpose. The Secure Delete folder is created even if a user does not delete a single file.

155 Although acknowledging his error in concluding that Mr. Moyse deleted a file merely from the presence of the Secure Delete folder on his computer, Mr. Musters did not change his opinion that Mr. Moyse most likely did use the Secure Delete function to delete files from his computer to prevent them being recovered by a forensic analysis. His reasoning however is something that falls outside of a forensic analysis and his expertise. What Mr. Musters was doing was engaging in an exercise of a judge or jury in considering possibilities unrelated to a forensic analysis. He said:

> My conclusion is based on a number of factors. The program was purchased and paid for. The Secure Delete feature is a function of a program called the advanced system optimizer, and when you load — when you launch advanced system optimizer, you get a home screen, and the Secure Delete feature is not on the home screen. There are about five options, if you will, on the left-hand side, one of them is security and privacy. If you then go to the security and

> privacy, it gives you, I believe, three options, one of them being Secure Delete. Underneath the Secure Delete it says this is how you permanently erase a file, its contents, never to be recovered, and then you launch — then you click on that Secure Delete feature to launch that function. That's when the folder gets created. I draw my conclusion in 13 on the fact that the program was bought, paid, installed, it wasn't easy to get to that function, and it was done on the night before the ISS was to examine the computer.

156 In a prior affidavit after learning of his error, Mr. Musters expressed the opinion that Mr. Moyse likely used the Secure Delete program to delete files and relied on several factors, based much on the same reasoning as he expressed at trial. One was that Mr. Moyse had exhibited a pattern of conduct that was consistent with taking confidential information from his previous employer. He admitted on cross-examination that he did not know if the documents he was referring to were confidential. Another was that the running of the Secure Delete program the night before Mr. Moyse was to deliver his computer to a forensic expert was too coincidental to be an innocent "mistake". Mr. Moyse never said that what he did with the ASO software, including clicking on the Secure Delete portion of it, was a mistake.

157 I am troubled by the assertions of Mr. Musters. They are really outside of his expertise and indicate somewhat of a less than neutral observation of an expert. They are argument and speculation.

158 It would not be entirely surprising that Mr. Moyse purchased the ASO software for other than a nefarious purpose. He saw it while searching the internet for a product that would help him prevent disclosure of the fact that he had accessed adult websites on the internet. The AOS software was sold by the same company that sold the RegCleanPro that he used. He used the RegCleanPro software on the night before he was to turn over his computer to his counsel for the reasons he has stated. To then look at the ASO software, including looking at the Secure Delete program on it, at the same time without using it to delete files is not something that can be concluded is too coincidental, as stated by Mr. Musters. Mr. Moyse's evidence that he has used the ASO software to optimize or clean up his computer since it has been returned to him was not challenged.

159 Mr. Musters has also speculated that Mr. Moyse took steps by using the Registry Editor on his computer to remove evidence that he had used the Secure Delete program to delete files. Mr. Lo, the expert called by Mr. Moyse, testified that he found no evidence that Secure Delete had been used to delete any files or folders from Mr. Moyse's computer. Mr. Lo explained that if the program had been run on the computer, a Secure Delete Log which maintains records of the files deleted would have been found, but no such log exists on Mr. Moyse's computer. Mr. Musters agreed that using Secure Delete to delete files would result in the creation of a Secure Delete Log but he speculated that Mr. Moyse took steps by using the Registry Editor on his computer to remove evidence that he had used the Secure Delete program to delete files.

160 Both experts agreed that it would be theoretically possible for a user to use the computer's Registry Editor to delete a Secure Delete Log. They differed on how easily that could be done. Mr. Musters said it could be done very easily. His explanation suffered somewhat by a hiccup in the information he said was available to the public which turned out to be information on how to remove the entire ASO program and not just the removal of the remnant files. Mr. Lo testified that it would be complicated and risky for a lay user to use a Registry Editor to hide the use of the Secure Delete program and said there was no evidence he found on Mr. Moyse's computer that he had done so.

161 I have considerable doubt that Mr. Moyse had the expertise needed to hide the use of the Secure Delete program on his computer. He left on his computer the ASO software and the Secure Delete folder, along with emails and the receipts recording his purchase of the software, to be easily found by a forensic investigator. Mr. Musters asserted at one place in his evidence that Mr. Moyse's understanding that cleaning the registry of his computer to erase his browsing history made no sense, which is somewhat inconsistent with a view that Mr. Moyse knew enough about a registry to remove evidence of his use of the Secure Delete program.

