Court of Appeal File No: C-65431
Superior Court File No. CV-16-11595-00CL

**COURT OF APPEAL FOR ONTARIO**

B E T W E E N:

**THE CATALYST CAPITAL GROUP INC.**

Plaintiff
(Appellant)

- 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
(Respondents)

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## TABLE OF CONTENTS

**Page No.**

## PART I - JUDGMENT UNDER APPEAL

1. The plaintiff, The Catalyst Capital Group Inc. ("**Catalyst**"), appeals from the judgment of The Honourable Mr. Justice Hainey ("**Justice Hainey**" or the "**Motions Judge**") dated April 18, 2018 (the "**Judgment**"),[1]

(a) dismissing Catalyst's action herein (the "**Current Action**") against all of the defendants on the grounds of issue estoppel, cause of action estoppel and/or abuse of process based on a prior action involving a former employee (the "**Moyse Action**);

(b) striking Catalyst's breach of contract claims against the defendants, Globalive Capital Inc. ("**Globalive**") and UBS Securities Canada Inc. ("**UBS**"), without leave to amend.[2]

2. The Motions Judge erred in his application of the preclusive doctrines of issue estoppel, cause of action estoppel and abuse of process. In doing so, he dismissed the Current Action against all the defendants in circumstances where the causes of action are different from the Moyse Action and the fundamental issues relating to those causes of action have yet to be adjudicated on the merits.

3. The Motions Judge further erred by finding that it was plain and obvious that Catalyst's breach of contract claims against UBS or Globalive could not succeed or, in the alternative, by failing to grant Catalyst leave to amend its statement of claim on the basis that the record bore viable claims that could be pleaded to rectify any deficiency in the pleading.

4. Catalyst requests that its appeal be granted. If required, Catalyst further requests leave to amend its statement of claim to address any perceived deficiency.

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[1] Judgment of Justice Hainey dated April 18, 2018, Appellant's Appeal Book and Compendium ("**ABC**"), Tab 2; Reasons for Decision in *The Catalyst Capital Group Inc. v. VimpelCom Ltd.*, 2018 ONSC 2471 ("**Reasons on the Motion Below**"), ABC Tab 3

[2] In this appeal, the plaintiff has not appealed the costs of the Motion below as the issue of costs has yet to be determined by the Motions Judge. It is anticipated that any appeal of a costs order will be addressed at the hearing of the appeal.

## PART II - OVERVIEW

5. This appeal addresses the appropriate use of the preclusive doctrines of issue estoppel, cause of action estoppel and abuse of process. These preclusive doctrines are exceptions to the general rule that disputes should be determined on their facts. The Motions Judge failed to appreciate that it is only in the clearest of cases where the preclusive doctrines should apply to drive a claimant from the judgment seat. This was not such a case.

6. The appeal concerns two separate actions being the earlier Moyse Action and the Current Action. Both actions relate in part to the acquisition of shares of a telecom company called WIND Mobile Corp. ("**Wind**") owned by VimpelCom Ltd. ("**VimpelCom**") and Globalive Capital Inc. ("**Globalive**"). The causes of action in both actions however are distinct.

7. VimpelCom and Globalive sought to sell their shareholdings in Wind. VimpelCom was assisted by its financial advisor UBS. Catalyst entered an exclusivity agreement (the "**Exclusivity Agreement**") and confidentiality agreement (the "**Confidentiality Agreement**") with VimpelCom (collectively, the "**Agreements**").

8. In breach of the Agreements, Vimpelcom, Globalive and UBS shared confidential information about their negotiations with Catalyst with a group of U.S. Investors who then shared it with the remaining defendants (the "**Consortium**") to submit what they described as a "superior proposal" to VimpelCom at the very same time when Catalyst's deal was to be approved. Notwithstanding that all the terms of a share purchase agreement between Catalyst and VimpelCom (the "**SPA**") were "substantially settled" and "done", new demands were made by VimpelCom that were intended to ensure that Vimpelcom could take advantage of the Consortium's "superior proposal".

9. In the Current Action, Catalyst has sued eleven parties. It has made claims of breach of confidence and breach of contract against Vimpelcom, UBS and Globalive for transmitting the confidential information obtained during negotiations with Catalyst. The gravamen of the Current Action are whether there was a breach of the Agreements, whether confidential information shared with VimpelCom, Globalive and UBS was disclosed to the Consortium, whether the defendants induced or conspired to induce those breaches and, if so, what are the appropriate remedies.

10. In contrast, the Moyse Action involved a former employee of Catalyst, Brandon Moyse. It was alleged that Moyse breached his obligation of confidentiality under his employment agreement by misappropriating and by passing on confidential information of Catalyst to West Face, his new employer (the "**Moyse Information**"). The Moyse Information was alleged to have been used by West Face in the Consortium's bid. At trial of the Moyse Action,[3] Justice Newbould held that Moyse had no confidential information and thus West Face could not have misused any such information. This finding was enough to dispose of the Moyse Action. Catalyst does not take issue with that finding. There is no allegation in the Current Action that the defendants misused any Moyse Information.

11. Despite involving different causes of actions and substantially different parties with different legal obligations, the Motions Judge dismissed the Current Action. The Motions Judge misconstrued the two actions as addressing the same central issue, being "why Catalyst did not

[3] Reasons for Decision in *Catalyst Capital Group Inc. v Moyse*, 2016 ONSC 5271 ("**Reasons on the Moyse Action**"), ABC Tab 4

acquire Wind"[4] and failed to distinguish the foundational facts of Justice Newbould from his collateral fact finding.

12. The issues relating to the breach of the Agreements, the duty of care owed by the defendants and any breach of that duty in the Current Action were neither adjudicated nor decided by Justice Newbould. In failing to address the causes of action in the Current Action, the Motions Judge failed to appreciate that the Current Action could result in remedies which are not predicated on Catalyst's ability to close the Wind transaction.

## PART III - SUMMARY OF FACTS

### A. Background

#### *(i) Catalyst's Negotiations with Vimpelcom*

13. Wind is a Canadian telecommunications provider formerly owned by Vimpelcom and Globalive.[5] In early 2013, VimpelCom decided to sell its shares in Wind.[6] Vimpelcom engaged UBS to advise and assist with the negotiations.[7]

14. In late 2013, Vimpelcom entered into the negotiations for the sale of its Wind shares to Catalyst.[8] On March 22, 2014, Vimpelcom and Catalyst executed a Confidentiality Agreement.[9] The Confidentiality Agreement applied to "Authorised Persons", which included UBS.[10] The Confidentiality Agreement specifically provided that the existence and content of the negotiations between Catalyst and VimpelCom were:[11]

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[4] Reasons on the Motion Below, para. 67, ABC Tab 3 p. 42
[5] Reasons on the Motion Below, para. 13, ABC Tab 3 p. 28
[6] Reasons on the Motion Below, para. 14, ABC Tab 3 p. 29
[7] Reasons on the Motion Below, para. 14, ABC Tab 3 p. 29
[8] Reasons on the Motion Below, para. 15, ABC Tab 3 p. 29
[9] Reasons on the Motion Below, para. 15, ABC Tab 3 p. 29
[10] See the definition of "Authorized Person" in the Confidentiality Agreement, para. 1, ABC Tab 17 p. 39-40
[11] Reasons on the Motion Below, para. 15, ABC Tab 3 p. 29; See also Confidentiality Agreement, para. 1, 3.3, 3.6 and 14, ABC Tab 17 p. 40, 41, and 43-44

