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.

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)

FACTUM OF THE DEFENDANT (RESPONDENT) WEST FACE CAPITAL INC.

October 31, 2018

DAVIES WARD PHILLIPS & VINEBERG LLP
155 Wellington Street West
Toronto ON M5V 3J7

Kent E. Thomson (LSUC# 24264J)
kentthomson@dwpv.com

Matthew Milne-Smith (LSUC# 44266P)
mmilne-smith@dwpv.com

Andrew Carlson (LSUC# 58850N)
acarlson@dwpv.com

Tel.: 416.863.0900
Fax: 416.863.0871

Lawyers for the Defendant (Respondent)
West Face Capital Inc.

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

Tel.: 416.862.7525
Fax: 416.862.7661

John E. Callaghan
john.callaghan@gowlingwlg.com

Benjamin Na
benjamin.na@gowlingwlg.com

Matthew Karabus
matthew.karabus@gowlingwlg.com

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

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

David C. Moore
david@moorebarristers.com

Ken Jones
ken@moorebarristers.com

Tel.: 416.581.1818 x.222
Fax: 416.581.1279

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

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

Orestes Pasparakis
orestes.pasparakis@nortonrosefulbright.com

Rahool Agarwal
rahool.agarwal@nortonrosefulbright.com

Tel.: 416.863.1200
Fax: 416.863.1716

Lawyers for the Defendant (Respondent), VimpelCom Ltd.

AND TO: **BORDEN LADNER GERVAIS LLP**
Bay Adelaide Centre, East Tower
22 Adelaide Street West
28th Floor
Toronto ON M5H 4E3

James D. G. Douglas
jdouglas@blg.com

Caitlin Sainsbury
csainsbury@blg.com

Tel.: 416.367.6000
Fax: 416.367.6749

Lawyers for the Defendant (Respondent), Globalive Capital Inc.

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

David R. Byers
dbyers@stikeman.com

Daniel Murdoch
dmurdoch@stikeman.com

Tel.: 416.869.5500
Fax: 416.947.0866

Lawyers for the Defendant (Respondent), UBS Securities Canada Inc.

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

Michael Barrack
michael.barrack@blakes.com

Kiran Patel
kiran.patel@blakes.com

Tel. 416.863.2400
Fax: 416.863.2653

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

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

Lucas E. Lung
llung@lerners.ca

Tel.: 416.867.3076
Fax: 416.867.9192

Lawyers for the Defendant (Respondent), Serruya Private Equity Inc.

AND TO: **MCCARTHY, TETRAULT LLP**
TD Bank Tower
66 Wellington Street West
Suite 5300
Toronto ON M5K 1E6

Junior Sirivar
jsirivar@mccarthy.ca

Jacqueline Cole
jcole@mccarthy.ca

Tel. 416.362.1812
Fax: 416.868.0673

Lawyers for the Defendant (Respondent),
Novus Wireless Communications Inc.

TABLE OF CONTENTS

PART I ~ OVERVIEW

1. The Catalyst Capital Group Inc. ("**Catalyst**") appeals from the Decision of Justice Hainey (the "**Motion Judge**") dismissing this action on the basis of issue estoppel, cause of action estoppel and abuse of process. Catalyst argues that because this second action against West Face concerning the sale of WIND Mobile Inc. by VimpelCom in 2014 (the "**Current Action**") pleads different legal duties than were at issue in Catalyst's previous action against West Face concerning the very same transaction (the "**Moyse Action**"), Justice Hainey somehow erred in dismissing the Current Action. Catalyst's assertion fundamentally misinterprets each of the three doctrines that the Motion Judge applied.

2. Issue estoppel applies when a party attempts to re-litigate important factual or legal issues decided against it in a preceding action, even if the second action alleges distinct legal duties. In the Moyse Action, Justice Newbould dismissed a claim for breach of confidence. In doing so, he held that Catalyst alone was responsible for its failure to acquire WIND, and that it could not have completed its proposed acquisition regardless of what any other bidder did at the time. These issues of causation and damages went to the very heart of the claims that Catalyst asserted against West Face in the Moyse Action. The Motion Judge held correctly that Catalyst is estopped from re-litigating the same issues of causation and damages in the Current Action, and that Catalyst's claims must therefore be dismissed on the basis of issue estoppel.

3. Cause of action estoppel forbids new claims that could and should have been brought in a preceding action. Catalyst was well aware of its supposed inducing breach claim against West Face by no later than May 2015 (over a year before the Moyse Action proceeded to trial), but made

the tactical choice not to assert that claim in the Moyse Action, and instead to "lie in the weeds".[1] Catalyst then engaged in litigation in instalments by suing West Face a second time, in the Current Action, over the same transaction that was at issue in the Moyse Action. The claims Catalyst asserted against West Face in the Current Action are the very sorts of claims the doctrine of cause of action estoppel is intended to prevent.

4. Abuse of process is concerned with safeguarding judicial economy, consistency, finality and the integrity of the administration of justice.[2] The Current Action arises out of many of the same facts and issues that were squarely at play and litigated extensively in the Moyse Action. As the Motion Judge correctly found, permitting Catalyst to re-litigate those matters in the Current Action would be manifestly unfair to West Face and violate the core principles that animate the doctrine of abuse of process.

5. Finally, there is no basis to interfere with the Motion Judge's exercise of discretion in applying each of the three doctrines outlined above. Catalyst's claims against West Face in the Moyse Action were dismissed by Justice Newbould, then the most senior and experienced Justice of the Commercial List. This Court dismissed Catalyst's appeal from that decision from the bench without the need to hear from counsel to West Face. Catalyst's claims against West Face in the Current Action were dismissed by Justice Hainey, who is currently the most senior and experienced Justice of the Commercial List. The decision of Justice Hainey is entitled to substantial deference on appeal, and he

---

1 This language was used by Justice Newbould in his Reasons in plan of arrangements proceedings in January 2016 concerning a subsequent sale of WIND, discussed in detail below.

2 *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.) Local 79*, 2003 SCC 63 at para 37 ["*C.U.P.E.*"], Respondents' Joint Book of Authorities ("RJBOA"), Tab 91.

made no error of principle in exercising his discretion to grant relief in favour of West Face.[3]

PART II ~ THE FACTS

6. Catalyst's Factum does not summarize fairly or accurately the relevant facts at issue in the Moyse Action or in the Current Action. West Face relies instead on the following summary of facts, which is taken principally from the findings of Justice Newbould and this Court in the Moyse Action (the "**Moyse Trial Decision**"[4] and "**Moyse Appeal Decision**"[5]), and of Justice Hainey in the proceedings below (the "**Motion Decision**").

A. Background to the WIND Transaction

7. WIND was formed in 2008 by Globalive Capital Inc. (a Canadian company) and Orascom Telecom Holdings S.A.E. (an Egyptian company). Because of foreign-ownership restrictions on telecommunications companies like WIND, Globalive held the majority of voting shares in WIND while Orascom held the majority of the overall equity. In 2011, VimpelCom Inc. acquired Orascom. By 2013, VimpelCom had grown frustrated by its inability to secure Government approval concerning its proposed acquisition of voting control of WIND. It retained UBS as its financial advisor and made widely known that it was willing to sell WIND based on an enterprise value of $300 million, failing which it intended to put WIND into protection under the *Companies' Creditors Arrangement Act*, sell the company's assets, and recover the sale proceeds by collecting on its shareholder loans to WIND of more than $1.5 billion.[6]

---

3 See *Western Larch Ltd. v. Di Poce Management Ltd.*, 2013 ONCA 722 at paras 15-16, RJBOA, Tab 94; *BNY Capital Corp. v. Katatakis*, [2005] O.J. No. 623 (C.A.) at para 8, RJBOA, Tab 16.

4 *Catalyst Capital Group Inc. v. Moyse*, 2016 ONSC 5271 [Moyse Trial Decision], Respondents' Joint Compendium ("RJC"), Tab 14, pp. 223-272.

5 *The Catalyst Capital Group Inc. v. Moyse*, 2018 ONCA 283 [Moyse Appeal Decision], RJC, Tab 16, pp. 281-301.

6 *The Catalyst Capital Group Inc. v. VimpelCom Ltd.*, 2018 ONSC 2471 at paras 13-14 [Motion Decision], RJC, Tab 5, pp. 99-131; Moyse Trial Decision at paras 17-27, RJC, Tab 14, pp. 229-231.

