Court of Appeal File No. C65431
Superior Court File No. CV-16-553800CL

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)

APPEAL FACTUM OF THE DEFENDANTS (RESPONDENTS), TENNENBAUM CAPITAL PARTNERS LLC, 64NM HOLDINGS GP LLC, 64NM HOLDINGS LP AND LG CAPITAL INVESTORS LLC

November 1, 2018

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Court of Appeal File No. C65431
Superior Court File No. CV-16-553800

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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
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PART I - OVERVIEW

1. The defendants/respondents Tennenbaum Capital Partners LLC ("**Tennenbaum**"), 64NM Holdings GP LLC ("**64NM GP**"), 64NM Holdings LP ("**64NM**") and LG Capital Investors LLC ("**LGCI**", and together with Tennenbaum, 64NM GP and 64NM, the "**U.S. Investors**") deliver these submissions in response to the plaintiff The Catalyst Capital Group's ("**Catalyst**") appeal of Justice Hainey's decision dismissing this action as against the U.S. Investors in its entirety on the basis that the action constituted an abuse of process and was precluded by the doctrines of issue estoppel and cause of action estoppel.

2. This appeal is Catalyst's latest attempt to re-litigate the same issues that have been repeatedly been decided against Catalyst, including by this Court in a related proceeding. Catalyst's appeal cannot succeed unless this Court finds that Justice Hainey erred in all three of the bases upon which the action against the U.S. Investors was dismissed. There is no legitimate basis to interfere with any of Justice Hainey's findings or conclusions, which were fully supported by the evidentiary record and consistent with the applicable legal principles.

3. Catalyst attempts to distinguish this action from previous proceedings by selectively focusing on specific differences relating some of the issues. However, in doing so, Catalyst disregards the significant overlap on other critical issues and fundamental similarities that underlie Justice Hainey's decision. Finally, Catalyst baldly suggests that Justice Hainey's conclusions are reviewable on a standard of correctness when, in fact, each of the conclusions regarding abuse of process, cause of action estoppel and issue estoppel turn on factual findings and, as such, warrant significant deference, as set out in further detail below.

PART II - SUMMARY OF FACTS

A. Background

4. Catalyst appeals the decision of Justice Hainey dismissing this action (the **"Current Action"**) as against all of the defendants as an abuse of process, and as against West Face Capital Inc. ("**West Face**"), the U.S. Investors and Globalive Communications Corporation ("**Globalive**"), on the grounds of cause of action estoppel and issue estoppel, as set out in Reasons for Decision dated April 18, 2018 (the "**Motion Decision**" or the **"Reasons"**).[1]

5. Justice Hainey's decision in the Current Action was based on a voluminous record relating to Catalyst's conduct and the determinations made in prior related proceedings, namely (i) Catalyst's action against West Face and Brandon Moyse (a former employee of Catalyst and West Face) (the "**Moyse Action**") and (ii) the plan of arrangement proceedings relating to the subsequent sale of WIND Mobile Corp. (the "**Plan of Arrangement**"), both of which were heard by Justice Newbould at first instance.[2] Prior to rendering the decision in the Current Action, Justice Hainey also had the benefit of this Court's decision dismissing Catalyst's appeal of the decision in the Moyse Action in its entirety (the "**Moyse Court of Appeal Decision**").[3]

6. Facts relating to the Moyse Action, the Plan of Arrangement and the Moyse Court of Appeal Decision are summarized in the factum submitted by West Face in connection with this appeal. The U.S. Investors adopt and rely on those facts and submissions in support of their own position on this appeal. Additional facts relating to the U.S. Investors' specific involvement in the

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[1] *The Catalyst Capital Group Inc. v. VimpelCom Ltd.,* 2018 ONSC 2471 ["Motion Decision"], Respondents' Joint Document Compendium ["RC"] Volume 1, Tab 5, pp. 99-131.

[2] 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.

[3] *The Catalyst Capital Group Inc. v. Moyse*, 2018 ONCA 283, RC Volume 1, Tab 16, pp. 281-301 ["Moyse Court of Appeal Decision"].

Plan of Arrangement and Moyse Action and the related findings made by Justice Newbould and Justice Hainey are summarized below.

B. The U.S. Investors' involvement in the Plan of Arrangement

7. As Justice Hainey acknowledged at paragraph 92 of the Reasons, the U.S. Investors actively participated in the Plan of Arrangement proceedings, submitting affidavits from two representatives: (a) Michael Leitner, Managing Partner of Tennenbaum[4] and (b) Hamish Burt, a member of 64NM GP, the general partner of 64NM, the special-purpose investment vehicle created by LGCI to participate in the acquisition of WIND Mobile Corp. ("**WIND**").[5]

8. The affidavits, which formed part of the record before Justice Hainey in the Current Action, set out how the U.S. Investors came to be involved with WIND and the information that the U.S. Investors relied upon in formulating their strategy to acquire WIND. As summarized at paragraph 92 of the Reasons, the evidence confirmed that they did not receive or use any of Catalyst's confidential information:

(a) Mr. Leitner and Mr. Burt clarified that while the U.S. Investors had been informed on July 23, 2014 that VimpelCom had entered into an exclusivity agreement with another bidder, they surmised but did not know for certain that the bidder was Catalyst:

> Mr. Leitner: On July 23, we were informed by UBS, VimpelCom's financial advisor, that VimpelCom had entered into exclusive negotiations with another party. We were fairly confident that this

[4] Affidavit of Michael Leitner, sworn January 7, 2016 ["Leitner Plan of Arrangement Affidavit"]. RC Volume 5, Tab 75, pp. 963-975, Appellant's Exhibit Book, Tab 13, pp. 4845-4857.

[5] Affidavit of Hamish Burt, sworn January 7, 2016 ["Burt Plan of Arrangement Affidavit"] at para. 17, RC Volume 4, Tab 73, pp. 932-933, Appellant's Exhibit Book, Tab 13, p. 4838.