> "Each Party agrees that …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." [emphasis added]

15. It was recognized and acknowledged that should the Confidentiality Agreement be breached, that it would cause irreparable damage to the non-breaching party.[12]

16. On May 6, 2014, Catalyst and VimpelCom agreed to a purchase price for Wind of $300 million.[13] Catalyst and Vimpelcom worked to complete a share purchase agreement.[14] As described in paragraphs 22-23 below, Catalyst and VimpelCom also entered into the Exclusivity Agreement, pursuant to which VimpelCom and UBS were prohibited from directly or indirectly soliciting or encouraging any offers, participating in any negotiations or discussions with any other party regarding any alternative transaction, or from furnishing any information to any other party in respect of the Wind transaction.[15] It was acknowledged that a breach of this Agreement would entitle the non-breaching party to equitable relief, without proof of special damages.[16]

### *(ii) The Consortium*

17. Prior to the Exclusivity Agreement, VimpelCom had negotiated the sale of Wind with other entities including Tennenbaum and West Face.[17]

18. West Face submitted four proposals to VimpelCom between April 23 and June 22, 2014.[18] Each of the proposals contained a different deal structure, but all involved VimpelCom

[12] Confidentiality Agreement, para. 11, ABC Tab 17 p 43. See also Confidentiality Agreement, para. 3.4, ABC Tab 17 p 41
[13] Reasons on the Motion Below, para. 16, ABC Tab 3 p. 29
[14] Reasons on the Motion Below, para. 16, ABC Tab 3 p. 29
[15] Exclusivity Agreement, para. 2(b), ABC Tab 21 p 344
[16] Exclusivity Agreement, para. 6(c), ABC Tab 21 p 346
[17] Reasons on the Motion Below, para. 17, ABC Tab 3 p. 29

remaining a minority equity holder in Wind or tying consideration to a future event.[19] VimpelCom rejected the proposals.

19. By the end of June 2014, West Face was not a serious player in the negotiations for Wind.[20] On July 21, West Face joined forces with Tennenbaum and the other Consortium members. As of late July, VimpelCom did not consider the Consortium or its members to be credible bidders for Wind.[21]

20. Despite the terms of the Agreements and the supposed confidentiality of the negotiations between VimpelCom and Catalyst, the Consortium was aware of the content of those negotiations and was kept apprised of their status by VimpelCom, UBS and Globalive.[22] For example, on July 21, 2014, Tennenbaum's principal, Michael Leitner, wrote to West Face's principal, Greg Boland, stating that he "heard [C]atalyst is seeking exclusivity this week". [23] On July 22, Leitner told Boland that "I spoke to Felix [Saratovsky of VimpelCom]…Catalyst may have this in exclusivity by the end of the week".[24] On July 23, Leitner and Boland were advised that "[Jonathan] Herbst [of UBS] called me to say that the company has entered into exclusivity at the reserve price - $150 million".[25]

21. Information regarding Catalyst's exclusivity and reserve price should not have been

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[18] Affidavit of Anthony Griffin, sworn June 4, 2016 ("**Griffin June 4, 2016 Affidavit**"), paras. 36, 38-39, and 54, ABC Tab 28
[19] Griffin June 4, 2016 Affidavit, paras. 36, 38-29, and 54, ABC Tab 28
[20] Griffin June 4, 2016 Affidavit, paras. 124, ABC Tab 28
[21] Examination in Chief of Michael Leitner at the Trial of the Moyse Action on June 9, 2016, p.895:18-p.896:12, ABC 31
[22] Further allegations are made in paras. 51-122 of the Amended Amended Statement of Claim in the Current Action, ABC Tab 6, regarding the disclosure of confidential information by VimpelCom, UBS, Globalive and Anthony Lacaverra (CEO of Wind and principal of Globalive):
[23] Emails between Michael Leitner and Greg Boland dated July 21, 2014, ABC Tab 18. See also, Email between Michael Leitner, Greg Boland and others dated July 21-22, 2014, ABC Tab 19
[24] Email between Michael Leitner, Greg Boland and others dated July 21-22, 2014, ABC Tab 19
[25] Emails between Jonathan Friesel, Michael Leitner, Greg Boland and others dated July 23, 2014, ABC Tab 20

disclosed to members of the Consortium by VimpelCom and UBS. The full extent of the information disclosed by Vimpelcom or UBS is currently unknown. Neither VimpelCom, UBS nor any of the key participants (e.g. Anthony Lacavera, the CEO of Wind and the principal of Globalive) have been examined for discovery on this issue.

***(iii) VimpelCom and Catalyst Agree to Negotiate Exclusively***

22. On July 23, 2014, VimpelCom and Catalyst entered into the Exclusivity Agreement whereby VimpelCom and its representatives would only negotiate exclusively with Catalyst until July 30.[26]

23. The Exclusivity Agreement specifically prohibited VimpelCom, UBS and Wind from directly or indirectly soliciting or encouraging any offers from, negotiating or discussing any alternative transaction with, or furnishing any information to any other party in respect of a transaction with Wind.[27] The terms of the Exclusivity Agreement itself were to be kept confidential.[28] It was recognized and acknowledged that, should the Exclusivity Agreement be breached, that it would cause irreparable damage and Catalyst would be entitled to "the remedy of injunction or …other equitable relief", without proof of special damages.[29]

24. By July 30, 2014, VimpelCom and Catalyst were close to finalizing the SPA.[30] They agreed to extend the Exclusivity Agreement to August 5.[31] By August 3, VimpelCom confirmed that, other than the schedules, the SPA was "substantially completed" and only approval from

[26] Reasons on the Motion Below, para. 19, ABC Tab 3 p. 30
[27] Exclusivity Agreement, para. 2(b), ABC Tab 21 p. 344
[28] Exclusivity Agreement, para. 4, ABC Tab 21 p. 345
[29] Exclusivity Agreement, para. 6(c), ABC Tab 21 p. 346
[30] Reasons on the Motion Below, para. 20, ABC Tab 3 p. 30
[31] Reasons on the Motion Below, para. 20, ABC Tab 3 p. 30

VimpelCom's Board of Directors was needed.[32] By August 7, the parties had signed off on the terms of the schedules, and a 300 plus page SPA was ready to be signed, subject only to formal approval by VimpelCom's Board.[33]

25. As to the regulatory conditions, because the SPA involved a change of control at Wind, the SPA agreed to by Vimpelcom and Catalyst was conditional on government approval.[34] However, since the change of control was to a Canadian entity Catalyst, this condition was not considered a serious risk. Indeed, Vimpelcom "received positive feedback from the government" about Catalyst's acquisition of Wind and agreed that the government would consider "Catalyst to be a preferred solution to the present situation". [35]

26. Aside from these standard conditions, Catalyst had sought concessions from the government to be able to sell its shares to a wireless incumbent (e.g. Rogers) if it could not operate Wind profitably.[36] This however was not a condition of the SPA and was not a predicate for closing the Wind transaction.[37] The agreed upon SPA explicitly stated that "before closing Catalyst could not discuss with any Governmental Authority the sale or transfer of Business, or any of its assets, …to an Incumbent".[38] Instead, the SPA "did permit Catalyst after closing to pursue regulatory concessions from Industry Canada *that WIND had been seeking*".[39]