8. West Face and Catalyst had been interested in WIND for years. Both began discussions with VimpelCom in late 2013. Brandon Moyse was a junior member of Catalyst's deal team for several weeks, but quit Catalyst on May 24, 2014 to join West Face. Soon thereafter, Catalyst sued West Face and Mr. Moyse and sought injunctive relief to enforce a six month non-compete covenant in Mr. Moyse's employment agreement. As a result of Catalyst's claim, Mr. Moyse was placed on leave by West Face. He only worked there for a period of approximately three weeks, from June 23 to July 16, 2014.[7]

9. West Face's initial proposals to VimpelCom did not find favour. On July 23, 2014, VimpelCom agreed to negotiate exclusively with Catalyst.[8] West Face was told only that VimpelCom was in exclusivity with another unidentified bidder, but was not given a copy of the exclusivity agreement. Meanwhile, West Face had decided to work with a consortium of other investors (together with West Face, the "**Investors**"[9]) on an unsolicited proposal to VimpelCom to acquire WIND.[10] That proposal was made on August 7, 2014, but was not responded to or negotiated during Catalyst's period of exclusivity. The Investors' unsolicited proposal did not affect VimpelCom's negotiations with Catalyst in any way.[11] Instead, as described more fully below, Catalyst's own intransigence led to the demise of its proposed transaction with VimpelCom.

10. After Catalyst allowed its period of exclusivity with VimpelCom to expire on August 18, 2014, in the circumstances discussed below, the Investors entered into negotiations with

---

7 Moyse Trial Decision, *supra* note 4 at paras 32-67, RJC, Tab 14, pp. 232-242.

8 Moyse Trial Decision, *supra* note 4 at para 30, RJC, Tab 14, p. 231.

9 The Investors at the material times from July 23 to August 18, 2014 were comprised of the defendants West Face, Tennenbaum Capital Partners LLC, 64 NM Holdings GP LLC, and LG Capital Investors LLC. Subsequently, Globalive Capital Inc., Serruya Private Equity Inc., and Novus Wireless Communications Inc. joined in the purchase of WIND.

10 Moyse Trial Decision, *supra* note 4 at para 104, RJC, Tab 14, p. 253.

11 Moyse Trial Decision, *supra* note 4 at para 127, RJC, Tab 14, p. 260.

VimpelCom. They completed their purchase of WIND shortly thereafter, on September 16, 2014. They did so at the enterprise value of $300 million that had previously been stipulated by VimpelCom.[12] Fifteen months later, in December 2015, the Investors agreed to sell WIND to Shaw Communications Inc. for $1.6 billion.[13]

B. The Moyse Trial Decision Addressed Why Catalyst Failed to Acquire WIND

11. In the Moyse Action, Catalyst alleged that West Face obtained from Mr. Moyse confidential information concerning Catalyst's negotiating and regulatory strategies and misused that information to obtain an advantage over Catalyst. In the Current Action, Catalyst claims that the Investors obtained confidential information concerning Catalyst's strategies from Globalive and UBS, and misused that information to obtain a negotiating advantage over Catalyst. While this second case adds claims of inducing breach against West Face concerning Catalyst's exclusivity agreement with VimpelCom, both cases fundamentally allege that West Face misused confidential information concerning Catalyst's negotiations with VimpelCom to acquire WIND. Catalyst's claims against West Face in both cases turn on the theory that: (i) the Investors' unsolicited proposal of August 7 was the triggering event that led to the collapse of Catalyst's negotiations with VimpelCom; and (ii) in the absence of that proposal, Catalyst would have succeeded in completing its proposed acquisition of WIND.

12. One of the many problems with Catalyst's theory is that Justice Newbould considered very carefully the facts and circumstances surrounding the failure of Catalyst's negotiations with VimpelCom in the Moyse action, and explicitly rejected Catalyst's claim. He concluded that the

---

12 Moyse Trial Decision, *supra* note 4 at para 31, RJC, Tab 14, p. 232.
13 Moyse Trial Decision, *supra* note 4 at para 5, RJC, Tab 14, p. 224.

conduct of the Investors had nothing to do with Catalyst's failure to acquire WIND.[14] Rather, as explained more fully below, Catalyst's negotiations with VimpelCom failed because of the petulance, intransigence and poor decision-making of its Founder and Managing Partner, Newton Glassman.

(i) Catalyst Failed to Prove at Trial in the Moyse Action that the Investors Obtained Confidential Information Concerning Catalyst's Negotiations with VimpelCom

13. Catalyst claims in the Current Action that the Investors obtained and misused confidential information concerning Catalyst's negotiations with VimpelCom in August 2014.[15] In making that allegation Catalyst relies, in particular, on an August 1 email chain among the Investors as well as on various occasions when the Investors referred to Catalyst as the likely party in exclusivity with VimpelCom.[16]

14. Catalyst made the same allegation in the Moyse Action, and relied on the same emails and other evidence in doing so. The only difference between Catalyst's complaints against West Face in the Moyse Action and in the Current Action concerns the alleged source of the information in question. That difference, however, is irrelevant. Justice Newbould considered very carefully the evidence of senior representatives of each of the Investors and concluded that Catalyst's interest in and likely involvement with WIND were widely known and had been reported on publicly.[17] Justice Newbould found as a fact that although the Investors <u>believed</u> that Catalyst was likely engaged in discussions with VimpelCom, "<u>they never knew for sure</u>".[18]

15. In short, the question of whether West Face obtained <u>any</u> confidential information

---

14 Moyse Trial Decision, *supra* note 4 at paras 124-125, 127-131, <u>RJC</u>, Tab 14, pp. 259-262.
15 <u>Catalyst Factum</u> at paras 20-21, 28.
16 <u>Catalyst Factum</u> at para 28, citing emails between Peter Fraser, Michael Leitner and others dated August 1, 2014, <u>Appeal Book and Compendium</u>, Tab 22, pp. 352-354.
17 Moyse Trial Decision, *supra* note 4 at paras 27, 89-95, 121, <u>RJC</u>, Tab 14, pp. 231, 248-250, 258.
18 Moyse Trial Decision, *supra* note 4 at para 89, <u>RJC</u>, Tab 14, p. 248.

concerning Catalyst's negotiations with VimpelCom was a live issue during the trial of the Moyse Action, and was not limited to what Mr. Moyse allegedly conveyed to West Face. Indeed, counsel for Catalyst led extensive oral and documentary evidence on the broader issue, cross-examined West Face's witnesses at length, and argued in its written closing that West Face "was regularly apprised of the status of Catalyst's negotiations" with VimpelCom, including well after Mr. Moyse left the employ of Catalyst in May 2014 and had no access whatsoever to information of that nature. [19] Most of the evidence Catalyst relied on in seeking this finding: (i) concerned events that occurred well after Mr. Moyse left the employ of Catalyst; (ii) had nothing to do with information that Mr. Moyse allegedly obtained from Catalyst and conveyed to West Face; and (iii) was more properly relevant to the claims asserted by Catalyst in the Current Action. After considering carefully all of this evidence, Justice Newbould decided this issue squarely against Catalyst.[20] In doing so he made findings that were fatal to the claims Catalyst asserted against West Face in the Moyse Action, and that are also fatal to Catalyst's claims against West Face in the Current Action.

(ii) Catalyst Failed to Prove at Trial in the Moyse Action that the Investors Caused Catalyst's Failure to Acquire WIND

16. Catalyst also failed to prove in the Moyse Action that anything West Face knew or did caused the failure of Catalyst's proposed transaction with VimpelCom. After considering all of the evidence adduced by both parties concerning what the Investors knew about Catalyst's negotiations with VimpelCom and when, Justice Newbould made four key findings in that regard.

17. *First*, Justice Newbould held that the unsolicited proposal made by the Investors to VimpelCom on August 7, 2014, "and the ultimate deal made with VimpelCom", were not based on

---

19 Catalyst's Closing Submissions dated June 14, 2016 (in the Moyse Action) at para 19(s), see also paras 243-246, RJC, Tab 81, pp. 1146-1147, 1150-1151.