162 It is not necessary to come to a final conclusion on how easily one could hide the use of the Secure Delete program. Whether or not it would have been easy or difficult to use the registry to remove evidence that the Secure Delete program

had been used to delete files, it would be sheer speculation unsupported by any forensic evidence to find that Mr. Moyse did erase any prior use of the Secure Delete program. Mr. Musters in his April 30, 2015 affidavit said as much by saying it was impossible to determine whether the absence of wiping history in the Secure Delete system summary means that Mr. Moyse did not use the software to permanently delete files or folders or whether he used the software and then removed the evidence of his having done so by deleting the Secure Delete files from his registry. His conclusion that Mr. Moyse likely used the Secure Delete program to permanently delete files from his computer was not based on forensic evidence but on speculation outside of his field as a forensic computer analyst.

163 Without cogent evidence that Mr. Moyse managed to remove from his computer the evidence that he had used the Secure Delete function, there is no cogent evidence that he used the Secure Delete program in the first place to delete any documents from his computer. I find that Catalyst has not established that Mr. Moyse used the Secure Delete program to delete to delete any relevant evidence.

164 Regarding the wiping of his BlackBerry before returning it to Catalyst, Mr. Moyse's evidence is that his BlackBerry contained photographs and text messages of a personal and private nature, and he thought it was completely reasonable to take steps to ensure that they would not be accessible to the next user of the company issued BlackBerry. The only email address associated with the BlackBerry was his Catalyst email address, and Catalyst had full access to those emails on its server. Catalyst admits it would have had all emails that were sent through this account on his BlackBerry. Mr. Moyse's evidence is that he did not believe that he used his BlackBerry to communicate with West Face, although it turned out later that he had used it once or twice to receive telephone calls. Mr. Moyse admits it was a mistake to have wiped his BlackBerry.

165 I accept that Mr. Moyse had no intent to destroy relevant evidence on his BlackBerry, and there is no evidence that any relevant evidence was destroyed. The call logs of his calls with West Face are in evidence.

166 In summary, I find that Catalyst has not established that Mr. Moyse intentionally destroyed evidence in order to affect the outcome of this litigation. There is no basis to find that or infer a presumption that Mr. Moyse destroyed evidence that would be unfavourable to him.

167 So far as the argument that West Face has liability for any spoliation of Mr. Moyse, I see no basis whatsoever for such a conclusion. Whatever Mr. Moyse did, he did it after he was on leave of absence from West Face and did it for his own concerns, not out of any concern to protect West Face in this litigation.

168 I need not consider whether an independent tort of spoliation exists in Ontario.

Conclusion

169 The action is dismissed in its entirety. The defendants are entitled to their costs. If not agreed, written submissions along with proper cost outlines may be made within 15 days and reply submissions may be made in writing within a further 15 days.

Action dismissed.

Footnotes

* Additional reasons at *Catalyst Capital Group Inc. v. Moyse* (2016), 2016 CarswellOnt 16043, 2016 ONSC 6285 (Ont. S.C.J. [Commercial List]), in respect of costs.

1 Unless stated otherwise, statements of fact in these reasons are findings of fact.

2 Catalyst contends that in his earlier affidavit of July 7, 2014, filed for the pending injunction motion that did not proceed, Mr. Moyse understated at paragraph 11 his role at Catalyst regarding WIND and that this is an indication that Mr. Moyse has something to hide about the extent of his knowledge of WIND. I do not accept that contention. In the affidavit Mr. Moyse stated that he had typed notes of Mr. De Alba, Mr. Riley and Mr. Michaud into a PowerPoint presentation in the

Mobilicity file. In his evidence he said that was his recollection at the time and that he was wrong as it was in the WIND file that the PowerPoint presentation was made. There was no PowerPoint in the Mobilicity file. Mr. Moyse was obviously mistaken and I do not accept that Mr. Moyse intentionally misled the Court. There was also a mistake in paragraph 56 of the affidavit in which Mr. Moyse said he was not privy to any internal discussions about the strategy behind Catalyst's potential acquisition of WIND. He was privy to the extent he participated in the preparation of the PowerPoint, and Mr. Moyse readily acknowledged at trial he was partly wrong but said that he didn't remember at the time the details of the PowerPoints given how frantic the pace of work was, and in terms of structuring, was still not sure he really knew anything about that. I do not accept that Mr. Moyse intended to mislead the Court.

