SCC File No: _____

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE ONTARIO COURT OF APPEAL)

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Applicant
(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., and WEST FACE CAPITAL INC.

Respondents
(Respondents)

APPLICATION FOR LEAVE TO APPEAL
(Pursuant to Rule 25 of the *Rules of the Supreme Court of Canada*)

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

MOORE BARRISTERS
Professional Corporation
Suite 1600, 393 University Avenue
Toronto, ON M5G 1E6

GOWLING WLG (CANADA) LLP
Barristers & Solicitors
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel: 613-7886-8695
Fax: 613-788-3509
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for Counsel for the Applicant

David C. Moore
david@moorebarristers.com

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

Counsel for the Applicant,
The Catalyst Capital Group Inc.

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

Rahool Agarwal
Tel: 416-216-3943
Fax: 416-216-3930
rahool.agarwal@nortonrosefulbright.com

Orestes Pasparakis
Tel: 416-216-4815
Fax: 416-216-3930
orestes.pasparakis@nortonrosefulbright.com

Michael Bookman
Tel: 416-216-2492
Fax: 416-216-3930
michael.bookman@nortonrosefulbright.com

Counsel for the Respondent,
VimpelCom Ltd.

BORDEN LADNER GERVAIS LLP
Barristers and Solicitors
Bay Adelaide Centre, East Tower
22 Adelaide Street West
28th Floor
Toronto, ON M5H 4E3

James D. G. Douglas
Tel: 416-367-6029
Fax: 416-367-6749

Caitlin Sainsbury
Tel: 416-367-6438
Fax: 416-367-6749

Counsel for the Respondent,
Globalive Capital Inc.

STIKEMAN ELLIOTT LLP
Barristers and Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, ON M5L 1B9

David R. Byers
Tel: 416 869 5697
Fax: 416-947-0866
dbyers@stikeman.com

Daniel Murdoch
Tel: 416 869 5529
Fax: 416-947-0866
dmurdoch@stikeman.com

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

Counsel for the Respondent,
UBS Securities Canada Inc.

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

Michael Barrack
Tel: 416 863 5280
Fax: 416-863-2653
michael.barrack@blakes.com

Kiran Patel
Tel: 416 863 2205
Fax: 416-863-2653
kiran.patel@blakes.com

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

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

Lucas E. Lung
Tel: 416-601-2673
Fax: 416-601-4192
llung@lerners.ca

Counsel for the respondent in appeal,
Serruya Private Equity Inc.

McCARTHY, TÉTRAULT LLP
Barristers and Solicitors
TD Bank Tower
66 Wellington Street West, Suite 5300
Toronto, ON M5K 1E6

Junior Sirivar
Tel: 416-601-7750
Fax: 416-868-0673
jsirivar@mccarthy.ca

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

Lawyers for the respondent in appeal,
Novus Wireless Communications Inc.

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

Matthew Milne-Smith
Tel: 416-863-0900
Fax: 416-863-0871
nunilne-smith@dwpv.com

Andrew Carlson
Tel: 416-863-0900
Fax: 416-863-0871
acarlson@dwpv.com

Counsel for the Respondent,
West Face Capital Inc.

TABLE OF CONTENTS

SCC File No.: N/A

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

THE CATALYST CAPITAL GROUP INC.

Applicant
(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., and WEST FACE CAPITAL INC.

Respondents
(Respondents)

NOTICE OF APPLICATION FOR LEAVE TO APPEAL
(Pursuant to s.40 of the *Supreme Court Act,* RSC 1985, c. S-26)

TAKE NOTICE that the Applicant applies for leave to appeal to this Honourable Court, under s.40 of the *Supreme Court Act,* RSC 1985, c. S-26, from the judgment of the Court of Appeal for Ontario made on April 4, 2019 (File No. C64845) and for any further or other order that the Court may deem appropriate;

AND FURTHER TAKE NOTICE that this application for leave is made on the ground that the proposed appeal raises the following questions related to the law of commercial litigation which are of public importance:

a) While recognizing a culture shift, how should courts and parties balance the interests of proportionality while protecting a party's right to pursue claims, particularly in cases involving multiple parties with different and separate causes of action?; and

b) Is proof of detriment a necessary element for a party to obtain equitable remedies for the tort of breach of confidence?

Dated at the City of Toronto this 1st day of August , 2019.

SIGNED:

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

GOWLING WLG (CANADA) LLP
Barristers & Solicitors
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel: 613-7886-8695
Fax: 613-788-3509
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for
Counsel for the Applicant

MOORE BARRISTERS
Professional Corporation
Suite 1600, 393 University Avenue
Toronto, ON M5G 1E6

David C. Moore (#16996U)
david@moorebarristers.com

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

Counsel for the Applicant,
The Catalyst Capital Group Inc.

3

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

Rahool Agarwal
Tel: 416-216-3943
Fax: 416-216-3930
rahool.agarwal@nortonrosefulbright.com

Orestes Pasparakis
Tel: 416-216-4815
Fax: 416-216-3930
orestes.pasparakis@nortonrosefulbright.com

Michael Bookman
Tel: 416-216-2492
Fax: 416-216-3930
michael.bookman@nortonrosefulbright.com

Counsel for the Respondent,
VimpelCom Ltd.

BORDEN LADNER GERVAIS LLP
Barristers and Solicitors
Bay Adelaide Centre, East Tower
22 Adelaide Street West
28th Floor
Toronto, ON M5H 4E3

James D. G. Douglas
Tel: 416-367-6029
Fax: 416-367-6749

Caitlin Sainsbury
Tel: 416-367-6438
Fax: 416-367-6749

Counsel for the Respondent,
Globalive Capital Inc.

4

STIKEMAN ELLIOTT LLP
Barristers and Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, ON M5L 1B9

David R. Byers
Tel: 416 869 5697
Fax: 416-947-0866
dbyers@stikeman.com

Daniel Murdoch
Tel: 416 869 5529
Fax: 416-947-0866
dmurdoch@stikeman.com

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

Counsel for the Respondent,
UBS Securities Canada Inc.

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

Michael Barrack
Tel: 416 863 5280
Fax: 416-863-2653
michael.barrack@blakes.com

Kiran Patel
Tel: 416 863 2205
Fax: 416-863-2653
kiran.patel@blakes.com

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

5

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

Lucas E. Lung
Tel: 416-601-2673
Fax: 416-601-4192
llung@lerners.ca

Counsel for the respondent in appeal,
Serruya Private Equity Inc.

McCARTHY, TÉTRAULT LLP
TD Bank Tower
66 Wellington Street West, Suite 5300
Toronto, ON M5K 1E6

Junior Sirivar LSUC#: 47939H
Tel: 416-601-7750
Fax: 416-868-0673
jsirivar@mccarthy.ca

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

Lawyers for the respondent in appeal,
Novus Wireless Communications Inc.

DAVIES WARD PHILLIPS & VINEBERG LLP
155 Wellington Street West, 37th Floor
Toronto, ON M5V 3J7

Matthew Milne-Smith
Tel: 416-863-0900
Fax: 416-863-0871
nunilne-smith@dwpv.com

Andrew Carlson
Tel: 416-863-0900
Fax: 416-863-0871
acarlson@dwpv.com

Counsel for the Respondent,
West Face Capital Inc.

6

NOTICE TO THE RESPONDENT: A respondent or intervener may serve and file a memorandum in response to this application for leave to appeal within 30 days after the day on which a file is opened by the Court following the filing of this application for leave to appeal or, if a file has already been opened, within 30 days after the service of this application for leave to appeal. If no response is filed within that time, the Registrar will submit this application for leave to appeal to the Court for consideration under section 43 of the *Supreme Court Act.*

OTT_LAW\ 10281137\3

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

ONTARIO

SUPERIOR COURT OF JUSTICE

(COMMERCIAL LIST)

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

HAINEY J.

Table of Contents

REASONS FOR DECISION

Overview

Nature of the Motions

[1] The defendants move to dismiss, permanently stay, or strike the statement of claim of The Catalyst Capital Group Inc. ("Catalyst") on the basis of:

(a) Issue Estoppel;

(b) Cause of Action Estoppel; and

(c) Abuse of Process.

[2] The defendants, VimpelCom Ltd. ("VimpelCom") and UBS Securities Canada Inc. ("UBS") also move to dismiss Catalyst's claim on the ground that it is barred against them by a court-ordered release.

[3] UBS and Globalive Capital Inc. ("Globalive") also move to strike Catalyst's statement of claim for breach of contract on the ground that it discloses no reasonable cause of action against them.

[4] Although Globalive challenged Catalyst's jury notice this was not argued on the motion and I do not intend to deal with it.

[5] Catalyst's claim in this action arises from its efforts to purchase Wind Mobile Corp. ("Wind") from VimpelCom in 2014. Catalyst alleges that certain of the defendants committed the torts of inducing breach of contract, conspiracy, and breach of confidence which prevented it from acquiring Wind. It also alleges that VimpelCom breached its exclusivity agreement and confidentiality agreement with respect to Catalyst's negotiations with VimpelCom to acquire Wind which was ultimately purchased from VimpelCom by a consortium of purchasers in September 2014 ("Catalyst's Current Action").

Parties

[6] Catalyst is a Toronto-based investment firm that specializes in investments in distressed and undervalued Canadian businesses.

[7] The defendants fall into two categories: (1) shareholders of Wind in 2014 ("2014 Wind Shareholders") and their advisors, and (2) the consortium that bought Wind in September 2014 ("Consortium").

[8] The 2014 Wind Shareholders are as follows:

(a) VimpelCom, a telecom company based in Amsterdam; and

(b) Globalive, an investment company based in Toronto.

[9] UBS is an investment bank that provided advisory services to VimpelCom with respect to the Wind transaction.

[10] The Consortium includes the following defendants:

(a) West Face Capital Inc. ("West Face"), a private equity corporation headquartered in Toronto;

(b) Tennenbaum Capital Partners LLC ("Tennenbaum"), an investment management firm based in Los Angeles; 64NM Holdings GP LLC ("64NM GP"), the general partner of 64NM Holdings LP ("64NM LP"), a limited partnership organized in Delaware and headquartered in New York (together "64NM"). 64NM was formed by LG Capital Investors LLC ("LG"), an investment firm in New York (collectively referred to as the "US Investors");

(c) Serruya Private Equity Inc. ("Serruya"), a private equity investment fund headquartered in Markham; and

(d) Novus Wireless Communications Inc. ("Novus"), a telecommunications provider based in Vancouver.

Allegations

[11] The main allegations in Catalyst's Current Action are as follows:

(a) Globalive and UBS owed a duty of confidence to Catalyst and breached that duty by communicating confidential information to the Consortium;

(b) The Consortium conspired amongst themselves, Globalive and UBS to induce VimpelCom to breach its exclusivity agreement with Catalyst and to enter into negotiations with them instead; and

(c) VimpelCom breached its confidentiality agreement and its exclusivity agreement with Catalyst and negotiated with the Consortium.

[12] Catalyst claims damages in the amount of $1.3 billion, which is the estimated profit that the Consortium generated from the subsequent sale of Wind to Shaw Communications ("Shaw") in January 2016.

Facts

The Wind Transaction

[13] Wind is a Canadian telecommunications provider formed in 2008 by Globalive and Orascom Telecom Holdings ("Orascom"). In 2011, VimpelCom bought Orascom's interest in Wind. Because VimpelCom is both a Dutch-headquartered and mostly Russian-owned company, Globalive, a Canadian company, held the majority voting equity in Wind and VimpelCom held the majority of the total equity. This was to satisfy the federal government's Canadian ownership requirements.

[14] In 2012, the Canadian government relaxed restrictions on foreign control of small telecommunication companies such as Wind. VimpelCom saw this as an opportunity to buy-out Globalive to gain full control of Wind. VimpelCom and Globalive entered into a share purchase agreement whereby VimpelCom was to purchase Globalive's equity in Wind. However, the federal government refused to approve the takeover, notwithstanding the relaxed foreign ownership restrictions. In early 2013, frustrated by its experience in Canada, VimpelCom decided to sell its interest in Wind. It engaged UBS to find a buyer. VimpelCom's asking price for the sale of its interest in Wind was based upon a $300 million enterprise value for the entire company. This was well-known within the industry. VimpelCom also made it known that if it could not sell its interest in Wind at this price it would commence proceedings under the *Companies' Creditors Arrangement Act*[1] ("CCAA") to recover its interest through Wind's insolvency.

[15] In late 2013, Catalyst began negotiating with VimpelCom for the potential purchase of Wind. On March 22, 2014, Catalyst executed a confidentiality agreement with VimpelCom ("Confidentiality Agreement"), in which VimpelCom agreed to provide Catalyst with Wind's business plan, enterprise value and VimpelCom's equity structure. The Confidentiality Agreement provided, among other things, that the existence and content of the negotiations between Catalyst and VimpelCom were confidential as follows:

> Each Party agrees that ... without the prior written consent of the other Party, such Party will not, and will cause its Authorised Persons not to, disclose to any person other than the other Party and its Authorised Persons (a) the fact that discussions or negotiations are taking place with the other Party concerning the Project, (b) any of the terms, conditions or other facts related to the other Party's participation in the Project, including the status thereof, or (c) the existence of this Agreement, the terms hereof or that Confidential Information has been made available pursuant to this Agreement.

[16] On May 6, 2014, after prolonged negotiations, Catalyst agreed to purchase Wind based upon an enterprise value of $300 million, with a closing date of no later than May 30, 2014. A share purchase agreement was not completed, but negotiations between Catalyst and VimpelCom continued.

[17] While Catalyst was negotiating with VimpelCom, VimpelCom was also negotiating with other parties including Tennenbaum and West Face.

[18] During June and July 2014, Catalyst continued to negotiate with VimpelCom to purchase Wind and made progress in the negotiations. According to Catalyst, it understood that the fact and content of its negotiations with VimpelCom were confidential pursuant to the Confidentiality Agreement.

---

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

[19] On July 23, 2014, believing that they were close to a deal, Catalyst and VimpelCom entered into an agreement pursuant to which VimpelCom could only negotiate with Catalyst until July 29, 2014 ("Exclusivity Agreement").

[20] By July 30, 2014, it appeared that VimpelCom and Catalyst were close to a deal. They agreed to extend the Exclusivity Agreement to August 5, 2014. On August 1, 2014, VimpelCom confirmed to Catalyst that the share purchase agreement was "substantially completed" subject to any settling details in the schedules. By August 3, 2014, Catalyst and VimpelCom agreed that the deal was "substantially settled", subject to approval from VimpelCom's directors. This automatically extended the Exclusivity Agreement an additional five business days.

[21] On August 6, 2014 the Consortium sent VimpelCom a "superior proposal" to purchase Wind which provided as follows:

> (a) Our proposal will be superior to any other offer as our proposal will not require regulatory approval...
>
> (b) Our transaction will not be a change of control of [Wind], and as a result requires no engagement with the regulatory authorities.
>
> (c) [O]ur proposal will be economically superior to any other proposal...

[22] On August 7, 2014, Globalive entered into a support agreement with VimpelCom in which it agreed to sell its interest in Wind to a buyer of VimpelCom's choosing or alternatively to support VimpelCom commencing CCAA proceedings with respect to Wind if the sale did not proceed. At the time, Globalive believed the proposed Catalyst transaction was the only realistic alternative to insolvency proceedings for Wind.

[23] On August 8, 2014, VimpelCom and Catalyst extended the Exclusivity Agreement to August 18, 2014.

[24] On August 11, 2014, VimpelCom and Catalyst held a joint conference call with Industry Canada to advise that their deal "was done".

[25] On August 15, 2014, VimpelCom advised Catalyst of the following two new demands: (1) it insisted on shortening the regulatory approval period from three months (with an automatic one-month extension) to two months, and (2) it asked for a $5-20 million break fee if the deal did not close. These new demands were the result of VimpelCom's concerns about the risk that regulatory approval for the sale of Wind to Catalyst would either not be obtained or would be significantly delayed.

[26] Catalyst refused to agree to VimpelCom's two new demands and stopped negotiating with it. The exclusivity period between Catalyst and VimpelCom terminated on August 18, 2014 without a deal being concluded. As a result, VimpelCom seriously considered proceeding with CCAA proceedings.

[27] On August 25, 2014, VimpelCom and the Consortium entered into an exclusivity agreement. On September 16, 2014, the Consortium concluded a deal with VimpelCom to

purchase Wind for $300 million through a corporation called Mid-Bowline Group Corp. ("Mid-Bowline").

[28] The benefit to VimpelCom of this transaction was that the Consortium, which included Wind's controlling shareholder, Globalive, only acquired VimpelCom's non-controlling interest in Wind. As there was no change in the control of Wind, there was no risk that the transaction would not receive regulatory approval, as none was required.

The Previous Litigation

[29] In early 2014, Brandon Moyse ("Moyse") was working as a junior analyst at Catalyst. In March 2014, Moyse was assigned to Catalyst's internal "telecom" deal team following the departure of another Catalyst analyst. At the time, Catalyst's partners were considering pursuing an acquisition of Wind. Moyse worked on Catalyst's potential acquisition of Wind.

[30] On May 24, 2014, Moyse resigned from Catalyst to work for West Face. Catalyst became concerned that Moyse might pass confidential information to West Face concerning the Wind opportunity and commenced an action against him and West Face on June 25, 2014 to enforce Moyse's non-competition clause in his employment agreement with Catalyst ("Moyse/West Face Action").

[31] In September 2014, when the Consortium concluded its deal to purchase Wind, Catalyst amended its statement of claim in the Moyse/West Face Action to allege that Moyse had communicated confidential information to West Face about Catalyst's acquisition strategy with respect to Wind. Catalyst alleged that West Face used the confidential information it received from Moyse to successfully pursue its acquisition of Wind from VimpelCom.

[32] Catalyst again amended its statement of claim in the Moyse/West Face Action in December 2014 to add claims for a constructive trust over West Face's interest in Wind and for a tracing remedy.

[33] In January 2015 Catalyst brought a motion for injunctive relief to enjoin West Face from exercising any management role in Wind and to appoint a supervising solicitor to inspect West Face's computers to determine whether it had received any of Catalyst's confidential information concerning Wind from Mr. Moyse. The motion was dismissed by Glustein J. in July 2015. Catalyst's motion for leave to appeal Glustein J.'s decision was dismissed in January 2016.

The Plan of Arrangement Proceeding

[34] In December 2016 the Consortium agreed to sell Wind to Shaw for $1.6 billion. Because Catalyst's claim for a constructive trust over West Face's interest in Wind had to be eliminated to enable Shaw to acquire clear title to Wind, the sale was structured to proceed by a plan of arrangement pursuant to s. 182 of the *Business Corporations Act (Ontario)* ("OBCA").

[35] The plan of arrangement proceeding began before Newbould J. on January 25, 2016.[2] Catalyst took the position that the plan should not be approved so that Catalyst could amend its statement of claim in the Moyse/West Face Action because of information it's Chief Operating Officer, James Riley, had just recently obtained from the plan of arrangement application material. During oral argument that day counsel to Catalyst advised for the first time that the proposed amendment to its statement of claim was to allege that West Face had induced VimpelCom to breach the Exclusivity Agreement.

[36] Justice Newbould rejected Catalyst's request. He concluded that it had known about the information since early 2015. He concluded that the plan of arrangement was fair and reasonable but he did not approve it at the time because he ordered an expedited trial of an issue as to whether Catalyst had a right to a constructive trust over West Face's interest in Wind. In his reasons for judgment in the plan of arrangement proceeding he referred to Catalyst's proposed claim against West Face for inducing the breach of the Exclusivity Agreement as follows at paras. 59 and 61:

> This intended action has not been started. It could have been started in March, 2015 when the facts were disclosed and known to Catalyst. To lie in the weeds until the hearing of the application and assert such a right to stop the plan of arrangement is troubling indeed and not acting in good faith. Waiting and seeing how things are going in the litigation process before springing a new theory at the last moment is not to be encouraged. Apart from the statement of Mr. Riley that the information was first learned in the material in this application, which was not true, no evidence has been given by Catalyst to explain why this new intended claim was not brought sooner.
>
> ...
>
> In the circumstances, I disregard the statement of Mr. Riley as to the intended claim Catalyst says it will bring. It is too late in the process and the provision in the amended plan of arrangement that would prevent such a claim being made is fair and reasonable. The trial of the issue I have ordered is not to consider any such claim.

[37] On January 31, 2016, Catalyst withdrew its claim for a constructive trust. The trial of an issue was therefore abandoned. Justice Newbould approved the plan of arrangement on February 3, 2016. Shaw's acquisition of Wind closed on March 1, 2016.