20 Moyse Trial Decision, *supra* note 4 at paras 89, 93-95, 113, 117, RJC, Tab 14, pp. 248, 250, 256-258.

information obtained by West Face concerning Catalyst's negotiations with VimpelCom. Rather, the proposal was the brainchild of two other Investors, Larry Guffey of LG Capital and Michael Leitner of Tennenbaum Capital Partners.[21] Justice Newbould accepted extensive evidence led at trial by West Face which established that its acquisition strategies "were not based on or derived from any knowledge of what Catalyst was doing with VimpelCom or of Catalyst's regulatory strategies."[22] That important finding was not limited to knowledge derived by West Face from Mr. Moyse.

18. *Second*, Justice Newbould held that there was no evidence that the Board of VimpelCom was even aware of the Investors' unsolicited proposal during VimpelCom's period of exclusivity with Catalyst.[23] Indeed, on August 8, 2014, the day after that proposal was made, VimpelCom agreed to extend its period of exclusivity with Catalyst.[24] Thereafter, VimpelCom made every effort to complete its transaction with Catalyst, but Catalyst obstinately refused to negotiate. While Catalyst now complains that no one from VimpelCom or UBS testified at trial in the Moyse Action,[25] it was Catalyst's choice to lead no such evidence. Catalyst argued in the Moyse Action that the Investors' unsolicited proposal of August 7, 2014 somehow caused VimpelCom to change course in its negotiations with Catalyst.[26] Having made that assertion, Catalyst has only itself to blame for choosing not to lead evidence from VimpelCom and UBS during the trial of that Action.

19. *Third*, Justice Newbould held that Catalyst failed to acquire WIND because of its

---

21 Moyse Trial Decision, *supra* note 4 at para 106, 114, RJC, Tab 14, pp. 254, 257.
22 Moyse Trial Decision, *supra* note 4 at para 114, RJC, Tab 14, p. 257.
23 Moyse Trial Decision, *supra* note 4 at para 127, RJC, Tab 14, p. 260.
24 Email Chain re: "Wind Canada- draft press release" dated August 8, 2014, RJC, Tab 37, p. 381; Email re "Exclusively Agreement Amendment 2 (…)" dated August 11, 2014 and Amendment No. 2 to Catalyst – VimpelCom Exclusivity Agreement dated August 8, 2014, RJC, Tab 41, pp. 387-390.
25 Catalyst Factum at para 43(a).
26 Catalyst's Closing Submissions dated June 14, 2016 (in the Moyse Action) at para 358, RJC, Tab 81, p. 1153-1154.

intransigence.[27] On August 11, 2014, after its Board considered the proposed transaction with Catalyst for the first time, VimpelCom asked Catalyst to consider a break fee of $5 million to $20 million, to cover ongoing operating losses of WIND that VimpelCom would have to absorb if the proposed sale to Catalyst did not receive the necessary regulatory approvals on a timely basis. VimpelCom stressed at the time that it had "a strong commitment to move quickly to signing", and that it was "open to finding solutions that work for both of us". Nevertheless, Mr. Glassman dismissed VimpelCom's request out of hand, and instead insisted that Catalyst's proposed Share Purchase Agreement with VimpelCom be finalized, executed and announced publicly that very day, "otherwise, no deal". He stated that he was "fed up" and "furious" with both VimpelCom and his own deal team, and did "not want to hear a single more excuse" from VimpelCom. On August 14, 2014, Mr. Glassman took the position that Catalyst's proposed transaction with VimpelCom was "technically dead". On August 15, 2014, Mr. Glassman terminated all discussions with VimpelCom, allowed Catalyst's period of exclusivity with VimpelCom to expire, and encouraged VimpelCom to consider its alternatives. [28] As it turns out, Mr. Glassman made an exceptionally poor choice. One of VimpelCom's alternatives was negotiating a transaction with the Investors, which it did in the weeks that followed.

20. *Fourth*, Justice Newbould held that even if West Face had somehow caused Catalyst's failure to enter into an agreement with VimpelCom, Catalyst suffered no damage because it would not

---

27 Moyse Trial Decision, *supra* note 6 at paras 127-130, RJC, Tab 14, pp. 260-261.

28 Moyse Trial Decision, *supra* note 6 at paras 128-130, RJC, Tab 14, p. 261; Email chain re "Wind Canada – draft press release" dated August 11, 2014, RJC, Tab 39, p. 384; Email chain re "Exclusivity Agreement" dated August 11, 2014, RJC, Tab 40, pp. 385-386; Email chain re "Good morning" dated August 11, 2014, RJC, Tab 42, pp. 391-395; Email chain re "Wind Canada – draft press release" (internal) dated August 5-12, 2014, RJC, Tab 44, pp. 378-398; Email chain re "when you have a moment" dated August 14, 2014, RJC, Tab 47, pp. 402-404; Email chain re "hi" dated August 15, 2014 (discussing break fee), RJC, Tab 48, pp. 405-406; Email chain re "hi" dated August 15, 2014 (discussing the shut-down of communications), RJC, Tab 49, pp. 407-409.

have completed its proposed acquisition of WIND even if it had somehow been able to finalize and execute a Share Purchase Agreement with VimpelCom. Multiple witnesses for Catalyst testified at trial that it would only have completed its acquisition of WIND if the Government of Canada had granted to Catalyst significant regulatory concessions that would have permitted Catalyst to sell WIND or its wireless spectrum to an incumbent telecom carrier (meaning Rogers, Telus or Bell) after five years.[29] Justice Newbould made an express finding in paragraph 124 of his Reasons that "Catalyst had no intention of closing a deal with VimpelCom if it could not obtain the concessions it was looking for from the Government". Justice Newbould also held that "from the start, Government officials made clear that no such concessions would be given", and that "[t]here was no evidence of any Government action that could lead one to expect the Government would relent and grant concessions".[30] As a result, Catalyst would never have completed an acquisition of WIND.[31]

C. Catalyst Chose Not to Raise its Inducing Breach Claims in the Moyse Action

21. Long before the Current Action was commenced and the Moyse Action was tried (both in June 2016), Catalyst knew that the Investors had made an unsolicited proposal to VimpelCom during Catalyst's period of exclusivity – the very event that Catalyst now relies upon to assert a claim of inducing breach against West Face. In March 2015, West Face explained under oath in the Moyse Action exactly how it had acquired WIND in responding materials to a motion brought by Catalyst for an interlocutory injunction prohibiting West Face from participating in the

---

29 Moyse Trial Decision, *supra* note 6 at paras 122, 124, RJC, Tab 14, pp. 259-260; Trial Affidavit of Newton Glassman dated May 27, 2016 at paras 4, 10-11, 20, 29, RJC, Tab 64, 604-606, 609-610, 612-613; Cross-examination of Newton Glassman at trial (in the Moyse Action) on June 7, 2016 at 415:1-419:23, 420:14-421:6, RJC, Tab 65, pp. 634-640; Cross–examination of Gabriel De Alba at trial (in the Moyse Action) on June 7, 2016 at 280:14-281:1, RJC, Tab 63, pp. 588-589.

30 Moyse Trial Decision, *supra* note 6 at para 11(d), RJC, Tab 14, pp. 226-227; see also Email Chain re "Industry Canada" dated July 25, 2014, RJC, Tab 31, pp. 355-356; Email Chain re "Ottawa Insights" dated August 3, 2014, RJC, Tab 34, pp. 370-372.

31 Moyse Trial Decision, *supra* note 6 at paras 11(d), 124, 131, RJC, Tab 14, pp. 226-227, 259-260, 261-262.

management of WIND.[32] Shortly thereafter, during cross-examinations in May 2015 associated with that motion, Catalyst partner James Riley alleged that VimpelCom had breached its exclusivity obligations to Catalyst, and implied that West Face could be liable for inducing a breach of those obligations.[33] These, of course, are the very same allegations and claims now made and asserted by Catalyst against West Face in the Current Action.