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[32] Email from Felix Saratovsky to Gabriel De Alba dated August 1, 2014, ABC Tab 23
[33] Affidavit of Gabriel De Alba, sworn May 27, 2016, para. 149, ABC Tab 27
[34] Share Purchase Agreement, para. 7.3, ABC Tab 23 p. 363
[35] Email from Felix Saratovsky to Jon Levin dated August 15, 2014 ABC Tab 26
[36] It was the intention of Catalyst to build a telecom business to compete with Rogers, Bell and Telus and it would do so by combining Wind with Mobilicity. However a concession was sought to sell the business to an incumbent in the event Catalyst was not successful.
[37] Share Purchase Agreement, ABC Tab 23. See also Cross-Examination of Gabriel De Alba at the Trial of the Moyse Action, June 7, 2016, pp. 278:1-281:1, ABC Tab 29 and Cross-Examination of Newton Glassman at the Trial of the Moyse Action, June 7, 2016, p.390:1-19 and pp.504:19-507:19, ABC Tab 29
[38] Reasons on the Moyse Action, para. 131 footnote 14, ABC Tab 4 p. 96-97
[39] Reasons on the Moyse Action, para. 131 footnote 14, ABC Tab 4 p. 96-97

27. On August 8, 2014, the Exclusivity Agreement was extended to August 18.[40] On August 11, Vimpelcom and Catalyst held a joint conference call with Industry Canada to advise that their deal "was done".[41]

### *(iv) The Consortium Submits a "Superior Proposal"*

28. It is alleged in the Current Action that the defendants either breached or induced the breach of the Agreements. For example, the Consortium knew by August 1, when the SPA with Catalyst was going to be submitted to the Vimpelcom Board.[42] The Consortium also received comments "over the phone" from VimpelCom about the Consortium's SPA.[43] The Consortium also received some "feedback on price levels as well".[44] How and why the Consortium knew when the SPA would be before the VimpelCom Board and what the reference to "price levels" meant, came up incidentally in the Moyse Action. As Justice Newbould remarked, information about when the SPA was going to the board for approval "likely came ... from an advisor to Tennenbaum who may have obtained it from UBS".[45] What the "price levels" was in reference to remained unclear to Justice Newbould.[46] What is clear is that the information regarding the Catalyst SPA was supposed to be confidential and any dealings between VimpelCom and the Consortium was prohibited under the Agreements.

29. To pre-empt VimpelCom's approval of the SPA, the Consortium sent VimpelCom, its senior executives and UBS, a "superior proposal" on August 7 which stated:[47]

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[40] Reasons on the Motion Below, para. 23, ABC Tab 3 p. 30
[41] Reasons on the Motion Below, para. 24, ABC Tab 3 p. 30
[42] Emails between Peter Fraser, Michael Leitner and others dated August 1, 2014, ABC Tab 22
[43] Emails between Peter Fraser, Michael Leitner and others dated August 1, 2014, ABC Tab 22
[44] Emails between Peter Fraser, Michael Leitner and others dated August 1, 2014, ABC Tab 22
[45] Reasons on the Moyse Action, para. 111, ABC Tab 4 p. 91
[46] Reasons on the Moyse Action, para. 111, ABC Tab 4 p. 91
[47] Reasons on the Motion Below, para. 21, ABC Tab 3 p. 30

(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…"

30. The Consortium's proposal was deliberately provided during the period of the Exclusivity Agreement so that – as described by Leitner of Tennenbaum – the Vimpelcom Board had "2 birds in hand" when it came to approve the Catalyst SPA.[48] Providing the proposal before the Board approved the Catalyst SPA was, in the words of Leitner, the Consortium's "only play".[49] This was exactly what was prohibited under the Agreements. Of course, the entirety of the reasons for and the extent of the breaches of the Agreements are not fully known as none of the key participants have been subject to discovery.

### *(v) VimpelCom Suddenly Demands a Break Fee*

31. On August 15, 2015, after having received the Consortium's bid, VimpelCom renewed two prior demands of Catalyst that had been rejected by Catalyst and abandoned by Vimpelcom early on in the negotiations: (1) it insisted on shortening the regulatory approval period from three months (with an automatic one-month extension) to two months, and (2) it demanded a $5-20 million break fee if such regulatory approval was not received within the two months.[50] Concurrent with these demands, UBS told the Consortium "don't burn the file yet".[51]

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[48] Emails between Michael Leitner, Peter Fraser, Anthony Griffin, Dea dated August 6/7, 2014, ABC Tab 24
[49] Emails between Michael Leitner, Peter Fraser, Anthony Griffin, Dea dated August 6/7, 2014, ABC Tab 24
[50] Reasons on the Motion Below, para. 25, ABC Tab 3 p. 30. See also Emails between Leitner, Boland and others from August 9-15, 2014, ABC Tab 25
[51] Emails between Michael Leitner, Greg Boland and others dated August 9-15, ABC Tab 25

32. These demands were made over 10 days after VimpelCom told Catalyst that the SPA was "substantially settled"[52] and 4 days after the parties told Industry Canada that the deal was "done".[53] Again, neither VimpelCom nor UBS has been discovered about these demands.

33. The exclusivity period with Catalyst expired on August 18, 2014.[54] In response to VimpelCom's demands, Catalyst was agreeable to the break fee if government approval was not obtained by an "Outside Date" of October 31, 2014 with an extension of two one-month periods provided there was no reason to believe that approval would not be obtained.[55] VimpelCom was advised that "on an absolute best case basis, three months would be the bare minimum" to obtain government approval.[56] VimpelCom however was "fixated on 2 months" without any extensions.[57] By fixating on 2 months, VimpelCom knew that the deal with Catalyst would inevitably "break".

34. On August 27, 2014, VimpelCom and the Consortium entered into an exclusivity agreement.[58] On September 16, the Consortium and VimpelCom concluded a deal to purchase Wind for the same price as Catalyst had negotiated ($300 million) through an entity called Mid-Bowline Group Corp.[59]

## B. The Cause of Action Advanced in the Moyse Action

35. In the Moyse Action, Catalyst claimed that Moyse breached the confidentiality obligations in his employment contract by providing to West Face the Moyse Information, which

[52] Reasons on the Motion Below, para. 20, ABC Tab 3 p. 30
[53] Reasons on the Motion Below, para. 24, ABC Tab 3 p. 30
[54] Reasons on the Moyse Action, para. 30, ABC Tab 4 p. 31
[55] Email from Felix Saratovsky to Jon Levin dated August 15, 2014, ABC Tab 26
[56] Email from Felix Saratovsky to Jon Levin dated August 15, 2014, ABC Tab 26
[57] Email from Felix Saratovsky to Jon Levin dated August 15, 2014, ABC Tab 26
[58] Griffin June 4, 2016 Affidavit, paras. 124-126, ABC Tab 28
[59] Reasons on the Motion Below, para. 27, ABC Tab 3 p. 30-31

it was alleged addressed Catalyst's strategy regarding Wind.[60] Moyse, a former analyst at Catalyst, resigned on May 24, 2014 to join West Face.[61]

36. As Justice Newbould and the Court of Appeal correctly stated, the central issue in the Moyse Action was the alleged misuse of "confidential information [that] came from…Moyse".[62] The specific Moyse Information alleged to have been passed by Moyse to West Face included the following:[63]

> "(a) Catalyst Weekly Reports — this document contains a summary of all existing investments and contemplated investment opportunities;
>
> (b) Quarterly letters reporting on results of Catalyst's activities;
>
> (c) Internal research reports;
>
> (d) Internal presentations and supporting spreadsheets; and
>
> (e) Internal discussions regarding the operations of companies in which Catalyst has made investments."