> other party was Catalyst, given that Catalyst had been actively seeking financing in the market...[6]
>
> Mr. Burt: On or around July 23, we (LG Capital) learned from UBS, VimpelCom's financial advisor that VimpelCom had entered into exclusive negotiations with another bidder (which we believed, and now know, to be Catalyst)…[7]

(b) Mr. Leitner and Mr. Burt further explained how the Consortium's transaction structure and initial proposal to purchase WIND was developed; that the initial proposal was unsolicited and made without any knowledge of the status or nature of the negotiations between Catalyst and VimpelCom; and that the U.S. Investors did not engage in any negotiations with VimpelCom during the period of exclusivity:

> Mr. Leitner: …Our proposal was entirely unsolicited, and was entirely "blind", in the sense that we had had no substantive communications with VimpelCom since it entered exclusivity on July 23, 2014. We knew nothing about the status or nature of the negotiations between Catalyst and VimpelCom, nor did we at any time during their period of exclusivity…Neither VimpelCom nor Globalive resumed or engaged in any negotiations with Tennenbaum or, to my knowledge, any of the New Investors from August 7 to August 18, 2014, and the New Investors made no further proposals to VimpelCom during this time period. It was only after exclusivity expired on August 18, 2014 that the New Investors joined with Globalive and resumed negotiations with VimpelCom.[8]
>
> Mr. Burt: …My understanding is that the successful transaction structure that the New Investors ultimately proposed to VimpelCom was developed among the New Investors in order to meet VimpelCom's well-known desire for a transaction that would proceed swiftly and with little to no regulatory risk to VimpelCom.

[6] Leitner Plan of Arrangement Affidavit at para. 18, RC Volume 5, Tab 75, p. 970, Appellant's Exhibit Book, Tab 13, p. 4852.

[7] Burt Plan of Arrangement Affidavit at para. 17, RC Volume 4, Tab 73, pp.932-933, Appellant's Exhibit Book, Tab 13, p. 4838.

[8] Leitner Plan of Arrangement Affidavit at paras. 23-24, RC Volume 5, Tab 75, p. 972 Appellant's Exhibit Book, Tab 13, p. 4854.

> This structure was not based on and had nothing to do with any Catalyst confidential information.[9]

(c) Mr. Leitner and Mr. Burt also expressly denied that the U.S. Investors had any knowledge of Catalyst's purported regulatory strategy:

> Mr. Leitner: No one at Tennenbaum had any knowledge of the details of Catalyst's regulatory strategy concerning [WIND], nor the details of its offer or its negotiations with VimpelCom during its period of exclusivity from July 23 to August 18. Neither VimpelCom nor Globalive told us anything about the negotiations with Catalyst.... Furthermore, West Face never communicated any information about Catalyst's strategies or negotiations to Tennenbaum, and no such information was used by the Investors in developing the transaction structure that the Investors put forward to VimpelCom. On the contrary, the successful transaction structure was proposed to the New Investors by Mr. Guffey [principal of LGCI and founder of 64NM].[10]
>
> Mr. Burt: …I can say that 64NM was never privy to any information regarding Catalyst's regulatory strategy and, to the best of my knowledge, that no such information was discussed among the Investors…For all we knew, Catalyst might have proposed the exact same structure involving Globalive as the Investors did...[11]

C. The U.S. Investors' involvement in the Moyse Action

9. As Justice Hainey further acknowledged at paragraphs 93 and 96 of the Reasons, the U.S. Investors were also actively involved in the Moyse Action that proceeded to trial before Justice Newbould in June 2016 and were important witnesses regarding the issue of whether the Consortium had been aware of or had taken advantage of Catalyst's acquisition strategy. Both Mr. Leitner and Mr. Burt submitted additional affidavits and testified at trial, where they were

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[9] Burt Plan of Arrangement Affidavit at para. 4, RC Volume 4, Tab 73, pp.929, Appellant's Exhibit Book, Tab 13, p. 4835.

[10] Leitner Plan of Arrangement Affidavit at para. 25, RC Volume 5, Tab 75, pp. 972-973, Appellant's Exhibit Book, Tab 13, pp. 4854-4855.

[11] Burt Plan of Arrangement Affidavit at paras. 4 & 25, RC Volume 4, Tab 73, pp. 929, 935, Appellant's Exhibit Book, Tab 13, pp. 4835, 4840.

cross-examined by Catalyst's counsel.[12] Both of these affidavits as well as substantial excerpts from the transcripts of Mr. Leitner and Mr. Burt's testimony were included in the motion record relied on by the U.S. Investors and other defendants in the Current Action.

10. The additional affidavits of Mr. Leitner and Mr. Burt in the Moyse Action supplemented the evidence they submitted in the Plan of Arrangement proceedings. Both again summarized the circumstances leading up to the Consortium's acquisition of WIND, including the U.S. Investors' knowledge and conduct during the exclusivity period, and the information that the U.S. Investors relied on in making the acquisition.[13]

11. Mr. Leitner and Mr. Burt clarified that the U.S. Investors did not know of Catalyst's strategy to seek regulatory concessions from the Government of Canada, and that this information did not affect the structure of the Consortium's bid:

> Mr. Leitner: …the transaction structure that the Investors ultimately proposed to VimpelCom, and which proved successful…had nothing to do with Catalyst's confidential plans to seek "regulatory concessions" from the Canadian Government as a condition to closing a transaction with VimpelCom. Rather, we chose to adopt this structure in order to address VimpelCom's known preference for a transaction that would maximize speed and certainty of closing.[14]
>
> Mr. Burt: …To the best of my knowledge, Catalyst's strategy to demand regulatory concessions from Industry Canada was never discussed among the Investors, whether as a strategy that we should pursue ourselves, as the strategy of Catalyst in particular, or as the possible strategy of a competing bidder in general…We had no way to know, and did not know, anything about VimpelCom and Catalyst's negotiations during their period of exclusivity. We

[12] Motion Decision at para. 93, RC Volume 1, Tab 5, p. 123.