22. Catalyst made the tactical choice not to advance its claim of inducing breach against West Face in a timely or appropriate manner. Rather, the next time Catalyst raised its potential claim against West Face for inducing breach was in late January 2016, when the Investors sought approval for a plan of arrangement associated with the sale of WIND to Shaw. The intended purpose of the plan of arrangement was to extinguish a claim for constructive trust that Catalyst had asserted over shares of WIND held by West Face that was preventing the sale to Shaw from being completed. Catalyst opposed the approval by Justice Newbould of the plan of arrangement, including on the basis that completion of the plan would foreclose a claim of inducing breach that Catalyst intended to assert against West Face. In his Plan of Arrangement Decision, Justice Newbould made the following findings concerning that claim:

> This intended action has not been started. It could have been started in March, 2015 when the facts were disclosed and known to Catalyst. **To lie in the weeds until the hearing of the application and assert such a right to stop the plan of arrangement is troubling indeed and not acting in good faith. Waiting and seeing how things are going in the litigation process before springing a new theory at the last moment is not to be encouraged**. Apart from the statement of Mr. Riley that the information was first learned in the material in this application, **which was not true**, no evidence has been given by

---

32 Affidavit of Anthony Griffin sworn March 7, 2015, paras 75-80, RJC, Tab 71A, pp. 774-776.

33 Cross-Examination of James Riley dated May 13, 2015 at 118:13-119:17, RJC, Tab 67, pp. 728-729; *Re: Mid-Bowline Group Corp*, 2016 ONSC 669 at paras 54-56 [Plan of Arrangement Decision], RJC, Tab 8, p. 171.

> Catalyst to explain why this new intended claim was not brought sooner.[34] [Emphasis added]

23. In the result, Justice Newbould conditionally approved the plan of arrangement, subject to an expedited trial of an issue in late February 2016 concerning Catalyst's claim for a constructive trust.[35] He further ordered that this trial of an issue was not to include Catalyst's late-breaking intended claim for inducing breach, because of Catalyst's delay in asserting it.[36]

24. Shortly thereafter, Catalyst abandoned its claim for a constructive trust.[37] As a result, the expedited trial of an issue was unnecessary, the plan of arrangement was approved on consent, and the Moyse Action proceeded to trial in the ordinary course in June 2016.[38] In early February 2016 counsel for West Face explicitly invited Catalyst to amend its Claim in the Moyse Action to include its claim against West Face for inducing breach, so as to permit all of Catalyst's claims against West Face concerning the acquisition of WIND to be heard and determined at the same time by the same judge based on the same evidence. Catalyst, however, made the tactical choice not to do so.[39]

D. Justice Newbould's Findings Concerning Catalyst's Failure to Acquire WIND Were Essential to His Decision, Rather Than *Obiter*

25. Catalyst submits that the one and only aspect of the Moyse Trial Decision that was "necessary" was the finding that Mr. Moyse did not transmit Catalyst's confidential information concerning WIND to West Face. Catalyst characterizes as mere *obiter* other findings that were equally fatal to Catalyst's claims against West Face.[40] In truth, the findings in question concerned important issues of causation and damage that were central to the proper disposition by Justice

---

34 Plan of Arrangement Decision, *supra* note 33 at para 59, RJC, Tab 8, p. 172.
35 Plan of Arrangement Decision, *supra* note 33 at para 50, RJC, Tab 8, pp. 169-170.
36 Plan of Arrangement Decision, *supra* note 33 at para 61, RJC, Tab 8, p. 172.
37 Email from Rocco DiPucchio to Matthew Milne-Smith dated January 31, 2016, RJC, Tab 51, pp. 434-435.
38 Motion Decision, *supra* note 6 at para 37, RJC, Tab 5, p. 106.
39 Affidavit of Andrew Carlson dated December 7, 2016 at para 59, RJC, Tab 56, pp. 467-468.
40 Catalyst Factum at paras 41-43.

Newbould of Catalyst's claims in the Moyse Action. They are the polar opposite of *obiter*.

26. In its Third Amended Statement of Claim in the Moyse Action, Catalyst pleaded that West Face's alleged misuse of confidential information caused the failure of Catalyst's proposed transaction with VimpelCom and permitted West Face to acquire WIND.[41] West Face met that claim head on at trial. During its opening submissions, West Face listed nine findings that it invited Justice Newbould to make at the conclusion of trial. Five of the nine concerned Catalyst's inability to acquire WIND regardless of the Investors' conduct.[42] Catalyst did not object to these submissions as improper. Nor could it properly have done so. The findings sought by West Face were directly responsive to the claims asserted against it by Catalyst.

27. Thereafter both parties led extensive evidence at trial about these very issues. Indeed, Catalyst's counsel cross-examined West Face's witnesses at length concerning the very issues that now form the basis of Catalyst's claims against West Face in the Current Action, including:

(a) whether Globalive and/or UBS revealed to the Investors confidential information concerning Catalyst's negotiations with VimpelCom;

(b) interactions between the Investors and VimpelCom during Catalyst's period of exclusivity; and

(c) whether the Investors induced VimpelCom to breach its exclusivity agreement with Catalyst.[43]

---

41 Amended Amended Amended Statement of Claim (in the Moyse Action) dated February 25, 2016 at paras 34.6, 34.7, RJC, Tab 12, p. 202.

42 West Face's Opening Statement Slideshow (in the Moyse Action) dated June 6, 2016, RJC, Tab 58, pp. 521-526.

43 Cross-examination of Anthony Griffin at trial (in the Moyse Action) on June 9, 2016 at 1031:7-1034:5, 1036:6-1042:24, RJC, Tab 72, pp. 839-849; Cross-examination of Hamish Burt at trial (in the Moyse Action) on June 9, 2016 at 856:23-858:12, 860:20-861:3, RJC, Tab 74, pp. 957-961; Cross-examination of Michael Leitner at trial (in the Moyse Action) on June 9, 2016 at 916:20-917:6, 917:10-920:15, 921:8-930:12, 934:21-940:13, RJC, Tab 76, pp. 1030-1051.
During the trial, counsel for West Face and Mr. Moyse objected to a portion of Catalyst's cross-examination of Mr. Griffin on issues that went beyond what Brandon Moyse could have known. These objections were not upheld by Justice Newbould, and Catalyst was not prevented from leading any evidence on those issues. See trial transcript (in the Moyse Action) of June 9, 2016 at 1042:25-1054:20, 1083:12-1084:17, RJC, Tab 72, pp. 849-861, 889-890.

28. Both parties sought findings in respect of these issues during their closing submissions. West Face's position was that "West Face's conduct in acquiring an interest in WIND … did not play any material role in Catalyst's failure to acquire WIND. Catalyst lost the WIND opportunity entirely on its own."[44] Catalyst, by contrast, argued that the Investors "used Catalyst's confidential information as a spring board to launch [themselves] ahead of Catalyst in the bidding with VimpelCom. As a result of the [Investor]'s spring-boarding, Catalyst could not complete an agreement with VimpelCom during the exclusivity period."[45] The issues of: (i) what the Investors knew from any source concerning Catalyst's negotiations with VimpelCom; (ii) what effect, if any, information of that nature had on the formulation of their unsolicited proposal of August 7, 2014; and (iii) the nature and extent of any dealings between the Investors and VimpelCom during Catalyst's period of exclusivity, were "front and centre" throughout the trial of the Moyse Action. Justice Newbould made important findings against Catalyst concerning all of these matters.[46]

29. Justice Hainey therefore correctly rejected Catalyst's argument that Justice Newbould's findings on causation and damages were somehow *obiter*:

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

---

44 West Face's Closing Submissions dated June 14, 2016 (in the Moyse Action) at para 268, see also paras 400-409, RJC, Tab 82, pp. 1159-1163.

45 Catalyst's Closing Submissions dated June 14, 2016 (in the Moyse Action) at para 358, RJC, Tab 81, pp. 1153-1154.

46 Moyse Trial Decision, *supra* note 4 at paras 83-131, RJC, Tab 14, pp. 246-262.

proceeding.[47] [Emphasis added]

PART III ~ ISSUES, LAW AND ARGUMENT

30. Catalyst's appeal raises three issues relevant to West Face:

(a) Is there a proper and sufficient basis for this Court to interfere with Justice Hainey's decision that this action is barred against West Face by the doctrine of *res judicata*? In particular:

(i) Does issue estoppel apply where matters central to Catalyst's pleaded cause of action against West Face in the Current Action have already been finally determined in favour of West Face in the Moyse Action?

(ii) Does cause of action estoppel apply to Catalyst's claim of inducing breach against West Face in the Current Action where Catalyst could have, but failed to, assert that cause of action against West Face in the Moyse Action?

(b) Is there a proper and sufficient basis for this Court to interfere with Justice Hainey's decision to stay or dismiss this action against West Face as an abuse of process?; and

(c) Is there a proper and sufficient basis for this Court to interfere with the exercise by Justice Hainey of his discretion in granting relief in favour of West Face?