3 The evidence of Catalyst witnesses as to why the presentations and notes and drafts of them were destroyed differed from witness to witness and made little sense. Mr. Glassman testified in chief that someone from Industry Canada asked Catalyst not to keep work product that they, i.e. the Government thought might be politically sensitive. So the drafts were destroyed. He said the Government had no problem with Catalyst keeping the final version that was presented to the Government but that if the work product had issues that were not eventually discussed with the Government, Industry Canada did not want it potentially coming back to cause them problems. He went so far as to say that it was his experience that this happened often and frequently, especially if the meetings are on sensitive issues to the Government, but on cross-examination he said this presentation was the first he had ever made to the Government. Why the Government would be concerned with drafts of a presentation made to it that were never seen by the Government is puzzling indeed. Mr. Riley's evidence prior to the trial was that all copies of the presentation were destroyed and this was confirmed by way of an answer to undertakings. At trial he testified that he gave directions that all copies be destroyed because of the sensitivity of information in it. He did not say it was at the direction of the Government that he ordered their destruction.

4 The fact that West Face was in negotiations with VimpelCom for WIND was not public and was confidential to West Face. How Catalyst knew that was unexplained.

5 This statement made to the Government was clearly misleading. Catalyst had not by the time of the presentation on March 27, 2014 had any access to the VimpelCom and WIND data room, which first took place in May 2014. It had not yet retained Morgan Stanley as its financial advisor and did not do so before May 6, 2014 when it approached Morgan Stanley to request that it advise it on the acquisition of WIND, and had not yet retained a technical expert in the areas of operating a wireless network as late as May 16, 2014. Catalyst had had no negotiations with VimpelCom having just signed a confidentiality agreement on March 21, 2014. The first draft of an agreement to purchase WIND by Catalyst was dated May 9, 2014 and sent by UBS, the financial advisor to Globealive to Morgan Stanley. I do not accept Mr. Glassman's evidence that it was possible to have advanced discussions on an informal basis. He did not know what Mr. De Alba had discussed with VimpelCom. The presentation to the Government stated that the purchase price for WIND was $500 million, which was far less than the price of $300 million that VimpelCom through UBS made known to Catalyst when it began its negotiations in May, 2014.

6 I reject the assertion made by Catalyst on the last day before the trial that in the interview of Mr. Moyse by Mr. Zhu, the vice-president of West Face, on April 15, 2014 they discussed WIND. The notes made by Mr. Zhu of the brief interview with Mr. Moyse list a number of things under a heading of Catalyst, including "live deals". Mr. Zhu's evidence is that he had no discussion with Mr. Moyse about WIND and that the reference to "live deals" was that Mr. Moyse said he had been working on live deals at Catalyst. He said he did not ask Mr. Moyse what the deals were and Mr. Moyse did not say what they were. Mr. Zhu was a straightforward witness and I accept his evidence. It would be sheer speculation to read into the words "live deals" a reference to any particular deal or to WIND.

7 Catalyst refers to an investment memo sent by West Face to investors on the credit part of the successful bid for VimpelCom's interest in WIND. That memorandum contained information as to collateral coverage for the investment. Under scenario 1 it said "In the event that Wind fails and there are no other buyer options, the Government cannot logically continue to block a sale to an incumbent. In this scenario, valuation range is $500 to $800 million.". I do not take this as being different from the investment strategy of West Face and I accept Mr. Griffin's evidence that it was not but rather was an assertion or thesis of a position if the investment was an abject failure. I also accept Mr. Griffin's evidence that West Face would never have based its acquisition strategy on the litigation that Mr. Glassman believed some unnamed party other than Catalyst would have pursued against the Federal Government over the regulatory restrictions that limited transferability of the 2008 spectrum licenses. Moreover, the assertion referred to in the West Face investment memo was not something that would in any event be confidential to Mr. Glassman or Catalyst. There was much discussion in the marketplace on this issue, particularly as

Mobilicity had twice been turned down by the Government on an attempt to sell its business to Telus. I do not accept the argument that the thought was Mr. Glassman's alone and that it must have come from Mr. Moyse to West Face. The idea was not so unique to draw that inference.

8 Catalyst is critical of West Face for not calling Mr. Guffey as a witness and asks for an adverse inference to be drawn. I see no basis for any adverse inference. Mr. Guffey was not at all in the control of West Face and it was open to Catalyst to call Mr. Guffey as a witness. See *Parris v. Laidley*, 2012 ONCA 755 (Ont. C.A.) at para. 2. Moreover, the evidence of Mr. Guffey would have been cumulative to evidence of others, and no adverse inference should be drawn. See *R. c. Jolivet*, 2000 SCC 29 (S.C.C.) at paras 24 and 28 and *R. v. Lapensee*, 2009 ONCA 646 (Ont. C.A.) at paras. 43, 49 and 52.