[13] Affidavit of Michael Leitner, sworn June 1, 2016 ["Leitner Trial Affidavit"], RC Volume 5, Tab 75, pp. 976-989, Appellant's Exhibit Book, Tab 15, pp. 6318-6332; Affidavit of Hamish Burt, sworn June 1, 2016 ["Burt Trial Affidavit"], RC Volume 4, Tab 73, pp. 938-948, Appellant's Exhibit Book, Tab 15, pp. 6307-6317.

[14] Leitner Trial Affidavit at para. 7, RC Volume 5, Tab 75, p. 978, Appellant's Exhibit Book, Tab 15, pp. 6321.

> certainly did not know that Catalyst was seeking regulatory concessions from Industry Canada.[15]

12. At trial of the Moyse Action, Mr. Leitner and Mr. Burt affirmed and expanded on the evidence they gave in their respective affidavits and were cross-examined by Catalyst's counsel. As Justice Hainey noted at paragraph 94 of the Reasons, Mr. Leitner and Mr. Burt gave evidence on several of the same issues being raised in the Current Action, including:

(a) how the U.S. Investors had no knowledge regarding the details of the exclusivity agreement that VimpelCom had entered into with a competing bidder;[16]

(b) how the U.S. Investors had no knowledge of the status of Catalyst's negotiations with VimpelCom during the exclusivity period;[17] and

(c) how the Consortium developed its proposal to acquire WIND without any knowledge of Catalyst's acquisition strategy.[18]

D. The Reasons for Judgment in the Moyse Action

13. As Justice Hainey acknowledged at paragraphs 95 and 96 of the Reasons, the U.S. Investors, through the participation of Mr. Leitner and Mr. Burt as witness at trial, clearly had a meaningful voice in the Moyse Action. Both were important witnesses whose evidence was clearly relied upon by Justice Newbould. Justice Newbould described Mr. Leitner and Mr. Burt as

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[15] Burt Trial Affidavit at paras. 5 & 27, RC Volume 5, Tab 73, pp. 940, 946, Appellant's Exhibit Book, Tab 15, pp 6308, 6315.

[16] See, for example, Transcript of the Cross-Examination of Michael Leitner on June 9, 2016 ["Leitner Cross-Examination"], p. 916, line 20 to p. 917, line 9 and p. 923, line 19 to p. 924, line 7, RC Volume 5, Tab 76, pp. 1030-1031, 1037-1038, Appellant's Exhibit Book, Tab 17, pp. 7594-7595, 7601-7602; Transcript of the Cross-Examination of Hamish Burt on June 9, 2016 ["Burt Cross-Examination"] , p. 857, line 18 to p. 858, line 12 , RC Volume 4, Tab 74, pp. 958-959, Appellant's Exhibit Book, Tab 17, pp. 7524-7525.

[17] See, for example, Leitner Cross-Examination, p. 905, line 17 to p. 907, line 6, RC Volume 5, Tab 76, pp. 1019-1021, Appellant's Exhibit Book, Tab 17, pp. 7583-7585; Burt Cross-Examination p. 860, line 20 to p. 861, line 3, RC Volume 4, Tab 74, pp. 960-961, Appellant's Exhibit Book, Tab 17, pp. 7527-7528.

[18] See, for example, Leitner Cross-Examination, p. 892, lines 2-10, p. 908, line 18 to p. 910, line 11, RC Volume 5, Tab 76, pp.1015, 1022-1024, Appellant's Exhibit Book, Tab 17, pp. 7570, 7586-7588.

"impressive" witnesses and accepted their evidence that the Consortium's August 7, 2014 proposal was unsolicited and that the U.S. Investors did not have any substantive communications with VimpelCom during the exclusivity period.[19] Notably, as reflected in the following paragraphs of his Reasons for Judgment (cited to by Justice Hainey at paragraph 95 of the Reasons), Justice Newbould accepted the evidence of Mr. Leitner and Mr. Burt that the August 7, 2014 proposal was not rooted in any knowledge of Catalyst's bid or strategies:

> [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 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 Government 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 Government rejection and it was an advantage to VimpelCom to have an offer without such a condition…[20]
>
> [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 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

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[19] Motion Decision at paras. 94-95, RC Volume 1, Tab 5, p. 123; *The Catalyst Capital Group Inc. v. Moyse*, 2016 ONSC 5271 ["Reasons for Judgment"] at paras. 104-105, RC Volume 1, Tab 14, pp. 253-254.

[20] Reasons for Judgment at para. 108, RC Volume 1, Tab 14, pp. 254-255.

> Catalyst was doing with VimpelCom or Catalyst's regulatory strategies.[21]
>
> [116] … 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.[22]

14. Contrary to the assertions by Catalyst on this appeal, none of Mr. Leitner and Mr. Burt's evidence in the Moyse Action supported Catalyst's claims in the Current Action. At paragraphs 28 to 30 of its appeal factum, Catalyst makes selective reference to an August 6, 2014 e-mail from Mr. Leitner to the Consortium (in which he referred to a "superior proposal") without addressing Justice Newbould's finding that the e-mail could not be viewed as indicating any knowledge of Catalyst's acquisition strategy.[23] Similarly, at paragraph 44 of its appeal factum, Catalyst makes arguments regarding an August 1, 2014 e-mail from Mr. Leitner without acknowledging Justice Newbould's findings, as set out above, that the U.S. Investors and other members of the Consortium did not know for certain that Catalyst was a bidder was for WIND and that they did not know the details of Catalyst's negotiations with VimpelCom.[24]

PART III - ISSUES, LAW AND ARGUMENT

Overview

15. The central issues on this appeal are as follows:

(a) What is the proper standard of review applicable to Justice Hainey's decision?