31. This appeal does not turn on controversial issues of law. Instead, this appeal concerns the application by Justice Hainey of well-established legal principles to the unique facts of this particular case. There is no dispute about the proper tests for issue estoppel, cause of action estoppel or abuse of process. Rather than identify one or more extricable errors of law, Catalyst simply alleges that Justice Hainey misapplied the applicable tests associated with all three doctrines. Specifically, Catalyst alleges that the Motion Judge:

(a) emphasized and relied on the wrong facts;[48]

(b) "relied on alleged findings that were neither central to the Moyse Action nor determinative of the causes of action in the Current Action";[49] and

---

47 Motion Decision, *supra* note 6 at para 65, RJC, Tab 5, p. 116.

48 For example, Catalyst claims that "[t]he Motion Judge failed to address the legal relationships of the parties…": see Catalyst Factum at para 58. Catalyst further states that "[t]he mere possibility of overlapping facts between the Current Action and the Moyse Action is not a basis to dismiss the Current Action": see Catalyst Factum at para 64.

49 Catalyst Factum at para 68.

(c) erred insofar as "[t]he Current Action is not a re-litigation of the causes of action advanced in the Moyse Action".[50]

These are quintessential questions of fact or of mixed fact and law. Catalyst can only prevail on appeal if it is able to establish palpable and overriding error.[51] No such error is alleged, let alone established. On this basis alone, Catalyst's appeal must be dismissed.

A. First Issue: Catalyst's Claim Is Barred by the Doctrine of *Res Judicata*

32. Issue estoppel and cause of action estoppel are components of the doctrine of *res judicata*. Issue estoppel precludes re-litigating findings made during an earlier proceeding. Cause of action estoppel precludes litigation by instalment, and thus applies to issues that the plaintiff should have put forward in prior litigation but did not. Justice Perell has explained the distinction as follows:

> The effect of the rule of *res judicata* is preclusive. It prevents a party and his or her privies from asserting a position, a claim, or defence. Issue estoppel precludes a litigant from asserting a position that is inconsistent or contrary to a fundamental point decided in a past proceeding in which the litigant or his or her privies participated. Cause of action estoppel precludes a litigant and his or her privies from asserting a claim or a defence that it asserted (cause of action estoppel) or had an opportunity of asserting in past proceedings (the rule from *Henderson v. Henderson*).[52]

33. Catalyst's factum commingles these doctrines, which can lead only to confusion and error. It is important to distinguish between them, as the Motion Judge did in his Reasons. They are addressed separately below.

(i) Issue Estoppel

34. The Supreme Court of Canada emphasized the importance of issue estoppel in

---

50 Catalyst Factum at para 80.

51 *Benhaim v. St. Germain*, 2016 SCC 48 at paras 36-38, RJBOA, Tab 13; *Hryniak v. Mauldin*, 2014 SCC 7 at paras 80-84, RJBOA, Tab 47; *Housen v. Nikolaisen*, 2002 SCC 33 at para 36, RJBOA, Tab 46.

52 *Martin v. Goldfarb*, 2006 CarswellOnt 4355 at para 59 (S.C.J.), RJBOA, Tab 61.

Danyluk v. Ainsworth Technologies Inc.[53] Writing for a unanimous Court, Justice Binnie stated:

> The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry… An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.[54]

35. The Court described the well-recognized three part test for issue estoppel as follows:

> (1) the issue must be the same as the one decided in the prior decision; (2) the prior judicial decision must have been final; and (3) the parties to both proceedings must be the same, or their privies.[55]

36. The Motion Judge held correctly that issue estoppel applies in this case because: (i) the issues of causation and damages in the Current Action are the same as in the Moyse Action; (ii) Justice Newbould's findings in the Moyse Action are final;[56] and (iii) the parties (West Face and Catalyst) are the same.

37. On appeal, Catalyst does not question any of these findings. Rather, it argues that because Justice Newbould held that Mr. Moyse did not convey confidential information to West Face, his findings against Catalyst concerning causation and damages — the last two elements of the test for breach of confidence — were not necessary to the decision and were therefore mere "*obiter*".[57]

38. Catalyst's argument finds no support in the case law and, if accepted, would lead to absurd results. First, it would bar the doctrine of issue estoppel from applying to a plaintiff that loses

---

53 2001 SCC 44 [*Danyluk*], RJBOA, Tab 27.

54 *Danyluk*, *supra* note 53 at para 18, RJBOA, Tab 27.

55 *C.U.P.E., supra* note 2 at para 23, RJBOA, Tab 91, citing *Danyluk, supra* note 53 at para 25, RJBOA, Tab 27.

56 While Catalyst has sought leave to appeal to the Supreme Court of Canada from the Moyse Appeal Decision, it has only done so on the narrow issue of spoliation, which is not relevant to this appeal.

57 Catalyst Factum at paras 43, 44, 69, 74; *Lysko v. Braley*, 2006 CarswellOnt 1758 (C.A.), at paras 17 to 19, RJBOA, Tab 59.

an action on more than one basis. After all, if a trial judge finds against a plaintiff for more than one reason, every one of those adverse findings would be sufficient, but not strictly speaking necessary, to the result. Put differently, where there are numerous grounds sufficient to defeat a claim, none is necessary according to Catalyst's formulation. Accepting this argument would lead to the absurd result that a plaintiff who fails to establish all three elements of a cause of action may re-litigate all of them (because no one element was determinative of the result, and therefore "necessary"). However, a plaintiff who establishes two elements of a cause of action but not the third would be estopped from re-litigating that third element (because the ruling on that point was exclusively determinative of the Plaintiff's claim and therefore "necessary").

39. The equally absurd implication that flows from Catalyst's argument is that in circumstances such as these where a trial judge finds that the plaintiff failed to satisfy any of the requirements of a cause of action, only the requirement the trial judge chooses to address first in his or her Reasons would be considered determinative, and therefore subject to the doctrine of issue estoppel. The applicability of this important doctrine would be haphazard, and subject to the order in which the trial judge chooses to arrange his or her Reasons. Catalyst has failed to cite a single case that supports its extraordinary proposition. The law is directly to the contrary, and establishes that every finding concerning the various elements of a cause of action can form the basis for issue estoppel.[58]

40. The Supreme Court of Canada recognized over 100 years ago that "it is impossible to treat a proposition which the court declares to be a distinct and sufficient ground for its decision as a mere *dictum* because there is another ground upon which, standing alone, the case might have been

---

[58] Loss or harm are constituent elements of the tort of inducing breach. *Persaud v. Telus Corporation*, 2017 ONCA 479 at para 26, RJBOA, Tab 80.

determined".[59] This Court recognized the same principle in *McIntosh v. Parent*.[60] Although that case concerned primarily cause of action estoppel, the Court also explained the principles underlying issue estoppel:

> **Any right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established** so long as the judgment remains.[61] (Emphasis added)

41. Issues of causation and damage were "distinctly put in issue" by both parties in the Moyse Action. Those issues were fully litigated, "directly determined by a Court of competent jurisdiction", and upheld by this Court. They have now been "conclusively established" and cannot be litigated yet again.

42. The decision in *Foreman v. Niven*[62] illustrates this point. Foreman failed to acquire a property, and then brought successive actions blaming others for his failure. Foreman's initial action for breach of confidence against the successful bidder, Chambers, was dismissed for failure to satisfy any of the elements of breach of confidence.[63] After the action against Chambers was dismissed, Foreman commenced a second action for breach of confidence and fiduciary duty against a financier he had consulted with that funded the acquisition of the property by Chambers.

43. The Court stayed the second action based on issue estoppel and abuse of process

---

59 *Bank of Montreal v. Stuart* (1909), 41 S.C.R. 516 at para 43, *per* Duff J. and concurred in by Fitzpatrick C.J., RJBOA, Tab 10. See also the reasons of Anglin J. at para 58. Both Duff J. and Anglin J. quoted *New South Wales Taxation Commissioners v. Palmer*, [1907] A.C. 179 at p.184. See also *Bergel & Edson v. Wolf* (2000), 50 O.R. (3d) 777 at paras 27-29 (S.C.J.), RJBOA, Tab 14; *Abbott Laboratories v. Canada (Minister of Health)*, 2007 FCA 140 at paras 31-35, RJBOA, Tab 5.

60 1924 CarswellOnt 212 (C.A.) [*McIntosh*], RJBOA, Tab 65.

61 *McIntosh*, *supra* note 60 at p.2, RJBOA, Tab 65.

62 2009 BCSC 1476 [*Foreman*], RJBOA, Tab 37.

