Court of Appeal File No.: C65431
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.

Appellant
(Plaintiff)

- and -

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

Respondents
(Defendants)

FACTUM OF THE RESPONDENT VIMPELCOM LTD.

NORTON ROSE FULBRIGHT CANADA LLP
Royal Bank Plaza, South Tower
3800 - 200 Bay Street
Toronto ON M5J 2Z4

Orestes Pasparakis LSO #: 36851T
orestes.pasparakis@nortonrosefublright.com

Rahool Agarwal LSO #: 54528I
rahool.agarwal@nortonrosefublright.com

Danny Urquhart LSO #: 70779Q
danny.urquhart@nortonrosefublright.com

Tel: +1 416.216.3943
Fax: +1 416.216.3930

Lawyers for the Respondent, VimpelCom Ltd.

TO: **GOWLING WLG (CANADA) LLP**
1 First Canadian Place
100 King Street West, Suite 1600
Toronto ON M5X 1G5

John E. Callaghan LSO #: 29106K
john.callaghan@gowlingwlg.com

Benjamin Na LSO#: 409580
benjamin.na@gowlingwlg.com

Matthew Karabus LSO #: 61892D
matthew.karabus@gowlingwlg.com

Tel: 416-862-7525
Fax: 416-862-7661

Lawyers for the Plaintiff/Appellant, The Catalyst Capital Group Inc.

AND TO: **MOORE BARRISTERS**
Professional Corporation
393 University Avenue, Suite 1600
Toronto, ON M5G 1E6

David C. Moore LSO#: 16996U
david@moorebarristers.com

Tel: 416-581-1818 x.222
Fax: 416-581-1279

Lawyers for the Plaintiff/Appellant, The Catalyst Capital Group Inc.

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

David R. Byers LSO #: 22992W
dbyers@stikeman.com
Tel: 416.869.5697
Daniel Murdoch LSO #: 53123L
dmurdoch@stikeman.com
Tel: 416.869.5529
Fax: 416.947.0866

Lawyers for the Defendant/Respondent,
UBS Securities Canada Inc.

AND TO: **DAVIES WARD PHILLIPS & VINEBERG LLP**
Barristers and Solicitors
155 Wellington Street West
Toronto, ON M5V 3JV

Kent Thomson LSO # 24264J
kentthomson@dwpv.com
Matthew Milne-Smith LSO #: 44266P
mmilne-smith@dwpv.com
Andrew Carlson LSO #: 58850N
acarlson@dwpv.com

Tel: 416.863.0900
Fax: 416.863.0871

Lawyers for the Defendant/Respondent,
West Face Capital Inc.

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

James D.G. Douglas
JDouglas@blg.com
Tel: 416.367.6029
Caitlin Sainsbury
CSainsbury@blg.com
Tel: 416.367.6438
Fax: 416.367.6749

Lawyers for the Defendant/Respondent,
Globalive Capital Inc.

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

Michael Barrack
michael.barrack@blakes.com
Tel: 416.863.5280
Kiran Patel
kiran.patel@blakes.com
Tel: 416.863.2205
Fax: 416.863.2653

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

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

Lucas E. Lung LSO #: 62565C
llung@lerners.ca

Tel: 416.601.2673
Fax: 416.601.4192

Lawyers for the Defendant/Respondent,
Serruya Private Equity Inc.

AND TO: **McCARTHY TÉTRAULT LLP**
Barristers and Solicitors
TD Bank Tower
Suite 5300 – 66 Wellington Street West
Box 48
Toronto, ON M5K 1E6

Junior Sirivar LSO #: 47939H
jsirivar@mccarthy.ca
Tel: 416.601.7750
Jacqueline Cole
jcole@mccarthy.ca
Tel: 416.601.7704
Fax: 416.868.0673

Lawyers for the Defendant/Respondent,
Novus Wireless Communications Inc.

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.

Appellant
(Plaintiff)

- and -

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

Respondents
(Defendants)

FACTUM OF THE RESPONDENT VIMPELCOM LTD.

TABLE OF CONTENTS

PAGE

PART I - OVERVIEW

1. Justice Hainey's discretionary decision dismissing Catalyst Capital Group Inc. (**Catalyst**)'s claim in this action as an abuse of process was deeply rooted in the evidence, is entitled to significant deference and should not be disturbed.

2. Catalyst's claim in this action is plainly "litigation by instalment": this proceeding will have to revisit and reconsider the very same issues and body of evidence that were the subject of adjudication (and appeal) in *Catalyst Capital Group Inc. v. Moyse* (the **Moyse Action**).[1]

3. Catalyst's claim also requires the Court to overturn findings made by Justice Newbould that were affirmed on appeal. As Justice Hainey expressly recognized "[t]o succeed in this proceeding Catalyst must ask the court to make findings that are inconsistent with Justice Newbould's findings."

4. Finally, Catalyst must also attack or ignore a court order which effects the release of Catalyst's claim against VimpelCom Ltd. (**VimpelCom**).

5. This action is plainly an abuse of process and is reflective of Catalyst's imperious conduct in these proceedings. Catalyst has variously been found to have tendered false affidavit evidence, deliberately laid "in the weeds" with respect to its claim against VimpelCom, and "playing hardball".[2] This unfortunate chapter in Catalyst's endless, serial litigation in the Ontario courts should be brought to a close.

---

[1] 2016 ONSC 5271 (**Moyse Decision**), Joint Compendium of the Respondents (**Compendium**), Vol 1, Tab 14, pp. 223 – 272.

[2] *Re-MidBowline Group Corp*, 2016 ONSC 669, (**Plan of Arrangement Decision**), paras. 53 and 59, Compendium, Vol 1, Tab 8, pp. 170 and 172; *Catalyst Capital Group Inc. v. Moyse*, 2016 ONSC 6285, para. 10, Compendium, Vol 1, Tab 15, p. 276.

PART II - THE FACTS

A. VimpelCom decides to sell WIND

6. In 2013, VimpelCom decided to sell its stake in WIND Mobile Corp. (**WIND**) and engaged UBS Securities Inc. (**UBS**) to assist with the sale process.[3] Through the first part of 2014, VimpelCom had discussions with several potential purchasers, including with Catalyst, West Face Capital Inc. (**West Face**), and certain investors who eventually purchased VimpelCom's interest in WIND (the **Consortium**).[4]

B. Catalyst commences the Moyse Action alleging breach of confidence

7. In May 2014, a junior analyst working at Catalyst, Brandon Moyse, resigned and began working at West Face on June 23, 2014.[5]

8. Two days later, Catalyst commenced the Moyse Action against West Face and Moyse alleging that Moyse had breached certain restrictive covenants and his duty of confidentiality and that West Face benefited from this breach in its ongoing negotiations with VimpelCom.[6]

C. VimpelCom pursues exclusive negotiations with Catalyst

9. In the summer of 2014, discussions between VimpelCom and Catalyst on the sale of WIND had progressed. On July 23, 2014, VimpelCom agreed to negotiate exclusively

---

[3] Moyse Decision, paras. 23 – 24, Compendium, Vol 1, Tab 14, p. 230; *The Catalyst Capital Group Inc. v. VimpelCom Ltd*., 2018 ONSC 2471 (**Motion Decision**), para. 14, Compendium, Vol 1, Tab 5, p. 103.
[4] Moyse Decision, paras. 24 and 30, Compendium, Vol 1, Tab 14, pp. 230 – 231.
[5] Moyse Decision, paras. 61 and 66, Compendium, Vol 1, Tab 14, pp. 241 – 242; Motion Decision, para. 30, Compendium, Vol 1, Tab 5, p. 105.
[6] Moyse Decision, paras. 1 and 76, Compendium, Vol 1, Tab 14, pp. 224 and 244 – 245; Motion Decision, para. 30, Compendium, Vol 1, Tab 5, p. 105.