Catalyst's Current Action

[38] On June 1, 2016 Catalyst provided West Face with its statement of claim in this proceeding. This was five days before the commencement of the trial in the Moyse/West Face Action. West Face's counsel immediately wrote to Catalyst's counsel to complain that this new

---

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

action was litigation by installment and an abuse of process. Catalyst's counsel responded that para. 61 of Newbould J.'s reasons for judgment in the plan of arrangement proceeding barred Catalyst from alleging that West Face had induced a breach of the Exclusivity Agreement in the Moyse/West Face Action.

The Moyse/West Face Trial

[39] Catalyst's claim against Moyse and West Face was tried before Newbould J. for six days commencing on June 6, 2016. In his reasons for judgment [3] Newbould J. described the nature of the action as follows at paras. 1-5:

> The Catalyst Capital Group Inc. ("Catalyst") brings this action against West Face Capital Inc. ("West Face") for an alleged misuse of confidential Catalyst information regarding WIND Mobile Inc. ("WIND") that Catalyst claims was obtained by West Face from the defendant Brandon Moyse who had previously worked for Catalyst before joining West Face. Catalyst claims that West Face used that confidential Catalyst information to successfully acquire an interest in WIND.
>
> Both Catalyst and West Face are Toronto-based investment management firms and have been competitors on potential deals. They were competitors in the chase for WIND.
>
> West Face was part of a consortium that acquired WIND. Before it did so, Catalyst was a bidder for WIND and had an exclusive right for a period of time to negotiate a purchase. When Catalyst failed to conclude a purchase of WIND, West Face and its consortium partners acquired an indirect interest in WIND on September 16, 2014 based on an enterprise value of WIND of $300 million.
>
> Mr. Moyse was an analyst at Catalyst for a little under two years. He left Catalyst in May 2014 and worked at West Face for three and a half weeks from June 23 to July 16, 2014. It is alleged that at some time between March 14, 2014 when Mr. Moyse first spoke to West Face and July 16, 2014 when he stopped working at West Face he gave West Face confidential information regarding Catalyst's strategy to acquire WIND that was used by West Face to structure its bid for WIND.
>
> The consortium in which West Face was a member later sold [WIND] to Shaw Communications for approximately $1.6 billion. Catalyst claims an accounting of the profits made by West Face.

---

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

[40] At the outset of the trial counsel for West Face set out a series of findings of fact that he asked Newbould J. to make at the conclusion of the trial. Counsel for Catalyst did not suggest that the proposed findings of fact were not relevant or were outside of the scope of the matters that were in issue in the trial. The defendants rely upon the following four proposed findings of fact that counsel for West Face asked Justice Newbould to make:

(1) Catalyst would not have completed the acquisition of Wind in 2014 without obtaining regulatory concessions, including to permit it to sell Wind or its wireless spectrum to an incumbent after five years;

(2) The Canadian government gave Catalyst no indication that it was willing to grant Catalyst its required regulatory concessions. Instead, the government made clear that the concessions sought by Catalyst would not be granted;

(3) Catalyst intended to sign a Share Purchase Agreement with VimpelCom and then engage in a course of conduct that the Agreement specifically precluded in the period prior to closing; and

(4) Catalyst failed to acquire Wind because it refused to meet VimpelCom's demands for a break fee to protect VimpelCom from regulatory risk. Catalyst made that choice based on its own assessment and on the advice of senior corporate counsel from Faskens and investment bankers from Morgan Stanley.

[41] Newbould J. dismissed the Moyse/West Face Action in its entirety. He made the following findings at paras. 126-130 of his reasons for judgment:

> *Did Catalyst suffer any detriment or compensable damage?*
>
> Even if a case of misuse of confidential Catalyst information were made out, I cannot find that it caused Catalyst any detriment or damage.
>
> Catalyst has failed to establish that it suffered any detriment by any misuse of Catalyst confidential information. There is no evidence that the bid of the Consortium of August 7, 2014 was even looked at by the board of VimpelCom during the period of exclusivity with Catalyst, or that it played any part in the position taken by VimpelCom with Catalyst that it wanted a break fee from Catalyst. It was that position taken by VimpelCom that caused Catalyst to terminate discussions with VimpelCom.
>
> On August 11, 2014, the Chairman of the Board of VimpelCom advised Mr. De Alba [Catalyst's Managing Director] that the Board was concerned about the Government's behaviour and wanted protection in case the Government did not approve the transaction. The Chairman advised Catalyst that VimpelCom insisted on a new term that provided for a $5-20 million break fee if regulatory approval was not granted within 60 days. Mr. Glassman [Catalyst's Managing Partner] was furious and told his people on August 11, 2014 as well as Mr. Levin of Faskens who was advising Catalyst that VimpelCom had to announce the deal publicly that day or else there would be no deal. He stated: "I am fed up. I do not want to

> hear a single more excuse from them." On August 14, 2014 Mr. Glassman told his people that the deal was technically dead or in deep trouble. The next day Mr. Levin advised that VimpelCom was "out to lunch and I think we should tell them." Mr. Babcock of Morgan Stanley, Catalyst's financial advisor, advised Catalyst to tell VimpelCom that "and then down communication. This needs to go past the exclusivity time and [VimpelCom] needs to see his alternatives and their terms."
>
> Catalyst then told VimpelCom that the request for a break fee was unacceptable and it shut down communications and let the period of exclusivity expire. It was after that that VimpelCom and the consortium, including West Face, concluded a deal. Mr. Glassman acknowledged in his evidence that the reason the deal between Catalyst and VimpelCom fell through was because of the break fee that VimpelCom requested that Catalyst would not agree to.
>
> For the same reason, Catalyst has not established that it suffered any damages. Catalyst has not established that but for the misuse by West Face of the confidential Catalyst information that it says West Face was given by Mr. Moyse it would have acquired WIND from VimpelCom. It was Catalyst's refusal to agree to a break fee requested by VimpelCom that caused Catalyst to end negotiations with VimpelCom.

[42] In his costs endorsement,[4] in which costs were awarded to West Face on a substantial indemnity scale against Catalyst, Newbould J. stated as follows at para. 10:

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

[43] Newbould J.'s decision was appealed to the Court of Appeal for Ontario. Counsel suggested and I agreed to delay finalizing my decision until the Court decided the appeal. The Court of Appeal released its decision on March 22, 2018.[5] The Court dismissed Catalyst's appeal. Following the release of its decision counsel requested an opportunity to make further submissions regarding the *Court of Appeal's decision*. I agreed to receive limited written submissions and I heard oral submissions on April 16, 2018. I have taken those submissions into account in my analysis of the issues raised on these motions.

---

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

Issues

[44] The issues I must decide are as follows:

(1) Is Catalyst's Current Action barred by the doctrine of issue estoppel?

(2) Is Catalyst's Current Action barred by the doctrine of cause of action estoppel?

(3) Is Catalyst's Current Action barred by the doctrine of abuse of process?

(4) Are the US Investors and Globalive privies to West Face for the purposes of the doctrines of issue estoppel and cause of action estoppel?

(5) Can VimpelCom and UBS rely upon the plan of arrangement to bar Catalyst's Current Action against them?

(6) Should Catalyst's breach of contract claims against Globalive and UBS be struck as disclosing no reasonable cause of action?

Positions of the Parties

The Defendants

[45] West Face submits that Catalyst's Current Action is barred against it because of the following:

(a) Catalyst's claims turn on issues that were decided against Catalyst in the Moyse/West Face Action and are barred by the doctrine of issue estoppel;

(b) Catalyst's claims arise from the same causes of action as those asserted in the Moyse/West Face Action and are barred by the doctrine of cause of action estoppel; and

(c) To allow Catalyst's Current Action to proceed would be manifestly unfair to West Face and would bring the administration of justice into disrepute. The action is therefore barred by the doctrine of abuse of process.

[46] The US Investors and Globalive submit that they are privies of West Face and adopt West Face's submissions which they maintain apply to them as well.

[47] Globalive also submits that Catalyst's breach of contract claim against it should be struck as disclosing no reasonable cause of action.

[48] Novus and Serruya submit that Catalyst's Current Action is an abuse of process as it seeks to re-litigate issues that were already determined in the Moyse/West Face Action. Further, it asks the court to make findings of fact that directly contradict and are inconsistent with findings of fact made by Newbould J. in the Moyse/West Face Action.

[49] VimpelCom and UBS submit that Catalyst's Current Action is an abuse of process for the same reasons. They also submit that the action is barred by a court-ordered release contained in Newbould J.'s order dated February 3, 2016 in which he approved the plan of arrangement with respect to Wind.

[50] Globalive and UBS also submit that Catalyst's Current Action does not disclose a cause of action against them for breach of contract as there is no privity of contract between Catalyst and them to support such a cause of action.

The Plaintiff

[51] Catalyst submits as follows:

(a) The factual findings made by Newbould J. in the Moyse/West Face Action that are relied upon by the defendants are *obiter* and were not fundamental to the determination of the Moyse/West Face Action and therefore do not satisfy the test for issue estoppel;

(b) Justice Newbould expressly prohibited Catalyst from asserting its inducing breach of contract claim in the Moyse/West Face Action;

(c) Catalyst's Current Action will turn on the reason why VimpelCom requested the break fee after it had previously told Catalyst that the share purchase agreement was "substantially settled";

(d) The causation issue in Catalyst's Current Action is entirely different from the causation issue determined by Newbould J. in the Moyse/West Face Action. The causation question in this action will boil down to whether Catalyst could have concluded a deal with VimpelCom absent VimpelCom's breach or the Consortium's interference;

(e) Justice Newbould's finding that VimpelCom would not agree to a deal with Catalyst that was conditional on receiving regulatory concessions was not fundamental to his decision;

(f) This action is not an attempt to impose a new legal theory of wrongdoing on the same facts. It is a new claim that arises out of different legal relationships and conduct by West Face acting in concert with others, which give rise to distinct and separate causes of action;

(g) This action is not an effort to recast the Moyse/West Face Action. It is about whether the Consortium, Globalive and UBS conspired to induce VimpelCom to breach the Exclusivity Agreement and misused confidential information they received about Catalyst's negotiations with VimpelCom;

(h) The US Investors and Globalive are not privies of West Face because they had no "skin in the game" because an adverse result in the Moyse/West Face Action would not have affected their own interests;

(i) This action is not an abuse of process because it is not oppressive, vexatious or a scandal to the administration of justice;

(j) The plan of arrangement does not extinguish Catalyst's claims against VimpelCom and UBS. This determination cannot be made on a motion pursuant to Rule 21.01(1)(a) of the *Rules of Civil Procedure*;[6] and

(k) Catalyst's breach of contract claims against Globalive and UBS should not be struck because it is not plain and obvious that they cannot succeed.

Analysis

West Face's Motion

[52] West Face relies upon the following three doctrines in support of its motion: (1) issue estoppel, (2) cause of action estoppel, and (3) abuse of process. In *Danyluk v. Ainsworth Technologies*[7] Binnie J. summarized the principles underlying these three doctrines at para. 18 as follows:

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

[53] West Face submits that Catalyst was required to put its best foot forward in the Moyse/West Face Action on the issue of whether West Face had improperly deprived it of the opportunity to acquire Wind and to advance all of its related claims, causes of action and allegations against West Face in the one proceeding. West Face argues that Catalyst was not entitled to "lie in the weeds" to reserve to itself a second "bite at the cherry" on these issues.

Is Catalyst's Current Action barred by issue estoppel?

[54] The Supreme Court of Canada reaffirmed the following three-part test for issue estoppel in *Danyluk* at para. 25:

(1) that the same question has been decided;

(2) that the judicial decision which is said to create the estoppel was final; and,

---

[6] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.
[7] *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, [*Danyluk*].

> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[55] In *Martin v. Goldfarb*[8] Perell J. described issue estoppel at para. 59 as follows:

> Issue estoppel precludes a litigant from asserting a position that is inconsistent or contrary to a fundamental point decided in a past proceeding in which the litigant or his or her privies participated.

[56] In *Danyluk*, the Supreme Court of Canada recognized that issue estoppel promotes the principles of finality and judicial efficiency noting at para. 54 as follows:

> Issue estoppel simply means that once a material fact such as a valid employment contract is found to exist (or not to exist) by a court or tribunal of competent jurisdiction, whether on the basis of evidence or admissions, the same issue cannot be relitigated in subsequent proceedings between the same parties. The estoppel, in other words, extends to the issues of fact, law, and mixed fact and law that are necessarily bound up with the determination of that "issue" in the prior proceeding.

Has the Same Question Been Decided?

[57] The first part of the test in *Danyluk* requires me to determine whether the same questions were decided in the Moyse/West Face Action as must be decided in Catalyst's Current Action. Any right, question or fact determined directly by Newbould J. in the previous action may form the basis of issue estoppel. MacKenzie J. made this clear in *Dableh v. Ontario Hydro*[9] at para. 16 as follows:

> The case law cited above provides that the question must be fundamental to the decision in the earlier proceeding and that the question can be any right, question or fact distinctly put in issue and directly determined by the court in the earlier proceeding.

[58] West Face makes the following submissions at para. 77 of its factum:

> ... Justice Newbould made critical findings of fact in deciding the Moyse action that are flatly inconsistent with and fatal to the claims asserted by Catalyst against West Face in the case at bar. Those findings were fundamental to Catalyst's claims in the Moyse action for breach of confidence. They defeated the causation and damages element of those claims. They were 'distinctly put in issue and directly determined by the court'. The causes of action pleaded against West Face in this action are breach of confidence, conspiracy and inducing breach of contract. All three of these torts include the requirement that the defendant's

---

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

> conduct actually caused damage to the plaintiff. That is, no doubt, why Catalyst pleaded in the case at bar that the conduct of the defendants did, in fact, cause it loss or harm.

[59] West Face relies upon the fact that Newbould J. concluded that the members of the Consortium did not cause Catalyst to suffer any loss or harm because:

(a) He found that "the reason the deal between Catalyst and VimpelCom fell through was because of the break fee that VimpelCom requested that Catalyst would not agree to."[10]

(b) He also found that there was no evidence "that the bid of the consortium of August 7, 2014 was even looked at by the board of VimpelCom during the period of exclusivity with Catalyst, or that it played any part in the position taken by VimpelCom with Catalyst that it wanted a break fee from Catalyst. It was that position taken by VimpelCom that caused Catalyst to terminate discussions with VimpelCom."[11]

(c) He also found that "Catalyst had no intention of closing a deal with VimpelCom if it could not obtain the concessions it was looking for from the Government"[12] and concluded that he had "considerable doubt of the plausibility of any theory that the Government would change its position on granting concessions based on Mr. Glassman's statements to Industry Canada or anyone else in Government."[13]

(d) Justice Newbould did not accept Mr. Glassman's evidence that he expected that the Government would soften its position. He concluded that "It is difficult to accept that based on his (Mr. Glassman's) analysis the Government would soften its position. The Government never said that it would. Mr. Drysdale, the Government relations expert retained by Catalyst made clear to Catalyst that the Government had said it would not grant concessions to Catalyst and that Industry Canada, the PCO/PMO and Prime Minister Harper were entrenched on this. Mr. Acker of Faskens, Catalyst's lawyers, an experienced communications lawyer advised Catalyst on July 25, 2014 that the current Government had made it clear that any proposed transfer of commercial mobile spectrum to an incumbent would be subject to very close scrutiny and, in the current climate, most unlikely to succeed."[14]

(e) Justice Newbould further concluded as follows at para. 131 of his reasons for judgment:

> There is another reason why Catalyst has not established any damages from misuse of confidential Catalyst information. It is clear that VimpelCom would not agree to any deal that carried any risk of the Government not approving the deal. Mr. Glassman's evidence throughout was that Catalyst would not agree to a deal

---

[10] *Moyse/West Face decision, supra* note 3 at para. 129.
[11] *Ibid* at para. 127.
[12] *Ibid* at para. 124.
[13] *Ibid* at footnote 13.
[14] *Ibid.*

> without Government concessions permitting the sale of spectrum to an incumbent in five years. Mr. Riley in his affidavit of February 18, 2015 stated that during the exclusivity period, the only point over which VimpelCom and Catalyst could not agree was regulatory approval risk. Catalyst wanted to ensure that its purchase was conditional on receiving regulatory concessions from Industry Canada, but VimpelCom would not agree to the conditions Catalyst sought. Given that evidence, and VimpelCom's refusal to agree to a deal that contained any such condition, there was no chance that Catalyst could have successfully concluded a deal with VimpelCom.

[60] Catalyst submits that these findings by Newbould J. were *obiter* and not fundamental to the determination of the Moyse/West Face Action. I do not agree with this submission for the following reasons.

[61] Catalyst's failure to acquire Wind and its acquisition by the Consortium is at the heart of Catalyst's Current Action. Paragraphs 63-65 of Catalyst's Amended Amended Amended Statement of Claim ("Catalyst's Statement of Claim") allege that the Consortium formed a conspiracy "to prevent Catalyst from successfully acquiring Wind". Paragraphs 126 and 127 provide as follows:

> 126. As a result of the misconduct of the Conspirators, VimpelCom and UBS breached the Exclusivity Agreement and breached their duty of good faith during its negotiations with Catalyst. As a result, the Consortium was able to purchase Wind to Catalyst's detriment.
>
> 127. On or about January 2016, Shaw Communications ("Shaw") acquired Mid-Bowline, the corporation formed after the Consortium's acquisition of VimpelCom's interest in Wind, for $1.6 billion. As a result, the Consortium received profit of over $1,300,000,000. thereby crystallizing Catalyst's damages as a result of the Conspirators' and VimpelCom's wrongful conduct, as described above.

[62] Paragraph 133 of Catalyst's Statement of Claim further describes its damages as the loss of profits from the sale of Wind to Shaw as follows:

> 133. As a result of the Consortium's inducement of breach of contract and VimpelCom's breach of the Exclusivity Agreement, Catalyst has suffered damages, which are crystallized in the form of profits realized by the Conspirators from the sale of Wind to Shaw, which Catalyst estimates to [be] $1,300,000,000.

[63] The damages claimed clearly flow from Catalyst's failure to acquire Wind and its acquisition by the Consortium.

[64] I disagree with Catalyst's submission that this new action is "not an attempt to impose a new legal theory of wrongdoing on the same facts". In my view, that is exactly what Catalyst is attempting to do in this proceeding.

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

[66] The *Court of Appeal's decision* supports my conclusion.[15] At paras. 41 and 42 the Court described Newbould J.'s findings that Catalyst maintains were *obiter* as "germane" to Catalyst's claim and West Face's defence as follows:

> ... evidence of the dealings between West Face and the consortium on one side and the vendor of the Wind shares on the other side in August 2014 was germane to the appellant's claim and West Face's defence that it pursued its own strategies in seeking to purchase the Wind shares, which were very different from those employed by the appellant. That strategy was reflected, in part, in the unsolicited proposal to purchase the Wind shares made by West Face and the consortium in early August 2014.
>
> The trial judge heard a great deal of evidence about the dealings between the vendor of the Wind shares and West Face and the consortium, particularly in August 2014. The appellant did not object to any of this evidence and, indeed, elicited most of it. In their closing arguments at trial, counsel for the appellant and the respondents urged the trial judge to make certain findings in respect of the dealings between West Face, the consortium and the vendor of the Wind shares. The trial judge's findings reflect those arguments and a preference for the position put forward by the respondents. We see no unfairness to the appellant in the manner in which these issues were litigated at trial. The judge's findings of fact in respect of these issues are supported by the evidence.

[67] In arriving at my view that Justice Newbould decided the same questions that would have to be decided in this proceeding I have relied upon the British Columbia Supreme Court's decision in *Foreman v. Niven*.[16] In that case, the plaintiff, Foreman, was interested in acquiring a property. He sought financing from Niven, who refused to provide the loan. Niven passed on the information he had received from Foreman about the property to a third party, Chambers, who ultimately acquired it for himself. Foreman unsuccessfully sued Chambers because the Court concluded that Foreman could never have acquired the property because he had insufficient assets to obtain the necessary financing. After the action against Chambers was dismissed, Foreman commenced a second action against Niven who successfully defended himself by relying on the doctrines of issue estoppel and abuse of process. The Court struck out Foreman's

---

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

statement of claim because the issue of whether Foreman could have acquired the property had been decided in the previous case. At para. 24 of his decision Savage J. held as follows:

> As I read both the decision of the trial judge and that of the Court of Appeal, both Courts accepted as made out that Niven rejected the loan application based on Foreman's lack of net worth. Both Courts also accepted that Foreman's claims against Chambers as a fiduciary failed because he could not make out that but for any breach he would have been able to acquire the lots. In short, the issue of his credit worthiness to obtain financing for the opportunity was a central issue in the action and Foreman was unable to show that he could have obtained financing and thus have availed himself to the alleged opportunity.