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[21] Reasons for Judgment at para. 114, RC Volume 1, Tab 14, p. 257.

[22] Reasons for Judgment at para. 116, RC Volume 1, Tab 14, pp. 257-258.

[23] Reasons for Judgment at paras. 113 and 115, RC Volume 1, Tab 14, pp. 256-257.

[24] Reasons for Judgment at paras. 92 and 114, RC Volume 1, Tab 14, pp. 248-249, 257.

(b) Did Justice Hainey err in finding that the Current Action is precluded based on the doctrine of issue estoppel?

(c) Did Justice Hainey err in finding that the Current Action is precluded based on the doctrine of cause of action estoppel?

(d) Does Justice Hainey's discretionary decision to dismiss the Current Action as an abuse of process warrant intervention by this Court?

16. Contrary to Catalyst's attempts on this appeal to conflate cause of action estoppel, issue estoppel and abuse of process, the doctrines are distinct and should be considered and applied separately. As noted above, Catalyst must establish that Justice Hainey erred in applying all three doctrines for its appeal to succeed as against the U.S. Investors.

A. Applicable standard of review

i. The standard of review applicable to issue estoppel and cause of action estoppel

17. Absent an extricable error in principle, a lower court's findings in applying the doctrines of issue estoppel and cause of action estoppel are reviewable under the standard of palpable and overriding error.[25]

18. In regard to issue estoppel, Catalyst does not challenge the well-accepted test governing the application of issue estoppel, including the requirements that the same question must have been decided in the prior proceeding and that the issues decided in that proceeding must have been

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[25] See, for example, *57095 Alberta Ltd v. Hamilton Brothers Exploration Co*, 2003 ABCA 34 at paras. 39-40, Respondents' Joint Book of Authorities ("RBA") Volume 1, Tab 1, and *Budlakoti v. Canada (Minister of Citizenship and Immigration)*, 2015 FCA 139 at paras. 42-44, RBA Volume 2, Tab 19.

fundamental to the decision arrived at by the Court. Instead, Catalyst focuses entirely on alleged factual errors made by Justice Hainey in applying these requirements, including:

(a) That Justice Hainey identified findings made by Justice Newbould which were not fundamental to his decision but were collateral or *obiter*;[26]

(b) That the only central determination made by Justice Newbould in his decision was that Moyse did not pass on confidential information to West Face;[27] and

(c) That Justice Hainey failed to take into account the different legal relationships present in the Moyse Action and the duties purportedly owed by the defendants in that case in deciding whether the same question requirement had been met.[28]

19. Justice Hainey's findings against Catalyst on these issues are factual findings that are entitled to deference absent a palpable and overriding error.

20. Similarly, Catalyst does not suggest that Justice Hainey applied the wrong legal test in respect of cause of action estoppel. Rather, Catalyst criticizes Justice Hainey's application of that test to the evidentiary record that was before the Court. Catalyst's criticism of Justice Hainey's conclusion that its action was precluded by cause of action estoppel centers on the factual finding that the Moyse Action and Current Action addressed the same causes of action.[29]

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[26] See, for example, Factum of The Catalyst Capital Group dated July 24, 2018 ["Catalyst Appeal Factum"] at paras. 69-70.

[27] See, for example, Catalyst Appeal Factum at para. 36.

[28] See, for example, Catalyst Appeal Factum at para. 56.

[29] See, for example, Catalyst Appeal Factum at paras. 35-38.

21. Catalyst also criticizes Justice Hainey's refusal to apply residual discretion to decline to apply cause of action and issue estoppel.[30] This discretionary decision is subject to the more stringent standard of review applicable to Justice Hainey's findings on abuse of process, as discussed below.

ii. The standard of review applicable to abuse of process

22. The doctrine of abuse of process is discretionary and, therefore, decisions in which the doctrine is applied are entitled to significant deference.[31] In *Elsom v. Elsom*, the Supreme Court of Canada explained that appellate courts should not interfere in discretionary matters unless a "trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice."[32]

23. Consistent with this approach, in *The Doctrine of Res Judicata in Canada*, Donald Lange suggests that because the application of abuse of process is "an exercise in discretion", an appellant must establish an "egregious error" to succeed in overturning its application on appeal.[33]

24. In short, Catalyst faces an exceedingly high hurdle in asking this Court to overturn Justice Hainey's discretionary finding that the Current Action constitutes an abuse of process.

B. Justice Hainey properly found that Catalyst's claims as against the U.S. Investors were barred on the basis of issue estoppel

25. As Justice Hainey correctly noted at paragraph 54 of the Reasons, the preconditions to the operation of issue estoppel were outlined by the Supreme Court of Canada in *Danyluk v. Ainsworth Technologies*:

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[30] Catalyst Appeal Factum at paras. 83-85.

[31] See, for example, *Dash 224, LLC v. Vector Aerospace Engine Services-Atlantic*, 2016 PECA 4 at para. 47, RBA Volume 2, Tab 28 and *Law Society of Manitoba v. Mackinnon*, 2014 MBCA 28 at para. 33, RBA Volume 4, Tab 58.

[32] *Elsom v. Elsom*, [1989] 1. S.C.R. 1367 at para. 18, RBA Volume 3, Tab 33.

[33] Donald Lange, *The Doctrine of Res Judicata in Canada*, 4th ed. (Markham, ON: LexisNexis Canada Inc., 2015) ["Lange"] at 192, RBA Volume 7, Tab 101.