with Catalyst (the **Exclusivity Agreement**). The Exclusivity Agreement was in place from July 23, 2014 to August 18, 2014.[7]

10. On August 7, 2014, during the exclusivity period, the Consortium made an unsolicited offer to VimpelCom to acquire its interest in WIND.[8] In the Moyse Action, Justice Newbould found that VimpelCom did not engage with the Consortium during the exclusivity period.[9]

11. VimpelCom negotiated solely with Catalyst, however the parties were ultimately unable to finalize a deal for the sale of WIND.[10] VimpelCom had proposed a $5-20 million break fee if regulatory approval for the transaction was not granted. Catalyst flatly rejected this term and walked away from the deal.[11]

D. VimpelCom agrees to sell WIND to the Consortium

12. After the expiry of the Exclusivity Agreement, VimpelCom began negotiations with the Consortium. A month later, the Consortium acquired VimpelCom's interest in WIND using a special-purpose vehicle, Mid-Bowline Group Corp. (**Mid-Bowline**).[12]

---

[7] Moyse Decision, para. 30, Compendium, Vol 1, Tab 14, p. 231; Motion Decision, paras. 19 – 23, Compendium, Vol 1, Tab 5, p. 104.
[8] Moyse Decision, para. 31, Compendium, Vol 1, Tab 14, p. 232; Motion Decision, para. 21, Compendium, Vol 1, Tab 5, p. 104.
[9] Moyse Decision, paras. 104 – 105, Compendium, Vol 1, Tab 14, pp. 253 – 254.
[10] Moyse Decision, para. 30, Compendium, Vol 1, Tab 14, p. 231; Motion Decision, paras. 25 – 26, Compendium, Vol 1, Tab 5, p. 104.
[11] Moyse Decision, para. 129, Compendium, Vol 1 , Tab 14, p. 261; Motion Decision, para. 26, Compendium, Vol 1, Tab 5, p. 104.
[12] Moyse Decision, para. 31, Compendium, Vol 1, Tab 14, p. 232; Plan of Arrangement Decision, paras. 1, 3 and 18, Compendium, Vol 1, Tab 8, pp. 156 – 157 and 160; Motion Decision, para. 27, Compendium, Vol 1, Tab 5, pp. 104 – 105.

E. Catalyst's continued attack on the WIND transaction

13. In late 2014, following the Consortium's acquisition of WIND, Catalyst amended its claim in the Moyse Action to: (a) allege that West Face misused Catalyst's confidential information to gain an improper advantage in the negotiations for WIND; and (b) claim a constructive trust over West Face's interest in WIND as well as an accounting of profits.[13]

14. In January 2015, Catalyst brought a motion in the Moyse Action for certain injunctive relief.[14] James Riley, Catalyst's Managing Director and Chief Operating Officer, tendered an affidavit for Catalyst.[15] During his cross-examination in May 2015, Mr. Riley admitted that Catalyst knew it had a potential claim against VimpelCom for breach of the Exclusivity Agreement:

> Q. That's fine. I take it I'm right that Catalyst has not commenced proceedings against VimpelCom for breach of that exclusivity obligation?
>
> A. No, we have not.
>
> Q. There is no suggestion here that VimpelCom breached exclusivity?
>
> A. I wouldn't say that.
>
> Q. You haven't sent a demand letter to VimpelCom?
>
> A. We have not at this time.
>
> Q. You haven't made any allegation to VimpelCom in that regard?
>
> A. Not to my knowledge. However, when a contract is breached, as I recall, there's two -- you can -- under the theory of Lumly and Guy, and I'm not trying to play

[13] Carlson Affidavit, para. 8, Compendium, Vol 3, Tab 56, p. 448; Motion Decision, para. 31, Compendium, Vol 1, Tab 5, p. 105.
[14] Plan of Arrangement Decision, para. 27, Compendium, Vol 1, Tab 8, pp. 162 – 163; Motion Decision, para. 33, Compendium, Vol 1, Tab 5, p. 105.
[15] Plan of Arrangement Decision, para. 30, Compendium, Vol 1, Tab 8, pp. 163 – 164.

> lawyer, you can go after one of two parties, the party breaching or the party inducing a breach.[16]

F. The sale of WIND to Shaw

15. In late 2015, Mid-Bowline agreed to sell its interest in WIND to Shaw Communications Inc. (**Shaw**).[17] Shaw, however, was concerned that it would not take clear title to Mid-Bowline given the Moyse Action.[18] Accordingly, the parties sought to close the transaction using a Court-approved plan of arrangement (the **Plan of Arrangement**) which included a release of Catalyst's claims (the **Proposed Release**).[19]

16. On January 26, 2016, Catalyst raised three objections to the Plan of Arrangement, all relating to the Proposed Release. Justice Newbould addressed each of Catalyst's objections in his decision relating to the Plan of Arrangement of the same day.

17. Justice Newbould dismissed Catalyst's first objection that the Court did not have jurisdiction to affect the rights of Catalyst because it was not a party to the Plan of Arrangement.[20] Justice Newbould explained that the "only reason" for the Plan of Arrangement was to extinguish Catalyst's claims, and concluded that the Court had jurisdiction to "compromise the rights of Catalyst" under section 192 of the CBCA.[21]

---

[16] Transcript of Cross-Examination of James Riley held May 13, 2015, at qq. 510-514, Compendium, Vol 3, Tab 66, pp. 728 – 729.
[17] Carlson Affidavit, para. 35, Compendium, Vol 3, Tab 56, p. 461; Motion Decision, para. 34, Compendium, Vol 1, Tab 5, p. 105.
[18] Plan of Arrangement Decision, para. 6, Compendium, Vol 1, Tab 8, pp. 157 – 158; Motion Decision, para. 34, Compendium, Vol 1, Tab 5, p. 105.
[19] Plan of Arrangement Decision, para. 5, Compendium, Vol 1, Tab 8, p. 157; Motion Decision, para. 34, Compendium, Vol 1, Tab 5, p. 105.
[20] Plan of Arrangement Decision, para. 39, Compendium, Vol 1, Tab 8, p. 166.
[21] Plan of Arrangement Decision, paras. 6 and 39, Compendium, Vol 1, Tab 8, pp. 157 – 158 and 166.

18. Catalyst's second objection was that the Proposed Release prejudiced Catalyst's existing claim in the Moyse Action.[22] Justice Newbould responded to that concern by ordering an expedited trial in the Moyse Action to be set down for February 2016.[23]

19. Catalyst's third objection was that the Proposed Release would extinguish its claim for breach of the Exclusivity Agreement.[24] Justice Newbould found that Catalyst had known about that claim since at least March 2015 but had "[laid] in the weeds":

> Although Catalyst was aware on March 13, 2015 of the facts that Mr. Riley now asserts he wants to use in this intended inducing breach of contract action, and was aware of the nature of a breach of contract action as disclosed on his cross-examination, it was only on Monday of this week that anything was first said by Catalyst about that. […]
>
> This intended action has not been started. It could have been started in March, 2015 when the facts were disclosed and known to Catalyst. To lie in the weeds until the hearing of the application and assert such a right to stop the plan of arrangement is troubling indeed and not acting in good faith. Waiting and seeing how things are going in the litigation process before springing a new theory at the last moment is not to be encouraged.[…][25]

20. Justice Newbould concluded that the Plan of Arrangement, including the Proposed Release was fair and reasonable:

> In the circumstances, I disregard the statement of Mr. Riley as to the intended claim Catalyst says it will bring. It is too late in the process and the provision in the amended plan of arrangement that would prevent such a claim being made is

[22] Plan of Arrangement Decision, para. 4, Compendium, Vol 1, Tab 8, p. 157.
[23] Plan of Arrangement Decision, paras. 49, 50, Compendium, Vol 1, Tab 8, p. 169 – 170.
[24] Plan of Arrangement Decision, para. 51, Compendium, Vol 1, Tab 8, p. 170.
[25] Plan of Arrangement Decision, paras. 56 and 59, Compendium, Vol 1, Tab 8, pp. 171 – 172.