[68] In my view, the finding at the first trial that Foreman lacked the ability to obtain financing to buy the property is essentially the same as Newbould J.'s finding that Catalyst would never have acquired Wind because it would not agree to a break fee and it would never have received the concessions it required from the Government of Canada. This is the same question that would have to be determined in this proceeding.

[69] A second case that supports my conclusion is *Dableh.* In that case, Dableh, who was an employee of Ontario Hydro, was granted a patent relating to the operation of the Candu nuclear reactor. Another employee was granted a different patent which Dableh claimed infringed his patent. Dableh sued for breach of confidence and breach of fiduciary duty in the Ontario Court General Division over the patent dispute. He later commenced a patent infringement action in the Federal Court which proceeded to trial before the Ontario Court action. Dableh's Federal Court action was dismissed on the basis that the two patents were distinct from each other. The defendants moved to dismiss the Ontario Court action on the ground of issue estoppel. Notwithstanding that the legal issues in the two cases were different - breach of confidence in the Ontario Court action - and patent infringement in the Federal Court action - MacKenzie J. concluded at para. 16 that issue estoppel applied as follows:

> ... I am of the view that the fundamental question in the earlier proceeding and in the present action is, who invented the LIM method and resulting apparatus. Muldoon J. found that Cenanovic was the inventor. This finding was essential or fundamental for the disposition against his interest of Dableh's claim in the Federal Court action.

[70] Newbould J.'s finding that Catalyst would never have acquired Wind was both essential and fundamental for the determination of the Moyse/West Face Action. It is equally essential and fundamental to the determination of Catalyst's Current Action.

[71] I am therefore satisfied that the first part of the *Danyluk* test has been met.

Was the prior decision final?

[72] The second part of the *Danyluk* test requires me to determine whether Justice Newbould's decision in the Moyse/West Face Action is final. When this motion was argued his decision was under appeal. As noted above, the Court of Appeal for Ontario dismissed Catalyst's appeal.[17]

[73] I am satisfied that the prior decision of Newbould J. relied upon by the defendants is now final. The second part of the *Danyluk* test has been satisfied.

Are the parties to both proceedings the same?

[74] West Face and Catalyst are parties to both proceedings. The third part of the *Danyluk* test is therefore satisfied.

Conclusion

[75] For these reasons I have concluded that Catalyst's Current Action is barred by issue estoppel. Further, I have not identified any manifest injustice in applying the doctrine in this case that would cause me to exercise my residual discretion not to apply it. Catalyst had its opportunity to put its best foot forward in the Moyse/West Face Action in which it complained that West Face had been responsible for its failure to acquire Wind. It is not entitled to a "second bite at the cherry" in this proceeding. To deny it one cannot be said to be unjust.

Is Catalyst's Current Action barred by Cause of Action Estoppel?

[76] West Face submits that Catalyst's Current Action is also barred by cause of action estoppel as a result of the rule in *Henderson v. Henderson.*[18] In that case the plaintiff was barred from asserting estate claims against his sister-in-law because he had failed to do so in previous estate litigation. Vice Chancellor Wigram of the U.K. Court of Chancery described the rule at p.319 as follows:

> I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of [a] matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in a special case, not only to points upon which the Court was

---

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

> actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the litigation, and which the parties exercising reasonable diligence, might have brought forward at the time.

[77] A cause of action in the context of cause of action estoppel was described by Sharpe J. (as he then was) at para. 18 in *Las Vegas Strip Ltd. v. Toronto (City)*[19] as follows:

> It is apparent that analysis of [the] question must focus on the causes of action that were asserted in the prior proceedings. "Cause of action" does not appear to have been precisely defined in the authorities cited by the parties. Standard dictionary definitions, however, suggest that it refers to a set of facts giving rise to a legal claim or entitlement ... A claim in law sufficient to demand judicial attention; the composite of facts necessary to give rise to the enforcement of a right ... The factual circumstances which give rise to a right to sue ... The fact or set of facts which gives a person a right of action ... The fact or facts which give a person a right to judicial redress or relief against another.

Justice Sharpe's decision was upheld by the Court of Appeal for Ontario.[20]

[78] The set of facts which gives Catalyst a right of action in both the Moyse/West Face Action and Catalyst's Current Action is Catalyst's failure to acquire Wind and its acquisition by the Consortium. Justice Newbould determined this issue in the Moyse/West Face Action. Catalyst was required to bring forward its "whole case" in that proceeding. It did not do so and it is therefore now barred by the doctrine of cause of action estoppel in this proceeding.

[79] Catalyst submits that it was prohibited from advancing its claim for inducing breach of contract in the Moyse/West Face Action by Justice Newbould. However, I have concluded that Justice Newbould only prohibited Catalyst from asserting that claim in the trial of an issue in the plan of arrangement proceeding that was to be heard on an expedited basis in February 2016. The trial of an issue was abandoned when Catalyst withdrew its claim for a constructive trust over West Face's interest in Wind and the plan of arrangement was approved.

[80] The full trial of the Moyse/West Face Action that proceeded in June 2016 was not subject to any prohibition by Justice Newbould with respect to Catalyst's claim for inducing breach of contract. My conclusion is supported by the *Court of Appeal's decision* at paras. 39 and 40 as follows:

> The appellant argues that the trial judge made a series of factual findings against the appellant in respect of the dealings between the vendor of the WIND shares and West Face and the consortium in August 2014. The appellant argues that these findings were made despite the trial judge having refused to allow the appellant to amend its claim to allege that West Face had induced the vendor of

---

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

> the WIND shares to breach its agreement with the appellant in the course of those August dealings. The appellant contends that the trial judge's findings were beyond the scope of the claim as framed in the pleadings before him and were based on an inadequate evidentiary record.
>
> We do not accept this submission. The appellant did not move in this proceeding to amend its claim to include an allegation that West Face induced the vendor of the WIND shares to breach its contract with the appellant. The appellant did unsuccessfully seek to make that amendment in a related proceeding. That refusal had no impact on the conduct of this trial.

[81] I disagree with Catalyst's submission that this proceeding involves a different causation issue and different causes of action. They are essentially the same. Catalyst is attempting to re-litigate the same causes of action in this proceeding that it did in the Moyse/West Face Action. In my view, this proceeding amounts to litigation by installment. The Supreme Court of Canada made it clear that litigation by installment is barred by cause of action estoppel in the case of *Doering v. Grandview (Town)*.[21] Doering sued the Town of Grandview for flooding on his property caused by a dam. The first action he brought, which was based upon an allegation that repairs to the dam caused the flooding, was dismissed. Doering brought a second action based upon a different theory as to why the dam caused the flooding. The Supreme Court held that the second action was barred by cause of action estoppel because it could have been brought in the original action. At para. 118 Ritchie J. stated as follows:

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

[82] The same can be said about Catalyst's allegations in this proceeding. All of the facts that Catalyst relies upon in support of its claim for inducing breach of contract against West Face were well known to it long before the trial before Newbould J. In fact, Justice Newbould admonished Catalyst for choosing to "lie in the weeds" with respect to its knowledge of the facts giving rise to its claim for inducing breach of contract in his reasons for judgment in the plan of arrangement proceeding at para. 59 as set out above. I also disagree with Catalyst's submission that its current action "will turn on the reason why VimpelCom requested a break fee". Catalyst's theory as to why VimpelCom requested a break fee is based upon its allegation that VimpelCom demanded the break fee to deliberately terminate negotiations with Catalyst so that it could pursue the Consortium's proposal. To succeed Catalyst would have to ask the court to make inconsistent findings from Newbould J.'s findings because he found at para. 127 of his reasons for judgment that:

---

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

> ... There is no evidence that the bid of Consortium of August 7, 2014 was even looked at by the board of VimpelCom during the period of exclusivity with Catalyst, or that it played any part in the position taken by VimpelCom with Catalyst that it wanted a break fee from Catalyst.

[83] This finding is entirely inconsistent with Catalyst's claim in this proceeding that VimpelCom demanded a break fee to terminate its negotiations with Catalyst so that it could accept the Consortium's proposal. This issue cannot be re-litigated in this proceeding.

Conclusion

[84] For these reasons I have concluded that Catalyst's Current Action is barred by cause of action estoppel because it is based upon the same facts as were alleged in the Moyse/West Face Action. Some facts may have been added in this proceeding, but the issue remains the same – whether West Face was responsible for Catalyst's failure to acquire Wind. Sharpe J. came to the same conclusion in *Las Vegas Strip* when he concluded as follows at para. 23:

> In my view, the present application cannot be said to be based upon a different set of facts for the purpose of *res judicata*. Las Vegas has, in effect, subtracted certain facts from the earlier claim, those concerning the prior use of the premises, but the issue remains whether its operation is illegal under the By-law.

Is Catalyst's Action barred by Abuse of Process?

[85] All of the defendants submit that Catalyst's Current Action is barred by the doctrine of abuse of process which is a more flexible doctrine than issue estoppel or cause of action estoppel and applies to all of them. The Supreme Court of Canada explained the doctrine in *Toronto (City) v. C.U.P.E., Local 79*[22] at para. 51 as follows:

> Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

---

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

[86] In my view, these principles apply in this case for many of the same reasons that I have relied upon to conclude that issue estoppel and cause of action estoppel applies to Catalyst's Current Action. Catalyst unsuccessfully litigated its failure to acquire Wind in the Moyse/West Face Action. Justice Newbould made findings at trial that are determinative of its claims against the defendants in this proceeding. Catalyst's Current Action advances claims that it chose not to allege in the previous action. It also seeks findings that are entirely inconsistent with Justice Newbould's findings in the Moyse/West Face Action. In my view, this constitutes an abuse of process because it would result in the relitigation of the reason why Catalyst's bid to acquire Wind failed.

[87] My conclusion is supported by the Court of Appeal for British Columbia's decision in *Gonzalez v. Gonzalez*.[23] In that case Mrs. Gonzalez filed an affidavit in matrimonial proceedings that included financial information about her husband that she found on his computer. Mr. Gonzalez moved unsuccessfully before Butler J. in the matrimonial proceedings to strike those portions of her affidavit on the ground that his wife had violated his right to privacy. He later brought an action against his wife for breach of the British Columbia *Privacy Act*[24] alleging that she had breached his right to privacy by accessing the financial information on his computer. The Court of Appeal concluded that the new action constituted an abuse of process. Bennett J.A. stated as follows at paras. 25 and 32:

> In my view, the question of Mr. Gonzalez's privacy interest was the issue 'front and centre' in the litigation before Butler J. and was the issue before Wong J. The documents in both cases were alleged to have been obtained from a computer in Mrs. Gonzalez's home. He asserted that the computer belonged to him, that both the computer and his e-mail account were password-protected and that he had an expectation of privacy.
>
> ...
>
> None of the circumstances discussed in *Toronto* at para. 52-53 that may have avoided a finding of abuse of process is present. Mr. Gonzalez did not argue that relitigation would yield a more accurate result. If a court hearing his civil claim were to make the same findings as Butler J., the litigation would prove to be a waste of judicial resources and unnecessary expense for the parties, particularly Mrs. Gonzalez. On the other hand, if contrary findings were reached, this inconsistency would 'undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality'. Mr. Gonzalez has not shown that relitigation would 'enhance, rather than impeach, the integrity of the judicial system'.

---

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

[88] The same can be said about Catalyst's attempt in this proceeding to relitigate why it failed to acquire Wind. This issue was "front and centre" in the litigation before Newbould J. It is also the main issue in Catalyst's Current Action. In my view, relitigation of this issue in this proceeding would impeach the integrity of the judicial system. It should not be permitted.

Conclusion

[89] For these reasons I have concluded that Catalyst's Current Action is an abuse of process.

Are the US Investors and Globalive Privies of West Face?

The US Investors

[90] The US Investors submit that they are privies of West Face by virtue of their direct and extensive involvement in the Moyse/West Face Action and their clear community of interest with West Face in defeating Catalyst's claims.

[91] The question of whether a party is a privy in a previous proceeding is a fact-specific inquiry that must be made on a case-by-case basis. The Court of Appeal for Ontario in *Rasanen v. Rosemount Instruments Ltd.*[25] concluded that the plaintiff was a privy in a prior proceeding where he had "a clear community of interest" with the party in the prior proceeding. The Court also relied upon the fact that Rasanen "had a meaningful voice, through his own evidence"[26] in the prior proceeding.

[92] The US Investors actively participated in both the plan of arrangement proceeding and the Moyse/West Face trial. Michael Leitner ("Leitner"), the managing partner of Tennenbaum and Hamish Burt ("Burt"), a member of 64NMGP, filed affidavits in the plan of arrangement proceeding in which they explained how they became involved in the Wind transaction. They denied receiving or using any of Catalyst's confidential information or that they were aware of Catalyst's regulatory strategy.

[93] Leitner and Burt also submitted affidavits and testified at the Moyse/West Face trial and were cross-examined by Catalyst's counsel.

[94] At trial they both confirmed that they had no knowledge regarding the status of Catalyst's negotiations with VimpelCom during Catalyst's exclusivity period. They explained how the Consortium developed its proposal to acquire Wind without any knowledge of Catalyst's acquisition strategy.

[95] In his reasons for judgment, Newbould J. commented upon Leitner's and Burt's testimony. He described them both as "impressive" witnesses and accepted their evidence that the Consortium's proposal was not based upon any knowledge of Catalyst's bid or strategies. He

---

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

had the following to say about their testimony at paras. 108, 114 and 116 of his reasons for judgment:

> In his affidavit, Mr. Leitner stated that the "advantage" of their August 7, 2014 proposal was to meet VimpelCom's desire for a speedy transaction that carried little to no regulatory risk to VimpelCom. It was put to him on cross-examination that he was referring to an advantage of the proposal over the Catalyst offer that was being dealt with by VimpelCom and the consortium knew from Mr. Moyse that Catalyst could not waive regulatory approval. Mr. Leitner denied this and said the advantage referred to was an advantage over the earlier proposal made by Tennenbaum ... that was for control of Wind that would require Government approval. As I read Mr. Leitner's affidavit, his explanation makes sense and I accept it. He knew that VimpelCom wanted to deal with no risk of Government rejection and it was an advantage to VimpelCom to have an offer without such a condition ...
>
> I accept the evidence of Mr. Leitner that the proposal made by him to VimpelCom on behalf of the consortium on August 7, 2014 and the ultimate deal made with VimpelCom was not based on anything that Catalyst was doing but rather was based on what Tennenbaum had concluded from its own due diligence and understanding of Wind and its prospect and of the lack of regulatory risk to what it was proposing. I accept his evidence that the lack of a need for regulatory concessions, and the lack of a need for a condition in the offer to VimpelCom of Government regulatory approval, were not based on or derived from any knowledge of what Catalyst was doing with VimpelCom or of Catalyst's regulatory strategies.
>
> ... Mr. Burt's evidence was that LG Capital had no knowledge of the details of Catalyst's offer or negotiations with VimpelCom. They assumed, but did not know that Catalyst's bid would be conditional on obtaining regulatory approval, because VimpelCom's standard form of agreement included such a term. I make the same findings regarding 64NM as I do with respect to Mr. Leitner.

[96] The US Investors, through the participation of Leitner and Burt as witnesses at trial, clearly had a meaningful voice in the Moyse/West Face Action. Leitner and Burt were important witnesses at trial on the issue of whether the Consortium had been aware of or had taken advantage of Catalyst's acquisition strategy for Wind. Justice Newbould clearly relied upon their evidence in arriving at his decision that the Consortium was not responsible for Catalyst's failure to acquire Wind.

[97] The US Investors also had a community of interest with West Face in the action, not only through Leitner's and Burt's testimony, but also by reason of their status as members of the Consortium which Catalyst alleged was responsible for its failure to acquire Wind.

Conclusion

[98] For these reasons, I have concluded that the US Investors are privies of West Face for the purpose of issue estoppel and cause of action estoppel with respect to the Moyse/West Face Action.

Globalive

[99] As set out above, Globalive founded Wind with Orascom in 2008 and held the majority of the voting shares of Wind. In 2011, VimpelCom acquired the majority of Wind's equity when it acquired Orascom. This ownership structure, in which Globalive was the controlling shareholder of Wind but VimpelCom held the majority equity interest, remained in place until September 2014 when the Consortium purchased VimpelCom's interest in Wind through Mid-Bowline. From 2008 until early 2015, Globalive's executives managed Wind's day-to-day operations.

[100] Globalive submits that it is a privy of West Face with respect to the Moyse/West Face Action because it was a member of the Consortium and its representative, Simon Lockie ("Lockie"), Globalive's Chief Legal Officer, testified in the plan of arrangement proceeding and at the Moyse/West Face trial. Lockie testified at the Moyse/West Face trial about Globalive's relationship to VimpelCom and the Consortium, its involvement in supporting the negotiations between VimpelCom and Catalyst, the Consortium's bid for VimpelCom's interest in Wind and the regulatory environment at the time. His evidence was central to the factual matrix in the Moyse/West Face trial and was relied upon by Newbould J. in arriving at his decision at trial. This same evidence would have to be adduced again in Catalyst's Current Action as it is highly relevant to its allegations in this proceeding.

[101] Further, Newbould J. made findings of fact in the Moyse/West Face Action that related to the entire Consortium and not just West Face. This was necessary because Catalyst's allegations in the Moyse/West Face Action were directed not just at West Face, but at the Consortium as a whole. Newbould J. made key findings about the actions of the entire Consortium at paras. 105 and 122 of his reasons for judgment as follows:

> ... As a result, neither VimpelCom nor Globalive had any discussions with any of the consortium members who had made the proposal before the exclusivity period that VimpelCom had with Catalyst expired on August 18, 2014.
>
> ...
>
> The basic strategy of Catalyst was based on its belief that Wind could not survive without Government concessions that would allow Wind to sell its spectrum to an incumbent by the end of five years. Even had West face or its consortium members been told of this strategy by Mr. Moyse or anyone else, it played no part in the reasoning of West face to bid as it did by itself and later with the consortium.

[102] Globalive clearly had a "meaningful voice" in the Moyse/West Face Action by reason of Lockie's participation as an important witness at trial. Further, Globalive had a clear

"community of interest" with West Face in defeating Catalyst' claims against the Consortium. I am therefore satisfied that Globalive is a privy of West Face with respect to the Moyse/West Face Action.

[103] My decision is supported by the decision of E. Macdonald J. in *Machado v. Pratt & Whitney Canada Inc.*[27] In that case, the plaintiff was dismissed for cause by his employer, Pratt & Whitney, because he was alleged to have sexually harassed three other employees. The plaintiff brought a claim before the Employment Standards Branch of the Ministry of Labour, and the referee found that Pratt & Whitney had just cause to dismiss the plaintiff. The three employees were witnesses in the proceeding before the referee. The plaintiff later sued Pratt & Whitney for unjust dismissal and the three employees for conspiracy and defamatory libel. The Court found that the three employees were privies to the proceeding before the referee because they had testified in that proceeding and their evidence was central to Pratt & Whitney's defence to the claim before the referee. The action was dismissed against them on the basis of issue estoppel.

Conclusion

[104] For these reasons I have concluded that Globalive is a privy of West Face for the purposes of issue estoppel and cause of action estoppel with respect to the Moyse/West Face Action.

Can VimpelCom and UBS rely upon the plan of arrangement to bar Catalyst's Current Action against them?

[105] The next issue I must decide is whether the release contained in Justice Newbould's order dated February 3, 2016 approving the plan of arrangement bars Catalyst's claims against VimpelCom and UBS in this proceeding.

[106] As outlined above, the sale of Wind by the Consortium to Shaw was structured to proceed by a plan of arrangement. This was to enable Shaw to obtain clear title to Wind notwithstanding Catalyst's claim for a constructive trust over West Face's interest in Wind. Ultimately, Catalyst withdrew its claim for a constructive trust and consented to Justice Newbould's order dated February 3, 2016 approving the plan of arrangement. The plan of arrangement carves out certain specified claims that Catalyst is permitted to pursue and extinguishes all other possible claims relating to the transaction in article 4.5 of the plan which reads in part as follows:

> 4.5 Paramountcy
>
> From and after the Effective Time ... all actions, causes of action claims or proceedings (actual or contingent and whether or not previously asserted) based on or in any way relating to any Purchased Shares or Options shall be deemed to

---

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

have been settled, compromised, released and determined without liability except as set forth herein; provided, however, that nothing in this section 4.5 shall be construed to extinguish any right of The Catalyst Capital Group Inc. to assert any of the following matters, with the exception of any constructive trust or equivalent remedy over the Purchased Shares, which shall be deemed to have been settled, compromised, released and determined without liability, along with all other claims in this section 4.5:

(a) Its existing claims as asserted in the Amended Amended Statement of Claim as amended December 16, 2014 in the proceeding bearing Court File No. CV-14–507120 in the Ontario Superior Court of Justice, against West Face Capital Inc. and Brandon Moyse;

(b) As against any person (as defined in the OBCA), any potential claim for a tracing of the money received by West Face Capital Inc. from the disposition of its interest in the Corporation pursuant to the Arrangement; or

(c) As against the Former Shareholders, any potential claim relating to their acquisition from VimpelCom Ltd. of their interest directly or indirectly in WIND Mobile Corp., including, to the extent permitted by law, for a tracing of the money received by them pursuant to the Arrangement.