9 Mr. Leitner and Mr. Burt used the expression of "socializing" the idea with Investment Canada. I took that word to mean more than a discussion over wine and canapés.

10 While Mr. Moyse was on vacation, and at the time that he decided to leave Catalyst, an email from Catalyst's lawyers enclosing a clean and blacklined copy of an early draft agreement of a Catalyst/VimpelCom share purchase agreement was sent to a number of Catalyst people including Mr. Moyse. Mr. Moyse's evidence is that he did not read the draft. I accept his evidence. Reading a 122 page agreement while on vacation with his girlfriend at a time he had decided to leave Catalyst would be an unusual thing to do.

11 Mr. Glassman's evidence was that the industry generally held the view that Government regulations would have to change for a transaction such as the acquisition of WIND to work and that another bidder such as West Face would either assume or know that Catalyst was putting such a proposition to the Government. If this central point to the argument of Catalyst in this case was something that Catalyst believes a bidder such as West Face would assume, Catalyst is in no position to say that the information of what it was putting to the Government was confidential.

12 An email from Mr. Boland of West Face to consortium members of August 26, 2014 summarized a meeting with Mr. Lacavera of Globealive in which Mr. Lacavera expressed concern "that we [the consortium] may over reach (by asking for roaming, spectrum transfer to incumbent etc). Catalyst argues that this makes it plain that the consortium intended to push the Government for concessions despite agreeing to step into the shoes of VimpelCom in the first step. I do not accept that argument. The email said nothing about the intentions of West Face or the other members of the consortium. The offer by West Face, Tennenbaum and 64NM that had been made to VimpelCom on August 7th contained no such condition and the consortium did not seek any concessions from the Government before that deal closed. Nor is there any evidence that West Face or the other consortium members ever sought concessions from the Government before the second step of the acquisition of WIND took place.

13 I have 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. Mr. Glassman was the chief architect of Catalyst's regulatory strategy. The *NextWave* case that Mr. Glassman put so much store on does not appear to be of much if any relevance to the issue. While Mr. Glassman obtained a law degree, he never practised law. He admitted he is no specialist in communication law or the law concerning the management of wireless spectrum in Canada. It is difficult to accept that based on his 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 Several drafts of an agreement between Catalyst and VimpelCom were exchanged. VimpelCom continuously refused to agree to a condition that would make closing the deal conditional on the Government granting concessions on transferring spectrum to an incumbent. In the last draft that Mr. Saratovsky of VimpelCom and Mr. De Alba agreed was substantially settled, it provided in section 6(d) that before closing Catalyst could not (i) develop, evaluate or analyze any studies, analyses, reports or plans relating to the sale of the Business, or any of its assets, by the Purchaser to an Incumbent; or (ii) discuss with any Governmental Authority the sale or transfer of the Business, or any of its assets, by the Purchaser to an Incumbent. In light of that, I have difficulty with the position of Mr. Glassman that he would not close without Government concessions regarding

spectrum, unless he intended to breach the terms of the agreement. Section 6(e) did permit Catalyst after closing to pursue regulatory concessions from Industry Canada that WIND had been seeking. Mr. De Alba's said on cross-examination that he did not think WIND had been seeking concessions to permit the sale of spectrum to an incumbent and agreed that if Catalyst had signed that agreement, it would not have been able before closing to seek concessions from the Government about selling spectrum to an incumbent.. Mr. De Alba asserted that section 6(e) would permit Catalyst to seek concessions on the sale of spectrum if Catalyst were to operate a wholesale business with WIND and not a retail business. I do not understand what would give Catalyst that right but in any event it is clear that Catalyst was interested in acquiring WIND to operate a retail operation.

End of Document

TAB 10

COURT OF APPEAL FOR ONTARIO

CITATION: The Catalyst Capital Group Inc. v. Moyse, 2018 ONCA 283
DATE: 20180322
DOCKET: C62655

Doherty, MacFarland and Paciocco JJ.A.

BETWEEN

The Catalyst Capital Group Inc.

Plaintiff (Appellant)

and

Brandon Moyse and West Face Capital Inc.