## C. The Causes of Action Advanced in the Current Action

37. The causes of action advanced by Catalyst in the Current Action was described by Justice Hainey in the motion below as follows:[64]

> "(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."

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[60] Reasons on the Moyse Action, para. 52, ABC Tab 4 p. 73
[61] Reasons on the Motion Below, para. 30, ABC Tab 3 p. 31
[62] Reasons for Decision in *The Catalyst Capital Group Inc. v. Moyse*, 2018 ONCA 283 ("**Reasons of the Court of Appeal in the Moyse Action**"), para. 2, ABC Tab 5 p. 109; Reasons on the Moyse Action, para. 14, ABC Tab 4 p. 63
[63] Amended Amended Amended Statement of Claim of The Catalyst Capital Group Inc. in the Moyse Action at para. 25, ABC Tab 14
[64] Reasons on the Motion Below, para. 11, ABC Tab 3 p. 28

38. At issue in the Current Action, are the breaches of contract and confidence alleged against VimpelCom, Globalive and UBS contrary to the Agreements and the misuse of confidential information by the Consortium, Globalive and UBS to conspire and induce VimpelCom to breach the Agreements.[21] No allegations are made against Moyse.

39. The confidential information pleaded in the Current Action includes the following:[65]

(a) The negotiation to purchase VimpelCom's equity and debt interests in Wind:

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

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

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

(e) The term of the Exclusivity Agreement.

40. This confidential information is distinct from the Moyse Information. The Current Action also involves different duties of care derived from different contractual and other legal relationships which are alleged to have been breached and which were not adjudicated in the Moyse Action. Indeed, West Face acknowledged that allegations of breaches of the Agreement were not relevant to the Moyse Action and were not properly before Justice Newbould.[66]

## D. The Decision in the Moyse Action

41. The claim to be decided in the Moyse Action was whether Moyse breached his duties as a former employee of Catalyst in disclosing confidential information to West Face. As Justice

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[21] Amended Amended Statement of Claim of The Catalyst Capital Group Inc. in the Current Action, para. 72, ABC Tab 6

[65] Amended Amended Statement of Claim of The Catalyst Capital Group Inc. in the Current Action, para. 69, ABC Tab 6

[66] West Face Closing Submissions at the Trial of the Moyse Action, para. 225, ABC Tab 32

Newbould said, this was the "central claim".[67] He correctly described elements of the claim as:[68]

> "[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. …" [emphasis added]

42. Justice Newbould dismissed this claim. He found that the first element of the cause of action was not made out. Moyse did not possess confidential information and thus could not disclose any to West Face. Although not necessary, Justice Newbould also found that West Face did not make use of the Moyse Information:

> "…, 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.
>
> **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, I would not find that West Face made use of it." [emphasis added]

43. Notwithstanding that he concluded there was no breach of confidence by Moyse, Justice Newbould proceeded to make a number of observations and *obiter* findings that were not fundamental in disposing of the Moyse Action:

(a) **"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".**[69] These comments were not necessary to decide the

[67] Reasons on the Moyse Action, para. 14, ABC Tab 4 p. 63
[68] Reasons on the Moyse Action, para. 68 and 69, ABC Tab 4 p. 77-78
[69] Reasons on the Moyse Action, para. 127, ABC Tab 4 p. 95

Moyse Action. His comment that there was "no evidence" about these matters reflects that no one from the Vimpelcom Board testified in the Moyse Action and Vimpelcom has never produced its documents on this issue which is central to the Current Action;

(b) **"It was Catalyst's refusal to agree to a break fee requested by VimpelCom that caused Catalyst to end negotiations with VimpelCom".**[70] Justice Newbould made this remark without deciding why VimpelCom made its demand for a break fee well after the parties had agreed upon the terms of the SPA and announced to Industry Canada that the deal was done. Whether VimpelCom was induced to demand a break fee is central to the Current Action but not to the Moyse Action;

(c) **"There was no chance that Catalyst could have successfully concluded a deal with VimpelCom as VimpelCom refused to agree to a deal conditional on Catalyst receiving regulatory concessions from Industry Canada that would permit the sale of wireless spectrum to an incumbent in five years".**[71] Once again, Justice Newbould left unanswered the question of whether Catalyst's inability to conclude a deal was a product of the breaches of contract and other allegations advanced in the Current Action. Justice Newbould also stated in his reasons that the final draft of the SPA stipulated that Catalyst would not seek regulatory concessions before closing and went on to express doubt that Catalyst would not have closed the transaction without such concessions. These inconsistent or unresolved findings were not central to the Moyse Action.[72]

44. Justice Newbould also made other *obiter* comments not central to the Moyse Action that support Catalyst's breach of confidence and breach of contract claims in the Current Action. On the issue of whether UBS or VimpelCom passed confidential information to the Consortium, Justice Newbould remarked, without deciding, that Tennenbaum "may have obtained" information on Catalyst's transaction from UBS or "some other source" [emphasis added]:[73]

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[70] Reasons on the Moyse Action, para. 129, ABC Tab 4 p. 96
[71] Reasons on the Moyse Action, para. 131, ABC Tab 4 p. 96-97
[72] Reasons on the Moyse Action, para. 131 at footnote 14, ABC Tab 4 p. 96-97
[73] Reasons on the Moyse Action, para. 111, ABC Tab 4 p. 91

> "In an email of August 1, 2014 to the consortium, Mr. Leitner [of Tennenbaum] 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…"

## E. The Reasons of the Court of Appeal in the Moyse Action

45. The Court of Appeal dismissed Catalyst's appeals of Justice Newbould's decision.[74] In doing so, the Court of Appeal focussed on the central issue in the Moyse Action: the claim of misuse of Catalyst confidential information allegedly passed by Moyse to West Face. As the Court of Appeal put it [emphasis added]:[75]

> "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."

46. Paragraphs 2, 4 and 14 of the reasons of the Court of Appeal emphasize that the issues in the appeal before it related to allegations against Moyse. In the result, in upholding Justice Newbould's decision, the Court of Appeal stated that:[76]

> "…The trial judge accepted the explanations offered by Mr. Moyse for his conduct outlined above…. 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." [emphasis added]

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[74] Reasons of the Court of Appeal in the Moyse Action, ABC Tab 5
[75] Reasons of the Court of Appeal in the Moyse Action, para. 8, ABC Tab 5 p. 111
[76] Reasons of the Court of Appeal in the Moyse Action, para. 16, ABC Tab 5 p. 114

## F. The Reasons of the Motions Judge

47. Although the central issue in the Moyse Action was whether Moyse disclosed the Moyse Information to West Face, the Motions Judge interpreted Justice Newbould's decision as answering the question "why Catalyst did not acquire Wind" as the central issue in this case.[77] In doing so, he held that the Current Action and the Moyse Action are based on the same facts and do not involve different causes of action.[78]

48. The Motions Judge held that the findings made by Justice Newbould were "essential and fundamental" to the determination of the Moyse Action. He did so despite the fact that, as acknowledged by Justice Newbould, the only finding necessary to dispose of the central issue in the Moyse Action was that Moyse obtained no confidential Moyse Information that he could have passed on to West Face.[79]

49. In dismissing the Current Action, the Motions Judge did not decide whether Vimpelcom and UBS breached the Agreements; whether confidential information was passed on by Vimpelcom or UBS to the Consortium and used to induce Vimpelcom to accept the Consortium's bid; or what remedies would be available against Vimpelcom, UBS and the other defendants for such wrongful conduct. These issues which are central to the Current Action have not been decided by any court.