[107] VimpelCom and UBS submit that none of Catalyst's claims that are carved out in article 4.5 are applicable to its claims against them in this proceeding. They argue that the court has jurisdiction to determine this issue as a question of law and dismiss Catalyst's claim against them pursuant to Rule 21.01(1)(a) of the *Rules of Civil Procedure*.[28]

[108] On a motion under Rule 21.01(1)(a), the moving party must show there is a question of law that can be determined without the adjudication of any factual issues. The court must accept all of the facts pleaded in the statement of claim as proven for the purpose of the motion. Although additional evidence may be admitted on the motion with leave of the court, VimpelCom and UBS have not sought leave to introduce any evidence on this motion.

[109] In my view, the application of the release in the plan of arrangement to VimpelCom and UBS is not a pure legal question because it requires a fact–driven analysis that includes consideration of the language of the document itself, the circumstances surrounding its execution, and evidence of the intention of the parties. The Supreme Court of Canada made it clear in *Creston Moly Corp. v. Sattva Capital Corp.*[29] that the interpretation of a contract is a question of mixed fact and law "as it is an exercise in which the principles of contractual

---

[28] *Supra* note 6.

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

interpretation are applied to the words of the written contract, considered in light of the factual matrix".[30]

[110] In order to determine the scope of the terms of the plan of arrangement including Article 4.5, the court must have regard to the facts giving rise to the plan. These facts are set out in the evidentiary record before this court for the purpose of VimpelCom's and UBS' abuse of process motions. However, I am not entitled to consider this evidence to determine their Rule 21.01(1)(a) motion. Therefore, in the absence of any evidence of the factual matrix giving rise to the terms of the plan of arrangement, I cannot determine whether it applies to VimpelCom and UBS. To do so would violate the principles of contractual interpretation set out by the Supreme Court of Canada in *Sattva.*

[111] Further, it is not "plain and obvious" from the document itself that the parties who negotiated the plan of arrangement intended to extinguish any claim that Catalyst may have against VimpelCom or UBS. The intention of the plan of arrangement was to permit Shaw to purchase the shares of Mid-Bowline free from any claim that Catalyst might make concerning those shares. The plan of arrangement on its face had nothing to do with VimpelCom or UBS who were not parties to the plan of arrangement proceeding and had no interest in its outcome.

[112] Article 2.1 of the plan of arrangement provides in part as follows:

> This Plan of Arrangement shall become effective at, and be binding at and after, the Effective Time on the Corporation, Guarantor, Purchaser, the Vendors and all Persons who were immediately prior to the Effective Time holders or beneficial owners of Purchased Shares or Options.

[113] VimpelCom and UBS are not included in Article 2.1. Based upon this Article, it is not plain and obvious to me that the plan of arrangement was intended to apply to claims against non-parties to the plan such as VimpelCom and UBS.

Conclusion

[114] The jurisprudence is clear that this type of motion can only be granted if it is plain and obvious that the action will fail. I cannot come to this conclusion with respect to VimpelCom's and UBS' motions under Rule 21.01(1)(a) without evidence of the factual matrix in relation to the plan of arrangement and accordingly their motions for this relief are dismissed.

Should Catalyst's breach of contract claims against Globalive and UBS be struck as disclosing no reasonable cause of action?

[115] Globalive and UBS submit that Catalyst's claim for breach of contract against them should be struck because it is plain and obvious that Catalyst's statement of claim does not disclose a reasonable cause of action against them for breach of contract.

---

[30] *Ibid* at para. 50.

[116] They argue that Catalyst has not pleaded sufficient facts in its statement of claim to sustain its breach of contract claim against either of them. In *McCarthy Corp. PLC v. KPMG LLP*[31] Mesbur J. set out the following requirements for pleading breach of contract at para. 26:

> A claim for breach of contract must contain sufficient particulars to identify the nature of the contract, the parties to the contract and the facts supporting privity of contract between the plaintiff and defendant, the relevant terms of the contract, which term or terms was breached, and the damages that flow from that breach. It must also plead clearly who breached the term, and how it was breached.

[117] Catalyst has not pleaded any of these elements against Globalive or UBS in its statement of claim. Globalive and UBS are not parties to either the Exclusivity Agreement or the Confidentiality Agreement. Paragraphs 28 and 43 of Catalyst's statement of claim set out the parties to the Confidentiality Agreement and the Exclusivity Agreement and neither Globalive nor UBS are alleged to be parties to these agreements. I do not accept Catalyst's submission that VimpelCom entered into these agreements as agent for Globalive and UBS because of the definition of "Authorised Person" in the Confidentiality Agreement and that they are therefore bound by the terms of the Confidentiality Agreement. This theory is not pleaded in Catalyst's statement of claim. Further, there is no privity of contract between either Globalive or UBS and Catalyst and none is pleaded in Catalyst's statement of claim. In my view this is fatal to Catalyst's breach of contract claims against Globalive and UBS.

[118] Ewaschuk J. made this clear in *Napev Construction Ltd. v. Lebedinsky,*[32] when he stated as follows:

> It is trite law that a stranger to a contract cannot be sued on that contract ... A person can be sued for breach of contract only when he or she has agreed to accept obligations or duties created by the contract.

Conclusion

[119] I have concluded for these reasons that it is plain and obvious that Catalyst's breach of contract claims against Globalive and UBS cannot succeed and they should be struck. In light of the number of opportunities Catalyst has had to properly plead its breach of contract claims against Globalive and UBS (the statement of claim has already been amended three times) and the fact that there is no contract between Catalyst and either Globalive or UBS such that an amendment could produce a viable cause of action against them for breach of contract, I am of the view that I should not grant Catalyst leave to amend its statement of claim to properly plead its breach of contract claims.

---

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

Conclusion

[120] For the reasons outlined above Catalyst's Current Action is dismissed as against all of the defendants as an abuse of process. It is also dismissed against West Face, the US Investors and Globalive on the grounds of issue estoppel and cause of action estoppel.

[121] Catalyst's breach of contract claims against Globalive and UBS are struck without leave to amend.

[122] VimpelCom's and UBS' motions to dismiss Catalyst's Current Action on the ground that it is barred against them by the release contained in the plan of arrangement are dismissed.

Costs

[123] If the parties cannot settle the issue of costs they may schedule a 9:30 a.m. appointment with me to determine costs.

[124] I thank all counsel for their helpful submissions.

HAINEY J.

Released: April 18, 2018

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

ONTARIO

SUPERIOR COURT OF JUSTICE

(COMMERCIAL LIST)

BETWEEN:

THE CATALYST CAPITAL GROUP INC.

Plaintiff/Responding Party

– and –

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

Defendants/Moving Parties

REASONS FOR DECISION

HAINEY J.

Released: April 18, 2018

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	WEDNESDAY, THE 18TH
	)	
JUSTICE HAINEY	)	DAY OF APRIL, 2018

BETWEEN:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

and

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

Defendants

JUDGMENT

THESE MOTIONS, made by the Defendants, for, among other things, orders dismissing this action as an abuse of process, were heard August 16, 17, and 18, 2017 and April 16, 2018, at the court house, 330 University Avenue, 7th Floor, Toronto, Ontario, M5G 1R7.

ON READING the Motion Records, Briefs, Compendia, Facta, and Books of Authorities of the parties, and on hearing the submissions of the lawyers for the parties,

1. THIS COURT ORDERS AND ADJUDGES that this action is dismissed as against all of the Defendants.

2. THIS COURT ORDERS AND ADJUDGES that the claims by the Plaintiff for breach of contract as against the Defendants Globalive Capital Inc. and UBS Securities Canada Inc. are struck out without leave to amend.

3. THIS COURT ORDERS AND ADJUDGES that it is not plain and obvious that this action is barred as against the Defendants VimpelCom Ltd. and UBS Securities Canada Inc. by the release contained in the Plan of Arrangement of Mid-Bowline Group Corp. approved February 3, 2016 (the **Release**), and accordingly the relief they seek in relation to the Release is denied.

4. THIS COURT ORDERS AND ADJUDGES that if the parties cannot settle the issue of costs they may schedule a 9:30 am appointment before me to determine costs.

Rm Ittleman JUL 23 2018

R. Ittleman, Registrar
Superior Court of Justice

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

JUL 23 2018

PER / PAR:

THE CATALYST CAPITAL GROUP INC.
Plaintiff

-and-

VIMPELCOM LTD. et al.
Defendants

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF
PROCEEDING COMMENCED AT TORONTO

JUDGMENT

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

Kent E. Thomson (LSUC# 24264J)
Email: kentthomson@dwpv.com
Tel: 416.863.5566
Andrew Carlson (LSUC# 58850N)
Email: acarlson@dwpv.com
Tel: 416.367.7437
Matthew Milne-Smith (LSUC# 44266P)
Email: mmilne-smith@dwpv.com
Tel: 416.863.5595

Tel: 416.863.0900
Fax: 416.863.0871

Lawyers for the Defendant
WEST FACE CAPITAL INC.

COURT OF APPEAL FOR ONTARIO

CITATION: The Catalyst Capital Group Inc. v. VimpelCom Ltd., 2019 ONCA 354
DATE: 20190502
DOCKET: C65431

Tulloch, Benotto and Huscroft JJ.A.

BETWEEN

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)

John E. Callaghan, Benjamin Na, Matthew Karabus, and David C. Moore, for the appellant

Orestes Pasparakis and Danny Urquhart, for the respondent VimpelCom Ltd.

James D.G. Douglas, Caitlin R. Sainsbury, and Graham Splawski, for the respondent Globalive Capital Inc.

Daniel S. Murdoch, for the respondent UBS Securities Canada Inc.

Michael Barrack, Kiran Patel, and Daniel Szirmak, for the respondents Tennenbaum Capital Partners LLC, 64NM Holdings GP LLC, 64NM Holdings LP and LG Capital Investors LLC

Lucas Lung, for the respondent Serruya Private Equity Inc.

Geoff R. Hall, for the respondent Novus Wireless Communications Inc.

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

Heard: February 19 and 20, 2019

On appeal from the judgment of Justice Glenn A. Hainey of the Superior Court of Justice, dated April 18, 2018, with reasons reported at 2018 ONSC 2471.

Tulloch J.A.:

OVERVIEW

[1] This case arises out of the failed attempt by the appellant, The Catalyst Capital Group Inc. ("Catalyst"), to purchase WIND Mobile Corp. ("Wind"). After its attempt to purchase Wind failed, Catalyst sued the respondents claiming more than $1 billion in damages. The motions judge dismissed the action on the basis of issue estoppel, cause of action estoppel, and abuse of process.

[2] Catalyst appeals. For the reasons that follow, I would dismiss the appeal.

FACTS

(1) Background

[3] Wind is a Canadian telecommunications provider. From 2011 to 2014, it was owned by the respondents VimpelCom Ltd. ("VimpelCom") and Globalive Capital Inc. ("Globalive"). VimpelCom held the majority of the total equity and Globalive held the majority of the voting equity.

[4] In 2013, VimpelCom announced its intention to sell its interest in Wind. Catalyst began negotiating with VimpelCom to purchase that interest. The respondent UBS Securities Canada Inc. ("UBS") advised VimpelCom in these negotiations.

[5] The negotiations proceeded over many months and gave rise to two agreements. On March 22, 2014, Catalyst and VimpelCom negotiated a Confidentiality Agreement providing that the existence and content of their negotiations were confidential. On July 23, 2014, Catalyst and VimpelCom signed an Exclusivity Agreement pursuant to which VimpelCom could negotiate only with Catalyst and could not solicit other bids. The exclusivity period under this agreement expired on August 18, 2014.

[6] By August 11, 2014, a deal seemed imminent. However, on this date, VimpelCom advised Catalyst that it wanted a $5 million to $20 million break fee and insisted on shortening the regulatory approval period for the deal from three months to two months. Catalyst refused to agree to these demands and ceased negotiations. The negotiations between Catalyst and VimpelCom proved unsuccessful. The exclusivity period expired on August 18, 2014 without a deal.

[7] After the exclusivity period expired, a group of purchasers (the "Consortium") successfully purchased VimpelCom's interest in Wind. The Consortium concluded the deal within a month of the exclusivity period's expiry. The Consortium had

made an unsolicited purchase proposal to VimpelCom on August 6, 2014. VimpelCom did not respond to the proposal until the exclusivity period under its Exclusivity Agreement with Catalyst expired. The members of the Consortium included the respondents West Face Capital Inc. ("West Face"), Tennenbaum Capital Partners LLC ("Tennenbaum"), 64NM Holdings LP ("64NM LP"), 64NM Holdings GP LLC ("64NM GP"), LG Capital Investors LLC ("LG"), Serruya Private Equity Inc., and Novus Wireless Communications Inc. Globalive was not initially part of the Consortium but joined the Consortium following the expiry of the exclusivity period on August 18, 2014.

(2) Commencement of the Moyse Action

[8] Brandon Moyse ("Moyse"), a junior analyst at Catalyst, left Catalyst and began working for West Face during the course of Catalyst's negotiations with VimpelCom. He resigned from Catalyst after the signing of the Confidentiality Agreement but before the conclusion of the Exclusivity Agreement. Catalyst commenced an action against Moyse and West Face (the "Moyse Action") to enforce the non-competition clause in Moyse's employment contract with Catalyst prior to the failure of Catalyst's bid to acquire Wind.

[9] Following the Consortium's purchase of VimpelCom's interest in Wind, Catalyst broadened the scope of the Moyse Action. It amended its statement of claim to allege that Moyse had communicated confidential information to West

Face about Catalyst's acquisition strategy with respect to Wind. Catalyst alleged that West Face used the confidential information it received from Moyse to successfully acquire Wind from VimpelCom. The amendments included a claim for a constructive trust over West Face's interest in Wind.

(3) Plan of Arrangement Proceedings

[10] Not long after acquiring Wind, the Consortium agreed to sell the company to Shaw Communications in December 2015. The sale proceeded by a plan of arrangement under s. 182 of the *Business Corporations Act*, R.S.O. 1990, c. B.16, to enable Shaw to obtain clear title to Wind's shares notwithstanding Catalyst's constructive trust claim. Catalyst opposed the plan because it would release the constructive trust claim.

[11] In his decision on the plan of arrangement, reported as *Re Mid-Bowline Group Corp.*, 2016 ONSC 669, Newbould J. made several adverse findings against Catalyst:

1) Catalyst deliberately delayed its claim against West Face to prevent it from selling its shares (para. 33);
2) Catalyst knew the facts underlying its claim for inducing breach of contract in March 2015 but only mentioned this claim for the first time in oral argument at the plan of arrangement hearing in January 2016 (paras. 52, 56);

3) Catalyst acted in bad faith by choosing to "lie in the weeds" until the hearing of the plan of arrangement application and then springing the "new theory" of inducing breach of contract (para. 59).

[12] Newbould J. did permit Catalyst to pursue a mini-trial of its constructive trust claim in the plan of arrangement proceedings. However, he declined to permit Catalyst to advance its claim for inducing breach of contract in this mini-trial. Catalyst ultimately declined to pursue a mini-trial, and Newbould J. approved the plan of arrangement on February 3, 2016.

[13] In early February 2016, following the revelation of Catalyst's intention to bring a claim for inducing breach of contract, counsel for West Face explicitly invited Catalyst to amend its pleadings in the Moyse Action to include such a claim if Catalyst in fact intended to pursue it. Catalyst declined to do so. The parties to the Moyse Action proceeded to schedule trial dates for June 2016.

(4) Commencement of Current Action

[14] Five days before the trial in the Moyse Action was to begin, Catalyst issued its statement of claim against West Face and the other respondents to the current action (the "Current Action") alleging breach of contract, breach of confidence, conspiracy, and inducing breach of contract. Counsel for West Face immediately wrote to Catalyst's counsel, asserting that the Current Action was litigation by

installment and an abuse of process. Catalyst did not take any steps in response to this protest and instead proceeded to trial in the Moyse Action.

(5) Decisions in the Moyse Action

[15] In reasons reported at 2016 ONSC 5271, 35 C.C.E.L. (4th) 242 ("Moyse Trial Reasons"), Newbould J. found that Catalyst had failed to make out each of the three elements of the breach of confidence claim. First, Moyse did not communicate any confidential information about Catalyst's acquisition strategy to West Face. Second, West Face made no use of such information in acquiring Wind. Third, even if West Face made use of Catalyst's confidential information, Catalyst suffered no detriment.

[16] Newbould J.'s findings on the detriment requirement of the breach of confidence cause of action are most relevant to this appeal. First, Newbould J. found that it was Catalyst's failure to agree to the break fee that VimpelCom requested that caused Catalyst to cease negotiations with VimpelCom: para. 130. Second, Newbould J. found that there was "no chance" that Catalyst could have closed the deal with VimpelCom because Catalyst insisted on making the deal conditional on receiving regulatory concessions from Industry Canada, a condition VimpelCom was unwilling to agree to: para. 131.

[17] In reasons reported at 2018 ONCA 283, 130 O.R. (3d) 675 ("Moyse ONCA Reasons"), this court dismissed Catalyst's appeal. This court rejected Catalyst's

attack on Newbould J.'s factual findings. Contrary to Catalyst's submissions, this court found that Catalyst was free to amend its pleadings in the Moyse Action to include a claim for inducing breach of contract but elected not to do so: para. 40. Similarly, this court noted that evidence pertaining to the dealings between VimpelCom, on the one side, and West Face and the Consortium on the other was relevant to Catalyst's claim and West Face's defence that it pursued its own strategies to purchase the Wind shares. The court noted that Catalyst did not object to any of this evidence at trial: paras. 41-42. The Supreme Court dismissed Catalyst's application for leave to appeal: [2018] S.C.C.A. No. 295.

(6) Decision of the Motions Judge: 2018 ONSC 2471

[18] The respondents in the Current Action moved to dismiss Catalyst's claims. Following this court's dismissal of Catalyst's appeal in the Moyse Action, the motions judge released comprehensive reasons dismissing Catalyst's claim ("Motions Reasons"). The motions judge dismissed the claim on the basis of issue estoppel and cause of action estoppel against VimpelCom and Globalive, as well as against Tennenbaum, 64NM LP, 64NM GP, and LG (the "US Investors"). While Globalive and the US Investors were not parties to the Moyse Action, the motions judge found that they were privies of West Face. The motions judge also dismissed Catalyst's claim against all respondents as an abuse of process. Finally, the motions judge struck Catalyst's claim of breach of contract against Globalive and UBS without leave to amend.

[19] First, the motions judge applied issue estoppel to dismiss the claim against VimpelCom, Globalive, and the US Investors because he found that Catalyst was trying to re-litigate the issue of why Catalyst failed to acquire Wind from VimpelCom. For the motions judge, Catalyst's claim was premised on a new theory that the Consortium conspired to induce VimpelCom to insist on a break fee condition that it knew Catalyst would reject. Newbould J., however, had found that Catalyst had no chance of concluding the deal. He found that there was no evidence that the Consortium's bid played any part in VimpelCom's decision to request a break fee, and that it was VimpelCom's refusal to agree to making the purchase conditional on receiving regulatory concessions that made a deal impossible. Thus, for Catalyst to succeed in the Current Action, the court would have to make a finding inconsistent with that of Newbould J. The motions judge declined to exercise his residual discretion not to apply issue estoppel because Catalyst was not entitled to a "second bite at the cherry": para. 75.

[20] Second, the motions judge applied cause of action estoppel to dismiss the claim against VimpelCom, Globalive, and the US Investors because he concluded that Catalyst's claims in the Moyse Action and the Current Action arose from the same set of facts. The motions judge identified those facts as Catalyst's failure to acquire Wind and Wind's subsequent acquisition by the Consortium. Newbould J. determined this issue against Catalyst in the Moyse Action. While Catalyst advanced a new theory of liability in the Current Action, it could have and should

have advanced this theory in the Moyse Action. Newbould J.'s ruling in the plan of arrangement proceedings did not bar it from doing so.

[21] Third, the motions judge dismissed Catalyst's claims against all the respondents as an abuse of process because he found that Catalyst was attempting to re-litigate why its bid failed. He stressed two factors: first, Catalyst could have advanced its claims from the Current Action in the Moyse Action; and second, for Catalyst to succeed in the Current Action, the court would have to make factual findings inconsistent with those of Newbould J.