Defendants (Respondents)

Brian H. Greenspan, David C. Moore and Michelle Biddulph, for the appellant

Robert A. Centa, Kristian Borg-Olivier and Denise Cooney, for the respondent, Brandon Moyse

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

Heard: February 20 and 21, 2018

On appeal from the decision of Justice F. Newbould of the Superior Court of Justice, dated August 18, 2016, dismissing Catalyst's action, reported at 2016 ONSC 5271, and an application for leave and, if leave is granted, an appeal from the costs decision of Justice F. Newbould, dated October 7, 2016.

REASONS FOR DECISION

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

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[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, at 203-208.

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.

TAB 11

2015 ONSC 6136
Ontario Superior Court of Justice [Commercial List]

Bieberstein v. Kirchberger

2015 CarswellOnt 15101, 2015 ONSC 6136, 258 A.C.W.S. (3d) 482

Harry Bieberstein, Plaintiff and Martin Kirchberger in his personal capacity and as a beneficiary of the Kirchberger Family Trust and the Kirchberger Fixed Income Trust, Christine Frazer (also known as Christine Kirchberger) in her personal capacity and as a beneficiary of the Kirchberger Family Trust and the Kirchberger Fixed Income Trust, Gerry Cecile in his personal capacity and as trustee of the Kirchberger Family Trust and as a trustee of the Kirchberger Fixed Income Trust, Bernie Korfman in his personal capacity and as trustee of the Kirchberger Family Trust, Andreas Kirchberger in his personal capacity and as a beneficiary of the Kirchberger Family Trust and the Kirchberger Fixed Income Trust and the Kirchberger Fixed Income Trust, Nicholas Kirchberger (also known as Niclas-Xaver Kirchberger) in his personal capacity and as a beneficiary of the Kirchberger Family Trust and Kirchberger Fixed Income Trust, Nomen Fitness Inc., the Branding Company, Amck Capital Investments Inc., 487223 Ontario Limited, Henry Wilmot, 1171852 Ontario Limited carrying on business as G.K. York Management Service, 2199036 Ontario Inc., Southern Shores Enterprises, LLC, West Real Grundstueckseverwaltung Und Besitz GmbH, Hildegard Kendlinger (formerly Kirchberger), Susanne Viktoria Schmidt, Carol Anne de Ville, Rick Frazer, Cathy Oden, Kathy Foerg, Kenneth John Shelley, David Wayne Shelley, Marianne C. Jones, Maria Brem, Aulfes-Steinmueller, Christine A. Adam, Millard, Rouse & Roserugh LLP (C.A.), Gerry Cecile & Associates Inc., Stephen C. Frost, Mary Welsh, Defendants

Newbould J.

Heard: October 1, 2015
Judgment: October 5, 2015
Docket: CV-12-9746-00 CL

Counsel: Morris Cooper, for plaintiff
John F. Evans, Q.C., for Defendant, Stephen C. Frost
Aaron Postelnik, for Defendant, Henry E. Wilmot
John C. Teal, for Defendant, Millard, Rouse & Rosebrugh LLP
Jonathan L. Rosenstein, for Defendants, Martin Kirchberger and Christine Frazer

Subject: Civil Practice and Procedure; Estates and Trusts; Public; Torts

Table of Authorities

Cases considered by *Newbould J.*:

Frazer v. Haukioja (2010), 2010 ONCA 249, 2010 CarswellOnt 1996, 317 D.L.R. (4th) 688, 73 C.C.L.T. (3d) 167, 261 O.A.C. 138, 101 O.R. (3d) 528 (Ont. C.A.) — referred to

Inter-Leasing, Inc. v. Ontario (Minister of Revenue) (2014), 2014 ONCA 683, 2014 CarswellOnt 13697 (Ont. C.A.) — referred to

Mantella v. Mantella (2006), 2006 CarswellOnt 3176, 27 R.F.L. (6th) 76 (Ont. S.C.J.) — followed

Risorto v. State Farm Mutual Automobile Insurance Co. (2003), 2003 CarswellOnt 934, 64 O.R. (3d) 135, 32 C.P.C. (5th) 304, 44 C.C.L.I. (3d) 135 (Ont. S.C.J.) — referred to
Stetson Oil & Gas Ltd. v. Stifel Nicolaus Canada Inc. (2013), 2013 ONSC 5213, 2013 CarswellOnt 11232 (Ont. S.C.J. [Commercial List]) — referred to

ADDITIONAL REASONS relating to costs of consent order striking plaintiff's action as against defendant lawyer, W, and accounting firm, and allowing him to issue fresh statement of claim against defendants K and F.