63 *Foreman v. Chambers*, 2006 BCSC 1244, aff'd 2007 BCCA 409, RJBOA, Tab 36.

because Foreman's ability to acquire the property absent the defendants' conduct was at issue in both cases:

> I find there to be issue estoppel between Foreman and the defendants as regards (1) the reasons the financing was rejected by Highland, and (2) the finding that Foreman could not have availed himself in any event of the opportunity he alleges is lost because of the defendants' conduct. As these issues are central to the causes of action alleged here, it is plain and obvious that these causes of action must fail.[64]

44. In short, *Foreman* refutes Catalyst's argument that if a plaintiff fails to establish any element of a multi-part test, only findings concerning the first element can form the basis for issue estoppel and all findings concerning other elements of the test are *obiter*.

45. *Dableh v. Ontario Hydro* also illustrates this principle.[65] Dableh's first proceeding for patent infringement was dismissed. His second action alleged breach of confidence and breach of fiduciary duties. Even though the second case concerned different causes of action asserted against additional parties arising out of different legal relationships, it was precluded because an important underlying factual issue concerning inventorship was the same in both proceedings and dispositive of the plaintiff's claims.[66]

46. None of the cases relied upon by Catalyst supports its extravagant proposition that an express finding against a plaintiff concerning one element of a cause of action is mere *obiter* if other findings adverse to the Plaintiff are also made concerning other elements of the same cause of action.

---

64 *Foreman*, *supra* note 62 at para 29, RJBOA, Tab 37.

65 1994 CarswellOnt 175 (Gen. Div.) [*Dableh*], additional reasons at 1995 CarswellOnt 2275 (Gen. Div), leave to appeal ref'd 1995 CarswellOnt 4546 (Gen. Div.), RJBOA, Tab 26.

66 *Dableh*, *supra* note 65 at para 16, RJBOA, Tab 26.

For example, in *Canam Enterprises Inc. v. Coles,*[67] Canam bought a building based on a representation concerning zoning made by the vendor and its realtor. When the representation turned out to be false, Canam sued the vendor and lost on the basis that the representation had merged with the conveyance.[68] Canam then commenced a second action against its former solicitor, Coles, for failing to discover the problem. Coles third-partied a realtor for making false representations concerning zoning that Coles relied upon in advising Canam.

47. This Court held that issue estoppel did not apply because the matters at issue in the second action – the existence and breach of any duty between the realtor and Canam – were never explored or decided in the first action:

> The issue in the third party claim is whether the Realtors owed a duty of care to Canam which was breached by the misrepresentation concerning zoning. **This duty is separate from and not derived from the contractual relationship between Canam and National Trust**. It depends on the nature of the direct relationship between Canam and the Realtors. **This duty was not part of the proceedings before Day J**. …[69] (Emphasis added)

48. In short, *Canam* merely reflects the uncontroversial proposition that issue estoppel does not apply where the issue in the second action was not decided (or even raised) in the first.

49. Catalyst cites no case in which a court has accepted its argument that "[w]here there is a distinct legal relationship with distinct legal duties, the issues are not the same and neither estoppel arise."[70] On the contrary, issue estoppel routinely applies when the second proceeding alleges factual or legal issues that were decided in an earlier proceeding even if the legal relationships at issue in the

---

67 (2000), 51 O.R. (3d) 481 (C.A.) [*Canam*], rev'd 2002 SCC 63, RJBOA, Tab 22. Both the majority and dissent at the Court of Appeal agreed that issue estoppel did not apply. The majority and dissent diverged on abuse of process, with the Supreme Court of Canada agreeing with Justice Goudge that it did not apply.

68 *Canam*, *supra* note 67 at para 6, RJBOA, Tab 22.

69 *Canam*, *supra* note 67 at para 48, RJBOA, Tab 22.

70 Catalyst Factum at para 56.

two cases are different. If accepted, Catalyst's argument would hollow out the doctrine of issue estoppel by confining it to cases where identical legal relationships are at issue in both proceedings. That has never been the law.

(ii) Cause of Action Estoppel

50. As stated above, cause of action estoppel forbids litigation by instalment. Parties may not "open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest".[71] Thus, parties can be prohibited from asserting a distinct claim if that claim arises from the same "set of facts giving rise to a legal claim or entitlement" in a prior proceeding.[72] For example, in *Las Vegas Strip v. Toronto (City)*,[73] the applicant sought a declaration that its strip club was a legal non-conforming use under the applicable adult entertainment by-law. After that claim was dismissed, it brought an application to invalidate the by-law on the grounds that it was vague or uncertain. Even though the applicant was asserting a new claim in the second proceeding that relied on different law and facts, Sharpe J. (as he then was) ruled that the second claim was precluded because it "cannot be said to be based upon a different set of facts for the purposes of *res judicata*."[74]

51. Catalyst's failure to assert its claim for inducing breach against West Face in a timely and appropriate manner is particularly grave in this case, where it: (i) was aware of that claim by no later than May 2015; (ii) was found by Justice Newbould to have chosen to "lie in the weeds" with respect to this claim in his Plan of Arrangement Decision in January 2016; (iii) was explicitly invited to assert this claim in the Moyse Action in early February 2016 but made the tactical choice not to do

---

71 *Henderson v. Henderson* (1843), 67 E.R. 313 (U.K. Ch.) at p.319, RJBOA, Tab 45.

72 *Las Vegas Strip v. Toronto (City)*, 1996 CarswellOnt 3426 (Gen. Div.) at para 18 [*Las Vegas*], aff'd 1997 CarswellOnt 1279 (C.A.), RJBOA, Tab 57.

73 *Las Vegas*, *supra* note 72, RJBOA, Tab 57.

74 *Las Vegas*, *supra* note 72 at paras 23-24, RJBOA, Tab 57.

so; and (iv) led extensive evidence and sought findings concerning this claim at trial in the Moyse Action.

52. The case for applying cause of action estoppel in these circumstances is therefore even more compelling than it was in the Supreme Court of Canada's decision in *Doering v. Grandview (Town)*,[75] where Doering sued the Town for flooding on his property in 1967 and 1968 caused by a dam on the theory that the dam had prevented water levels from falling to normal levels. After he lost at trial, Doering obtained expert advice concerning the cause of the flooding while contemplating an appeal. This expert advised Doering that his initial theory had been wrong, and that the flooding was caused by water impounded by the dam flowing through a subterranean aquifer that had saturated the ground from below.[76] Doering then sued for damage caused from 1969 through 1972 on this new theory.

53. Even though Doering's second claim concerned a different period of flooding as well as a different factual and legal theory that he was unaware of at the time of the first action, the Supreme Court held that the new claim was barred by the doctrine of cause of action estoppel because it could have been brought as part of the original action:

> **[A]ll the facts which are alleged to constitute tortious conduct by the town in the present case existed when the prior action went to trial** and it was there found that these facts did not support the present respondent's action for damage to his crops by water. … **Nothing had changed between the bringing of the first action and the second one except that the respondent had received advice from a soil expert who expounded the aquifer theory**.[77] [Emphasis added]

---

75 1975 CarswellMan 64 (S.C.C.) [*Doering*], RJBOA, Tab 31.
76 *Doering*, *supra* note 75 at paras 5-7, RJBOA, Tab 31.
77 *Doering*, *supra* note 75 at para 11, RJBOA, Tab 31.

54. Similarly, in *J.R.T. Nurseries Inc. v. 0843374 B.C. Ltd.*,[78] the plaintiff used a new fertilizer that killed his crops. The plaintiff sued the manufacturer in Oregon and won, but not for the entire amount claimed. It then sued wholesalers in British Columbia under the provincial *Sale of Goods Act* for the balance of its damages. The second proceeding was commenced in a different jurisdiction and involved new defendants, new relationships, and new legal duties. Nevertheless, the factual background underlying the second claim was the same as in the earlier proceeding. The second claim was dismissed on the basis of cause of action estoppel. The plaintiff's failure to assert all claims arising out of the same facts and circumstances in the first action was fatal to the assertion of its claims in the second action.[79]

55. Catalyst makes the bald assertion in paragraph 64 of its Factum that "cause of action estoppel does not preclude a plaintiff from bringing a claim for a separate cause of action with common facts".[80] That, of course, is the very definition of what cause of action estoppel does. Catalyst relies in this regard on the decision of this Court in *McIntosh*,[81] where the dispute in question arose from a landlord's failure to erect a building on leased lands. The first claim resulted in an order against the landlord of specific performance; the second proceeding claimed damages against the landlord in respect of the period after the order was given. Importantly, the trial judge in the first action specifically declined jurisdiction over the plaintiff's claim for damages. The plaintiff was not estopped from advancing a claim for damages that it had been precluded from asserting in the first proceeding. *McIntosh* is easily distinguishable, and has no bearing on the case at bar.