[22] Finally, the motions judge struck Catalyst's claim for breach of contract against Globalive and UBS without leave to amend. He found that Catalyst had failed to plead the required elements of a breach of contract claim because it failed to plead that Globalive and UBS were parties to the Exclusivity Agreement and the Confidentiality Agreement. He declined leave to amend because Catalyst had many opportunities to properly plead its breach of contract claim and no amendment could produce a viable cause of action.

ISSUES

[23] The following issues arise on this appeal:

1) Did the motions judge err in dismissing the Current Action on the ground of issue estoppel?

2) Did the motions judge err in dismissing the Current Action on the ground of cause of action estoppel?
3) Did the motions judge err in dismissing the Current Action as an abuse of process?
4) Did the motions judge err in striking Catalyst's pleadings of breach of contract against UBS and Globalive without leave to amend?

ANALYSIS

Standard of Review

[24] This court owes deference to the motions judge's application of the tests for issue estoppel, cause of action estoppel, and abuse of process. As the Supreme Court held in *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19, [2013] 2 S.C.R. 125, at para. 27, the decision to apply issue estoppel is discretionary. Accordingly, an appellate court should intervene only if the motions judge misdirected himself, came to a decision that is so clearly wrong as to be an injustice, or gave no or insufficient weight to relevant considerations. This same standard of review applies to the application of the tests for cause of action estoppel and abuse of process: *Law Society of Manitoba v. Mackinnon*, 2014 MBCA 28, 370 D.L.R. (4th) 385, at para. 31; *Burcevski v. Ambrozic*, 2011 ABCA 178, 505 A.R. 359, at paras. 7-9, leave to appeal refused, [2011] S.C.C.A. No. 388.

I agree with the respondents that Catalyst has not pointed to an extricable error of law that would justify applying the correctness standard.

(1) Did the motions judge err in dismissing the Current Action on the ground of issue estoppel?

(a) The Law

[25] In *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, at para. 25, the Supreme Court outlined the three requirements for issue estoppel:

1) The same question has been decided;

2) The judicial decision said to give rise to the estoppel is final; and

3) The parties to the judicial decision or their privies were the same persons as the parties to the proceeding in which the estoppel is raised or their privies.

Even if all three requirements are met, however, the court still has a residual discretion not to apply issue estoppel when its application would work an injustice: *Danyluk*, at paras. 62-63.

[26] The second and third of these requirements were not seriously contested in this court. Catalyst's only argument on the third requirement is that parties can only be privies if the same question is involved in both proceedings. Catalyst does not argue that, should this court find that the same question is involved in both

proceedings, the US Investors and Globalive were insufficiently connected to West Face to be its privies. Accordingly, the focus of these reasons is on the first requirement, that the question decided in the two proceedings be the same, as well as on the residual discretion.

[27] Different causes of action may have one or more material facts in common. Issue estoppel prevents re-litigation of the material facts that the cause of action in the prior action embraces: *Danyluk*, at para. 54. However, the question out of which the estoppel arises must be "fundamental to the decision arrived at" in the prior proceedings: *Angle v. M.N.R.*, [1975] 2 S.C.R. 248, at p. 255. Accordingly, the question must be "necessarily bound up" with the determination of the issue in the prior proceeding for issue estoppel to apply: *Danyluk*, at paras. 24, 54.

[28] Catalyst argues that the motions judge erred in applying issue estoppel for the following reasons:

1) Newbould J.'s findings in the Moyse Action were obiter and collateral to his decision;

2) Newbould J.'s findings are merely overlapping facts and are incidental to Catalyst's claims in the Current Action;

3) Catalyst may be entitled to a remedy without any inconsistent findings; and

4) The exercise of residual discretion favours not applying issue estoppel.

[29] I disagree and would reject this ground of appeal.

(b) Newbould J.'s Findings Are Not Obiter

[30] Catalyst submits that Newbould J.'s findings are in obiter and collateral because they were not necessary to his decision. For Catalyst, the central issue in the Moyse Action was whether Moyse passed confidential information to West Face and since Newbould J. found that Moyse had not, his other findings were collateral.

[31] I would reject this submission. Catalyst's submission is premised on the assumption that the only fundamental issue in the Moyse Action was whether Moyse passed confidential information to West Face. However, to succeed in its breach of confidence claim, Catalyst was also required to prove that West Face used confidential information in its bid for Wind and that this misuse caused detriment to Catalyst: Moyse ONCA Reasons, at para. 8.

[32] Canadian courts have consistently rejected the argument that a judicial finding is merely dictum or collateral because there was another sufficient basis for the judge's decision. In *Stuart v. Bank of Montreal* (1909), 41 S.C.R. 516, the Supreme Court rejected the argument that a judicial finding that is "a distinct and sufficient ground for its decision [is] a mere dictum because there is another ground upon which, standing alone, the case might have been determined": p. 534, per Duff J. (Fitzpatrick C.J. concurring), pp. 539-540, per Anglin J., quoting *New South Wales Taxation Commissioners v. Palmer*, [1907] A.C. 179 (P.C.), at p. 184. More

recently, the Federal Court of Appeal held that a judge's finding on one necessary element of a claim gave rise to issue estoppel even though the judge had earlier in his reasons reached a conclusion on another element that was sufficient to dispose of the claim: *Pharmascience Inc. v. Canada (Health)*, 2007 FCA 140, 282 D.L.R. (4th) 145, at paras. 34-35.

[33] As West Face submits, accepting Catalyst's argument would lead to absurd consequences, because it would make the applicability of issue estoppel dependent on the order in which the court chooses to address issues in its reasons. Baron Bramwell's statement in *Membery v. The Great Western Railway Co.* (1889), 14 App. Cas. 179 (H.L.), at p. 187, cited in *Stuart* by Anglin J. at p. 539, provides a complete answer to Catalyst's argument:

> Of course it is in a sense not necessary that I should express an opinion on this as the ground I have first mentioned, in my opinion, disposes of the case. But if, instead of mentioning that ground first, I had mentioned the one I am now dealing with, it would, on the same reasoning, be unnecessary to mention that. What I am saying is not obiter, not a needless expression of opinion on a matter not relevant to the decision. There are two answers to the plaintiff; and I decide against him on both; on one as much as on the other.

(c) Newbould J.'s Findings Are Central to the Current Action

[34] Catalyst further submits that Newbould J.'s findings are merely overlapping facts such that the same question was not determined. For Catalyst, the Moyse

Action was about confidential information that Moyse received and transmitted. In contrast, Catalyst submits that this action concerns the transmission of confidential information by VimpelCom and/or UBS to the Consortium in breach of the Confidentiality Agreement and the Exclusivity Agreement. As a result, it follows that Newbould J.'s finding that even if Moyse did pass on confidential information to West Face, and such confidential information did not cause detriment to Catalyst, it does not mean that confidential information that VimpelCom and/or UBS leaked to the Consortium did not cause detriment to Catalyst.

[35] I do not accept this argument. It is facially appealing. However, it is premised on a misunderstanding of what the parties put at issue in the Moyse Action.

[36] The Moyse Action necessarily concerned the overall conduct of West Face and the other Consortium members. As Catalyst had no direct evidence that Moyse gave West Face confidential information, it submitted that the court should infer from all the evidence that he did so: Moyse Trial Reasons, at para. 7. As Newbould J. recognized, this required the court to examine West Face's "overall course of conduct" to determine if there was a transfer of Catalyst's confidential information or if there were other explanations for West Face's conduct: Moyse Trial Reasons, at paras. 72-73. Therefore, whether West Face received any confidential information in breach of the Confidentiality Agreement and the

Exclusivity Agreement, and whether West Face's use of confidential information caused any detriment to Catalyst, were live issues at trial.

[37] Newbould J. was thus required to analyze whether the conduct of West Face and other Consortium members was consistent with the use of confidential information and whether there was any evidence that the use of confidential information caused Catalyst a detriment. He was entitled to draw inferences from the evidence as to what would likely have happened but for a misuse of confidential information: *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142, at para. 73. As the motions judge noted, West Face invited Newbould J. to make findings of fact that Catalyst failed to acquire Wind because it refused VimpelCom's demand for a break fee and because it would have been unable to obtain regulatory concessions. Catalyst did not object to any of these proposed findings of fact as being outside of the scope of the Moyse Action: Motions Reasons, at para. 40. In fact, Catalyst elicited considerable evidence on the dealings between VimpelCom and UBS, and the Consortium, and urged Newbould J. to make certain findings in respect of these dealings: Moyse ONCA Reasons, at para. 42. Catalyst cannot now complain that it was improper for Newbould J. to make contrary findings or that those contrary findings were not essential to his decision.

[38] I thus do not accept Catalyst's argument that Newbould J.'s findings on detriment were restricted to detriment from confidential information transmitted by

Moyse. Perhaps this would have been the case had Catalyst litigated the Moyse Action differently or had it produced direct evidence of leaks of confidential information by Moyse. However, Catalyst chose to put at issue not only the Consortium's entire conduct, but also the reasons why Catalyst failed to acquire Wind and whether misuse of confidential information by the Consortium had anything to do with that failure. As this court found, Newbould J. did not overstep his bounds in finding against Catalyst on these issues: Moyse ONCA Reasons, at paras. 39-42.

(d) Newbould J.'s Findings Would Bar Catalyst from Establishing Liability

[39] Catalyst submits that Newbould J.'s findings about why it failed to acquire Wind would not bar it from gaining a remedy for its claims. Catalyst argues that, even accepting Newbould J.'s findings, it is nonetheless entitled to recovery. I would reject this submission.

[40] In its argument, Catalyst focuses in particular on its claims against West Face, Globalive, and the US Investors for breach of confidence and inducing breach of contract. Relying on certain statements in *Cadbury Schweppes* that establish that the court has jurisdiction to grant a remedy dictated by the facts of the case rather than strict doctrinal considerations, Catalyst submits that it may be

entitled to equitable remedies such as an accounting of profits even if it suffered no financial loss.

[41] However, the jurisprudence is clear that a claimant must prove detriment to establish liability for breach of confidence, inducing breach of contract, and conspiracy: *Lysko v. Braley* (2006), 79 O.R. (3d) 721 (C.A.), at paras. 17-19; *Persaud v. Telus Corporation*, 2017 ONCA 479, at para. 26; *Cement LaFarge v. B.C. Lightweight Aggregate*, [1983] 1 S.C.R. 452, at pp. 471-472. There is no contradiction between this requirement to prove detriment and the passages from *Cadbury Schweppes* that Catalyst points to. *Lysko* explicitly accepted that *Cadbury Schweppes* adopted a broad definition of detriment but confirmed the requirement: paras. 18-19. Accordingly, Newbould J.'s findings would bar Catalyst from establishing the liability of West Face, Globalive, and the US Investors for breach of confidence, inducing breach of contract, and conspiracy.

[42] Nor do I accept that the fact that detriment is not required to establish liability for breach of contract changes my analysis. Catalyst did not plead breach of contract against West Face or the US Investors. Admittedly, Catalyst did plead breach of contract against Globalive. However, as I will explain later in these reasons, the motions judge correctly struck Catalyst's pleading of breach of contract against Globalive as disclosing no reasonable cause of action without leave to amend. Accordingly, Catalyst was required to prove detriment for each of

the causes of action it validly pled against West Face, Globalive, and the US Investors.

[43] Moreover, I do not place weight on the availability of alternative remedies. Catalyst did not plead any of the alternative remedies such as an accounting for profits that it now refers to on appeal. Instead, it repeatedly pled that the breach of confidence and inducement of breach of contract caused it to fail to acquire Wind. This is a precise inconsistency with Newbould J.'s findings.

[44] These inconsistencies also lead me to reject Catalyst's submission that the fact that it has pled different causes of action in the Current Action means issue estoppel cannot apply. Issue estoppel applies precisely when there are different causes of action as long as those causes of action have a material fact in common: *Danyluk*, at para. 54. For instance, in *Danyluk*, the claim to unpaid commissions was a material fact in both the administrative proceeding under the *Employment Standards Act*, R.S.O. 1990, c. E.14, and the civil claim for wrongful dismissal: para. 55. In the present case, the motions judge correctly identified that the need to prove detriment, namely that the respondents' conduct caused Catalyst to fail to acquire Wind, was a material fact common to the relevant causes of action Catalyst asserted in both actions.

[45] Lastly, I do not accept that issue estoppel cannot apply even in the face of Newbould J.'s findings because those findings simply overlap with the issues in

the Current Action and are not fundamental to his decision. Comparing the present case with the Supreme Court's decision in *Angle* illustrates that Newbould J.'s findings were not merely overlapping. *Angle* was a case involving merely overlapping facts. There, Dickson J. concluded that a finding that a shareholder was not under an obligation to pay a corporation for a benefit was not legally indispensable to the judgment in the prior tax proceeding as this indebtedness was only relevant to a subsidiary issue. There was no necessary inconsistency between the shareholder being obligated to pay the corporation and the decision that the shareholder had received a taxable benefit: pp. 255-256. In contrast, here Newbould J.'s finding that there was no chance Catalyst could have successfully concluded a deal with VimpelCom made it impossible for Catalyst to succeed on its breach of confidence claim in the Moyse Action. This finding similarly makes it impossible for Catalyst to succeed on its claims in the Current Action against West Face, Globalive, and the US Investors for breach of confidence, inducing breach of contract, and conspiracy without a court having to make inconsistent findings, as proof of loss is an element of those claims.

(e) Residual Discretion

[46] Catalyst argues that the motions judge erred in not exercising his residual discretion to permit Catalyst's action to proceed. Relying on *Danyluk*, Catalyst argues that the motions judge's analysis was cursory and that he erred in principle by failing to address the factors for and against the exercise of the discretion.

Catalyst submits that applying issue estoppel results in an injustice to Catalyst because there has been no discovery of VimpelCom or UBS regarding the circumstances surrounding the sale of VimpelCom's shares of Wind.

[47] I would not accept this argument. The court does have residual discretion, but its exercise is more limited in nature in this case because the Moyse Action was a court proceeding, not an administrative proceeding as in *Danyluk*: *Danyluk*, at para. 62. The passage in the motions judge's reasons where he explicitly referred to residual discretion was brief. However, his conclusion, at para. 75, that Catalyst failed to put its "best foot forward" and is not entitled to a "second bite at the cherry" was reasonable. It must be read in light of the motions judge's extensive reasons addressing Catalyst's failure to advance its current claims in the Moyse Action and its attempt to re-litigate Newbould J.'s findings in the Moyse Action.

[48] Finally, I am not convinced that the application of issue estoppel in these circumstances would work an injustice. In *Danyluk*, the court found such an injustice because the appellant's claim to employment commissions was never properly adjudicated due to procedural unfairness in the administrative proceedings the appellant pursued before commencing a civil action: para. 80. In contrast, in this case, Catalyst received a procedurally fair trial, the result of which this court upheld on appeal. While issue estoppel bars Catalyst from eliciting evidence and advancing new theories of liability against West Face, this is not a

manifest injustice since Catalyst could have elicited that evidence and advanced those theories in the Moyse Action.

(2) Did the motions judge err in dismissing the Current Action on the ground of cause of action estoppel?

(a) The Law

[49] The purpose of cause of action estoppel is to prevent the re-litigation of claims that have already been decided. As expressed by Vice Chancellor Wigram in *Henderson v. Henderson* (1843), 67 E.R. 313, at p. 319, it requires parties to "bring forward their whole case." The court thus has the power to prevent parties from re-litigating matters by advancing a point in subsequent proceedings which "properly belonged to the subject of the [previous] litigation".

[50] For cause of action estoppel to apply, the basis of the cause of action and the subsequent action either must have been argued or could have been argued in the prior action if the party in question had exercised reasonable diligence: *Grandview v. Doering*, [1976] 2 S.C.R. 621, at p. 638. That said, I accept Catalyst's submission that it is not enough that the cause of action could have been argued in the prior proceeding. It is also necessary that the cause of action properly belonged to the subject of the prior action and should have been brought forward in that action: *Hoque v. Montreal Trust Co. of Canada*, 1997 NSCA 153, 162 N.S.R. (2d) 321, at para. 37, leave to appeal refused, [1997] S.C.C.A. No. 656;

Pennyfeather v. Timminco Ltd., 2017 ONCA 369, at para. 128, leave to appeal refused, [2017] S.C.C.A. No. 279.

[51] Like issue estoppel, cause of action estoppel also requires a final judicial decision and that the parties to that decision were the same persons or the privies to the parties to the present proceeding: *Pennyfeather*, at para. 128; *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 21, rev'd on other grounds, 2002 SCC 63, [2002] 3 S.C.R. 307. As these requirements were not seriously contested before us, I will not discuss them further.

(b) Catalyst Could Have Brought Forward its Claims in the Moyse Action

[52] Catalyst submits that cause of action estoppel should not apply because it could not have brought forward its current claims in the Moyse Action. In particular, Catalyst argues that it was barred from advancing its claim for inducing breach of contract in the Moyse Action. Newbould J., however, found that Catalyst was aware of its claim for inducing breach of contract by March 2015 and that it chose to "lie in the weeds" rather than assert its claim: *Mid-Bowline*, at para. 59. Catalyst never took steps to amend its pleadings in the Moyse Action to add a claim for inducing breach of contract in the Moyse Action even though West Face explicitly invited it to four months prior to the trial. This case is thus analogous to *Martin v. Goldfarb*, [2006] O.T.C. 629 (S.C.), where Perell J. applied cause of action

estoppel against corporate claims when the individual plaintiff had the opportunity to join the corporate claims to a previous individual action but failed to do so: at paras. 70, 78-79.

[53] Furthermore, I would reject Catalyst's argument that the possibility that new evidence would be obtained from VimpelCom and UBS regarding the sale of Wind in the Current Action means that cause of action estoppel should not apply. New evidence is only a basis to re-open litigation if it would "entirely chang[e]" the case and the party could not have reasonably ascertained it through reasonable diligence: *Grandview*, at pp. 636-637. Even assuming that the new evidence was so important as to entirely change the case, Catalyst could have ascertained this evidence through reasonable diligence in the Moyse Action. Catalyst knew of the facts underlying its claim for inducing breach of contract by March 2015. It thus had ample time to elicit this evidence at the trial of the Moyse Action. In *Grandview*, the plaintiff learned of a new theory of liability only following the trial of the first action, and the majority of the Supreme Court still applied cause of action estoppel: pp. 632-633. Here, the case for applying cause of action estoppel is even more compelling, as Catalyst was aware of its new theory of liability more than a year prior to the trial of the Moyse Action.

(c) Catalyst Should Have Brought Forward its Claims in the Moyse Action

[54] Catalyst's central argument on cause of action estoppel is that it was appropriate for Catalyst to advance its current claims in a new action rather than amending its pleadings in the Moyse Action. Catalyst submits that the focus of the Moyse Action was the leak of confidential information by Moyse. In contrast, the Current Action focuses on breaches of the Exclusivity and Confidentiality Agreements that West Face allegedly induced. The Current Action thus involves separate and distinct causes of action that flow from distinct legal relationships. Catalyst submits that the factors *Hoque* outlined to guide the court's determination of whether a party should have raised a matter in a prior proceeding show that Catalyst should not have advanced its current claims in the Moyse Action.

[55] I do not agree. In *Hoque*, at para. 37, Cromwell J.A. (as he was then) outlined several factors that are relevant to whether a matter should have been raised in a prior proceeding. These include the following:

1) Whether the second proceeding is a collateral attack against the earlier judgment;
2) Whether the second proceeding relies on evidence that could have been discovered in the past proceeding with reasonable diligence; and

3) Whether the second proceeding relies on a new legal theory that could have been advanced in the past proceeding.

[56] These three factors weigh against Catalyst in this case. As I have already found, the Current Action would require the court to make findings inconsistent with those of Newbould J. in order for Catalyst to establish liability for conspiracy, breach of confidence, and inducing breach of contract. It thus involves a collateral attack against Newbould J.'s trial decision. Moreover, as I have previously stated, the new evidence that Catalyst points to could have been discovered in the Moyse Action through reasonable diligence.

[57] The same is true of Catalyst's new legal theory that Globalive and UBS communicated confidential information to the Consortium and the Consortium used this information to induce VimpelCom to breach the Exclusivity and Confidentiality Agreements. I agree with Catalyst that its legal theory of causation in the Current Action is distinct from its theory of causation in the Moyse Action. However, I accept West Face's submission that this is analogous with *Grandview*, where the majority of the Supreme Court applied cause of action estoppel. In *Grandview*, the subject matter of both actions was that water flowed from the defendant's land onto the plaintiff's. Only the theory as to which way the water reached the plaintiff's land changed between the two actions. Similarly, in this case, the subject matter of both the Moyse Action and the Current Action is the

flow of confidential information to West Face. While Catalyst does have a different legal theory in this action, that theory only outlines a different means by which confidential information flowed to and was used by West Face.