(a) the same question has been decided;

(b) the judicial decision which is said to create the estoppel was final; and

(c) 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.[34]

Additionally, the question in the first proceeding must have been fundamental to the decision rendered for issue estoppel to apply.[35]

26. The above test governing the application of issue estoppel has not been challenged by Catalyst on this appeal, and the second requirement (that the prior decision must have been final) is not at issue. The only issues relevant to this appeal are whether Justice Hainey properly concluded that the same question, fundamentality and mutuality requirements above had been met, and whether Justice Hainey appropriately refused to exercise his residual discretion to decline to apply the doctrine.

i. Justice Hainey properly found that the same question requirement was met with respect to Justice Newbould's determinations in the Moyse Action

27. Justice Newbould made several factual findings which satisfied the same question requirement and are fatal to Catalyst's claims as against the U.S. Investors in the Current Action.

28. Most important is Justice Newbould's finding that Catalyst's failure to acquire WIND was not caused by any actions taken by the Consortium but rather was entirely predicated on Catalyst's own conduct. As Justice Hainey acknowledged at paragraphs 41 and 59 of the Reasons, Justice Newbould made the following significant factual findings in support of this conclusion:

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[34] *Danyluk v. Ainsworth Technologies*, 2001 SCC 44["*Danyluk*"] at para. 25, RBA Volume 2, Tab 27, citing *Angle v. M.N.R.*, [1975] 2 S.C.R. 248 at para. 3, RBA Volume 1, Tab 8 and *Dableh v. Ontario Hydro*, 1994 CarswellOnt 175 (Ont. Gen. Div.) ["*Dableh*"] at para. 9, RBA Volume 2, Tab 26.

[35] *Danyluk* at para. 24, RBA Volume 2, Tab 27.

(a) Firstly, that it was Catalyst's refusal to agree to a break fee requested by VimpelCom, and not the Consortium's August 7, 2014 proposal, that caused Catalyst to fail in its negotiations with VimpelCom:

> [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.**

(b) Secondly, that Catalyst would not have completed its proposed acquisition of WIND even if it had completed and executed a Share Purchase Agreement because it required, but had no plausible chance of obtaining, regulatory concessions from the Government of Canada:

> [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.**[36]

29. As Justice Hainey emphasized at paragraphs 61 to 63 and 65 of the Reasons, for the Current Action as against the U.S. Investors to succeed, the Court would have been required to make findings which were inconsistent with Justice Newbould's findings (as set out above), as Catalyst's claims for misuse of confidential information, conspiracy and inducement of breach of contract each require Catalyst to establish that it suffered damages and that those damages were caused by the defendants' conduct rather than its own. Accordingly, Justice Newbould's findings

[36] Reasons for Judgment at para. 131 [emphasis added], RC Volume 1, Tab 14, pp. 261-262.

not only satisfied the same question requirement but were also fatal to each of Catalyst's claims in the Current Action and therefore warranted the dismissal of the Current Action in its entirety.[37]

30. In suggesting that the same question requirement was not met in this case, Catalyst fails to address Justice Hainey's findings regarding the issues common to both actions, and instead selectively focuses on the differences between the proceedings, namely Justice Newbould's consideration of whether Mr. Moyse passed confidential information onto the Consortium. These differences are not a basis to vitiate a finding of issue estoppel on those issues which are common to both proceedings.

31. On appeal, Catalyst also seeks to reargue that the same question requirement has not been met because the Moyse Action and Current Action involved a consideration of different legal relationships and duties owed by the defendants. In support of this assertion, Catalyst relies on this Court's decision in *Canam Enterprises Inc. v. Coles* without acknowledging the distinguishable facts giving rise to the conclusions in that case.[38]

32. In *Canam*, the plaintiff Canam Enterprises Inc. ("**Canam**") sued its solicitor in negligence for failing to properly advise Canam that the property it had purchased from the National Trust Company of Canada ("**National Trust**") was not zoned for commercial use, which resulted in Canam sustaining significant financial losses and in turn defaulting on a vendor take-back mortgage Canam had entered into with National Trust.

33. At issue before this Court in *Canam* was whether issue estoppel applied to bar the defendant solicitor's third party claim against the realtor and the realtor's fourth party claim for

[37] Motion Decision at paras. 65 and 86, RC Volume 1, Tab 5, pp. 116, 121.

[38] *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), ["*Canam*"], RBA Volume 2, Tab 22; Catalyst Appeal Factum at paras. 56 to 58.

contribution and indemnity against National Trust on the basis of a prior action brought by Canam directly against National Trust. The Court in the prior action rejected Canam's assertion that the mortgage on which it had defaulted was void and unenforceable in light of the misrepresentations made by the realtor regarding the zoning of the property, finding that while those misrepresentations had been made, they did not affect the contractual validity of the mortgage.[39]

34. In finding that issue estoppel did not apply to bar the third and fourth party claims in the present action, both the majority and the dissent stressed that the Court's finding on the legal effect of the realtor's misrepresentations on Canam's position was premised on the contractual relationship between it and National Trust, and therefore did not determine the separate issue of whether the realtor owed and breached a duty to Canam in making the misrepresentations.[40] To this end, as the majority stressed, the claim against the realtor in the negligence action involved a separate cause of action that was unrelated to the contractual dispute in the previous action.[41]

35. In contrast to *Canam*, the Moyse Action and Current Action involve overlapping causes of action. Further, Justice Newbould's above-noted findings in favour of West Face in the Moyse Action were not predicated on any distinct or unique legal relationship between Catalyst and West Face as compared to the relationship between Catalyst and the U.S. Investors, and, as emphasized above, were clearly determinative of each of Catalyst's claims as against the U.S. Investors in the Current Action.

ii. Justice Hainey properly found that Justice Newbould's above findings were fundamental to his decision

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[39] *Canam* at paras. 6-8, RBA Volume 2, Tab 22.
[40] *Canam* at paras. 27-30 and 47-49, RBA Volume 2, Tab 22.
[41] *Ibid.*

36. On appeal, Catalyst also seeks to reargue that Justice Newbould's findings as to why Catalyst did not acquire WIND were collateral to his decision or made in *obiter*. The interpretation put forward by Catalyst distorts the way in which the fundamentality requirement must be considered and ignores the findings made by Justice Hainey regarding this issue.