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[77] Reasons on the Moyse Action, para 65 and 86, ABC Tab 4 p. 76-77 and 82
[78] Reasons on the Motion Below, para 65 and 67, 77, 81 and 84, ABC Tab 3 p. 42, 45, 46, and 48
[79] Reasons on the Motion Below, para. 59, ABC Tab 3 p. 40

## PART IV - ISSUES AND LAW

50. At issue in this appeal are the following questions:

(a) Did the Motions Judge err in dismissing the Current Action on the grounds of issue estoppel, cause of action estoppel and abuse of process?

(b) Did the Motions Judge err in striking, without leave to amend, Catalyst's claim of breach of contract against Globalive and UBS on the ground that it discloses no reasonable cause of action?

51. The Motions Judge's application of incorrect principles relating to these preclusive doctrines and the motion to strike raise questions of law and are to be reviewed on a standard of correctness.[80]

### A. Catalyst's Current Action Should Not be Precluded by the Doctrines of Estoppel

#### *(i) Separate and Distinct Causes of Action – No Estoppel*

52. Both issue estoppel and cause of action estoppel are exceptions to the general principle that disputes must be tried on their merits. While both doctrines involve slightly different tests, both require that their application be stringently construed and only be applied if it can truly be said that the cause of action or issue has been decided and is fundamental to the earlier decision.

53. In *Danyluk v. Ainsworth Technologies Inc.*, Justice Binnie held that the issue must be fundamental to the decision in the former action. He held that it is not sufficient for the purposes of issue estoppel merely that the fact was or could have been put in issue [emphasis added]:[81]

> "[The] description of the issues subject to estoppel ("[a]ny right, question or fact distinctly put in issue and directly determined") is more stringent than the formulation in some of the older cases for cause of action estoppel (e.g., "all matters which were, or might properly have been, brought into litigation", … The question out of which the

[80] *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 8 and 101, Appellant's Book of Authorities ("**ABOA**") Tab 14
[81] *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at para. 24, ABOA Tab 10

> estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceeding. In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or of mixed fact and law ("the questions") that were necessarily (even if not explicitly) determined in the earlier proceedings."

54. If an issue or question arose collaterally or incidentally in the earlier proceeding, then there can be no estoppel. As Dickson J. (as he then was) stated in *Angle v. MNR*:[82]

> "Is the question to be decided in these proceedings ... the same as was contested in the earlier proceedings? If it is not, there is no estoppel. It will not suffice if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment." [emphasis added]

55. Due to its effect in depriving a litigant of its day in court, distinguishing an issue or finding that is fundamental from one that is collateral or incidental must be analyzed and applied with "unrelenting severity". As described by the Alberta Court of Appeal in *R. v. Duhamel*:

> "[19] The strictness with which this concept is applied is clear from the phrase "unrelenting severity". This comes from the conceptual origin of issue estoppel. Only those matters which were necessary to the decision should and do bind the parties. The finality and sanctity of a prior decision is not challenged when collateral matters are re-litigated. Neither is the policy of preventing multiplicity offended when collateral matters are re-litigated for a different substantive purpose."[83] [emphasis added]

56. The analysis of either type of estoppel commences by correctly determining the central issue in the Current Action and the Moyse Action including the legal relationship between the parties, the duties derived from that relationship and whether those duties were breached. Where there is a distinct legal relationship with distinct legal duties, the issues are not the same and neither estoppel arise.

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[82] *Angle v. MNR*, [1975] 2 S.C.R. 248 at para. 3, ABOA Tab 3
[83] *R. v. Duhamel*, 1981 ABCA 295 at para. 19, ABOA Tab 24, appeal dismissed, [1984] 2 SCR 555, ABOA Tab 25

57. In *Canam Enterprises Inc. v Coles*,[84] Goudge, J.A. (in dissent, upheld by the Supreme Court of Canada) addressed the issue of separate proceedings dealing with the same underlying facts or transaction but where the actions addressed different duties by different parties. In that case, a bank had successfully defended a misrepresentation claim relating to a mortgage. In a separate action, the plaintiff's lawyer and realtor were sued and the bank was added as a subsequent party. Goudge, J.A. held that issue estoppel did not apply. He stated that the determination of issue estoppel requires a "careful analysis of both the factual context and the legal question addressed in the earlier proceeding" which reflects the "fastidious approach" that the courts have taken to the "same question" test.[85] Goudge, J.A. held that the duties in question were distinct from the action under consideration:[86]

> "The issue in the third party claim is whether the Realtors owed a duty of care to Canam which was breached by the misrepresentation concerning zoning. This duty is separate from and not derived from the contractual relationship between Canam and National Trust. It depends on the nature of the direct relationship between Canam and the Realtors. This duty was not part of the proceedings before Day J.,…." [emphasis added]

58. The Motions Judge failed to address the legal relationships of the parties in the Current Action in determining whether the doctrines of estoppel apply. The legal relationship between Catalyst and VimpelCom, UBS and Globalive were derived from the Agreements and the receipt of confidential information. The Consortium's legal relationship arose as a result of their proximity to the Agreements and their alleged conduct in inducing the breach of the Agreements. The causes of action relate to matters different from the Moyse Action.[87]

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[84] *Canam Enterprises Inc. v. Coles*, 2000 CarswellOnt 4739 (C.A.) ABOA Tab 8 rev'd 2002 SCC 63 ABOA Tab 9
[85] *Canam Enterprises Inc. v. Coles*, 2000 CarswellOnt 4739 (C.A.) ABOA Tab 8 at para. 47 aff'd on this point 2002 SCC 63 ABOA Tab 9
[86] *Canam Enterprises Inc. v. Coles*, 2000 CarswellOnt 4739 (C.A.) ABOA Tab 8 at para. 48 aff'd on this point 2002 SCC 63 ABOA Tab 9
[87] Reasons on the Motion Below, para. 65, ABC Tab 3 p. 42

59. The fundamental issue in the Moyse Action was whether Moyse breached his duty of confidence owed pursuant to his employment agreement by disclosing confidential information to West Face. Moyse's relationship with Catalyst, as an employee, was contractual and West Face's duty arose as it put itself within the proximity of that contract as Moyse's new employer. These issues are separate and distinct from the central issues in the Current Action.

60. The causes of action in the Current Action were not resolved in the Moyse Action. Justice Newbould made no findings in the Moyse Action (nor could he without the necessary evidentiary record) with respect to whether Vimpelcom breached the Agreements, whether the Consortium conspired to induce Vimpelcom to breach its Agreements with Catalyst, or whether the imposition of a break fee would have occurred but for that inducement. Justice Newbould's decision in the Moyse Action cannot found an estoppel of the Current Action.

61. Similarly, Justice Newbold's decision cannot found a basis for the Motions Judge's decision that the defendants in the Current Action, Globalive and the "US Investors" (Tannenbaum, LG, and 64 NM), are privies of West Face.