[58] Nor am I persuaded that the different legal claims Catalyst has advanced in this action bar the operation of cause of action estoppel. I acknowledge that the existence of a "separate and distinct" cause of action is a factor that might weigh against applying cause of action estoppel: *Hoque*, at para. 37. However, as Sharpe J. (as he was then) held in *Las Vegas Strip Ltd. v. Toronto (City)* (1996), 30 O.R. (3d) 286 (Gen. Div.), at p. 297, aff'd (1997), 32 O.R. (3d) 651 (C.A.), the law does not permit the manipulation of the underlying facts to advance a new legal theory. Similarly, this court has held that cause of action estoppel bars "a subsequent lawsuit relating to the same loss being advanced on a different cause of action": *Lawyers' Professional Indemnity Co. v. Rodriguez*, 2018 ONCA 171, 139 O.R. (3d) 641, at para. 47, leave to appeal refused, [2018] S.C.C.A. No. 128 (Emphasis added).

[59] I find that Sharpe J.'s decision in *Las Vegas Strip* is analogous and confirms that cause of action estoppel should apply even though Catalyst has advanced distinct legal claims in the Current Action. In *Las Vegas Strip*, a strip club unsuccessfully argued that its operation was a legal non-conforming use under a municipal bylaw in a prior proceeding. The strip club then commenced a

subsequent proceeding alleging that the bylaw was invalid on municipal law and *Charter* grounds. Sharpe J. acknowledged that the strip club had raised "new legal arguments" in the second proceeding: p. 298. However, he found that it was barred from doing so because the prior proceedings put squarely in issue the same matter central to the second proceeding, namely the strip club's legal right to operate. The strip club was free to raise the municipal law and *Charter* arguments in the prior proceeding but elected not to do so: pp. 295-296. This court affirmed Sharpe J.'s decision on the same basis: p. 651.

[60] Similarly, in this case Catalyst was free to raise its inducing breach of contract and conspiracy claims in the Moyse Action but elected not to do so. I acknowledge, as Sharpe J. did, that Catalyst has raised new legal arguments. However, the motions judge reasonably concluded, at para. 78 of his reasons, that these new legal arguments arose from the same set of facts, namely Catalyst's failure to acquire Wind and its acquisition by the Consortium. Catalyst's current claims certainly sought to add certain facts related to VimpelCom and UBS's conduct and to subtract other facts related to Moyse's conduct. However, as Sharpe J. held in *Las Vegas Strip*, attempting to add or subtract facts does not change the reality that the underlying subject matter is the same and all of the facts were available in the earlier action: p. 297.

(3) Did the motions judge err in dismissing the Current Action as an abuse of process?

(a) The Law

[61] It is well-recognized that the re-litigation 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 in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 52:

> [F]rom 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.

[62] The abuse of process doctrine applies to prevent the attempt to impeach a judicial finding by re-litigation in a different forum: *C.U.P.E.*, at para. 46. It is a flexible doctrine unencumbered by the mutuality of parties requirement that applies to issue estoppel and cause of action estoppel: *C.U.P.E.*, at para. 37. While abuse of process does include a finality requirement, that requirement is met in this case because the Supreme Court dismissed Catalyst's application for leave to appeal from this court's decision in the Moyse Action.

[63] The need to protect the integrity of the adjudicative functions of courts compels a bar against re-litigation: *C.U.P.E.*, at para. 43. If re-litigation leads to the same result, there will be a waste of judicial resources, and if it leads to a different result, the inconsistency will undermine the credibility of the judicial process:

C.U.P.E., at para. 51. The law thus seeks to avoid re-litigation primarily for two reasons: first, to prevent overlap and wasting judicial resources; and second, to avoid the risk of inconsistent findings: *Petrelli v. Lindell Beach Holiday Resort Ltd.*, 2011 BCCA 367, 24 B.C.L.R. (5th) 4, at para. 71; see also *C.U.P.E.*, at para. 51; Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 4th ed. (Markham, ON: LexisNexis Canada Inc., 2015), pp. 217-218.

(b) The Current Action is an Abuse of Process

[64] The motions judge rightly concluded that Catalyst's Current Action was an abuse of process as against all respondents because the Current Action is an attempt to re-litigate the findings in the Moyse Action.

[65] Both of the concerns underlying the abuse of process doctrine are present here. Catalyst's claim is abusive both because: (a) it directly overlaps with the issues that were before the court in the Moyse Action; and (b) it can only be successful if the court rejects the findings made by Newbould J. For the reasons already outlined under issue estoppel and cause of action estoppel, Catalyst is trying to re-litigate Newbould J.'s factual finding that Catalyst's own actions caused its failure to acquire Wind. This is an abuse of process.

[66] Moreover, Catalyst's behaviour exhibits classic signs of re-litigation. Newbould J. found that Catalyst chose to "lie in the weeds" for strategic reasons and then to spring a new theory at the last moment: *Mid-Bowline Group*, at para.

59. Catalyst filed its statement of claim in the Current Action mere days before the trial of the Moyse Action. This is analogous to *Bear v. Merck Frosst Canada & Co.*, 2011 SKCA 152, 345 D.L.R. (4th) 152, where a law firm directed the commencement of a new class action merely a day after it exhausted its appeal processes of the dismissal of the previous class action. In that case, the Saskatchewan Court of Appeal found that there was nothing in the second class action that could not have been advanced in the first class action and that the law firm was attempting "to litigate by installment": paras. 76-78. Accordingly, the court found that the new class action was an abuse of process.

[67] Catalyst's submission that abuse of process is not intended to prevent the raising of a separate cause of action in a subsequent action should be rejected. As previously discussed, Catalyst could have raised the claims it advances in the Current Action in the Moyse Action. It elected not to. As this court recently held, abuse of process applies where issues "could have been determined" but were not: *Winter v. Sherman Estate*, 2018 ONCA 703, 42 E.T.R. (4th) 181, at para. 7. Moreover, it also applies to prevent re-litigation of previously decided facts: *Winter*, at para. 8. As previously stated, for Catalyst to succeed in the Current Action, a court would have to reach different factual findings from those of Newbould J. on the reasons why Catalyst failed to acquire Wind.

[68] Moreover, none of the factors the Supreme Court outlined in *C.U.P.E.* that would permit re-litigation apply in this case. The Supreme Court stated, at para. 52, that it might be appropriate to permit re-litigation in the following circumstances:

1) When the first proceeding is tainted by fraud or dishonesty;

2) When fresh, new evidence, previously unavailable, conclusively impeaches the original results; or

3) When fairness dictates that the original result should not be binding in the new context.

[69] Catalyst does not allege that the first proceeding is tainted by fraud or dishonesty. To the extent that there is a possibility that new evidence from VimpelCom and UBS regarding the sale of Wind might impeach the original results, this evidence was not previously unavailable and could have been adduced by Catalyst at the trial of the Moyse Action. As for the fairness factor, the Supreme Court clarified that this would apply if the stakes in the original proceeding were too minor to give a party an adequate incentive to litigate: *C.U.P.E.*, at para. 53. However, the financial stakes in the Moyse Action were not minor and Catalyst robustly litigated that proceeding.

[70] Catalyst's reliance on Goudge J.A.'s dissenting reasons in *Canam*, which the Supreme Court subsequently upheld, is misplaced. *Canam* is distinguishable

on the facts because it concerned a claim that a party could not have raised in prior proceedings, not one which a party could have raised but chose not to. In *Canam*, a purchaser first sued the vendor in contract. The court found that there had been a misrepresentation by the vendor's realtors but dismissed the purchaser's claim because of the doctrine of merger. The purchaser then sued its lawyer in tort for professional negligence. The lawyer commenced third party proceedings against the realtors in which he sought to add them as joint tortfeasors for their misrepresentations to the purchaser. As neither the lawyer nor the realtor were parties to the purchaser's original contractual action against the vendor, Goudge J.A. found that the lawyer was not attempting to re-litigate a claim because he had not and could not have raised this issue previously: para. 58. In contrast, in this case Catalyst could have raised its claims in the Current Action but elected not to do so.

(4) Did the motions judge err in striking Catalyst's pleadings of breach of contract against UBS and Globalive without leave to amend?

[71] The motions judge struck Catalyst's pleadings of breach of contract against UBS and Globalive without leave to amend. Catalyst makes two submissions. First, it argues that the motions judge erred in striking the pleadings because Catalyst did plead all elements of privity of contract against both Globalive and UBS. Second, Catalyst submits that the motions judge should have granted leave

to amend because an amendment could have cured any deficiencies without incompensable prejudice to the respondents.

[72] I do not agree.

[73] First, the motions judge correctly concluded that the pleadings did not disclose a reasonable cause of action because they failed to plead privity of contract. A claim for breach of contract must contain sufficient particulars to identify the parties to the contract: *McCarthy Corporation PLC v. KPMG LLP*, [2007] O.J. No. 32 (S.C.), at para. 26. Similarly, it is trite law that, subject to certain exceptions that are not applicable here, a non-party to a contract cannot be sued for breach of contract: *Greenwood Shopping Plaza Ltd. v. Beattie*, [1980] 2 S.C.R. 228, at pp. 236-238.

[74] As the motions judge found, Catalyst failed to plead that either Globalive or UBS were parties to the Exclusivity Agreement or the Confidentiality Agreement. Catalyst's statement of claim listed the parties to each agreement without including either Globalive or UBS. While Catalyst did plead that UBS was "bound" by these agreements, the motions judge correctly concluded that as a matter of law UBS could not be bound to an agreement to which it was not a party in these circumstances. With respect to Globalive, the motions judge found that the claim must also fail. Catalyst's theory is that Globalive is vicariously liable for the actions of its principal, Anthony Lacavera ("Lacavera"), who Catalyst in turn pleads was

bound not to undermine the Exclusivity Agreement. However, Catalyst pleads that Lacavera was not a party to the Exclusivity Agreement, so this claim similarly fails.

[75] Second, the motions judge's decision to deny leave to amend was reasonable. The decision whether or not to grant leave to amend is a discretionary decision entitled to deference: *RWDI Air Inc. v. N-SCI Technologies Inc.*, 2015 ONCA 817, at para. 14. The motions judge denied leave to amend both pleadings because Catalyst had many opportunities to properly plead its breach of contract claims and since the absence of any contract between Catalyst and Globalive or UBS meant that no amendments could make the pleading legally tenable. Both of these findings are consistent with jurisprudence establishing that a court may deny leave to amend where a party has had many opportunities to properly plead the claims and where amendments could not make the pleadings legally tenable: see *Cavanaugh v. Grenville Christian College*, 2013 ONCA 139, 360 D.L.R. (4th) 670, at paras. 82-83; *RWDI*, at para. 14.

CONCLUSION

[76] In all the circumstances, I would dismiss the appeal.

[77] With respect to the issue of costs, the parties agreed that should the disposition of this appeal be in favour of the respondents, then they should be awarded their costs collectively fixed in the amount of $300,000. Accordingly, costs

are hereby awarded to the respondents collectively, fixed in the mount of $300,000, inclusive of all taxes and disbursements.

Released: MAY - 2 2019

J.A.

I agree M.L. Benotto J.A.

Lauren Sury J.A.

TAB 2D

Judgment of the Court of Appeal for Ontario dated May 2, 2019

[to be filed when available]

PART I – OVERVIEW AND STATEMENT OF FACTS

A. OVERVIEW

1. The proposed appeal addresses the consequences which can emerge when doctrines of efficiency are used to drive claimants from the "judgment seat". In this case, the Applicant proceeded with an earlier action against only one of the eleven defendants in the within action. Relying on the principles of efficiency in *Hryniak*, the trial of the first action was expedited to deal with narrowly focussed issues in a 6-day hearing. Concurrently, all rights in respect of the claims in the within action were preserved by Court order. Yet, the doctrines of abuse of process and estoppel were applied by the courts below to dismiss this second action. The courts below held that this second action ought to have been heard with the original action, notwithstanding that the original action had been expedited and only involved one of the eleven defendants in the second action.

2. This case provides an opportunity to consider the balance between this Court's recent call in *Hryniak* for proportional litigation, and the traditional doctrines of estoppel and abuse of process. Where multiple claims and litigants exist (as often happens), these traditional doctrines of estoppel and abuse of process need to be tempered to avoid undermining the principles of proportionality and ensure there is the fair adjudication of disputes.

3. In addition, this case raises the long unresolved issue of whether proof of detriment is required to succeed in a claim for breach of confidence. The law in Canada is conflicting and unclear on this issue and has been the subject of confusion and commentary by the courts and legal scholars.

4. These issues of public importance arise out of two separate actions: the current action between the Applicant Catalyst Capital Group Inc. ("**Catalyst**") and the Respondent group of companies for breach of contract, breach of confidence, inducing breach of contract and conspiracy, in respect of a large corporate transaction (the "**VimpelCom Action**"), and an earlier, narrower action by Catalyst against a departing employee, Brandon Moyse ("**Moyse**"), for breach of his employment agreement (the "**Moyse Action**"). Both actions relate in part to the acquisition of a telecom company called WIND Mobile Corp. ("**WIND**"). However, the causes

of action in the two actions are distinct, as are all but one of the defendants against whom the separate causes of action are advanced.

5. VimpelCom Ltd. ("**VimpelCom**") and Globalive Capital Inc. ("**Globalive**"), assisted by UBS Securities Canada Inc. ("**UBS**"), sought to sell their shareholdings in WIND. Catalyst sought to acquire WIND. Catalyst and VimpelCom entered into an Exclusivity Agreement and a Confidentiality Agreement that prohibited VimpelCom and its advisor and agent, UBS, from negotiating or discussing any alternative transaction with any other party and that required VimpelCom to keep the content of its negotiations with Catalyst confidential. Both VimpelCom and Catalyst recognized and agreed that should either agreements be breached, it would cause irreparable harm entitling Catalyst to equitable relief without proof of special damages.

6. In breach of these Agreements, VimpelCom, Globalive and UBS entered into negotiations with a group of U.S. Investors (the "**Consortium**") who delivered what they described as a "superior proposal" at the very same time as Catalyst's deal was before the VimpelCom Board for approval. Catalyst failed to acquire WIND and commenced an action seeking damages and equitable remedies for breach of confidence and breach of contract against VimpelCom, UBS and Globalive for engaging with members of the Consortium during the period of exclusivity with Catalyst and transmitting confidential information obtained during negotiations with Catalyst. The action also claimed damages for inducing breach of contract, misuse of confidential information and conspiracy against members of the Consortium.

7. By contrast, the Moyse Action involved claims against a former employee of Catalyst, Moyse. It was alleged that Moyse breached his obligation of confidentiality under his employment agreement by misappropriating and passing confidential information belonging to Catalyst to its competitor and Moyse's new employer, West Face (the "**Moyse Information**"). The Moyse Information was alleged to have been used by West Face in the Consortium's successful bid for WIND.

8. Relying on the principles of proportionality, the trial of the Moyse Action was ordered by Justice Newbould to take place over six days on a very expedited schedule. Justice Newbould

also specifically ordered that Catalyst's rights to assert any potential claim against members of the Consortium relating to their acquisition of WIND were to be preserved.

9. In his decision in the Moyse Action, Justice Newbould held that Moyse had not passed confidential information about Catalyst's strategies and attempts to acquire WIND to West Face and thus West Face could not have misused any such information. This finding was enough to dispose of the Moyse Action. Catalyst does not take issue with that finding.

10. However, in the within VimpelCom Action, the Motions Judge relied on the preclusive doctrines of estoppel and abuse of process to dismiss the VimpelCom Action and held that the claims against the eleven defendants in the VimpelCom Action should have been advanced within the Moyse Action. The Court of Appeal, in upholding the dismissal of the VimpelCom Action, also held that Catalyst "could have" and "should have" brought the claims in the VimpelCom Action in the Moyse Action. The Court of Appeal also held that Catalyst suffered no detriment and, as such, was not entitled to any equitable remedies.

11. The Court of Appeal gave no consideration to the fact that Justice Newbould had ordered that the Moyse Action proceeded on a focussed and expedited basis and the impact that this had on the VimpelCom Action, before upholding the dismissal of the VimpelCom Action.

12. This Court, in *Hryniak v. Mauldin*,[1] pronounced a culture shift in litigation and called on judges and counsel to recognize proportionality as an important principle in the adjudication of disputes. The decision to dismiss the VimpelCom Action on the basis of estoppel and abuse of process doctrines sets a dangerous precedent, warranting review and intervention by this Court, as it will force plaintiffs to combine all possible claims against all possible defendants into a single proceeding even when it may not be efficient or proportionate to do so. This decision is also inconsistent with the frequently cited principles set out by the House of Lords in *Ashmore* that "it is part of [a judge's] duty to identify crucial issues and to see they are tried as expeditiously and inexpensively as possible. …When a judge alive to the possible consequences decides that a particular course should be followed in the conduct of the trial in the interests of

[1] *Hryniak v. Mauldin*, [2014] 1 SCR 87 [*Hryniak*] at para 32.

justice, his decision should be respected by the parties and upheld by an appellate court unless there are very good grounds for thinking that the judge was plainly wrong" [2]

13. The decision also adds to the confusion that exists in the law in Canada of whether a plaintiff must establish "detriment" – in the nature of loss or damages - to succeed in a claim for breach of confidence. The decision conflicts with other jurisprudence in Canada. It is also at odds with the leading jurisprudence in the United Kingdom on this issue. It is of importance to the orderly development of commercial law in Canada that this Court clarify whether detriment is a required element for torts such as breach of confidence and inducing breach of contract.

B. STATEMENT OF FACTS

(i) The VimpelCom Action

14. WIND was a telecommunications provider. Until September 16, 2014, it was owned by VimpelCom and Globalive when they, with the assistance of UBS, sold their interest in WIND to the Consortium.

15. A month prior to that however, Catalyst had substantially completed a deal with VimpelCom to purchase WIND.[3] By August 7, 2014, Catalyst and VimpelCom had a 300-plus page Share Purchase Agreement ("**SPA**") ready to be signed whereby VimpelCom was to sell WIND to Catalyst for $300 million, subject only to formal approval by VimpelCom's Board.[4] Indeed, VimpelCom and Catalyst held a joint conference call with Industry Canada to advise that their deal was "done".[5]

16. To govern and facilitate their negotiations, Catalyst and VimpelCom had executed a Confidentiality Agreement[6] and an Exclusivity Agreement[7] (collectively, the "**Agreements**").

---

[2] *Ashmore v. Corp of Lloyd's*, [1992] 2 All ER 486 (H.L.) [*Ashmore*] at 488 and 492
[3] *The Catalyst Group Inc. v VimpelCom Ltd.*, 2019 ONCA 354 [*Reasons of the ONCA Below*] at para 6.
[4] *The Catalyst Capital Group Inc. v VimpelCom Ltd.*, 2018 ONSC 2471 [*Reasons on the Motion Below*] at para 20.
[5] *Reasons on the Motion Below* at para 24.
[6] Confidentiality Agreement dated March 21, 2014, by and between VimpelCom Ltd., Global Telecom Holding S.A.E., and The Catalyst Capital Group Inc. [*Confidentiality Agreement*].

The intent was to ensure that their discussions were kept confidential and that they be able to exclusively negotiate the purchase of WIND without interference from competing bids.

17. The Confidentiality Agreement specifically provided that the content of the negotiations between Catalyst and VimpelCom, as well as any terms or conditions relating to the purchase of WIND by Catalyst, were confidential and were not to be disclosed to any third party. VimpelCom and Catalyst expressly recognized and agreed that, should the Confidentiality Agreement be breached, this would cause irreparable harm to the non-breaching party. [8]

18. The Exclusivity Agreement specifically provided that VimpelCom, UBS and WIND were to deal exclusively with Catalyst and prohibited them from soliciting or encouraging any offers from, negotiating or discussing any alternative transaction with, or furnishing any information to any other party in respect of a transaction with WIND. The parties expressly recognized and agreed that, should the Exclusivity Agreement be breached, it would cause irreparable harm entitling Catalyst to "the remedy of injunction or …other equitable relief", "without proof of special damages".[9]

19. In the VimpelCom Action, Catalyst alleges that VimpelCom and its agents breached the Agreements and that members of the Consortium induced the breach of these Agreements. It is further alleged that VimpelCom and UBS dealt with members of the Consortium during the period of exclusivity with Catalyst, and that the Consortium was improperly informed of the status and content of the ongoing negotiations with Catalyst.