> fair and reasonable. The trial of the issue I have ordered is not to consider any such claim.[26]

21. In the following days, Catalyst resolved its objections to the Plan of Arrangement, which included a settlement of the terms of the Proposed Release, carving out certain claims Catalyst wished to reserve the right to pursue. These "reserved" claims did not include Catalyst's claim against VimpelCom. By Court order dated February 3, 2016, the Court approved the Plan of Arrangement and the revised release (the **Release**).[27] Catalyst consented to the order. [28]

G. Catalyst sues VimpelCom, UBS, and the Consortium

22. On May 31, 2016, just days before the trial of the Moyse Action was set to begin, Catalyst commenced this action against VimpelCom, UBS, and the Consortium.[29] Catalyst alleged that VimpelCom breached the Exclusivity Agreement in order to sell WIND to the Consortium[30] and that its damages crystalized in the form of profits realized by the Consortium from the sale of WIND to Shaw.[31]

H. The trial and appeal of the Moyse Action

23. The trial of the Moyse Action was held in June 2016 over six days before Justice Newbould.[32] The parties called 13 witnesses, including the principals of Catalyst, West

---

[26] Plan of Arrangement Decision, paras. 56, 59 and 61, Compendium, Vol 1, Tab 8, pp. 171 – 172; Motion Decision, para. 36, Compendium, Vol 1, Tab 5, p. 106 (emphasis added).
[27] Plan of Arrangement Order, section 4.5, Compendium, Vol 1, Tab 9, pp. 183 – 184.
[28] Carlson Affidavit, para. 54, Compendium, Vol 3, Tab 56, p. 466.
[29] Motion Decision, para. 38, Compendium, Vol 1, Tab 5, pp. 106 – 107.
[30] Motion Decision, para. 5, Compendium, Vol 1, Tab 5, p. 101.
[31] Catalyst's Statement of Claim, paras. 99 and 100, Compendium, Vol 1, Tab 1, p. 22; Catalyst's Amended Amended Statement of Claim, paras. 127, 133, Compendium, Vol 1, Tab 3, pp. 61 – 62.
[32] Motion Decision, para. 39, Compendium, Vol 1, Tab 5, p. 107.

Face, LG Capital Investors, Tennenbaum Capital Partners, and Globalive Capital Inc.[33] The productions totaled more than 7,300 documents.[34] The closing submissions exceeded 500 pages.[35]

24. In his decision of August 18, 2016, Justice Newbould dismissed Catalyst's claims.[36] He made two findings directly relevant to Catalyst's claims in this action.

25. First, Justice Newbould found as a fact that VimpelCom did not communicate with the Consortium during the period of the Exclusivity Agreement:

> neither VimpelCom nor Globalive had any discussion with any of the consortium members who had made the proposal before the exclusivity period that VimpelCom had with Catalyst expired on August 18, 2014.[37]

26. This finding directly addresses Catalyst's new allegations in this claim that VimpelCom communicated or negotiated with the Consortium in breach of the Exclusivity Agreement.

27. Second, Justice Newbould held that Catalyst could never have concluded a deal with VimpelCom and would never have acquired an interest in WIND:

> 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

[33] Carlson Affidavit, para. 99, Compendium, Vol 3, Tab 56, pp. 476 – 477.
[34] Carlson Affidavit, para. 112, Compendium, Vol 3, Tab 56, p. 480.
[35] Carlson Affidavit, para. 103, Compendium, Vol 3, Tab 56, p. 478.
[36] Moyse Decision, para. 8, Compendium, Vol 1, Tab 14, p. 225.
[37] Moyse Decision, para. 105, Compendium, Vol 1, Tab 14, pp. 253 – 254; Motion Decision, para. 101, Compendium, Vol 1, Tab 5, p. 125.

> 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.[38]

28. This finding precludes Catalyst's claim for damages in this action. Catalyst's claim in this proceeding is that it has been denied an opportunity to purchase WIND. Justice Newbould found that there was "no chance" Catalyst and VimpelCom would conclude a transaction.[39]

29. Catalyst appealed Justice Newbould's decision to this Court. The appeal was dismissed on March 22, 2018.[40] In its decision, the Court of Appeal made several important findings relevant to this proceeding.

30. First, the Court of Appeal rejected Catalyst's argument that the dealings between Catalyst, VimpelCom, West Face and the Consortium in August 2014 were "beyond the scope of the claim as framed in the pleadings" in the Moyse Action.[41] To the contrary, the Court concluded that those facts were "germane" to the claim and that a "great deal of evidence" on those issues was elicited by both sides at the trial.[42]

31. Second, the Court of Appeal acknowledged Justice Newbould's finding that Catalyst chose to terminate its negotiations with VimpelCom rather than agree to the

---

[38] Moyse Decision, para. 131, Compendium, Vol 1, Tab 14, pp. 261 – 262 (emphasis added).
[39] Moyse Decision, para. 131, Compendium, Vol 1, Tab 14, pp. 261 – 262.
[40] *The Catalyst Capital Group Inc. v. Moyse*, 2018 ONCA 283 (**Moyse Appeal**), para. 7, Compendium, Vol 1, Tab 16, p. 284.
[41] Moyse Appeal, para. 39, Compendium, Vol 1, Tab 16, pp. 295 – 296.
[42] Moyse Appeal, para. 42, Compendium, Vol 1, Tab 16, p. 297.

break fee demanded by VimpelCom.[43] It made reference to that finding and did not disagree with it.

32. Third, the Court of Appeal did not disturb Justice Newbould's conclusion that there was "no chance" Catalyst would have concluded a deal with VimpelCom.

I. The decision under appeal

33. On April 18, 2018, Justice Hainey dismissed this action as an abuse of process: it was an attempt to relitigate claims already adjudicated in the Moyse Action and allowing the claim to proceed would "impeach the integrity of the judicial system".[44]

34. In his reasons, Justice Hainey made the following findings:

(a) Catalyst's failure to acquire WIND and its acquisition by the Consortium was "at the heart" of Catalyst's new action and "front and centre" in the Moyse Action;[45]

(b) Catalyst's new action asserts claims it elected not to allege in the Moyse Action;[46]

(c) Catalyst's new action is an attempt to impose a new legal theory of wrongdoing on the same facts as the Moyse Action;[47]

(d) to succeed in its new action Catalyst must ask the court to make findings inconsistent with Justice Newbould's findings in the Moyse Action;[48]

---

[43] Moyse Appeal, para. 15, Compendium, Vol 1, Tab 16, p. 287.
[44] Motion Decision, para. 88, Compendium, Vol 1, Tab 5, p. 123.
[45] Motion Decision, paras. 61, 65 and 88, Compendium, Vol 1, Tab 5, pp. 115 – 116 and 123.
[46] Motion Decision, para. 86, Compendium, Vol 1, Tab 5, p. 122.
[47] Motion Decision, para. 64, Compendium, Vol 1, Tab 5, p. 115.