***Newbould J.*:**

1 On April 24, 2015 a motion to strike the fresh as amended statement of claim was set to be heard. Unfortunately, Mr. Cooper, the new lawyer for plaintiff, had not been given notice of that date by his client. Mr. Cooper was telephoned and he came down to the court. After discussion in court in which I made my preliminary views known about the pleading, and after a recess, a consent order was made dismissing the action against several parties, striking the fresh as amended statement of claim and granting leave to issue a fresh statement of claim against two parties.

2 Mr. Cooper contends that his lack of notice was not an accidental slip but a deliberate decision collectively made by the moving parties' counsel. That is an unfortunate contention and one that should not have been made. There is no basis whatsoever to suggest that Mr. Evans, a past president of the Advocates' Society with a sterling reputation, or the other counsel, would have done such a thing. Nothing would be gained by bringing on a motion without giving notice to the opposing party as the motion would not be able to proceed. In fact, the problem lay with the failure of Mr. Dewart, the lawyer acting for Mr. Manning who wanted to get off the record against Mr. Bieberstein's wishes, to advise anyone, including apparently Mr. Cooper after he was retained in early March, of the return date of the motion that had been set two months previously. Mr. Evans had advised Mr. Dewart of the April 24th date by letter of February 20, 2015.

3 Mr. Cooper says in hindsight he should not have come down that day to court when called, as he says nothing would have occurred that day. Apart from ignoring a request from me that he be called, it would have just put off the inevitable that would have taken place at another date.

4 The fresh as amended statement of claim under attack was a dreadful pleading that stood no chance of standing up to a motion to strike it. It was amended following a decision of Justice Mesbur striking it with leave to amend, but it in no way complied with her order. When I pointed out my view to Mr. Cooper when he arrived, he did not argue that it was a proper pleading. I suggested that it be struck with leave to amend one more time and that serious consideration be given to narrowing the claims and reducing the number of defendants. Defence counsel were concerned that any further leave be given to deliver a fresh claim. After a break during which counsel arrived at a consensus, a draft order heavily amended in handwriting was handed up. It contained an order that the action be dismissed against the defendants Henry Wilmot, Stephen C. Frost and Millard Rouse & Rosebrugh LLP with costs of the action to be agreed or fixed, that the fresh as amended statement of claim be struck and that a fresh statement of claim could be issued as against the defendants Martin Kirchberger and Christine Frazer.

5 I will deal first the costs claimed on behalf of Mr. Frost. He claims costs of the action on a full indemnity basis of $89,441.50 for fees, and with disbursements and HST, a total of $101,271.94. The basis for this scale is that claims of fraud, breach of fiduciary duty and trust were made against Mr. Frost, a lawyer. These kinds of claims are deserving of costs on the highest scale when made against an experienced person whose reputation is of the utmost importance. I reject completely the contention of Mr. Cooper that he was "sucker punched" by Mr. Evans in his now seeking these costs on behalf of Mr. Frost. Mr. Cooper, and more importantly Mr. Bieberstein, had to know that when the action against Mr. Frost was dismissed, the costs of the action would be high, particularly with the type of allegations made. I see no reason to set aside the consent to the order dismissing the action with costs, as Mr. Cooper argues should be the case. It was inevitable that substantial costs of the action would be ordered, and the decision to agree to a dismissal of the action against Mr. Frost was made by the plaintiff in consultation with Mr. Cooper. The costs incurred were the

result of all of the machinations of Mr. Manning on behalf of the plaintiff and the history of this action does no credit to the plaintiff. The rates charged by Mr. Evans and others in his firm were modest rates charged to LawPro.

6 No argument is made by the plaintiff that too much time was spent by counsel for Mr. Frost. That is a telling matter. Any suggestion that too much time was spent would be an attack in the air. See: *Risorto v. State Farm Mutual Automobile Insurance Co.* (2003), 64 O.R. (3d) 135 (Ont. S.C.J.) per Winkler J. (as he then was). The lack of information from the plaintiff as to the amount of time spent by plaintiff's counsel on the action leads to an inference that at least as much time was spent as by the successful party's lawyer. See: *Frazer v. Haukioja*, 2010 ONCA 249 (Ont. C.A.) per LaForme J.A.