62. Parties can only be privies to one another for the purposes of estoppel if the same question is involved in both proceedings. As Goudge, J.A. stated in *Canam*, if the causes of action are distinct, the parties cannot be privies: [88]

> "Given this finding, it is unnecessary to deal with "the same parties" requirement of issue estoppel. Indeed where, as here, the question is whether they are "privies", this inquiry may be impossible to answer if the two proceedings do not raise the same question. The measure of whether the parties are the privies of those in the earlier proceeding would seem to require that the same question be involved in both proceedings, that is, that the subject matter of both disputes be the same." [emphasis added]

[88] *Canam Enterprises Inc. v. Coles*, 2000 CarswellOnt 4739 (C.A.) ABOA Tab 8 at para. 50 aff'd on this point 2002 SCC 63, ABOA Tab 9

### *(ii) Overlap of Facts – No Estoppel*

63. Facts may overlap between one action and another. This does not give rise to an estoppel unless the findings of fact are "fundamental to the earlier decision". However, facts are only fundamental to a decision if the decision cannot stand without those findings of fact. As stated Dickson in *Angle v. MNR*:[89]

> The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceedings: …. the enquiry which must be made:
>
> …whether the determination on which it is sought to found the estoppel is "so fundamental" to the substantive decision that the latter *cannot stand* without the former. Nothing less than this will do. [emphasis added]

64. The mere possibility of overlapping facts between the Current Action and the Moyse Action is not a basis to dismiss the Current Action. Courts have repeatedly confirmed that cause of action estoppel does not preclude a plaintiff from bringing a claim for a separate cause of action with common facts. Bringing such a claim cannot be characterized as "lying in the weeds". The decision to dismiss the Current Action on this basis is an error in law.

65. In *Hall v. Hall,* the Alberta Court of Appeal held that a distinct cause of action, even where some facts may be common with a previously litigated cause of action, can be tried:[90]

> "The doctrine has not so wide an application as the broadness of the language might lead one to infer. It is, I think, clear that if there are facts which are common to several causes of action, an inquiry into these facts in one cause of action does not prevent the examination of the same facts where another cause of action is set up, provided that this cause of action is separate and distinct. [emphasis added]

66. In *McIntosh v. Parent*, Middleton J.A. for the Court of Appeal stated that a party ought not to be estopped where separate causes of action arise out of the same set of facts:[91]

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[89] *Angle v. MNR*, [1975] 2 S.C.R. 248 at para. 3, ABOA Tab 3; *Kaymar Rehabilitation Inc. v. Champlain Community Care Access Centre*, 2010 ONSC 2248 at para. 206, ABOA Tab 18

[90] *Hall v. Hall*, [1958] A.J. No. 60 (C.A.) at para. 33, ABOA Tab 13

> "Where, however, the rights are distinct, though arising out of the same state of facts, separate actions may be brought, e.g., an action to rescind a subscription for stock on the ground of misrepresentation and an action for damages against the promoters for fraud and deceit: ….
>
> Upon this principle, a recovery of damages in certain cases where the damage is of the essence of the action, and *damnum* as well as *injuria* must be proved, will not bar a recovery where there is a new damnum. …" [emphasis added]

67. In this case, the Current Action ought not to have been dismissed on the basis that there are facts common in the Moyse Action.

### *(iii) Collateral Findings – No Estoppel*

68. In dismissing the Current Action, the Motions Judge focused much of his decision on why Catalyst did not acquire Wind. In doing so, the Motions Judge relied on alleged findings that were neither central to the Moyse Action nor determinative of the causes of action in the Current Action. In particular, the Motions Judge relied on the following:

(a) VimpelCom requested a break fee during the negotiations with Catalyst and this caused Catalyst to cease negotiations; and

(b) Catalyst would not have closed the transaction with VimpelCom because it could not obtain the regulatory concessions from the federal government that it wanted and thus would not have suffered any damages

69. Neither of these alleged findings are central to the issue of whether Moyse passed on confidential Moyse Information to West Face. These findings are not fundamental to the Moyse Action such that, without them, Justice Newbould's decision cannot stand. They are collateral and cannot found an estoppel in the Current Action. Moreover, these collateral findings do not address the causes of action at issue in the Current Action.

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[91] *McIntosh v. Parent*, [1924] 4 D.L.R. 420 (Ont. C.A.), at p. 4 (WL), ABOA Tab 21

70. Similarly, these collateral findings cannot be relied upon to infer that Catalyst is not entitled to any remedy to its claims in the Current Action. The breaches of the Agreements, the breaches of confidence and the inducement of the breach which were not considered by the Motions Judge may give rise to a "wide variety of remedies available" at law.[92]

71. The Supreme Court in *Cadbury Schweppes* held that the "foundation of action for breach of confidence does not rest solely on one of the traditional jurisdictional bases for action of contract, equity or property".[93] In such a case, the courts possess "jurisdiction… to grant a remedy dictated by the facts of the case rather than strict jurisdictional or doctrinal considerations".[94] This jurisdiction "provides the Court with considerable flexibility in fashioning a remedy" that responds to the unique facts of a given case, while doing justice between the parties.[95]

72. The House of Lords in *Attorney General v. Blake,* held that an accounting for profits can be awarded as a remedy for breach of contract where damages are not a sufficient remedy:[96]

> "No fixed rules can be prescribed. The court will have regard to all the circumstances, including the subject matter of the contract, the purpose of the contractual provision which has been breached, the circumstances in which the breach occurred, the consequences of the breach and the circumstances in which relief is being sought. A useful general guide, although not exhaustive, is whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity and, hence, in depriving him of his profit." [emphasis added]

73. The extent of remedies in areas involving breaches of confidence are yet to be fully resolved by the courts.[97] The damages may include damages which are not directly reflective of

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[92] *Air Canada v. WestJet Airlines* Ltd., [2005] OJ No. 5512 (S.C.J.) at para 24, ABOA Tab 2
[93] *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 SCR 142 at para. 20, ABOA Tab 7. See also, *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 SCR 574, ABOA Tab 19
[94] *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 SCR 142 at para. 24, ABOA Tab 7
[95] *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 SCR 142 at para. 22, ABOA Tab 7
[96] *Attorney General v. Blake* [2000] 4 All ER 385 (HL) at p. 9 (WL) [see the decision of Lord Nicholls of Birkenhead for the majority] ABOA Tab 4

the plaintiff's financial loss, such as disgorgement of profits or negotiation damages for the loss of the value of the Agreements. Indeed, in this case, the parties to the very Agreements acknowledged that a breach will result in irreparable harm and that equitable remedies, such as disgorgement would be available.

74. It was an error for the Motions Judge to foreclose on the nature and scope of the remedy available to Catalyst with reference only to (*obiter*) findings regarding compensatory damage alone.[98]

## B. Catalyst's Current Action Is Not An Abuse of Process

75. In *Toronto (City) v. C.U.P.E.*, the Supreme Court set out the high standard required to establish an abuse of process. The proceeding must be "oppressive and vexatious" and "violate the fundamental principles of justice underlying the community's sense of fair play and decency".[99] The moving party has a heavy burden to have an action dismissed as an abuse of process.