(e) Catalyst's new action amounts to "litigation by installment";[49] and

(f) there is no identifiable injustice to barring Catalyst's claim in this case.[50]

PART III - ISSUES AND THE LAW

35. Catalyst's claim is the latest installment in its serial litigation related to its failed acquisition of WIND. Justice Hainey applied the relevant legal principles and properly exercised his discretion to dismiss the claim as an abuse of process. The decision should be affirmed, and Catalyst should be denied a second "bite at the cherry."[51]

A. The Standard of Review

36. Contrary to Catalyst's position, correctness is not the appropriate standard of review. Justice Hainey's decision was based on the exercise of discretion and deeply rooted in the evidence. It should only be overturned if it is "clearly wrong" or founded on a palpable and overriding error.

37. Abuse of process engages the discretionary powers of the court.[52] The Supreme Court of Canada has stated that a discretionary decision will be reversible only where the lower court "came to a decision that is so clearly wrong that it amounts to an injustice" or gave "no or insufficient weight to relevant considerations".[53]

---

[48] Motion Decision, para. 65, Compendium, Vol 1, Tab 5, p. 116.
[49] Motion Decision, para. 81, Compendium, Vol 1, Tab 5, p. 120.
[50] Motion Decision, para. 75, Compendium, Vol 1, Tab 5, p. 118.
[51] *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 (***Danyluk***), para. 18, Joint Book of Authorities of the Respondents (**Joint BOA**), Vol 2, Tab 27; Motion Decision, para. 75, Compendium, Tab 5, p. 118.
[52] *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, 2003 SCC 63 (***Toronto v. CUPE***), para. 35, Joint BOA, Vol 7, Tab 91.
[53] *Penner v. Niagara Regional Police Services Board*, 2013 SCC 19, para. 27, Joint BOA, Vol 6, Tab 79.

38. Importantly, Justice Hainey's exercise of discretion was predicated on findings rooted in the evidence. Justice Hainey scrutinized the entire evidentiary record before Justice Newbould in the Moyse Action, which included affidavits, transcripts of oral evidence, exhibits, the pleadings and the positions taken by the parties. He concluded, on the evidence, that this action would necessarily require the relitigation of factual issues already adjudicated in the Moyse Action.

39. Accordingly, to succeed in this appeal, Catalyst must attack Justice Hainey's factual findings and demonstrate a palpable and overriding error.

40. In *Northmont Resort Properties Ltd. v. Goldberg*, the B.C. Court of Appeal considered the standard of review for factual findings made in the context of a determination of abuse of process. The Court of Appeal made clear that such an order was entitled to a high level of deference and, as a result, the appellants faced a "significant challenge":

> this Court will not lightly interfere with the judge's assessment of the factual matrix to which he applied the principles concerning an abuse of process. In short, the appellants face a significant challenge in overcoming the deference that this Court will show to an order of the kind under appeal.[54]

B. Catalyst's action is an abuse of process through relitigation

i. The Court's power to dismiss an action as an abuse of process

41. Rules 21.01(3)(d) and 25.11(c) permit dismissal if an action "is an abuse of the process of the court."[55] This power is discretionary and rooted in the Court's inherent

[54] *Northmont Resort Properties Ltd. v. Goldberg*, 2017 BCCA 404, para. 12, Joint BOA, Vol 5, Tab 72.
[55] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R. 21.01(3)(d) and R. 25.11(c).

jurisdiction to "prevent the misuse of its procedure, in a way that would […] bring the administration of justice into disrepute".[56] Rules 21.01(3)(d) and 25.11(c) operate to prevent litigation that would undermine judicial economy, consistency and finality.[57]

42. Importantly, the doctrine of abuse of process is broader and more flexible than the doctrines of *res judicata*, issue estoppel, or cause of action estoppel.[58] For example, there is no mutuality or privity requirement and the abuse of process doctrine is available to dismiss a claim made against a party who was not named in the previous proceeding.[59]

ii. Abuse of process through relitigation

43. It is well-recognized that the relitigation of issues that have been before the courts in a previous proceeding will create an abuse of process. As stated by the Supreme Court of Canada:

> from the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole.[60]

44. The law seeks to avoid relitigation primarily for two reasons:

---

[56] *Behn v. Moulton Contracting Ltd*., 2013 SCC 26, para. 40 (***Behn***), Joint BOA, Vol 1, Tab 12, citing *Canam Enterprises Inc. v. Coles*, 2000 CarswellOnt 4739 (C.A.) per Goudge J.A., dissenting, adopted at 2002 SCC 63 (***Canam***), paras. 55 – 56, Joint BOA, Vol 2, Tab 22; *Toronto CUPE*, Joint BOA, Vol 7, Tab 91; *Winter v. Sherman*, 2018 ONCA 703, Joint BOA, Vol 7, Tab 96.
[57] *Toronto v. CUPE*, para. 37, Joint BOA, Vol 7, Tab 91.
[58] *X. v. Y.*, 2016 ONSC 4333, para. 36, Joint BOA, Vol 7, Tab 98.
[59] *Behn*, paras. 39 – 41, Joint BOA, Vol 1, Tab 12.
[60] *Toronto v. CUPE*, para. 52, Joint BOA, Vol 7, Tab 91; See also *DeFaveri v.Toronto-Dominion Bank*, [1998] O.J. No. 2741 (C.A.), Joint BOA, Vol 3, Tab 30 and *Ernst & Young Inc. v. Central Guaranty Trust Co. (2006)*, 2006 ABCA 337, Joint BOA, Vol 3, Tab 35.

(a) overlapping issues and a waste of judicial resources.[61] As stated in Donald Lange's leading text on *res judicata* and abuse of process: "Not bringing forward all claims, or counterclaims, arising out of one set of circumstances in one action is an abuse of process";[62] and

(b) the risk of inconsistent findings, which serve to undermine the credibility of the justice system. Again, as stated in Donald Lange's text: "Bringing new causes of action which would contradict previous findings of fact is an abuse of process."[63]

45. Catalyst's claim is abusive for both reasons: (a) it directly overlaps with the issues that were before the Court in the Moyse Action; and (b) Catalyst's claim can only be successful if the Court rejects the findings made by Justice Newbould.

iii. Overlap with the Moyse Action

46. Catalyst's claim in this action directly overlaps with the factual issues at the heart of the Moyse Action.

47. Both claims arise from the WIND sales process in the summer of 2014, and the specific discussions between VimpelCom and Catalyst, on the one hand and VimpelCom and the Consortium on the other. In each case, Catalyst claims that the Consortium negotiated with an improper advantage:

---

[61] *Toronto v. CUPE*, para. 51, Joint BOA, Vol 7, Tab 91.
[62] Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 4th ed. (Markham, ON: LexisNexis Canada Inc., 2015), (**Lange**) p. 217, Joint BOA, Vol 7, Tab 101.
[63] Lange, p. 218, Joint BOA, Vol 7, Tab 101.

(a) in the Moyse Action, the alleged improper advantage arose from the Consortium's supposed access to Catalyst's confidential information through Moyse;[64] and

(b) in this action, the alleged improper advantage arises from the Consortium's supposed access to VimpelCom and UBS during the term of the Exclusivity Agreement.[65]

48. Catalyst's damages theory in both cases is premised on its belief that it lost the opportunity to acquire WIND and sell it to Shaw for a substantial profit.[66] Catalyst claims identical damages in both actions: the difference between the price for which it hoped to acquire WIND and the price for which the Consortium later sold WIND to Shaw.