20. In particular, the Consortium knew when the SPA between Catalyst and VimpelCom was going to be submitted to the VimpelCom Board. The Consortium also received comments from VimpelCom about the Consortium's own proposed share purchase agreement including feedback on price levels during the exclusivity period. This was specifically prohibited under the Agreements.

---

[7] Exclusivity Agreement dated July 23, 2014, among The Catalyst Capital Group Inc. and VimpelCom Ltd. [*Exclusivity Agreement*].
[8] *Confidentiality Agreement* at para 11.
[9] *Exclusivity Agreement* at para 6(c).

21. To frustrate the Agreements and interfere with Catalyst's attempts to buy WIND, the Consortium, knowing of the state of Catalyst and VimpelCom's negotiations, sent what the Consortium described as a "superior proposal" to VimpelCom on August 7, just when the Catalyst SPA was before the VimpelCom Board for approval.[10]

22. On August 15, 2014, after having received the Consortium's bid, VimpelCom sought to "retrade" the deal that had been negotiated for months by demanding that Catalyst pay a break fee of between $5 and $20 million if regulatory approval from the government of Catalyst's purchase of WIND was not received within two months.[11]

23. This demand for a break fee was made *after* VimpelCom told Catalyst that the SPA was substantially settled[12] and just days after the parties told Industry Canada that the deal was "done".[13] VimpelCom knew that the deal with Catalyst would inevitably "break" because there was no way government approval could be obtained in less than two months.[14] This new demand by VimpelCom was intended to ensure that VimpelCom could take advantage of the Consortium's "superior proposal".

24. Catalyst did not accede to the break fee demand. On August 25, 2014, VimpelCom and the Consortium entered into their own exclusivity agreement.[15] On September 16, the Consortium and VimpelCom concluded a deal to purchase WIND.[16]

25. The issue of whether VimpelCom or its advisor, UBS, breached the Exclusivity Agreement or the Confidentiality Agreement, why VimpelCom made a demand for a break fee and whether any of the members of the Consortium induced VimpelCom to make its demand for a break fee to avoid signing the SPA, were to be adjudicated in the VimpelCom Action.

---

[10] *Reasons on the Motion Below* at para 21.
[11] *Reasons on the Motion Below* at para 25.
[12] *Reasons on the Motion Below* at para 20.
[13] *Reasons on the Motion Below* at para 24.
[14] *Reasons on the Motion Below* at para 25.
[15] *Reasons on the Motion Below* at para 27.
[16] *Reasons on the Motion Below* at para 27.

26. The Court of Appeal, in upholding the Motions Judge's dismissal of the VimpelCom Action on the basis of estoppel and abuse of process, recognized that the VimpelCom Action raised distinct causes of action.[17] It concluded, however, that Catalyst "could have" and "should have" advanced its claims for breach of the Agreements, breach of confidence and inducing breach of contract, within the context of a focussed and expedited 6-day trial of the Moyse Action (more fully described below). The decision in the Moyse Action has now been used to estop Catalyst from pursuing its claim against VimpelCom and members of the Consortium.

(ii) The Moyse Action

27. During Catalyst's negotiations with VimpelCom, an action was commenced by Catalyst on June 25, 2014, against Moyse and West Face (one member of the Consortium). Moyse was a Catalyst employee working on Catalyst's acquisition of WIND, until he resigned from Catalyst on May 24, 2014 to join West Face effective June 22, less than two months before the Consortium submitted its successful bid for WIND. [18]

28. A claim was commenced to enforce Moyse's non-competition obligations pursuant to his employment agreement with Catalyst, and was later amended to include a claim for a constructive trust over West Face's shares of WIND that were acquired by West Face and the other members of the Consortium. The central issue in the Moyse Action was the alleged misuse of "confidential information [that] came from…Moyse" while he was an employee of Catalyst and was allegedly provided to West Face, his new employer (the "**Moyse Information**").[19]

29. On November 10, 2014, an interim order enjoining Moyse from using, misusing or disclosing any and all confidential and/or proprietary information of Catalyst was issued.[20] The Court held that there was a strong *prima facie* case that Moyse had breached the confidentiality

---

[17] *Reasons of the ONCA Below* at para 57.
[18] *Reasons on the Motion Below* at para 30.
[19] *The Catalyst Capital Group Inc. v Moyse*, 2018 ONCA 283 [*Reasons of the Court of Appeal in the Moyse Action*] at para 2; *Catalyst Capital Group Inc. v Moyse*, 2016 ONSC 5271 [*Reasons of the Superior Court in the Moyse Action*] at para 14.
[20] *The Catalyst Capital Group Inc. v Moyse*, 2014 ONSC 6442 [*Moyse Injunction Order*] at para 83.

clause of his Employment Agreement.[21] The Court found that Moyse took and delivered to West Face information which could demonstrate strategies Catalyst used in a competitive business.[22]

(iii) The Plan of Arrangement and the 6-day Expedited Moyse Trial

30. On December 23, 2015, while various interlocutory motions and appeals in the Moyse Action were proceeding through the courts, Mid-Bowline Group Corp., the entity through which the Consortium acquired the shares of WIND, brought an application for court approval of a plan of arrangement to sell its interest in WIND to Shaw Communications for $1.6 billion. Without any prior notice to Catalyst, the Consortium brought an application to obtain clear title to the shares of WIND and to obtain a release in favour of West Face of Catalyst's constructive trust claim in the Moyse Action.

31. Catalyst objected to the plan of arrangement. Catalyst also put the Consortium on notice that it intended to pursue a claim for inducing breach of contract in relation to its bid to acquire WIND during the period of exclusivity between Catalyst and VimpelCom.

32. Justice Newbould held in his reasons dated January 26, 2016, that the Moyse Action must be decided quickly, and in doing so, relied on the principle of proportionality pronounced in *Hryniak*.[23]

33. He also held that the trial of the Moyse Action was <u>not</u> to consider any claims for inducing breach of contract against members of the Consortium in relation to their acquisition of WIND.[24] Justice Newbould found that Catalyst could have started the new claim in March 2015 when new facts were disclosed and found it "troubling" for Catalyst to "lie in the weeds" to assert new claims to stop the plan of arrangement.[25] However, Catalyst had no notice of the plan of arrangement until December 23, 2015. Similarly, Catalyst never had (nor has it had) full

---

[21] *Moyse Injunction Order* at para 71.
[22] *Moyse Injunction Order* at para 71.
[23] *Re: Mid-Bowline Group Corp*, 2016 ONSC 669 [*Mid-Bowline*] at para 48.
[24] *Mid-Bowline* at para 61.
[25] *Mid-Bowline* at para 59.

production of documents regarding the potential breaches of the Agreements, and the few documents which it did have, came into its possession well after March 15, 2015.

34. The formal Order of Justice Newbould issued on February 3, 2016, provided that, among other things, any potential claim by Catalyst against members of the Consortium relating to their acquisition of their interests in WIND from VimpelCom were preserved.[26]

35. To accommodate counsel schedules, Justice Newbould also formally set the trial date in the Moyse Action for May 18, 2016 for six days.[27] Five days before the commencement of the Moyse trial, the claim against VimpelCom and the Consortium that had been carved out by the February 3 Order was issued.

(iv) The Decision in the Moyse Action

36. The central issue in the Moyse Action was the alleged misuse of confidential information received by Moyse while he was employed at Catalyst.[28] The specific information alleged to have been passed by Moyse to West Face included Catalyst's internal research reports, internal presentations and internal discussions.

37. Following the 6-day trial, Justice Newbould dismissed the Moyse Action. He found that Moyse did not pass confidential information about Catalyst's dealings with or strategy regarding WIND to West Face and thus West Face could not have used such information.[29]

38. Notwithstanding that he concluded there was no breach of confidence by Moyse, Justice Newbould also proceeded to make a number of other findings and observations:

(a) "There is no evidence that the bid of the consortium of August 7, 2014 was even looked at by the Board of VimpelCom during the period of exclusivity with Catalyst or that it

---

[26] Order of Justice Newbould Approving Mid-Bowline Plan of Arrangement, dated February 3, 2016 [*Plan of Arrangement Order*] at para 4.5.
[27] Endorsement of Justice Newbould dated February 3, 2016. The Trial ultimately commenced on June 6, 2016.
[28] *Reasons of the Court of Appeal in the Moyse Action* at para 2; *Reasons of the Superior Court in the Moyse Action* at para 14.
[29] *Reasons of the Superior Court in the Moyse Action* at paras. 117 and 125

played any part in the position taken by VimpelCom with Catalyst that it wanted a break fee from Catalyst".[30]

However, the comment that there was "no evidence" about these matters reflects the fact that VimpelCom was not a party to the Moyse Action, no one from the VimpelCom Board ever testified in the Moyse Action, and VimpelCom never produced its documents nor was it discovered on this issue, which is central to the VimpelCom Action but not the Moyse Action;

(b) "It was Catalyst's refusal to agree to a break fee requested by VimpelCom that caused Catalyst to end negotiations with VimpelCom".[31]

Justice Newbould made this remark without deciding why VimpelCom made its demand for a break fee well after the parties had agreed upon the terms of the Catalyst SPA and announced to Industry Canada that the deal was "done". Whether VimpelCom was induced to demand a break fee is central to the VimpelCom Action, but not to the Moyse Action;

(c) "…there was no chance that Catalyst could have successfully concluded a deal with VimpelCom."[32]

Again, Justice Newbould left unanswered the question of whether Catalyst's inability to conclude a deal was a result of the breaches of the Agreements and the conduct of the Consortium as pleaded in the VimpelCom Action.

39. On appeal of the Moyse Action, the Court of Appeal upheld Justice Newbould's decision and held that "Mr. Moyse had not provided any confidential information to West Face".[33] In so doing, the Court of Appeal focussed on the central issue in the Moyse Action: the claim of misuse of Catalyst confidential information allegedly passed by Moyse to West Face. As the Court of Appeal put it [emphasis added]:[34]

"To succeed on the misuse of confidential information claim, Catalyst had to prove that:

---

[30] *Reasons of the Superior Court in the Moyse Action* at para 127.
[31] *Reasons of the Superior Court in the Moyse Action* at para 130.
[32] *Reasons of the Superior Court in the Moyse Action* at para 131.
[33] *Reasons of the Court of Appeal in the Moyse Action* at para 16.
[34] *Reasons of the Court of Appeal in the Moyse Action* at paras 2, 4, 8, 14 and 16.

- Mr. Moyse gave confidential information concerning Catalyst's bid to purchase WIND to West Face;
- West Face used that confidential information when pursuing its bid for WIND; and
- The misuse of that confidential information caused detriment to Catalyst."

40. There was no adjudication of the issues related to VimpelCom's breach of the Exclusivity Agreement or the Consortium's inducing that breach. These simply were not issues in the Moyse Action.

(v) Dismissal of the VimpelCom Action

41. The central issues raised in the VimpelCom Action were whether VimpelCom breached the terms of the Agreements, whether VimpelCom and/or UBS engaged in negotiations with the Consortium during the period of exclusivity with Catalyst, whether confidential information shared with VimpelCom, Globalive and UBS (not Moyse) was disclosed to the Consortium, whether members of the Consortium induced or conspired to induce VimpelCom to breach its Agreements with Catalyst or whether the imposition of a break fee would have occurred but for that inducement, and, if so, what are the appropriate remedies.[35] The VimpelCom Action addresses *different* causes of action from the Moyse Action arising out of *different* legal relationships, *different* conduct, and *different* confidential information, against substantially *different* parties. No allegations were made against Moyse in the VimpelCom Action.

42. In dismissing the VimpelCom Action, the Motions Judge did not decide whether VimpelCom or UBS breached the Exclusivity Agreement or the Confidentiality Agreement; whether confidential information was passed by VimpelCom or UBS to the Consortium and used to induce VimpelCom to accept the Consortium's bid; or what equitable remedies would be available against VimpelCom, UBS and the other defendants for such wrongful conduct. The merits of these allegations are central to the VimpelCom Action and have not been decided by any Court.

43. To date, no Court has heard from VimpelCom or UBS regarding the circumstances surrounding the sale of WIND. No documentary or oral discovery of VimpelCom or UBS has

[35] Amended Amended Amended Statement of Claim of The Catalyst Capital Group Inc. in the VimpelCom Action, at paras 26-30, 43-45, 55-59, 63-76, 95-98, 103-122, and 125-127.

taken place. No explanation has been given by VimpelCom about why it demanded a break fee if regulatory approval could not be obtained within two months, after having already settled the terms of the SPA and announcing that a deal with Catalyst was "done". There has been no explanation by UBS of the numerous conversations it had with the Consortium members throughout the period of Catalyst's Exclusivity Agreement. VimpelCom's, UBS's and Globalive's sharing of information that led to the Consortium's bid has yet to be adjudicated upon.

44. The Court of Appeal dismissed Catalyst's appeal of the Motions Judge's dismissal of the VimpelCom Action. In its reasons, from which Catalyst now seeks leave to appeal to this Court, the Court of Appeal held that:

(a) Catalyst **"**could have" and "should have" brought forward the claims made in the VimpelCom Action in the Moyse Action.[36] The Court made this finding even though Catalyst's rights to pursue a separate claim against VimpelCom and the other members of the Consortium were specifically preserved.[37] The Court of Appeal did not consider or weigh the fact that Newbould J. ordered an expedited 6-day trial in the Moyse Action to commence within four months' time and that to add the VimpelCom Action and have ten new parties defend, discovered and tried on distinct theories of liability, would have undermined the expediency and proportionality of the proceeding (indeed, VimpelCom, an entity based in the Netherlands, was entitled to and insisted on at least 60 days to deliver a defence); and

(b) Catalyst could not succeed in its claim in the VimpelCom Action for breach of confidence, inducing breach of contract and conspiracy, because Catalyst could not suffer any detriment as Catalyst could not have concluded a deal with VimpelCom to acquire WIND.[38] In dismissing the appeal, the Court of Appeal stated that Catalyst did not plead any of the alternative equitable remedies, such as an accounting, even though Catalyst did plead such equitable remedies when it

[36] *Reasons of the ONCA Below* at para 20.
[37] *Plan of Arrangement Order* at para 4.5.
[38] *Reasons of the ONCA Below* at para 45.

specifically pleaded a tracing of the monies.[39] The Court of Appeal also held that detriment was a necessary element for a breach of confidence, inducing breach of contract and conspiracy claims. The Court of Appeal stated that the "**jurisprudence is clear**" that a claimant must prove detriment to establish liability for breach of confidence, inducing breach of contract and conspiracy[40], even though there is conflicting jurisprudence that has also clearly stated that detriment is not a required element to seek equitable remedies for these torts.

PART II – THE QUESTIONS IN ISSUE

45. The proposed appeal raises the following issues of public importance warranting consideration by this Court:

(a) While recognizing a culture shift in *Hryniak*, how should courts and parties balance the interests of proportionality while also protecting a party's right to pursue claims, particularly in cases involving multiple parties with different and separate causes of action?; and

(b) Is proof of detriment a necessary element for a party to obtain equitable remedies for the tort of breach of confidence?

PART III – STATEMENT OF ARGUMENT

A. THE BALANCE BETWEEN PROPORTIONALITY AND RES JUDICATA

46. It is a long-standing tenet of our judicial system that every person with an arguable claim should be entitled to a fair and just adjudication by the court. As this Court held in *Hunt v. Carey*,[41] only in the clearest of cases should a claimant be driven from the judgment seat.

---

[39] Amended Amended Amended Statement of Claim in the VimpelCom Action, paras 134-137, in which a tracing of the proceeds was specifically pleaded.
[40] *Reasons of the ONCA Below* at para 41.
[41] *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959 at 980.

47. In *Hryniak v. Mauldin*, this Court pronounced a culture shift. *Hryniak* recognized proportionality "as an important legal principle"[42] and the principle has since been described as the "touchstone"[43] of modern civil justice and the "benchmark"[44] for access to civil justice.

48. To give effect to this culture shift, this Court called upon judges to make changes to case management and to make "reasonable efforts to control and manage the conduct of trials".[45] As Ontario's Chief Justice remarked, deference must be shown to the case management efforts of the courts and courts must be mindful of the impact of their decisions in giving effect to the culture shift to proportionality.[46]

49. The pursuit of proportionality ought not to come at the expense of a party's right to pursue and have valid claims adjudicated by the court. If such rights can be at risk of being extinguished in the pursuit of the goal of proportionality, then clear guidelines are required by this Court setting out the circumstances in which such rights can or cannot be in jeopardy.

50. In this case, in the interests of proportionality, a 6-day trial of the Moyse Action was set, commencing in four-months' time. Nonetheless, the Motions Judge and the Court of Appeal in this action concluded that it was an abuse of process to commence a second action and that the claims in the VimpelCom Action against ten additional parties, involving distinct and separate causes of action, "should have" and "could have" been advanced by Catalyst within the context of the expedited Moyse Action. These rulings were made notwithstanding an order by Justice Newbould that the rights of Catalyst vis-à-vis VimpelCom and others were expressly preserved.

51. Justice Newbould, in exercising his case management powers and relying on the principle of proportionality, ordered a very speedy trial in the Moyse Action and preserved Catalyst's rights to pursue claims in respect of other parties. However, the Court of Appeal held that

---

[42] *Heritage Electric Ltd. et al v Sterling O & G International Corporation et al.*, 2017 MBCA 85 at para 21.
[43] *Klippenstein v Manitoba Ombudsman*, 2015 MBCA 15 at para 32, leave to appeal refused [2015] SCCA No. 135
[44] *Burns Bog Conservation Society v Canada (Attorney General)*, 2014 FCA 170 at para 42.
[45] *R v Jordan*, 2016 SCC 27 at para 139.
[46] Remarks of Chief Justice George Strathy at the Opening Courts of Ontario, 2016 (online: http://www.ontariocourts.ca/coa/en/ps/).

Catalyst "could have" and "should have" added ten additional parties in the VimpelCom Action to the Moyse Action. To do so would have taken an expedited case and made it a model of complexity, undermining (and not enhancing) the principle of proportionality.

52. In the pursuit of proportionality in the Moyse Action, Catalyst is now estopped from pursuing its claims against VimpelCom, UBS and members of the Consortium in the VimpelCom Action. In doing so, there was no consideration given by the Court of Appeal to the fact that advancing these claims in the Moyse Action was neither expedient nor proportionate.

53. The Court of Appeal's decision undermines the desired culture shift in cases involving multiple parties with multiple causes of action. By this decision, parties will be compelled, out of fear that their rights could be extinguished on the basis of the doctrines of estoppel and abuse of process, to bring all possible claims against all possible parties in a single action, even though it may be neither expedient nor proportionate to do so.

54. The Ontario Court of Appeal has recognized, in the context of motor vehicle accidents, that it is not necessarily an abuse of process to bring multiple lawsuits where there are overlapping facts. Due to the factual and legal complexities of motor vehicle cases, multiple lawsuits are often brought arising out of the same occurrence, without the risk that such lawsuits will be dismissed on the bases of issues estoppel, cause action estoppel or abuse of process. Striking multiple lawsuits in the context of motor vehicle cases, particularly where different causes of action are advanced against different defendants, fails to balance the interests of justice and may be *disproportionate* to the efficiency that it seeks to achieve.[47] These decisions stand in stark contrast to the within appeal.

55. No Canadian jurisprudence in the commercial context has considered whether the principle of proportionality are best served by bringing separate proceedings against multiple defendants involving different causes of action, and under what circumstances it is an abuse of process for failing to proceed with such a case in a single proceeding.

---

[47] See, e.g., *Abarca v Vargas*, 2015 ONCA 4 at paras 24, 28 and 35; *Hoffman v Avis Budget Group Inc.*, 2015 ONSC 7740 at para 13; see also Sinai, Y., "The Downside of Preclusion: Some Behavioural and Economic Effects of Cause of Action Estoppel" (2011) 56:3 McGill LJ 673.

56. By contrast, consistent with the *Ashmore* principles, the English courts have recognized that there is a real public interest in not encouraging a single action against a wide range of defendants with discrete claims:

(a) In *Johnson v Gore Wood,*[48] the House of Lords adopted "a broad, merits-based" approach to the question of whether a claim is an abuse of process and refused to strike out the claimant's personal claim against the defendants, where he had already brought a claim against them arising out of the same circumstances on behalf of his company.

(b) In *Dexter Ltd v Vlieland-Boddy,*[49] the English Court of Appeal held that in large commercial disputes, it by no means follows that either the public interest in efficiency and economy in litigation or the interests of the parties... are best served by one action against them all".

(c) In *Aldi Stores Ltd. v WSP London Ltd*.,[50] the English Court of Appeal held that "there is a real public interest in allowing parties a measure of freedom to cho[o]se whom they sue in a complex commercial matter and not to give encouragement to bringing a single set of proceedings against a wide range of defendants… That freedom can and should be restricted by appropriate case management."