37. Notably, in suggesting that the issue of "whether Moyse passed on confidential Moyse Information to West Face" was singularly essential to Justice Newbould's decision, Catalyst overlooks the fact that (i) findings are only considered *obiter* if they are not required to be decided by a court and (ii) Justice Newbould was required, based on the three constituent elements of Catalyst's misuse of confidential claim against West Face, to determine not only whether West Face received Catalyst's confidential information, but also whether confidential information was misused and whether any such misuse caused damage to Catalyst.[42]

38. Accordingly, while Catalyst's claim against West Face in the Moyse Action failed in part on the basis of Justice Newbould's finding that Moyse did not reveal confidential information to West Face, it also failed on the basis of Justice Newbould's findings that the Consortium's acquisition strategy was not premised on Catalyst's confidential information, and that Catalyst had only its own actions to blame for its failure to acquire WIND. The fact that Justice Newbould decided the issue of whether Moyse revealed confidential information to West Face first sequentially does not alter the centrality and legal necessity of his findings vis-à-vis the second and third constituent elements of Catalyst's misuse of confidential information claim. As Justice Hainey correctly concluded, these findings remain fatal to Catalyst's claims as against the U.S. Investors in the Current Action.

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[42] Catalyst Appeal Factum at para. 69; Reasons for Judgment at paras. 126-127, RC Volume 1, Tab 14, p. 260; see, for example, *Davidner v. Schuster*, [1936] 1. D.L.R. 560 (Sask. C.A.) at paras. 70-72, RBA Volume 2, Tab 29.

39. Further, in suggesting that Justice Newbould's findings as to why Catalyst failed to acquire WIND were *obiter*, Catalyst ignores the fact that, as emphasized by Justice Hainey at paragraphs 65 to 66 and 92 to 96 of the Reasons, this issue was thoroughly canvassed in the Moyse Action, including through the extensive affidavit and trial evidence of the U.S. Investors' representatives Mr. Burt and Mr. Leitner. Significantly, as Justice Hainey noted at paragraph 66 of the Reasons, Justice Newbould's findings on this issue were expressly described by this Court in the Moyse Appeal Decision as "germane" to both Catalyst's claim and West Face's defence thereof.

iii. Justice Hainey properly found that the U.S. Investors were privies of West Face in the Moyse Action

40. As Justice Hainey correctly noted at paragraph 91 of the Motion Decision, the question of whether a party can be considered a privy in a previous proceeding is a fact-specific inquiry that must be made on a case-by-case basis. Notably, in its leading decision in *Rasanen v. Rosemount Instruments Ltd.*, this Court found a party to be a privy in a prior proceeding by virtue of the fact that he had a "clear community of interest" with the party in the prior proceeding and had a "meaningful voice" through giving evidence and directly assisting the party in that proceeding.[43] A number of subsequent decisions have followed the reasoning of this Court in *Rasanen* in deciding whether a party could be considered a privy in a prior proceeding.[44]

41. Applying *Rasanen*, Justice Hainey properly found the U.S. Investors to be privies of West Face in the Moyse Action by virtue of their direct and extensive involvement in the proceeding and their clear community of interest with West Face in defeating Catalyst's claims given their status as members of the Consortium. Justice Hainey gave appropriate consideration at paragraphs 92 to

[43] *Rasanen v. Rosemount Instruments Ltd.*, 1994 CarswellOnt 960 (C.A.) at paras. 46-47, RBA Volume 6, Tab 84; Motion Decision at para. 91, RC Volume 1, Tab 5, p. 123.

[44] See, for example, *Foreman v. Niven*, 2009 BCSC 1476, RBA Volume 3, Tab 37; and *Dableh*, RBA Volume 2, Tab 26.

97 of the Reasons to the active participation of Mr. Leitner and Mr. Burt in both the Plan of Arrangement and Moyse Action, and appropriately found that the U.S. Investors had a meaningful voice in the proceeding through this involvement.

42. Justice Hainey's findings on this issue are supported by the evidence, including the affidavit evidence of Mr. Leitner and Mr. Burt in the Plan of Arrangement and Moyse Action as well as the substantial excerpts from the transcripts of their testimony in the Moyse Action.

iv. Justice Hainey properly refused to exercise his residual discretion to decline to apply cause of action and issue estoppel

43. After finding that the requirements of issue estoppel had been met, Justice Hainey properly refused to exercise his residual discretion to decline to apply the doctrine. Justice Hainey's refusal to do so was consistent with the fact that such discretion should only be applied "in the rarest of cases", namely those in which applying the doctrine would result in an obvious injustice to the plaintiff.[45] In finding that Catalyst faced no such injustice in this case, Justice Hainey appropriately relied on the fact that Catalyst had the full opportunity to assert its present claims in the Moyse Action and chose not to do so (see paragraph 75 of the Reasons).

C. Justice Hainey properly found that Catalyst's claims as against the U.S. Investors were barred on the basis of cause of action estoppel

44. As Justice Hainey noted at paragraph 76 of the Motion Decision, the doctrine of cause of action estoppel bars the litigation of specific causes of action or claims which have been determined in a previous proceeding.

45. There are four requirements that must be met for cause of action estoppel to apply:

[45] Lange, at 227, RBA Volume 7, Tab 101.