49. Ultimately, both actions arise from the same factual matrix, involving:

(a) the negotiations for the sale of WIND between VimpelCom and Catalyst;

(b) the breakdown in those negotiations, including Catalyst's refusal to agree to the break fee requested by VimpelCom;

(c) the unsolicited bid of the Consortium during the exclusivity period;

(d) the successful sale of WIND to the Consortium;

(e) the subsequent sale of WIND to Shaw;

---

[64] Catalyst's Amended Amended Amended Statement of Claim, para. 1, Compendium, Vol 1, Tab 12, pp. 198 – 200.
[65] Catalyst's Amended Amended Statement of Claim, paras. 110-122, Compendium, Vol 1, Tab 4, pp. 91 - 93.
[66] Catalyst's Amended Amended Statement of Claim, paras. 1, 103 – 109, 114 – 122, 126 – 127, Compendium, Vol 1, Tab 4, pp. 71 – 72, 90 – 94.

(f) whether Catalyst ever could have acquired WIND; and

(g) the damages Catalyst seeks, being the difference between what it hoped to purchase WIND for and what Shaw ultimately paid for WIND.

50. Given the overlap, many of the same witnesses and documents in the Moyse Action will be required for this action. For example, Catalyst witnesses Messrs. Glassman, De Alba, and Riley, who testified in the Moyse Action,[67] will once again need to answer questions about their negotiations with VimpelCom and why a deal with VimpelCom was never completed. Many of the seven witnesses called by West Face, including Messrs. Leitner, Griffin and Lockie, will also be required to give evidence.

51. Moreover, substantially all of the trial record from the Moyse Action would be required to be entered into evidence again, including hundreds of pages of affidavit evidence, documents, emails and transcripts. The Court in this action will be asked to retread all of these materials.

52. Justice Hainey expressly recognized the abuse created by the overlap between this action and the Moyse Action. He held that the "main issue" in this action, namely Catalyst's failure to acquire WIND, was "front and centre" in the Moyse action and that permitting this action to proceed would impeach the integrity of the justice system:

> The same can be said about Catalyst's attempt in this proceeding to relitigate why it failed to acquire Wind. This issue was "front and centre" in the litigation before Newbould J. It is also the main issue in Catalyst's Current Action. In my view, relitigation of this issue in this

[67] Carlson Affidavit, para. 99, Compendium, Vol 3, Tab 56, pp. 476 – 477.

> proceeding would impeach the integrity of the judicial system. It should not be permitted.[68]

53. Justice Hainey's conclusion is clearly correct and ought not to be disturbed.

iv. Risk of inconsistent findings

54. Not only will the Court in this action be called upon to reconsider issues that were adjudicated in the Moyse Action, it will also be asked to reject Justice Newbould's findings on certain key issues.

55. For Catalyst to prove its claim against VimpelCom, a trial judge will need to find that: (a) negotiations with the Consortium took place during the exclusivity period, and (b) VimpelCom and Catalyst would have closed the sale of WIND. However, Justice Newbould has already found in the Moyse Action that:

(a) VimpelCom did not communicate with any members of the Consortium during the term of the Exclusivity Agreement:

> neither VimpelCom nor Globalive had any discussion with any of the consortium members who had made the proposal before the exclusivity period that VimpelCom had with Catalyst expired on August 18, 2014.[69]

(b) Catalyst could not have successfully closed a deal with VimpelCom:

> 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

[68] Motion Decision, para 88, Compendium, Vol 1, Tab 5, p. 123.
[69] Moyse Decision, para. 105, Compendium, Vol 1, Tab 14, pp. 253 – 254.

> VimpelCom requested that Catalyst would not agree to.[70]
> […]
>
> 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.[71]

56. It is important to note that Justice Newbould's finding that "there was no chance that Catalyst could have successfully concluded a deal with VimpelCom" was based primarily on Catalyst's own evidence.[72] Indeed, on appeal this Court acknowledged that Justice Newbould's finding that Catalyst did not suffer any damages "did not depend on the trial judge accepting the testimony of Mr. Moyse, or the West Face witnesses".[73]

57. Justice Hainey properly concluded that Catalyst could only succeed in this proceeding by attacking Justice Newbould's findings:

> Because Justice Newbould determined the reason why Catalyst did not acquire Wind in the Moyse/West Face Action, Catalyst cannot now pursue a new action alleging other misconduct by West Face and the other defendants that it alleges caused its failure to acquire Wind. To succeed in this proceeding Catalyst must ask the court to make findings that are inconsistent with Newbould J.'s

[70] Moyse Decision, para. 129, Compendium, Vol 1, Tab 14, p. 261.
[71] Moyse Decision, para. 131, Compendium, Vol 1, Tab 14, pp. 261 – 262 (emphasis added).
[72] Moyse Decision, para. 131, Compendium, Vol 1, Tab 14, pp. 261 – 262.
[73] Moyse Appeal, para 14, Compendium, Vol 1, Tab 16, pp. 286 – 287.

> findings. Catalyst's failure to acquire Wind was a central issue in the Moyse/West Face Action. It is also the central issue in Catalyst's Current Action. This issue has been decided by Justice Newbould. It cannot be re-litigated in this proceeding.[74]

58. In response, Catalyst argues that Justice Newbould's findings on these factual issues are *obiter* and "not fundamental in disposing of the Moyse action."[75] That argument has no merit:

(a) the findings are clearly dispositive of the claim against VimpelCom: if Catalyst cannot prove that VimpelCom communicated with the Consortium during the exclusivity period or that it could have successfully acquired WIND, its claim is doomed to fail; and

(b) the principle of *obiter dicta* does not apply to factual findings. *Obiter dicta* serves to distinguish legal conclusions giving rise to *stare decisis* from those that do not. The *Shorter Oxford Dictionary* defines "*obiter dictum*" as "an expression on a matter of law" ,[76] and *Sweet's Law Dictionary* defines it as "an observation… on a legal question".[77]

59. In any event, Justice Hainey properly rejected this submission by Catalyst. In his view, the findings that: (a) VimpelCom did not communicate with the Consortium during

---

[74] Motion Decision, Para 65, Compendium, Vol 1, Tab 5, p. 116.
[75] Catalyst Factum, para. 43.
[76] C. Finch *et al*, eds., *Words & Phrases: Judicially Defined in Canadian Courts and Tribunals,* Vol. 6 (Scarborough, ON: Carswell) "Obiter Dictum", citing *R. v. Wise*, [1982] 4 W.W.R. 658 (B.C. County Ct.) at 665, (emphasis added), Joint BOA, Vol 7, Tab 100.
[77] C. Finch et al, eds., *Words & Phrases: Judicially Defined in Canadian Courts and Tribunals*, Vol. 6 (Scarborough, ON: Carswell) "Obiter Dictum", citing *Davidner v. Schuster*, 1936 D.L.R. 560 (Sask. C.A.), (emphasis added), Joint BOA, Vol 7, Tab 100.

the exclusivity period; and (b) Catalyst would never have acquired WIND, were "key" and "essential and fundamental" findings to the Moyse Action.[78]

60. Catalyst also argues that its new action is not abusive because VimpelCom was not a party to the Moyse action. That argument should be rejected. It fails to recognize that abuse of process, as distinct from issue estoppel or cause of action estoppel, does not require mutuality of parties. Abuse of process is doctrinally designed to address cases just like this: where Catalyst chose to pursue a claim involving VimpelCom's actions but deliberately decided not to name VimpelCom as a party. Abuse of process is designed to stop litigation by installment.[79]

61. Catalyst relies on *Hall v. Hall*, but that case is not helpful to it. In *Hall v. Hall*, there was no risk of inconsistent findings. The plaintiff had brought an action against her husband for "judicial separation" and for proceeds from the sale of their farm.[80] In response to questioning at trial, the plaintiff made mention of the fact that she jointly operated a feed store in Calgary with her husband.[81] The feed store was not at issue in that proceeding, and the Court made no findings with respect to the feed store. In the circumstances, it was obviously not abusive for the plaintiff to bring a subsequent action alleging joint ownership of the feed store.[82]

62. In contrast, Justice Newbould's critical findings were: (a) hotly contested at trial; and (b) as found by Justice Hainey, central and determinative to both actions.