7 This was a very large claim made against a lawyer with allegations of fraud and breach of fiduciary duty. The plaintiff had to know that a full and spirited defence would be advanced and that it would be expensive. In my view a fair and reasonable amount on a full indemnity basis to be paid by the plaintiff to Mr. Frost is the amount incurred of $101,271.94. The plaintiff is to pay this amount to Mr. Frost forthwith.

8 Mr. Wilmot seeks costs of $24,634. It is argued on behalf of the plaintiff that as the original statement of claim had been struck by Mesbur J. as against Mr. Wilmot and no reference in the additional paragraphs in the fresh as amended statement of claim was made to Mr. Wilmot, there was no need for Mr. Wilmot to bring his further motion to strike. I do not agree. In the fresh as amended statement of claim, the allegations against Mr. Wilmot were repeated. Mr. Wilmot was required to bring his further motion.

9 The rate charged to Mr. Wilmot by Mr. Postelnik, called to the bar in 1991, of $350 per hour, was modest for Toronto standards. It is no more than he would have been entitled to if the rates suggested by the rules subcommittee on costs were used, rates which I and now the Court of Appeal have said are much too low by today's standards. See *Stetson Oil & Gas Ltd. v. Stifel Nicolaus Canada Inc.*, 2013 ONSC 5213 (Ont. S.C.J. [Commercial List]) and *Inter-Leasing, Inc. v. Ontario (Minister of Revenue)*, 2014 ONCA 683 (Ont. C.A.). The fact that there is little or no difference between partial indemnity rates and the low rate charged by Mr. Postelnik does not make the claim unreasonable. I agree with Justice Corbett who stated in *Mantella v. Mantella*, [2006] O.J. No. 2085 (Ont. S.C.J.):

> In this case, because of the rates at which counsel undertook Ms. Murray's defence, there is little difference between partial indemnity and full recovery costs. The actual fees charged by counsel are not the starting point of a costs analysis. Costs are an indemnity, and thus may not exceed the client's total liability to her solicitor; the client may not gain a windfall as a result of a costs award. However, in fixing partial indemnity costs, the court does not look at the actual fee arrangement between solicitor and client and discount that arrangement to ensure that recovery is "partial". Rather, the court considers the pertinent factors laid down in the rules in fixing the amount of recovery appropriate on a partial indemnity basis. So long as the amount is equal to or less than the actual fees and disbursements charged, then the amount arrived at by reference to the factors listed in the rules will be the amount of the award - whether that represents 50% of actual fees, 75% of actual fees, or even 100% of actual fees. If counsel is prepared to work at rates approximating partial recovery costs, that is counsel's choice. There is no reason why the client's fee recovery ought to be reduced because she has negotiated a favourable rate with counsel, so long as the total of the indemnity does not exceed the fees actually charged.

10 The allegations against Mr. Wilmot contained the same allegations of fraud that were made against all of the defendants. Mr. Wilmot could have claimed costs on a full indemnity basis because of that pleading, in which case the fact that his claim is based on a rate equating to his hourly rate charged would not have been an issue.

11 Mr. Cooper contends that if costs are to be awarded, they should be less than the costs of $2,500 ordered against the plaintiff by Mesbur J. in striking the first statement of claim. Why that should be the case is not apparent. The modest cost order make by Mesbur J. was for the motion to strike, not for the entire action. Counsel for Mr. Wilmot, like all counsel, had work to do before bringing the first motion to strike, and had more work to do after when the improper fresh as amended statement of claim was delivered. Regarding the second motion to strike which the plaintiff faced, in light of the completely improper way in which the claim was amended after the order of Mesbur J., the plaintiff or his

counsel should have recognized that the cost award made by Mesbur J. that was generous to the plaintiff would likely not occur again.

12 In the circumstances, taking into account the factors in rule 57.01 and what the plaintiff could reasonably expect to pay for the action, I fix the cost of Mr. Wilmot at $24,500 inclusive of disbursements and HST, to be paid forthwith by the plaintiff.

13 Millard, Rouse & Rosebrugh LLP seek fees on a partial indemnity scale of $38,322.70 which together with disbursements and HST amounts to $40,323.60.

14 It is contended on behalf of Mr. Bieberstein that no costs should be awarded because after the first statement of claim was delivered, Millard delivered a statement of defence and it is said that it is a condition precedent to a defendant bringing a rule 21 motion to strike that a defendant has not pleaded to the statement of claim. I do not agree in this case. Rule 21 does not expressly state that, and while normally filing a statement of defence would be considered to be a fresh step precluding a motion to strike the statement of claim, in this case there are other circumstances. First, the defendant delivered its statement of defence "without prejudice" to its position regarding the statement of claim. Whether or not the rules provide for such a thing, the first motion by Millard to strike the statement of claim was heard by Mesbur J. and she did not dismiss the motion by Millard on the basis that a statement of defence had been delivered before the motion. Second, since the fresh as amended statement of claim was delivered, no further defence to that pleading was filed by Millard. In these circumstances I see no basis to deny Millard its costs.