(a) There must be a final decision of a court of competent jurisdiction in the prior action;

(b) The parties to the subsequent litigation must have been parties to or in privy with the parties to parties to the prior action;

(c) The cause of action in the prior action must not be separate and distinct; and

(d) The basis of the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence.[46]

46. The above test and leading authorities governing the application of cause of action estoppel have not been challenged by Catalyst on this appeal, and the first requirement above (that the decision in the prior action must have been final) is not at issue. Catalyst has only expressly challenged Justice Hainey's findings that the mutuality requirement was met and that the causes of action asserted in the Moyse Action were not separate and distinct.

i. Justice Hainey properly found that the causes of action asserted by Catalyst in the Moyse Action and Current Action were one and the same

47. As Justice Hainey properly recognized at paragraphs 77 to 78 of the Reasons, the appropriate focus in determining whether the causes of action asserted as between two proceedings are the same is not on how they have been named or characterized by a plaintiff, but rather on the essential set of facts underlying their respective rights of action in the two proceedings.

48. Consistent with this approach, Justice Hainey found that the technical differences between Catalyst's conspiracy and inducement claims in the Current Action and its misuse claim in the

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[46] *Bjarnarson v. Manitoba*, 6. A.C.W.S. (3d) 20 (Man. Q.B.) ["*Bjarnarson*"] at para. 6, RBA Volume 1, Tab 15. The test laid out in *Bjarnarson* has been frequently cited by Ontario courts (see, for example, *Kovacs v. Sparkes*, 2017 ONSC 938, at para. 4, RBA Volume 4, Tab 54).

Moyse Action belied the fact that in both proceedings, the essential facts giving Catalyst a right of action related to the circumstances behind Catalyst's failure to acquire WIND and its acquisition by the Consortium.[47]

49. Contrary to Catalyst's assertions on this appeal, Justice Hainey did not find that the causes of action asserted in the Moyse Action and Current Action were the same merely due to the existence of some factual overlap between the proceeding.[48] Rather, after giving due consideration to the issues considered by Justice Newbould and the extensive evidentiary record before him, Justice Hainey found the overlap to be sufficiently extensive to warrant exercising his discretion to invoke the doctrine.[49]

50. In arguing that Justice Hainey erred in applying cause of action estoppel, Catalyst fails to address to the substantial overlap between the Moyse Action and the Current Action. As noted by Justice Hainey at paragraph 84 of the Reasons, courts have appropriately refused to decline applying cause of action estoppel merely on the basis that the facts as between two proceedings differed in certain limited respects. An approach to the contrary would enable litigants such as Catalyst to avoid the application of the doctrine by simply re-characterizing their claims in subtle ways.

ii. Justice Hainey properly found that Catalyst had the opportunity to raise its claims in the Moyse Action

51. Relying on Justice Newbould's above-noted findings in the Plan of Arrangement proceeding and this Court's decision dismissing Catalyst's appeal of the Moyse Action (neither of which have been appealed), Justice Hainey properly found at paragraphs 36 and 82 of the Reasons

[47] Motion Decision at paras. 78, 81 and 84, RC Volume 1, Tab 5, pp. 119-121.
[48] Catalyst Appeal Factum at paras. 63-67.
[49] See, for example, Motion Decision at paras. 64 and 78, RC Volume 1, Tab 5, pp. 115, 119.

that all of the facts relied on by Catalyst in the Current Action in support of its inducement claim were known to it in early 2015, well before the commencement of the Moyse Action, and that Catalyst was therefore fully aware of the basis behind each of its claims in the Current Action.

52. As Justice Hainey emphasized at paragraphs 76 and 81 of the Reasons, courts (including, most notably, the Supreme Court of Canada in *Doering v. Grandview (Town)*) have applied cause of action estoppel to prevent litigants from asserting, in a new action, alternate theories of causation vis-à-vis the losses or harm at issue in the prior action where they were aware of the factual basis behind that theory at the time of the prior action.[50] Catalyst's attempt to do precisely that constituted an additional reason why, Catalyst's action was barred by cause of action estoppel.

D. Justice Hainey reasonably exercised his discretion in finding that Catalyst's claims as against the U.S. Investors and the other defendants constituted an abuse of process

53. As Justice Hainey accurately noted at paragraph 85 of the Reasons, the doctrine of abuse of process is a more flexible doctrine than issue or cause of action estoppel as it does not have the same formal requirements. Abuse of process focuses on the integrity of the adjudicative process rather than the motive or status of the parties.[51]

54. Justice Hainey reasonably concluded at paragraph 86 of the Reasons that Catalyst's claim constituted an abuse of process on the grounds that (i) Catalyst sought to re-litigate – and asked the Court to make inconsistent findings in regard to – issues that had already been determined in the Moyse Action and (ii) Catalyst advanced claims that it chose not to allege in the Moyse Action. Catalyst has failed to establish that any of these discretionary findings involved an "egregious

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[50] *Doering v. Grandview (Town)*, [1976] 2 S.C.R. 621, RBA Volume 3, Tab 31.

[51] Justice Hainey cited *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, 2003 SCC 63 at para. 51, RBA Volume 7, Tab 91.

error" or were "so clearly wrong as to amount to an injustice" such that they warrant intervention on appeal.[52]

i. Justice Hainey reasonably found that Catalyst's attempt to re-litigate issues decided in the Moyse Action constituted an abuse of process

55. Contrary to Catalyst's submissions at paragraphs 63 to 67 of its appeal factum, the doctrine of abuse of process is not limited to situations in which the two actions in question involved the same causes of action, and has been invoked in cases where the court in the subsequent action would have been required to make *factual* findings which were inconsistent with those made by the court in the prior action. As such, while Justice Hainey appropriately found the causes of action advanced in the Moyse Action and Current Action to substantially overlap, his conclusion that Catalyst's action constituted an abuse of process was justified independent of that finding along with his other findings on cause of action and issue estoppel.