---

[78] Motion Decision, paras. 65, 70 and 101, Compendium, Vol 1, Tab 5, pp. 116 – 117, 125.
[79] *Danyluk*, para. 18, Joint BOA, Vol 2, Tab 27.
[80] *Hall v. Hall and Hall's Feed & Grain Ltd*, [1958] A.J. No. 60 (C.A) (***Hall***), paras. 23 and 26, Joint BOA, Vol 4, Tab 44.
[81] *Hall*, paras. 37 – 38, Joint BOA, Vol 4, Tab 44.
[82] *Hall*, para. 28, Joint BOA, Vol 4, Tab 44.

63. *Canam Enterprises Inc. v. Coles* similarly does not assist Catalyst. In *Canam*, the new claim did not engage the issue already litigated. Justice Goudge noted that the new claim is "different from the issue already determined".[83] Moreover, the Court based its decision on the fact that the claimant in the new action was not attempting to "relitigate a claim which he has previously raised but lost".[84] In other words, the circumstances in *Canam* were the very opposite of the circumstances of this case.

C. Catalyst's claim against VimpelCom is a collateral attack

64. Catalyst's claim against VimpelCom is an abuse of process for a futher reason: it is a collateral attack on Justice Newbould's order approving the Release. Under the terms of the Release, Catalyst's claim has been "settled, compromised, released and determined without liability".[85]

i. The law of collateral attack

65. The doctrine of collateral attack is "one facet of abuse of process."[86] The rule against collateral attack prohibits attempts to impeach decisions "by the impermissible route of relitigation in a different forum."[87]

66. The Release was part of the Plan of Arrangement given effect by Justice Newbould's Order dated February 3, 2016.[88] Catalyst consented to the order approving

---

[83] *Canam Enterprises Inc. v. Coles*, [2000] O.J. No. 4607 (C.A.) (***Canam***), para. 57, Joint BOA, Vol 2, Tab 22.
[84] *Canam*, para. 58, Joint BOA, Vol 2, Tab 22.
[85] Plan of Arrangement Order, section 4.5, Compendium, Vol 1, Tab 9, pp. 183 – 184.
[86] *Greengen Holdings Ltd. v. British Columbia (Ministry of Forests, Lands and Natural Resource Operations)*, 2018 BCCA 214, para 31; Joint BOA, Vol 4, Tab 42; see also *Toronto v. CUPE*, para. 34, Joint BOA, Vol 7, Tab 91.
[87] *Toronto v. CUPE*, para. 46, Joint BOA, Vol 7, Tab 91, *Wilson v. The Queen*, [1983] 2 S.C.R. 594 at 599, Joint BOA, Vol 7, Tab 95, as cited in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, para. 71, Joint BOA, Vol 3, Tab 39.

the Release. Catalyst's attempt to skirt the Release is a collateral attack on Justice Newbould's order and an abuse of process.

ii. The Release captures Catalyst's claim against VimpelCom

67. The language of the Release captures Catalyst's claim for breach of the Exclusivity Agreement and bars it. The operative language of the Release is broad:

> all actions, causes of action, claims or proceedings (actual or contingent and whether or not previously asserted) based on or in any way relating to any Purchased Shares or Options shall be deemed to have been settled, compromised, released and determined without liability […].[89]

68. The Release captures Catalyst's claim against VimpelCom if those claims can be said to be "based on" or "in any way related to" the shares of Mid-Bowline. Ontario courts have variously held that:

(a) the words "based on" mean "as referring to a starting point - a foundation" or "taking into account";[90]

(b) the term "relating to" should be given a "plain but expansive meaning";[91]

(c) the term "in any way related to" is "very broad";[92]

---

[88] For cases interpreting the effect of a court-ordered release see: *Yu v. Jordan*, 2012 BCCA 367, para. 53, Joint BOA, Vol 7, Tab 99; *Conway v. Law Society of Upper Canada*, 2016 ONCA 72, paras. 13 – 14 and 32, Joint BOA, Vol 2, Tab 24.
[89] Plan of Arrangement Order, section 4.5, Compendium, Vol 1, Tab 9, pp. 183 – 184.
[90] *Eastern Power Ltd. v. Ontario Electricity Financial Corp.*, [2008] O.J. No. 3722 (S.C.), para. 113, rev'd in 2010 ONCA 467 on other grounds, Joint BOA, Vol 3, Tab 32; citing *P. (J.) v. Sinclair* (1997), 93 B.C.A.C. 175 (C.A.), para. 17, Joint BOA, Vol 6, Tab 78; and *Moreau-Bérubé v. Nouveau-Brunswick*, [2002] 1 S.C.R. 249, para. 65, Joint BOA, Vol 5, Tab 68.
[91] *725410 Ontario Inc. v. Gertner*, 2011 ONSC 6121, para. 32, Joint BOA, Vol 1, Tab 2.

(d) "[t]he words 'relating to' enjoy a wide compass";[93] and

(e) the term "relating to" does not require a "sufficient" connection but rather should be understood in its ordinary sense.[94]

69. The plain language of the Release clearly captures this litigation. The core of Catalyst's claim is that the Consortium improperly acquired WIND from VimpelCom, Mid-Bowline was the vehicle of this wrongful act and therefore the Consortium ought not benefit from the ownership of their shares in Mid-Bowline. As a result, there can be no doubt that the proceeding is "in any way related to" the shares of Mid-Bowline.

70. The allegations in Catalyst's Statement of Claim also make clear that the action is directly related to the Purchased Shares. First, Catalyst pleads that it only discovered its claim by reviewing the affidavits filed in connection with Plan of Arrangement for the Purchased Shares:

> The affidavits revealed to Catalyst for the first time that VimpelCom did, in fact, breach the Exclusivity Agreement and had failed to negotiate with Catalyst in good faith through the exclusivity period.[95]

71. In other words, Catalyst pleads that its claim arose as a consequence of the Consortium's Plan of Arrangement concerning the Purchased Shares and, based on the

---

[92] *Juroviesky and Ricci LLP v. Lawyers Professional Indemnity Co*., 2014 ONSC 43, paras. 31-33, Joint BOA, Vol 4, Tab 52.
[93] *Woolcock v. Bushert*, [2004] O.J. No. 4498 (C.A.), para. 23, Joint BOA, Vol 7, Tab 97.
[94] *Ontario (Attorney General) v. Toronto Star*, 2010 ONSC 991 (Div. Ct.), paras. 44 – 45, Joint BOA, Vol 6, Tab 75.
[95] Catalyst's Amended Amended Statement of Claim, paras. 129-132, Compendium, Vol 1, Tab 4, pp. 94 – 95 (Emphasis added).

language of the Release itself, Catalyst's claim is thus necessarily "based on" and "related to" the Purchased Shares.