15 The allegations against Millard, a firm of chartered accountants, included claims of fraud, civil conspiracy, breach of fiduciary duty and falsifying documents. These allegations went to the heard of Millard's reputation earned over nearly 100 years. While Millard has not requested costs on a higher scale because of these allegations, it could have. The plaintiff had to expect that Millard would vigorously defend this action.

16 Millard points out that companies related to Gabriel Kirchberger and potentially touched by claims made in the action have been clients of Millard for many years and that the volume of documents in the possession of Millard was in excess of 500,000 pages. The defence obviously involved a significant amount of work.

17 The rates charged by the lawyers on Millard's behalf were modest. Mr. Burns called in 1994 charged $395 per hour. Mr. Teal called to the bar in 2004 charged $250 per hour. They claim 75% of those rates. While 60% of rates charged by lawyers is now the norm, see *Stetson* and *Inter-Leasing*, supra, in this case it is reasonable to claim 75% as the rates were modest and the claim involving fraud was made against a professional firm. In my view, a reasonable amount in these circumstances for costs is $40,000 inclusive of disbursements and HST, which the plaintiff is ordered to pay forthwith to Millard.

18 Mr. Rosenstein submits that his clients Martin Kirchberger and Christine Frazer should have their costs of the motion to strike the fresh as amended statement of claim. The consent order provided that it be struck. The order made no mention of costs, either that there be costs or there be no costs. Mr. Rosenstein says that because of the way the order was made and handed up in the form that it was, it was a mistake on his part that it did not provide costs to his clients. Mr. Cooper says that there is no basis to change a consent order.

19 In this case, the fresh as amended statement of claim could not stand and Mr. Cooper had to know that. It was a completely improper attempt at remedying what had previously been struck by Mesbur J. The court order that was signed regarding Martin Kirchberger and Christine Frazer does not speak to costs at all, one way or the other. Mr. Cooper does not state in his submissions that he and Mr. Rosenstein agreed there would be no costs. Mr. Cooper's statement in his brief is that no hint or reference in the order or in any submissions made by anyone in court could lead to an inference that the plaintiff consented to costs. The fact that the plaintiff did not consent to the costs does not mean that an order cannot now be made.

20 I accept Mr. Rosenstein's explanation that it was a slip that led to what happened. There was no reason for Mr. Bieberstein to expect not to pay the costs of the defendants Martin Kirchberger and Christine Frazer. The pleading had no chance of standing, and the plaintiff was facing a strong argument that no further leave should be given to have a third try at it. Mr. Rosenstein on behalf of his clients agreed to the order that a fresh statement of claim could be delivered by the plaintiff, but I cannot find any agreement on his part not to claim costs of the motion to strike.

21 The total fees and disbursements claimed by Mr. Rosenstein on behalf of the Kirchberger defendants are $6,763.05. This is a modest amount and no argument is made against that amount. I assess the costs all inclusive of disbursements and HST at $6,500, to be paid within 30 days.

Order accordingly.

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THE CATALYST CAPITAL GROUP INC. Plaintiff	-and- VIMPELCOM LTD. et al. Defendants	Court File No. CV-16-11595-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

COSTS SUBMISSIONS OF THE DEFENDANTS TENNENBAUM CAPITAL PARTNERS LLC, 64NM HOLDINGS GP LLC, 64NM HOLDINGS LP AND LG CAPITAL INVESTORS LLC

BLAKE, CASSELS & GRAYDON LLP
Barristers & Solicitors
199 Bay Street
Suite 4000, Commerce Court West
Toronto ON M5L 1A9

Michael Barrack LSUC #21941W
Tel: 416-863-5280
michael.barrack@blakes.com

Kiran Patel LSUC #58398H
Tel: 416-863-2205
kiran.patel@blakes.com

Daniel Szirmak LSUC #70163O
Tel: 416-863-2548
Fax: 416-863-2653
daniel.szirmak@blakes.com

Lawyers for the defendants,
Tennenbaum Capital Partners LLC, 64NM Holdings GP LLC, 64NM Holdings LP and LG Capital Investors LLC