56. Catalyst's reliance on *McIntosh* appears to be a veiled re-hashing of an unfounded

---

78 2016 BCSC 501 [*J.R.T. Nurseries*], RJBOA, Tab 50.
79 *J.R.T. Nurseries*, *supra* note 78 at paras 47-55, RJBOA, Tab 50.
80 Catalyst Factum at para 64.
81 *McIntosh*, *supra* note 60, RJBOA, Tab 65.

contention that this Court has already rejected in the Moyse Action, and that the Motion Judge also rejected in the Current Action. Catalyst's principal argument about cause of action estoppel before the Motion Judge was that Justice Newbould had improperly precluded it from advancing a claim for inducing breach against West Face in the Moyse Action. Catalyst made the same assertion on appeal in the Moyse Action in challenging findings of Justice Newbould that undermined its claim of inducing breach.[82] This Court made short work of Catalyst's argument in the Moyse Appeal Decision:

> We do not accept this submission. The appellant did not move in this proceeding to amend its claim to include an allegation that West Face induced the vendor of the WIND shares to breach its contract with the appellant. The appellant did unsuccessfully seek to make that amendment in a related proceeding. That refusal had no impact on the conduct of this trial.[83]

57. The Court of Appeal went on to note that, as described above, Catalyst elicited a wealth of evidence at trial in the Moyse Action regarding the dealings between VimpelCom and the Investors, and explicitly asked Justice Newbould to make factual findings in that regard.[84]

58. Justice Hainey reached the same conclusion in the case at bar, and relied on the Court of Appeal's reasoning in doing so:

> Catalyst submits that it was prohibited from advancing its claim for inducing breach of contract in the Moyse/West Face Action by Justice Newbould. **However, I have concluded that Justice Newbould only prohibited Catalyst from asserting that claim in the trial of an issue in the plan of arrangement proceeding that was to be heard**

---

82 Moyse Appeal Decision, *supra* note 5 at para 39, RJC, Tab 16, pp. 295-296.

83 Moyse Appeal Decision, *supra* note 5 at para 40, RJC, Tab 16, p. 296. The "related proceeding" was the plan of arrangement proceeding concerning the sale of WIND to Shaw. Catalyst was forbidden from raising the inducing breach claim in an expedited trial of an issue in that proceeding given Justice Newbould's finding that it had deliberately chosen to "lie in the weeds" with respect to that proposed claim, and was "not acting in good faith": Plan of Arrangement Decision, *supra* note 33 at para 59, RJC, Tab 8, p. 172.

84 Moyse Appeal Decision, *supra* note 5 at paras 41-42, RJC, Tab 16, pp. 296-297.

> **on an expedited basis in February 2016**. The trial of an issue was abandoned when Catalyst withdrew its claim for a constructive trust over West Face's interest in WIND and the plan of arrangement was approved.
>
> **The full trial of the Moyse/West Face Action that proceeded in June 2016 was not subject to any prohibition by Justice Newbould with respect to Catalyst's claim for inducing breach of contract.** My conclusion is supported by the Court of Appeal's decision at paras. 39 and 40 …[85] [Emphasis added]

59. While the Decision of the Motion Judge in the Court below is entitled to deference, this Court's Decision in the Moyse Appeal is *res judicata*. Any argument Catalyst might make that it was somehow prevented from asserting its inducing breach claim against West Face in the Moyse Action must be firmly rejected.

B. Second Issue: Catalyst's Choice to Assert a Claim for Inducing Breach as a Separate Action Was an Abuse of Process

60. Issue estoppel and cause of action estoppel are governed by the application of well-defined criteria. Abuse of process, by contrast, "is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel."[86] As alluded to above, this doctrine applies where the requirements of issue or cause of action estoppel might not be met, but "where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice."[87]

61. In the seminal case of *Toronto (City) v. Canadian Union of Public Employees, Local 79* ("**C.U.P.E.**"),[88] the Supreme Court of Canada considered a labour arbitration grieving an employee's dismissal where he had previously been convicted of sexually assaulting a child under his

---

85 Motion Decision, *supra* note 6 at paras 79-80, RJC, Tab 5, pp. 119-120.
86 *Canam*, *supra* note 67 at para 55, RJBOA, Tab 22.
87 *C.U.P.E.*, *supra* note 2 at para 37, RJBOA, Tab 91; see also *Behn v. Moutton Contracting Ltd.*, 2013 SCC 26 at paras 39-42, RJBOA, Tab 12, which found tactical delay in commencing an action to be an abuse of process.
88 *C.U.P.E.*, *supra* note 2, RJBOA, Tab 91.

supervision at work. The Court held that allowing the claim to proceed would either be a waste of judicial resources (if the grievance failed), or bring the administration of justice into disrepute (if inconsistent results were arrived at in the second proceeding).[89] The Court held that the risk of inconsistent results should be avoided because "the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality." For these reasons, re-litigation results in "a blatant abuse of process", even where the parties, legal relationships and duties involved in the second proceeding are different.[90]

62. Catalyst claims that the Current Action is not abusive because it "addresses different causes of action arising out of different legal relationships, different conduct, and different confidential information, against substantially different parties."[91] Its assertion is incorrect, both in fact and in law.

63. Catalyst's position is wrong in fact because the Current Action arises out of the same conduct that was at issue in the Moyse Action. As described above at paragraphs 11-20, Catalyst led extensive evidence at trial in the Moyse Action concerning the same matters that are now complained of in the Current Action. To succeed in this Action, Catalyst would need to obtain findings concerning the important issues of causation and damages that are flatly inconsistent with those made by Justice Newbould in the Moyse Action, including his findings that: (i) Catalyst has only itself to blame for its failure to acquire WIND; and (ii) Catalyst could not have completed such an acquisition even if it had been able to conclude an Agreement with VimpelCom because of its inability to obtain crucial regulatory concessions from the Government of Canada.

---

89 *C.U.P.E.*, *supra* note 2 at paras 51, 57, RJBOA, Tab 91.
90 *C.U.P.E.*, *supra* note 2 at paras 51-56, RJBOA, Tab 91.
91 Catalyst Factum at para 80.

64. Catalyst's position is wrong in law because courts have routinely applied the doctrine of abuse of process even where (unlike in this case) the second claim actually did concern "different causes of action arising out of different legal relationships and different conduct … against substantially different parties." For example, in *Free Trade Medical Network Inc. v. RBC Travel Insurance Co.*,[92] the plaintiff FTM failed to broker a deal between CCN and RBC. FTM commenced an arbitration alleging that CCN had breached its brokerage contract with FTM. This claim was dismissed. FTM then commenced a second claim against RBC (a different party) alleging that RBC had intentionally interfered with FTM's contractual relations (a different cause of action) with CCN (a different relationship). In circumstances where the plaintiff had "retained counsel and participated fully in the [arbitration] process", the claim was "barred as an abuse of process by re-litigation."[93] The decision of the Supreme Court of Canada in *C.U.P.E.*, discussed above, is to similar effect.

65. The Current Action is about why Catalyst failed to acquire WIND. That very same matter was directly at issue in the Moyse Action.[94] To re-litigate that issue now would leave West Face in a most unfair and invidious position while raising the prospect of inconsistent results and undermining the principle of finality. The Current Action was properly dismissed by the Motion Judge as a flagrant abuse of process.

C. Third Issue: The Motion Judge Properly Exercised His Discretion to Dismiss the Claim

66. In *Danyluk*, the Supreme Court held that the discretion not to apply preclusive doctrines "must be very limited in application".[95] As Chief Justice Winkler explained in *Monteiro v.*

---

92 2005 CarswellOnt 4659 (S.C.J.) [*Free Trade*], aff'd 2006 CarswellOnt 5503 (C.A.), leave to appeal ref'd 2007 CarlwellOnt 1353 (S.C.C.), RJBOA, Tab 38.

93 *Free Trade*, *supra* note 92 at para 117, RJBOA, Tab 38.