72. Second, Catalyst pleads that the Purchased Shares were the means through which the Consortium wrongfully acquired WIND from VimpelCom. The foundation of Catalyst's claim is that VimpelCom's alleged breach of the Exclusivity Agreement allowed the Consortium to acquire WIND to Catalyst's detriment. Paragraph 126 of Catalyst's Statement of Claim reads:

> As a result of the misconduct of the Conspirators, VimpelCom and UBS breached the Exclusivity Agreement and breached their duty of good faith during its negotiations with Catalyst. As a result, the Consortium was able to purchase Wind to Catalyst's detriment.[96]

73. At paragraph 124 of its claim, Catalyst pleads that Mid-Bowline was the vehicle used by the Consortium to unlawfully acquire WIND:

> On September 15, 2014, the Consortium and VimpelCom announced an agreement by which the Consortium, through Mid-Bowline Group Corp., purchased VimpelCom's stake in Wind.[97]

74. Accordingly, the Purchased Shares were the vehicle used to acquire WIND.

75. Third, at paragraphs 127 and 133 of its Claim, Catalyst specifically pleads that its damages "crystalized" when Shaw acquired Mid-Bowline – *i.e.*, the Purchased Shares:

> On or about January 2016, Shaw Communications ("Shaw") acquired Mid-Bowline, the corporation formed after the Consortium's acquisition of VimpelCom's interest in Wind, for $1.6 billion. As a result, the Consortium received a profit of over $1,300,000,000, thereby

[96] Catalyst's Amended Amended Statement of Claim, para. 126, Compendium, Vol 1, Tab 4, p. 94 (emphasis substituted).
[97] Catalyst's Amended Amended Statement of Claim, para. 124, Compendium, Vol 1, Tab 4, p. 93 (emphasis added).

> crystallizing Catalyst's damages as a result of the Conspirators' and VimpelCom's wrongful conduct, as described above. […]
>
> As a result of the Consortium's inducement of breach of contract and VimpelCom's breach of the Exclusivity Agreement, Catalyst suffered damages, which are crystalized in the form of profits realized by the Conspirators from the sale of Wind to Shaw, which Catalyst estimates to be $1,300,000,000 (the "Proceeds").[98]

76. The substance of Catalyst's claim is that it lost the opportunity to sell WIND to Shaw at a substantial profit. Catalyst claims as damages the profits that the Consortium realized on Shaw's acquisition of the Purchased Shares. Accordingly, for this reason as well, Catalyst's claim is necessarily "based on" or "related to" the Purchased Shares.

iii. The carve-out in the Release does not apply to Catalyst's claim

77. The manner in which the carve-out is drafted further supports the conclusion that the Release bars Catalyst's claim against VimpelCom in this action. The carve-out reads:

> nothing in this section 4.5 shall be construed to extinguish any right of The Catalyst Capital Group Inc. to assert any of the following matters, with the exception of any constructive trust or equivalent remedy over the Purchased Shares, which shall be deemed to have been settled, compromised, released and determined without liability, along with all other claims in this section 4.5:
>
> (a) Its existing claims as asserted in the Amended Amended Statement of Claim as amended December 16, 2014 in the proceeding bearing Court File No. CV-14-507120 in the Ontario Superior Court of Justice, against West Face Capital Inc. and Brandon Moyse;
>
> (b) As against any person (as defined in the OBCA), any potential claim for a tracing of the money received by West

[98] Catalyst's Amended Amended Statement of Claim, paras. 127 and 133, Compendium, Vol 1, Tab 4, pp. 94 – 95 (emphasis removed).

> Face Capital Inc. from the disposition of its interest in the Corporation pursuant to the Arrangement; or
>
> (c) As against the Former Shareholders, any potential claim relating to their acquisition from VimpelCom Ltd. of their interest directly or indirectly in WIND Mobile Corp., including, to the extent permitted by law, for a tracing of the money received by them pursuant to the Arrangement.[99]

78. The Release specifically binds Catalyst in respect of all claims relating to the Purchased Shares except those enumerated exceptions found in subparagraphs (a) – (c). The three exceptions each target specific parties:

(a) subparagraph (a) allows Catalyst to pursue a claim against West Face and Moyse in the Moyse Action;

(b) subparagraph (b) allows Catalyst to pursue a tracing claim against any person who receives certain proceeds from the sale to Shaw; and

(c) subparagraph (c) allows Catalyst to pursue a claim against only the Consortium in connection with the purchase from VimpelCom.

79. The carve-out at subparagraph (c) is particularly relevant. That carve-out allows Catalyst to pursue any potential claim relating to the Consortium's acquisition from VimpelCom of their interest in WIND (*i.e.*, this action), but only against the Consortium. The carve-out does not allow Catalyst to pursue any related claim against VimpelCom.

80. Subparagraph (c) of the Release could have been drafted to allow Catalyst to make claims against "any person". For example, subparagraph (b) is broadly drafted to

[99] Plan of Arrangement Order, section 4.5, Compendium, Vol 1, Tab 9, pp. 183 – 184 (emphasis added).

allow Catalyst to pursue a claim against "any person" who receives proceeds from West Face's sale of WIND. Subparagraph (c) is narrower; it only allows Catalyst to make a claim against the Consortium.

81. Ultimately, the inclusion of the carve-out in subparagraph (c) reinforces the conclusion that all other claims relating to VimpelCom's sale of WIND are caught by the Release – including the claim against VimpelCom in this action.

iv. Catalyst is bound by the Release

82. There can be no dispute that Catalyst is bound by the Release: (a) Catalyst consented to the order and the Release, (b) the Release expressly contemplates claims by Catalyst, and (c) Justice Newbould found that the Court had jurisdiction to compromise Catalyst's claims through the Plan of Arrangement.[100]

83. Moreover, Justice Newbould approved the Plan of Arrangement with the express intention that it would release any claim by Catalyst for breach of the Exclusivity Agreement. In response to Catalyst's objection that the Release compromised its potential claim against VimpelCom for breach of the Exclusivity Agreement,[101] Justice Newbould determined that the Plan of Arrangement was fair and reasonable even though it "would prevent such a claim being made":

> In the circumstances, I disregard the statement of Mr. Riley as to the intended claim Catalyst says it will bring. It is too late in the process and the provision in the amended plan of

[100] Plan of Arrangement Decision, paras. 39, 56, 69 and 61, Compendium, Vol 1, Tab 8, pp. 166, 171 – 172; Motion Decision, para. 36, Compendium, Vol 1, Tab 5, p. 106; Carlson Affidavit, para. 54, Compendium, Vol 3, Tab 56, p. 466.
[101] Plan of Arrangement Decision, para. 51, Compendium, Vol 1, Tab 8, p. 170.

> arrangement that would prevent such a claim being made is fair and reasonable.[102]

D. The Court should protect its own process

84. The dismissal of Catalyst's claim as an abuse of process is particularly appropriate in light of Catalyst's conduct in the litigation arising from its failure to acquire WIND. Catalyst has been found to have tendered false affidavit evidence, "laid in the weeds", and acted in bad faith, all with respect to this specific claim.

i. False affidavit evidence

85. Catalyst's representative tendered false affidavit evidence in an attempt to explain away the abusive nature of this claim. Mr. Riley swore in his January 25, 2016 affidavit that he learned of claims against VimpelCom arising from the Exclusivity Agreement "for the first time through the materials filed" in the Plan of Arrangement application.[103]

86. However, six months earlier on May 13, 2015 it was put to Mr. Riley on cross-examination that Catalyst had not sued VimpelCom for breach of the exclusivity terms between VimpelCom and Catalyst. Mr Riley refused to agree that VimpelCom had not breached its exclusivity clause, and made clear that Catalyst was aware of a potential claim for breach of contract against VimpelCom:

> However, when a contract is breached, as I recall, there's two - you can - under the theory of Lumley and Guy, and I'm not

[102] Plan of Arrangement Decision, para. 61, Compendium, Vol 1, Tab 8, p. 172 (emphasis added).
[103] Affidavit of James Riley sworn January 25, 2016, para. 21, Compendium, Vol 3, Tab 69, p. 742.