76. Long-standing authority of the Court of Appeal has described the principle as follows:

> "The concept of abuse of process protects the public interest in the integrity and fairness of the judicial system. It does so by preventing the employment of judicial proceedings for purposes which the law regards as improper. These improper purposes include harassment and oppression of other parties by multifarious proceedings which are brought for purposes other than the assertion or defence of a litigant's legitimate rights…."[100] [emphasis added]

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[97] *Strother v. 3464920 Canada Inc.*, [2007] 2 SCR 177 at para. 156, ABOA Tab 27

[98] *Experience Hendrix LLC v. PPX Enterprises Inc.*, [2003] EWCA Civ 323 (Eng. C.A.), ABOA Tab 11 cited in *Smith v. Landstar Properties Inc.* 2011 BCCA 44 at para. 39-44, ABOA Tab 26. See also the discussion in *Huttonville Acres Ltd. v. Archer*, 2009 CarswellOnt 5986 (S.C.J.) at paras. 13-17, ABOA Tab 16 aff'd 2011 ONCA 115, ABOA Tab 17

[99] *Toronto (City) v. C. U.P.E. Local 79*, 2003 SCC 63, at para. 35, ABOA Tab 28

[100] *Foy v. Foy* (No. 2), (1979) 26 O.R. (2d) 2002 (C.A.), at para. 59 (dissenting opinion, but not on this point), ABOA Tab 12

77. The legal principal is intended to prevent the raising of issues as it relates to the same cause of action previously determined and not a separate cause of action. This was addressed by the English Court of Appeal in *Hall v Hall* [emphasis added]:[101]

> "32 …: "The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."
>
> 33 It was apparently the wider principle of *res judicata* that was applied in the present case. This doctrine has not so wide an application as the broadness of the language might lead one to infer. It is limited to such matters as arise within one cause of action. It is, I think, clear that if there are facts which are common to several causes of action, an inquiry into these facts in one cause of action does not prevent an examination of the same facts where another cause of action is set up, provided that this cause of action is separate and distinct."

78. One way of assessing whether an action is an abuse of process is to examine the action from the perspective of the party required to defend the claim. If the action does not force the party to relitigate a claim then it is not an abuse of process. As Goudge J.A. stated in *Canam*:

> "Equally this issue can be examined from the perspective of the party required to defend the claim. Here, it cannot be said that the third party claim forces the Realtors to relitigate a claim which [they have] already successfully resisted. The Realtors have not previously been required to defend this or any other claim by either Canam or Coles."[102] [emphasis added]

79. In this case, the Motions Judge held that Catalyst should have raised the causes of action claimed in the Current Action in the Moyse Action. In doing say, he described both actions "as "why Catalyst did not acquire Wind".[103] This is an erroneous premise.

80. The Current Action addresses different causes of action arising out of different legal relationships, different conduct, and different confidential information, against substantially different parties. It cannot be said that the defendants in the Current Action are being forced to

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[101] *Hall v Hall*, [1958] A.J. No. 60 (C.A.) at para. 32, ABOA Tab 13
[102] *Canam Enterprises Inc. v Coles*, 2000 CarswellOnt 4739 (C.A.) ABOA Tab 8 at para. 59 aff'd 2002 SCC 63, ABOA Tab 9
[103] Reasons on the Motion Below, para. 65, ABC Tab 3 p. 42

re-litigate these claims. The Current Action is not a re-litigation of the causes of action advanced in the Moyse Action.

81. The cause of action that was litigated by Moyse and West Face and determined in the Moyse Action was whether Moyse passed on confidential Moyse Information to West Face. Justice Newbould made no determination on the causes of action claimed in the Current Action. Indeed, he left open the possibility that the Consortium's proposal was based on information that came from UBS or "some other source".[104]

82. It is not oppressive, vexatious or a "scandal to the administration of justice" to have these causes of action in the Current Action determined by the Court. The prosecution of the Current Action is not manifestly unfair to the defendants and not abusive. There has yet to be any resolution of these issues.

### C. The Court Should Not exercise Residual Discretion to Strike

83. In the alternative, if the Court concludes that any of the preclusive doctrines applies, Catalyst submits that the Court should have exercised its discretion in favour of not staying the Current Action. The Motions Judge could not identify "any manifest injustice in applying the doctrine in this case"[105] but provided no analysis. He said that Catalyst had its "bite at the cherry".[106] In saying so, he failed to recognise that the Moyse Action did not address the causes of action in the Current Action.

84. To date, no Court has heard from Vimpelcom or UBS regarding the circumstances surrounding the sale of its shares of Wind. No documentary or oral discovery of VimpelCom or

[104] Reasons on the Moyse Action, para. 111, ABC Tab 4 p. 91
[105] Reasons on the Motion Below, para. 75, ABC Tab 3 p. 44
[106] Reasons on the Motion Below, para. 75, ABC Tab 3 p. 44

UBS have taken place. No explanation has been given by Vimpelcom about why it renewed its demand for a break fee if regulatory approval could not be obtained within 60 days after having already settled the terms and announcing that a deal with Catalyst was done. There has been no explanation by UBS for the numerous conversations with the Consortium throughout the period of Catalyst's Exclusivity Agreement.

85. VimpelCom's, UBS's and Globalive's conduct in the sharing of information that led to the Consortium's bid has yet to be adjudicated upon. This was not considered by the Motions Judge and was a central factor that ought to have been considered in the exercise of his Honour's discretion. The Court should exercise its residual discretion not to apply the preclusive doctrines of estoppel in the particular circumstances of this case. This is not the clearest of cases where the preclusive doctrine ought to be applied.[107]

**D. Breach of Contract Properly Pleaded Against UBS and Globalive**

86. To strike a pleading on the basis of Rule 21.01, "it must be plain and obvious that the claim discloses no reasonable cause of action".[108] The pleading is to be "read generously so as not to unfairly deprive a party of the benefit of the pleading".[109] The threshold to strike is high and is intended only to weed out hopeless claims.

87. In this case, the Motions Judge struck Catalyst's breach of contract claims against UBS and Globalive on the basis that "Catalyst ha[d] not pleaded any of the elements against Globalive

[107] *Nordion Inc. v. Life Technologies Inc.*, 2015 ONSC at para. 43, ABOA Tab 23
[108] *Hunt v. T & N plc.*, [1990] 2 SCR 959 (SCC) at para 36, ABOA Tab 15
[109] *Metz v Tremblay-Hall*, [2006] O.J. No. 4134 (S.C.J.) at para. 8, ABOA Tab 22

or UBS in its statement of claim." and that Globalive and UBS are not parties to either the Exclusivity Agreement or the Confidentiality Agreement.[110]

### *(i) UBS*

88. As pleaded, UBS was an "Authorised Person" under the Agreements.[111] UBS was necessarily bound and agreed to be bound by the terms of the Agreements and liable for any breach thereof. Although UBS was not a signatory to the Agreements with Catalyst, there was privity of contract between UBS and Catalyst.[112] Moreover, all of the elements of privity of contract were pled as against UBS. Catalyst's claim for breach of the Agreements for wrongs committed by UBS ought not to have been struck. At minimum, Catalyst should be permitted to amend correct any deficiencies perceived by the Motions Judge.

### *(ii) Globalive*

89. Globalive, as pleaded, was similarly bound by the terms of the Agreements.[113] In addition, it was pleaded that Globalive is vicariously liable for the breaches of Lacavera who was both the CEO of Wind and the principal of Globalive. Wind was a party to the Agreements as affiliates of VimpelCom.