94 Motion Decision, *supra* note 6 at para 88, RJC, Tab 5, p. 123.

95 *Danyluk, supra* note 53 at para 62, RJBOA, Tab 27, quoting with approval from *General Motors of Canada Ltd. v. Naken*, [1983] 1 S.C.R. 72 at 101.

Toronto Dominion Bank,[96] the "overriding consideration in the exercise of [this] discretion is fairness, [and] fairness involves a balancing of the interests of both sides."[97] Discretionary decisions like that of the Motion Judge in the case at bar are entitled to a high degree of deference and should be reversed on appeal "only if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice".[98]

67. Catalyst asserts that even if one or more of the preclusive doctrines outlined above applies, the Motion Judge should have exercised his discretion not to stay the Current Action.[99] Catalyst's principal argument on this issue is that "no Court has heard from VimpelCom or UBS regarding the circumstances surrounding the sale of its shares of WIND."[100] This, of course, is entirely a consequence of Catalyst's own strategic choices. As plaintiff, Catalyst bore the burden in the Moyse Action of proving that its claimed losses were caused by West Face. Catalyst could have adduced evidence from VimpelCom or UBS to address that important issue, but chose not to.

68. Moreover, it is an unavoidable and intended consequence of the application of the preclusive doctrines at issue here that new evidence or arguments of the plaintiff will not be heard. In addition to the numerous examples cited above, all of which precluded the plaintiff from advancing new evidence and legal arguments, one of the most compelling examples of the strength and importance of the principle of finality (and therefore of the preclusive doctrines at issue) comes from this Court's decision in *Tsaoussis (Litigation Guardian of) v. Baetz*.[101] The plaintiff Lorrie Tsaoussis

---

96 2008 ONCA 137 [*Monteiro*], leave to appeal ref'd 2008 CarswellOnt 9254 (S.C.C.), RJBOA, Tab 67.

97 *Monteiro*, *supra* note 96 at para 54, RJBOA, Tab 67.

98 *Canada (Minister of Citizenship & Immigration) v. Tobiass*, [1997] 3 S.C.R. 391 at para 87, RJBOA, Tab 20, quoting in part from *Elson v. Elson*, [1989] 1 S.C.R. 1367 at 1375.

99 Catalyst Factum at para 83.

100 Catalyst Factum at para 84.

101 (1998), 41 O.R. (3d) 257 (C.A.) [*Tsaoussis*], leave to appeal ref'd [1998] S.C.C.A. No. 518 (S.C.C.), RJBOA, Tab 93.

was a three year old girl injured in a car accident. A claim was made on her behalf and swiftly settled for $5,420, based on a medical evaluation at the time that her injuries were relatively minor. Tragically, as time passed that medical evaluation proved incorrect.

69. In the period after the settlement was reached, Lorrie exhibited profound neurological impairments. Once they emerged, she sued again, this time for $2.2 million. The Motion Judge set aside the earlier settlement and allowed the new case to proceed. This Court reversed. The Court recognized that there are limited exceptions to the preclusive doctrines. However, it emphasized that such exceptions must be confined to cases raising "the very integrity of the judgment process".[102] The Court refused to undermine the principle of finality by setting aside the settlement, even though in doing so it prevented the family's reliance upon relevant and compelling new evidence of grievous harm to a child. Catalyst's claim for an exception from the preclusive doctrines pales in comparison.

PART IV ~ NO ADDITIONAL ISSUES

70. West Face raises no issues in addition to those raised by Catalyst's appeal.

PART V ~ ORDER REQUESTED

71. West Face respectfully requests that an Order be made dismissing Catalyst's appeal, with costs in an amount to be agreed upon by the parties or determined by this Court.

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

Davies Ward Phillips & Vineberg LLP

Davies Ward Phillips & Vineberg LLP
Lawyers for the Defendant (Respondent),
West Face Capital Inc.

---

102 *Tsaoussis*, *supra* note 101 at para 19, RJBOA, Tab 93.

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.

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 1.5 hours will be needed for West Face's oral argument of the appeal. An order under subrule 61.09(2) (original record and exhibits) is not required.

DATED AT Toronto, Ontario this 31st day of October, 2018.

Davies Ward Phillips & Vineberg LLP

Davies Ward Phillips & Vineberg LLP
155 Wellington Street West
Toronto ON M5V 3J7

Kent E. Thomson (LSUC# 24264J)
Matthew Milne-Smith (LSUC# 44266P)
Andrew Carlson (LSUC# 58850N)

Lawyers for the Defendant (Respondent),
West Face Capital Inc.

SCHEDULE A

LIST OF AUTHORITIES

1. *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.) Local 79*, 2003 SCC 63
2. *Western Larch Ltd. v. Di Poce Management Ltd.*, 2013 ONCA 722, leave to appeal ref'd 2014 CarswellOnt 4612 (S.C.C.)
3. *BNY Capital Corp. v. Katotakis*, 2005 CarswellOnt 625 (C.A.)
4. *Benhaim v. St. Germain*, 2016 SCC 48
5. *Hryniak v. Mauldin*, 2014 SCC 7
6. *Housen v. Nikolaisen*, 2002 SCC 33
7. *Martin v. Goldfarb*, 2006 CarswellOnt 4355 (S.C.J.)
8. *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44
9. *Lysko v. Braley*, 2006 CarswellOnt 1758 (C.A.)
10. *Persaud v. Telus Corporation*, 2017 ONCA 479
11. *Bank of Montreal v. Stuart* (1909), 41 S.C.R. 516
12. *Bergel & Edson v. Wolf* (2000), 50 O.R. (3d) 777 (S.C.J.)
13. *Abbott Laboratories v. Canada (Minister of Health)*, 2007 FCA 140
14. *McIntosh v. Parent*, 1924 CarswellOnt 212 (C.A.)
15. *Foreman v. Niven*, 2009 BCSC 1476
16. *Foreman v. Chambers*, 2006 BCSC 1244, aff'd 2007 BCCA 409
17. *Dableh v. Ontario Hydro*, 1994 CarswellOnt 175 (Gen. Div.), additional reasons at 1995 CarswellOnt 2275 (Gen. Div), leave to appeal ref'd 1995 CarswellOnt 4546 (Gen. Div.)
18. *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), rev'd 2002 SCC 63
19. *Henderson v. Henderson* (1843), 67 E.R. 313 (U.K. Ch.)

20. *Las Vegas Strip Ltd. v. Toronto (City)*, 1996 CarswellOnt 3426 (Gen. Div.), aff'd 1997 CarswellOnt 1279 (C.A.)

21. *Doering v. Grandview (Town)*, 1975 CarswellMan 64 (S.C.C.)

22. *J.R.T. Nurseries Inc. v. 0843374 B.C. Ltd.*, 2016 BCSC 501

23. *Behn v. Moutton Contracting Ltd.*, 2013 SCC 26

24. *Free Trade Medical Network Inc. v. RBC Travel Insurance Co.*, 2005 CarswellOnt 4659 (S.C.J.), aff'd 2006 CarswellOnt 5503 (C.A.), leave to appeal ref'd 2007 CarswellOnt 1353 (S.C.C.)

25. *Monteiro v. Toronto Dominion Bank*, 2008 ONCA 137, leave to appeal ref'd 2008 CarswellOnt 9254 (S.C.C.)

26. *Canada (Minister of Citizenship & Immigration) v. Tobiass*, [1997] 3 S.C.R. 391

27. *Tsaoussis (Litigation Guardian of) v. Baetz* (1998), 41 O.R. (3d) 257 (C.A.), leave to appeal ref'd [1998] S.C.C.A. No. 518 (S.C.C.)

THE CATALYST CAPITAL GROUP INC.
Plaintiff (Appellant)

-and-

VIMPELCOM LTD. et al.
Defendants (Respondents)

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 DEFENDANT (RESPONDENT), WEST FACE CAPITAL INC.

DAVIES WARD PHILLIPS & VINEBERG LLP
155 Wellington Street West
Toronto ON M5V 3J7

Kent E. Thomson (LSUC# 24264J)
kentthomson@dwpv.com

Matthew Milne-Smith (LSUC# 44266P)
mmilne-smith@dwpv.com

Andrew Carlson (LSUC# 58850N)
acarlson@dwpv.com

Tel.: 416.863.0900
Fax: 416.863.0871

Lawyers for the Defendant (Respondent),
West Face Capital Inc.