56. Similarly, in suggesting that Justice Hainey erred in exercising his discretion to invoke the abuse of process doctrine, Catalyst also places mistaken emphasis on the fact that the parties in the Moyse Action were not the same as those in the Current Action. Contrary to this assertion, the doctrine is not restricted by the mutuality requirement applicable to cause of action and issue estoppel, and Catalyst's attempt to conflate these doctrines should be rejected.[53]

ii. Justice Hainey reasonably found that Catalyst's failure to assert its claims in the Moyse Action constituted an abuse of process

57. Justice Hainey's further finding that Catalyst's claim constituted an abuse of process in light of its decision to advance claims in the Current Action which it chose not to assert in the

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[52] *Elsom v. Elsom*, [1989] 1 S.C.R. 1367 at para. 18, RBA Volume 3, Tab 33; Lange, at 192, RBA Volume 7, Tab 101.
[53] *Toronto* at para. 37, RBA Volume 7, Tab 91; see also *Lansdowne Park Conservancy v. Ottawa (City)*, 2012 ONSC 1975 at paras. 23-30, RBA Volume 4, Tab 56.

Moyse Action (despite having full knowledge of the factual basis behind those claims) is also reasonable and supported by jurisprudence in which courts have made similar findings.[54]

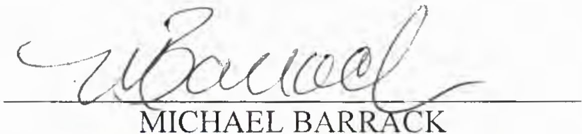
PART IV - ADDITIONAL ISSUES

58. The U.S. Investors raise no issues in addition to those raised by Catalyst's appeal.

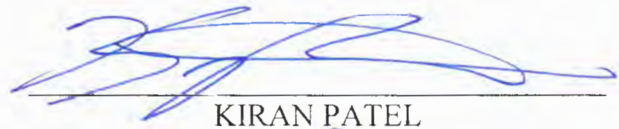
PART V - ORDER REQUESTED

59. For the reasons outlined above, the U.S. Investors respectfully request an Order dismissing Catalyst's appeal, with costs in an amount agreed by the parties or determined by this Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of November, 2018.



MICHAEL BARRACK



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[54] See, for example, *Aba-Alkhail v. University of Ottawa,* 2013 ONCA 633 at paras. 12 & 14, RBA Volume 1, Tab 3; and *Kenderry-Esprit (Receiver of) v. Burgess, MacDonald, Martin and Younger*, [2001] O.J. No. 776 (S.C.) at para. 35, RBA Volume 4, Tab 53.

Court of Appeal File No. C65431
Superior Court File No. CV-16-553800CL

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 one third of an hour (20 minutes) will be needed for the U.S. Investors' oral argument of the appeal. An order under subrule 61.09(2) (original record and exhibits) is not required.

DATED AT Toronto, Ontario this 1st day of November, 2018.

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SCHEDULE A

LIST OF AUTHORITIES

Cases

1. *The Catalyst Capital Group Inc. v. VimpelCom Ltd.*, 2018 ONSC 2471
2. *The Catalyst Capital Group Inc. v. Moyse*, 2018 ONCA 283
3. *The Catalyst Capital Group Inc. v. Moyse*, 2016 ONSC 5271
4. *57095 Alberta Ltd v Hamilton Brothers Exploration Co*, 2003 ABCA 34
5. *Budlakoti v Canada (Minister of Citizenship and Immigration),* 2015 FCA 139
6. *Dash 224, LLC v Vector Aerospace Engine Services-Atlantic*, 2016 PECA 4
7. *Law Society of Manitoba v. Mackinnon*, 2014 MBCA 28
8. *Elsom v. Elsom*, [1989] 1. S.C.R. 1367
9. *Danyluk v. Ainsworth Technologies*, 2001 SCC 44
10. *Angle v. M.N.R.*, [1975] 2 S.C.R. 248
11. *Dableh v. Ontario Hydro*, 1994 CarswellOnt 175 (Ont. Gen. Div.)
12. *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.)
13. *Rasanen v. Rosemount Instruments Ltd.*, 1994 CarswellOnt 960 (C.A.)
14. *Davidner v. Schuster*, [1936] 1. D.L.R. 560
15. *Foreman v. Niven*, 2009 BCSC 1476
16. *Bjarnarson v. Manitoba*, 6. A.C.W.S. (3d) 20 (Man. Q.B.)
17. *Kovacs v. Sparkes*, 2017 ONSC 938
18. *Doering v. Grandview (Town)*, [1976] 2 S.C.R. 621
19. *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, 2003 SCC 63
20. *Lansdowne Park Conservancy v. Ottawa (City),* 2012 ONSC 1975
21. *Aba-Alkhail v. University of Ottawa*, 2013 ONCA 633
22. *Kenderry-Esprit (Receiver of) v. Burgess, MacDonald, Martin and Younger*, [2001] O.J. No. 776 (S.C.)

Secondary Sources

23. Donald Lange, *The Doctrine of Res Judicata in Canada*, 4th ed. (Markham, ON: LexisNexis Canada Inc., 2015)

SCHEDULE B

TEXT OF STATUTES, REGULATIONS & BY-LAWS

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

RULE 21 DETERMINATION OF ISSUE BEFORE TRIAL

...

To Defendant

21.01(3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,

…

(d) the action is frivolous or vexatious or is otherwise an abuse of process of the court, and the judge may make an order or grant judgment accordingly.

RULE 25 PLEADINGS IN AN ACTION

...

STRIKING OUT A PLEADING OR OTHER DOCUMENT

25.11 The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,

(a) may prejudice or delay the fair trial of the action;

(b) is scandalous, frivolous or vexatious; or

(c) is an abuse of the process of the court.

…

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

Stay of proceedings

106 A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

…

Multiplicity of proceedings

138 As far as possible, multiplicity of legal proceedings shall be avoided.

THE CATALYST CAPITAL GROUP INC. -and- VIMPELCOM LTD. et al.
Plaintiff Defendants

Court of Appeal File No. C65431
Court File No. CV-16-553800CL

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

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