90. In *Leung v. Shanks*, a claim was made against a clinic, a doctor, and a nurse. The plaintiff went to the clinic for fertility treatment. At some point during the treatment, a sexual relationship developed between the nurse and plaintiff's spouse. The plaintiff sought general damages for pain and suffering, breach of contract and breach of privacy. The claim included an

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[110] Reasons on the Motion Below, para. 117, ABC Tab 3 p. 55
[111] Reasons on the Motion Below, para. 15, ABC Tab 3 p. 29
[112] Amended Amended Statement of Claim of The Catalyst Capital Group Inc. in the Current Action, para. 29, ABC Tab 6
[113] Amended Amended Statement of Claim of The Catalyst Capital Group Inc. in the Current Action, paras. 47 and 82, ABC Tab 6

allegation of vicarious liability. The defendants moved to strike the claim. The court refused to strike the breach of contract claim.[114] It was held that it was possible that the clinic could be vicariously liable for the breach of fiduciary duty by the nurse:[115]

> "…The test laid down in Bazley cannot be properly undertaken without some investigation done into the nexus or connection between the employer's enterprise and the wrong complained of. At this stage, the pleading is sufficient to disclose a reasonable cause of action. It is not plain and obvious that Dr. P and the clinic would escape a finding of vicarious liability."

***(iii) Leave to Amend***

91. The Motions Judge struck the claim for breach of contract against Globalive and UBS, not because the facts pleaded failed rule 21 analysis, but rather for the technical reason that they simply had not been pleaded in the statement of claim with sufficient particularity.

92. Where the deficiencies in the pleadings may be cured by an appropriate amendment, and there is no incompensable prejudice to the respondents, then leave to amend should be granted.[116] Catalyst ought to have been given the opportunity to amend the pleadings per Rule 26.01, rather than having them struck entirely and without leave to amend.

## PART V - ORDER REQUESTED

93. Catalyst respectfully requests that the appeal be granted with costs, the Judgment of the Motions Judge be set aside and the motions of the defendants be denied, or the Current Action be permitted to proceed on appropriate terms, including such amendments as may be required **ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 24th day of July, 2018.

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[114] *Leung v. Shanks*, 2013 ONSC 4943, at para 35, ABOA Tab 20
[115] *Leung v. Shanks*, 2013 ONSC 4943, at para 41, ABOA Tab 20. See also *Benson Kearley IFG Insurance Brokers v. Logan*, 2012 ONSC 2855, ABOA Tab 6 and *Bazley v. Curry*, [1999] 2 S.C.R. 534, at para. 37, ABOA Tab 5
[116] *Adelaide Capital Corp. v. Toronto Dominion Bank*, [2007] O.J. No. 2445 (C.A.), para. 6, ABOA Tab 1

"*John Callaghan*"

**John Callaghan**

"*Benjamin Na*"

**Benjamin Na**

"*Matthew Karabus*"

**Matthew Karabus**

"*David Moore*"

**David Moore**

## SCHEDULE "A"

## LIST OF AUTHORITIES

1. *Adelaide Capital Corp. v. Toronto Dominion Bank*, [2007] O.J. No. 2445 (C.A.)
2. *Air Canada v. WestJet Airlines Ltd.*, [2005] OJ No. 5512 (S.C.J.)
3. *Angle v. MNR*, [1975] 2 S.C.R. 248
4. *Attorney General v. Blake* [2000] 4 All ER 385 (HL)
5. *Bazley v. Curry*, [1999] 2 S.C.R. 534
6. *Benson Kearley IFG Insurance Brokers v. Logan*, 2012 ONSC 2855
7. *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 SCR 142
8. *Canam Enterprises Inc. v Coles*, 2000 CarswellOnt 4739 (C.A.)
9. *Canam Enterprises Inc. v Coles*, 2002 SCC 63
10. *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44
11. *Experience Hendrix LLC v. PPX Enterprises Inc.*, [2003] EWCA Civ 323 (Eng. C.A.)
12. *Foy v. Foy (No. 2)*, (1979) 26 O.R. (2d) 2002 (C.A.)
13. *Hall v Hall*, [1958] A.J. No. 60 (C.A.)
14. *Housen v. Nikolaisen*, 2002 SCC 33
15. *Hunt v. T & N plc*. [1990] 2 SCR 959
16. *Huttonville Acres Ltd. v. Archer*, 2009 CarswellOnt 5986 (S.C.J.)
17. *Huttonville Acres Ltd. v. Archer*, 2011 ONCA 115
18. *Kaymar Rehabilitation Inc. v. Champlain Community Care Access Centre*, 2010 ONSC 2248
19. *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 SCR 574
20. *Leung v. Shanks*, 2013 ONSC 4943
21. *McIntosh v. Parent*, [1924] 4 D.L.R. 420 (Ont. C.A.)
22. *Metz v Tremblay-Hall*, [2006] O.J. No. 4134 (S.C.J.)
23. *Nordion Inc. v. Life Technologies Inc.*, 2015 ONSC
24. *R. v. Duhamel*, 1981 ABCA 295
25. *R. v. Duhamel*, [1984] 2 SCR 555
26. *Smith v. Landstar Properties Inc.*, 2011 BCCA 44
27. *Strother v. 3464920 Canada Inc.*, [2007] 2 SCR 177
28. *Toronto (City) v. C. U.P.E. Local 79*, 2003 SCC 63

## SCHEDULE "B"

## STATUES AND REGULATIONS REFERRED TO

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

### RULE 21 DETERMINATION OF AN ISSUE BEFORE TRIAL

### WHERE AVAILABLE

***To Any Party on a Question of Law***

**21**.01 (1) A party may move before a judge,

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

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly.

(2) No evidence is admissible on a motion,

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

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

***To Defendant***

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

**Jurisdiction**

(a) the court has no jurisdiction over the subject matter of the action;

**Capacity**

(b) the plaintiff is without legal capacity to commence or continue the action or the defendant does not have the legal capacity to be sued;

**Another Proceeding Pending**

(c) another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter; or

**Action Frivolous, Vexatious or Abuse of Process**

(d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court,

and the judge may make an order or grant judgment accordingly.

…

## RULE 26 AMENDMENT OF PLEADINGS

### GENERAL POWER OF COURT

**26**.01 On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

### WHEN AMENDMENTS MAY BE MADE

**26**.02 A party may amend the party's pleading,

(a) without leave, before the close of pleadings, if the amendment does not include or necessitate the addition, deletion or substitution of a party to the action;

(b) on filing the consent of all parties and, where a person is to be added or substituted as a party, the person's consent; or

(c) with leave of the court.

…

### AMENDMENT AT TRIAL

**26**.06 Where a pleading is amended at the trial, and the amendment is made on the face of the record, an order need not be taken out and the pleading as amended need not be filed or served unless the court orders otherwise.

Court of Appeal File No: C-65431
Superior Court File No. CV-16-11595-00CL

**COURT OF APPEAL FOR ONTARIO**

B E T W E E N:

**THE CATALYST CAPITAL GROUP INC.**

Plaintiff
(Appellant)

- 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
(Respondents)

# CERTIFICATE

I estimate that 5 hours will be needed for my oral argument of the appeal, not including reply. An order under 61.09(2) (original record and exhibits) is not required.

DATED AT Toronto, Ontario this 24th day of July, 2018.

*"John Callaghan"*
**John Callaghan**

Lawyers for the Appellant

Court of Appeal File No.: 65431
Super Court File No.: CV-16-11595-00CL

**THE CATALYST CAPITAL GROUP INC.**
Plaintiff/Appellant

- and -

**VIMPELCOM LTD. et. al.**
Defendants/Respondents

**COURT OF APPEAL FOR ONTARIO**

PROCEEDING COMMENCED AT
TORONTO

# FACTUM OF THE APPELLANT


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