> trying to play lawyer, you can go after one of the two parties, the party breaching or the party inducing a breach.[104]

87. Justice Newbould recognised the inconsistency and explicitly found that Mr. Riley's sworn affidavit filed in the Plan of Arrangement evidence was "not true"[105] noting that "it is quite clear that the information regarding the [Consortium's] bid was known by Mr. Riley in early 2015" given his answers on cross-examination.[106]

ii. Bad faith by Catalyst

88. Justice Newbould also found that Catalyst acted in bad faith by *lying in the weeds* and waiting until the Plan of Arrangement hearing to assert its claim against VimpelCom:

> The intended action has not been started. It could have been started in March, 2015 when the facts were disclosed and known to Catalyst. To lie in the weeds until the hearing of this application and assert such a right to stop the plan of arrangement is troubling indeed and not acting in good faith.[107]

89. Despite Justice Newbould's reprimand, Catalyst did not take any timely steps to bring this claim, either by amending its claim in the Moyse Action or by commencing a new claim. Catalyst once again chose to "lie in the weeds" until a week before the trial of the Moyse Action.

iii. Unfounded allegations

90. Justice Newbould admonished Catalyst for unfounded allegations of improper conduct by Moyse and West Face. Justice Newbould accordingly ordered Catalyst to pay substantial indemnity costs of over $1.2 million in the Moyse Action, holding that the

[104] Plan of Arrangement Decision, paras. 54, 56, Compendium, Vol 1, Tab 8, p. 171 (Emphasis added).
[105] Plan of Arrangement Decision, para. 59, Compendium, Vol 1, Tab 8, p. 172.
[106] Plan of Arrangement Decision, para. 53, Compendium, Vol 1, Tab 8, p. 170.
[107] Plan of Arrangement Decision, para. 59, Compendium, Vol 1, Tab 8, p. 172.

case was driven by Mr. Glassman's failure to accept "being outsmarted by someone else", that Mr. Glassman "played hardball" and that he "utterly failed":

> This law suit was driven by Mr. Glassman. He was not able to accept that he lost his chance to acquire Wind by being outsmarted by someone else. He set out to prove his belief that the West Face witnesses were lying and that West Face had obtained confidential Catalyst information from Mr. Moyse that they used to defeat Catalyst's bid to acquire Wind. He was certainly playing hardball attacking the reputation and honesty of West Face. However, in spite of the best efforts of Catalyst's very able and skilled lawyers, he utterly failed.[108]

91. The action Catalyst seeks to bring and that is now before this Court is yet another example of Catalyst's refusal to accept the results of the WIND acquisition and its "*hardball*" determination to "*win*" at any cost. Catalyst's claim is abusive in all respects and this Court should not overturn its dismissal.

PART IV - ORDER REQUESTED

92. VimpelCom requests that this appeal be dismissed, with substantial indemnity costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of October, 2018.

NORTON ROSE FULBRIGHT CANADA LLP
Lawyers for the Respondent/Defendant,
VimpelCom Ltd.

[108] *Catalyst Capital Group Inc. v. Moyse*, 2016 ONSC 6285, para. 10, Compendium, Vol 1, Tab 15, p. 276.

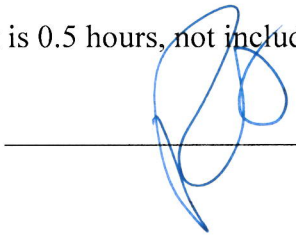
CERTIFICATE

I, Rahool Agarwal, lawyer for the Respondent/Defendant VimpelCom Ltd, certify that:

(i) An order under subrule 61.09 (2) (original record and exhibits) is not required.

(ii) The estimated time of my oral argument is 0.5 hours, not including reply.

October 31, 2018



SCHEDULE "A"
LIST OF AUTHORITIES

Cases

1. *Catalyst Capital Group Inc. v. Moyse*, 2016 ONSC 5271
2. *Re-MidBowline Group Corp*, 2016 ONSC 669
3. *The Catalyst Capital Group Inc. v. Moyse*, 2018 ONCA 283
4. *The Catalyst Capital Group Inc. v. VimpelCom Ltd*., 2018 ONSC 2471
5. *Danyluk v. Ainsworth Technologies Inc.,* 2001 SCC 44
6. *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, 2003 SCC 63
7. *Penner v. Niagara Regional Police Services Board*, 2013 SCC 19
8. *Northmont Resort Properties Ltd. v. Goldberg*, 2017 BCCA 404
9. *Behn v. Moulton Contracting Ltd*., 2013 SCC 26
10. *Canam Enterprises Inc. v. Coles,* 2000 CarswellOnt 4739 (C.A.)
11. *Canam Enterprises Inc. v. Coles,* 2002 SCC 63
12. *Winter v. Sherman*, 2018 ONCA 70
13. *X. v. Y.*, 2016 ONSC 4333
14. *DeFaveri v.Toronto-Dominion Bank*, [1998] O.J. No. 2741 (C.A)
15. *Ernst & Young Inc. v. Central Guaranty Trust Co. (2006)*, 2006 ABCA 337
16. *R. v. Wise*, [1982] 4 W.W.R. 658 (B.C. County Ct.)
17. *Davidner v. Schuster*, 1936 D.L.R. 560 (Sask. C.A.)
18. *Hall v. Hall and Hall's Feed & Grain Ltd*, [1958] A.J. No. 60 (C.A)
19. *Greengen Holdings Ltd. v. British Columbia (Ministry of Forests, Lands and Natural Resource Operations)*, 2018 BCCA 214
20. *Wilson v. The Queen*, [1983] 2 S.C.R. 594
21. *Garland v. Consumers' Gas Co*., 2004 SCC 25

22. *Yu v. Jordan*, 2012 BCCA 367

23. *Conway v. Law Society of Upper Canada*, 2016 ONCA 72

24. *Eastern Power Ltd. v. Ontario Electricity Financial Corp.*, [2008] O.J. No. 3722 (S.C.)

25. *Eastern Power Ltd. v. Ontario Electricity Financial Corp.*, 2010 ONCA 467

26. *P. (J.) v. Sinclair* (1997), 93 B.C.A.C. 175 (C.A.)

27. *Moreau-Bérubé v. Nouveau-Brunswick*, [2002] 1 S.C.R. 249

28. *725410 Ontario Inc. v. Gertner*, 2011 ONSC 6121

29. *Juroviesky and Ricci LLP v. Lawyers Professional Indemnity Co.*, 2014 ONSC 43

30. *Woolcock v. Bushert*, [2004] O.J. No. 4498 (C.A.)

31. *Ontario (Attorney General) v. Toronto Star*, 2010 ONSC 991 (Div. Ct.)

32. *Catalyst Capital Group Inc. v. Moyse*, 2016 ONSC 6285

Secondary Authorities

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

34. C. Finch et al, eds., Words & Phrases: Judicially Defined in Canadian Courts and Tribunals, Vol. 6 (Scarborough, ON: Carswell) "Obiter Dictum"

SCHEDULE "B"
RELEVANT STATUTES

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

Rule 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.

Rule 21.01(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).

Rule 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 the process of the court, and the judge may make an order or grant judgment accordingly.

Rule 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, …

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

THE CATALYST CAPITAL GROUP INC.
Appellant / Plaintiff

and

VIMPELCOM LTD. *et al*.
Respondents / Defendants

Court of Appeal File No.: C65431
Superior Court File No.: CV-16-11595-00CL

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

FACTUM OF THE RESPONDENT, VIMPELCOM LTD

NORTON ROSE FULBRIGHT CANADA LLP
Royal Bank Plaza, South Tower
3800 - 200 Bay Street
Toronto ON M5J 2Z4

Orestes Pasparakis LSO #: 36851T
Rahool Agarwal LSO #: 54528I
Danny Urquhart LSO #: 70779Q
Tel: +1 416.216.3943
Fax: +1 416.216.3930

Lawyers for the Respondent,
VimpelCom Ltd.