(d) In *Otkitrie v Threadneedle,*[51] the Court refused to strike out the claims against the defendants in the second action as an abuse of process. The Court stated that such a case management breach is not by itself sufficient to constitute an abuse of process.

57. With the recent culture shift having been pronounced in *Hryniak,* the time is ripe for this Court to provide direction on how to balance the principle of proportionality, the doctrines of estoppel and abuse of process, and the rights of parties to have their claims fairly and justly adjudicated.

---

[48] *Johnson v Gore Wood,* [2000] UKHL 65 at 31.
[49] *Dexter Ltd v Vlieland-Boddy,* [2003] EWCA Civ 14 at paras 51-53.
[50] *Aldi Stores Ltd. v WSP London Ltd.*, [2007] EWCA Civ 1260 at paras 17 and 25.
[51] *Otkitrie v Threadneedle*, [2015] EWHC 2329 at paras 26-28.

B. IS DETRIMENT A NECESSARY ELEMENT FOR EQUITABLE REMEDIES?

58. In upholding the dismissal of the VimpelCom Action, the Court of Appeal stated that "the jurisprudence is clear that a claimant must prove detriment to establish liability for breach of confidence…"[52] There is, however, conflicting jurisprudence that clearly states that detriment is not a required element to obtain equitable remedies for breach of confidence.

59. In *Cadbury Schweppes v FBI Foods*,[53] this Court considered the cause of action of breach of confidence. Cadbury Schweppes had not suffered financial loss due to the breach of confidence. Cadbury Schweppes was, however, awarded damages at trial "in the interest of fairness".[54] This Court, quoting from the House of Lords in *Attorney-General v Guardian Newspapers Ltd. (No. 2)*, stated that in some circumstances the disclosure itself might be sufficient, without more, to constitute detriment.[55]

60. This Court also noted that while La Forest J. in *Lac Minerals* had considered detriment to be an essential element of a breach of confidence action, it was clear that La Forest J. had regarded detriment as a broad concept, large enough for example to include the emotional or psychological distress that would result from the disclosure of intimate information.[56]

61. Commentators have described the law on whether detriment is a necessary element of breach of confidence as "confusing". Paul Perell (as he then was) noted that "detriment" is not necessarily required to establish a compensable claim for breach of confidence. The wrongful gains of the breaching party may be sufficient:

> [T]he element of detriment means that the confider must suffer a wrong or injury from the misconduct of the confidant, which injuries would include not only the confider's compensable losses but also the confidant's wrongful gains connected to the misconduct.[57]

---

[52] *Reasons of the ONCA Below* at para 41, citing its decision in *Lysko v Braley*, [2006] OJ No 1137 (CA) at paras 17-19.
[53] *Cadbury Schweppes v FBI Foods*, [1999] 1 SCR 142 [*Cadbury Schweppes*].
[54] *Cadbury Schweppes* at para 53
[55] *Cadbury Schweppes* at para 53, quoting from *Attorney General v Guardian Newspaper Ltd. (No. 2)*, [1990] AC 109 (UKHL) [*Spycatcher*].
[56] *Cadbury Schweppes* at para 53.
[57] Paul Perell, "Breach of Confidence to the Rescue", (2002) 25:2 ADVOC Q. 199 at 205.

62. In other contexts, this Court has acknowledged that damages may be determined by the extent of the defendant's gain rather than the plaintiff's detriment:

> Considerations other than the extent of the plaintiff's actual loss shape the way the compensation principle is applied and there are well-established exceptions to it. For example, the rule that contract damages compensate only the plaintiff's actual loss is not the only rule that applies to assessing contract damages. As a leading English case put it, "Damages are measured by the plaintiff's loss, not the defendant's gain. But the common law, pragmatic as ever, has long recognised that there are many commonplace situations where a strict application of this principle would not do justice between the parties. Then compensation for the wrong done to the plaintiff is measured by a different yardstick": *Attorney General v. Blake*, [2001] 1 A.C. 268 (H.L.), at p. 278. In some cases, for example, an award of damages in contract may be based on the advantage gained by the defendant as a result of the breach rather than the loss suffered by the plaintiff: see, e.g., *Bank of America Canada v. Mutual Trust Co*., 2002 SCC 43 (CanLII), [2002] 2 S.C.R. 601, at para. 25. The rule that damages are measured by the plaintiff's actual loss, while the general rule, does not cover all cases.[58]

63. Canadian courts have been and continue to be inconsistent in the application of the legal requirements for breach of confidence:

(a) In *Stonetile (Canada) Ltd. v Castcon Ltd.*,[59] the Alberta Court of Queen's Bench held, in a case of breach of confidence, that the the misuse of confidential information did not directly cause damage to the plaintiff. The Court found however that it provided a "springboard" effect, which drove the court to look for a remedy that ensures the possessor of the information does not get an unfair start in the field of competition;[60]

(b) In *Pat's Off-Road Transport v Campbell*,[61] the defendant had used confidential information to replicate his employer's truck-mounted hot oil heaters. The plaintiff had not suffered any detriment. Nevertheless, the Alberta Court of Queen's Bench held that this should not allow the defendants to escape from any

---

[58] *Waterman v IBM Canada Ltd*., 2013 SCC 70 at para 36.
[59] *Stonetile (Canada) Ltd. v Castcon Ltd*., 2010 ABQB 392 [*Stonetile*]
[60] *Stonetile* at paras 58 and 63.
[61] *Pat's Off-Road Transport v Campbell*, 2010 ABQB 443 [*Pat's Off Road*].

award of damages.[62] The Court formulated the third element of the cause of action: "Was there unauthorized use of the information?"[63]

(c) In *Minera Aquiline Argentina SA v IMA Exploration Inc.*,[64] the plaintiff suffered a detriment as a result of the defendant's unlawful use of confidential information. Given that the plaintiff suffered a detriment, the British Columbia Court of Appeal did not find it necessary to analyze the question of whether detriment is a necessary element of an action founded in breach of confidence, but noted that the law with respect to this question "does not appear to be entirely settled;"[65]

(d) In *Seaway Marine Services Ltd. v Weiwaikum General Partner Ltd.*,[66] the defendants argued that proof of detriment is an essential element of the breach of confidence and that the plaintiff's failure to prove detriment was fatal to its case. The Court disagreed, finding that "the proposition that detriment is an essential element of the cause of action is not entirely free of doubt."[67]

64. By contrast, the law that plaintiffs in breach of confidence actions may be entitled to a remedy even if they have not suffered a financial detriment is well established in England:

(a) *Terrapin Ltd. v Builders' Supply Co*.[68]: Using confidential information to gain a commercial advantage or "springboard" allowing the competing product to come to market sooner can cause "detriment" to the party disclosing the information.

(b) *Seager v. Copydex Ltd*. [69]: "He who has received information in confidence shall not take unfair advantage of it." Even if misused innocently, information disclosed in confidence or inadvertently, if it gives the defendant a "springboard" or an advantage, is actionable.

---

[62] *Pat's Off-Road* at para 85.
[63] *Pat's Off-Road* at para 64.
[64] *Minera Aquiline Argentina SA v IMA Exploration Inc*., 2007 BCCA 319 [*Minera*].
[65] *Minera* at para 85.
[66] *Seaway Marine Services Ltd. v Weiwaikum General Partner Ltd*., 2014 BCSC 2102 [*Seaway*].
[67] *Seaway* at para 94, citing *Cadbury Schweppes* at paras 52-54.
[68] *Terrapin Ltd. v Builders' Supply Co.*, [1967] RPC 375 (Ch.D.) at 376, 389, 391, and 392.
[69] *Seager v Copydex Ltd*., [1967] 1 WLR 923(ChD, CA) [*Seager*] at 368, 371 and 374.

(c) *Attorney General v. Guardian Newspaper Ltd. (No. 2)*[70]: A party should not be allowed to benefit from his own wrong and may be accountable for any profit made out of that party's breach of duty.

(d) *Experience Hendrix*[71]: There is no reason to bar, in appropriate circumstances, an order for payment of a reasonable sum having regard to any benefit made by the infringement, even though the appellant cannot prove any financial loss.

(e) *Attorney General v. Blake*[72]: An accounting for profits can be awarded as remedy where damages are not sufficient.

65. It is of importance to the orderly development of commercial law in Canada that this Court clarify whether detriment is a required element for torts such as breach of confidence, particularly in a case such as this, where the parties specifically agreed in writing that a breach would entitle the innocent party to equitable relief, without proof of special damages.

66. The Court of Appeal in this case has restricted or limited the available remedies a party is entitled for such claims where courts are, as this Court stated, supposed to have "considerable flexibility in fashioning a remedy"[73] and in doing so, has perpetuated the state of confusion that Perell observed in the law almost twenty years ago.

PART IV – SUBMISSIONS CONCERNING COSTS

67. The Applicant requests its costs of the application for leave to appeal.

PART V - ORDER SOUGHT

68. The Applicant requests an Order granting it leave to appeal the decision of the Court of Appeal, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of August, 2019.

---

[70] *Spycatcher* at 255-256 and 262.
[71] *Experience Hendrix LLC v PPX Enterprises Inc*., [2003] EWCA Civ 323 at para 35.
[72] *Attorney General v Blake*, [2001] 1 A.C. 268 (HL) at 285.
[73] *Lac Minerals Ltd. v International Corona Resources Ltd.*, [1989] 2 SCR 574 at 615 and 671.

"*John Callaghan*"

John Callaghan

"*Benjamin Na*"

Benjamin Na

"*Matthew Karabus*"

Matthew Karabus

"*David Moore*"

David Moore

PART VI – TABLE OF AUTHORITIES & LEGISLATION

Case Law: Paragraphs

Case Law: Paragraphs

Seager v. Copydex Ltd., [1967] 1 WLR 923 (ChD, CA) 64

Seaway Marine Services Ltd. v Weiwaikum General Partner Ltd., 2014 BCSC 2012 63

Stonetile (Canada) Ltd. v Castcon Ltd.,2010 ABQB 392 63

Terrapin Ltd. v Builders' Supply Co., [1967] RPC 375 (Ch.D) 64

Waterman v IBM Canada Ltd., 2013 SCC 70 62

Secondary Sources:

Perell, P. "Breach of Confidence to the Rescue", (2002) 25:2 ADVOC Q. 199 61, 66

Remarks of Chief Justice George Strathy at the Opening Courts of Ontario, 2016 (online: http://www.ontariocourts.ca/coa/en/ps/). 48

Sinai, Y. "The Downside of Preclusion: Some Behavioural and Economic Effects of Cause of Action Estoppel in Civil Actions", (2011) 56:3 McGill LJ 673. 54

Statutes, Regulations, Legislation:

Nil.

COUNSEL SLIP

5413

COURT FILE NO CV-15-11238-00CL

DATE FEB 3RD 2016

NO ON LIST 1

TITLE OF PROCEEDING

MID-BOWLING GROUP CORP v. CATALYST CAPITAL GROUP INC.

COUNSEL FOR: PHONE & FAX NOS

PLAINTIFF(S) Kent Thomson 416 863 0900 (T)

APPLICANT(S) Matthew Milne-Smith 416 863 0871 (F)

PETITIONER(S) mmilne-smith@dwpv.com

for Mid-Bowline

COUNSEL FOR: PHONE & FAX NOS

DEFENDANT(S) Rocco Di Pucchio (P) 416 598 2268

RESPONDENT(S) Lauren Epstein (F) 416 598 3730

for Catalyst Capital Group Inc

February 3, 2016

Trial set for 6 days starting May 18/16.

Shaw Communications Inc.

Michael Schafler / Ara Basmadjian

michael.schafler@dentons.com / ara.basmadjian@dentons.com

(T): 416.863.4511

(F): 416.863.4592

James Zibarras
Brauti Thorning Zibarras LLP
counsel for Globealive
Tannenbaum
60 NM Holdings
Singular Guff.

Robert A. Centa
for Brandon Moyse

416-646-4314
416-646-4301 (F)
Robert.Centa@PALIARERoLAND.com

DAVID STEINBERG
PAPE BARRISTERS
for JAMES RILEY

T. 416.364.8798
F. 416.364.8855
e. dss@papebarristers.com

TOM CURRY
for option-holders and other minor shareholders.

CITATION: The Catalyst Capital Group Inc. v. Moyse, 2014 ONSC 6442
COURT FILE NO.: CV-14-507120
DATE: 20141110

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
THE CATALYST CAPITAL GROUP INC.	)	*Rocco DiPucchio* & *Andrew Winton*, for the Plaintiff
	)	
Plaintiff	)	
	)	
– and –	)	
	)	
BRANDON MOYSE and WEST FACE CAPITAL INC.	)	*Jeff C. Hopkins* & *Justin Tetreault*, for the Defendant, Brandon Moyse
	)	
Defendants	)	*Jeff Mitchell* & *Matthew J.G. Curtis*, for the Defendant, West Face Capital Inc.
	)	
	)	
	)	
	)	
	)	
	)	**HEARD: October 27, 2014**

LEDERER J.:

INTRODUCTION

[1] This is a motion for an interlocutory injunction. The defendant, Brandon Moyse, has changed jobs. His former employer seeks to enjoin him from breaching a confidentiality clause that was part of his employment contract and compelling him to comply with a clause that, for a time, would prevent him from working for a competitor.

[2] An injunction is an equitable remedy. It has long been said that: "He who seeks equity must do equity" or "He who comes into equity must come to court with clean hands". This is not just true of those who ask for an injunction, but also to those who oppose it.

BACKGROUND

[3] Brandon Moyse was employed by the plaintiff, The Catalyst Capital Group Inc. ("Catalyst"), as an analyst. On March 14, 2014, Brandon Moyse sent an e-mail to Thomas Dea, a partner at the defendant, West Face Capital Inc. ("West Face"), expressing interest in "working with West Face".[1] At the time, West Face was recruiting analysts. They met on March 26, 2014. On May 19, 2014, West Face offered Brandon Moyse a job. On May 24, 2014, while on vacation, Brandon Moyse gave notice of his resignation to Catalyst, effective June 22, 2014.[2] The e-mail sent by Brandon Moyse made no reference to his plans or to having accepted employment with West Face. This information came to light within the following few days. By letter, dated May 30, 2014, counsel for Catalyst wrote to West Face and counsel for Brandon Moyse concerned about the implications of the departure of Brandon Moyse and his accepting employment with West Face, a competitor in a narrow field of investing. In particular, the letter states that the valuation methodologies used by Brandon Moyse, at Catalyst, were proprietary and that the information he received and generated was "highly sensitive and confidential". It relates Catalyst's concern that Brandon Moyse "has imparted or will be imparting Confidential Information to West Face that he acquired in the course of his employment with [Catalyst]." The letter refers to provisions in the Catalyst's Employment Agreement with Brandon Moyse dealing with confidentiality, "Non-Solicitation" and "Non-Competition".[3]

[4] Answers were not long in coming. On June 3, 2014, counsel for West Face responded, followed two days later by counsel for Brandon Moyse. The former took the position that the non-competition and non-solicitation clauses were both unenforceable. The latter agreed. Counsel for West Face said little about the concern for confidentiality indicating only that West Face "had impressed upon Mr. Moyse that he is not to share or divulge any confidential information that he obtained during his employment with [Catalyst]".[4] Counsel for Brandon Moyse said more. He denied that Brandon Moyse had used "proprietary valuation methodologies" and said that Brandon Moyse did not understand what investment strategies were being referred to "in the context or proprietary information". Counsel assured the representatives of Catalyst that Brandon Moyse had no intention of revealing "any information which could reasonably be considered confidential or proprietary in nature". Counsel offered that Brandon Moyse would "abide by the confidentiality provisions contained in the [Catalyst] Employment Agreement".[5]

---

[1] *Affidavit of Thomas Dea*, sworn July 7, 2014, at para. 20.
[2] *Affidavit of James Riley*, sworn June 26, 2014, at Exhibit H.
[3] *Ibid*, at Exhibit I.
[4] *Ibid*, at Exhibit J.
[5] *Ibid*, at Exhibit K.

[5] A single reply was delivered by counsel for Catalyst. This letter, dated June 13, 2014, pointed out that the rejection of Catalyst's reliance on the non-competition and non- solicitation clauses failed to account for the fact that West Face was a direct competitor of Catalyst "…in a highly specialized field in which very sensitive and proprietary information is shared every day with trusted analysts such as Mr. Moyse". The response recognized the assurances provided in respect of confidential information, but concludes that they "do not go far enough."[6]

[6] These letters demonstrate two things of importance. The first is that West Face and Brandon Moyse, while they did not and do not dispute the enforceability of the confidentiality clause, were unprepared to recognize any substance to the concerns for confidentiality raised by Catalyst. The second is how quickly this turned litigious. In his first letter, counsel for Catalyst, having repeated the concern of his client that confidential information had been or would be given to West Face, said that the business interests of Catalyst "have been and will continue to be irreparably harmed" and referred to the "Remedies" provision in the agreement. The letter went on to say that Catalyst would consider any proposal that would answer "the current situation".[7] In his response, the lawyer acting for West Face complained that "no evidence to support your allegation that your client has suffered irreparable harm"[8] had been provided. This letter was written on June 3, 2014, which is to say, three weeks before Brandon was to start working at West Face (June 23, 2014) and only ten days after he had given his notice to Catalyst. It is difficult to see how such proof could be prepared so early and so quickly without any understanding of what Brandon Moyse had in his possession and could have or had delivered to West Face. West Face and Brandon Moyse simply gave their assurances; thereby denying there was any reason for concern. Their letters propose that either Catalyst accept their assurance or go to court. They volunteered nothing.

[7] Was Catalyst right? Was there any reason for concern?

MARCH 27, 2014 E-MAIL AND THE INVESTMENT MEMOS

[8] Thomas Dea deposed that, at the meeting on March 26, 2014, he requested that Brandon Moyse provide a copy of his resumé "so that I could circulate it to others at West Face".[9] What Thomas Dea did not say was that, at the meeting, he also requested that Brandon Moyse deliver samples of his research and writing.[10] Rather, further on in the affidavit, Thomas Dea indicated that "[s]ince the commencement if this litigation…West Face has conducted a diligent search of

---

[6] *Ibid*, at Exhibit L.
[7] *Ibid*, at Exhibit I.
[8] *Ibid*, at Exhibit J.
[9] *Affidavit of Thomas Dea*, sworn July 7, 2014, at para. 21.
[10] *Cross-examination of Thomas Dea*, July 31, 2014, at qq. 289-292, *Cross-examination of Brandon Moyse*, July 31, 2014, at q. 624. In making this request, Thomas Dea cautioned Brandon Moyes that that these writing samples should not contain confidential material.

its emails to determine whether there was any information of Catalyst disclosed by Brandon". He says that, as a result of the search, West Face found an e-mail, dated March 27, 2014, which delivered examples of the written work of Brandon Moyse.[11]

[9] Brandon Moyse deposed an affidavit he said was in response to two affidavits made in support of the application for an injunction.[12] The first of these was an affidavit of James Riley, the Chief Operating Officer of Catalyst; and the second, an affidavit of Martin Musters, a consultant retained by counsel for Catalyst to undertake a forensic examination of a computer that had been used by Brandon Moyse during his employment with Catalyst. Neither of these affidavits refers to the e-mail of March 27, 2014 and attached memos. Presumably for that reason, there is no mention of them in the affidavit of Brandon Moyse. It was not referred to and so it was not part of the response.

[10] What Brandon Moyse did say is that he was aware of "three potential investments" being considered by Catalyst. He reviewed his involvement with each and described Catalyst's interest and the information he had, and used, variously as "widely known", available "to any potential purchaser", "publically available" and containing "no confidential information".[13] He cited the paragraphs of the affidavit of James Riley this responds to and summarized them, as follows:

> Contrary to the allegations at paragraphs 8 and 67 of Mr. Riley's Affidavit, there was nothing confidential and proprietary in the methodology that I used to value certain investment opportunities while I worked at Catalyst. Rather, I used commonly used and well-known valuation methods.[14]

[11] In paragraph 8 of his initial affidavit, the first of the two paragraphs to which Brandon Moyse was responding, James Riley explained the harm that can arise if "… a competitor learns of the opportunities Catalyst is considering or studying, the investment models it is using for a particular situation, the methodology Catalyst is considering for acquiring control or influence, or the turnaround plan Catalyst is considering once it acquires control."[15] In paragraph 67, the second of the two paragraphs referred to, James Riley outlined the specific harm to Catalyst if Brandon Moyse is not compelled to comply with the non-compete clause and to return all confidential information to Catalyst.[16]

[12] James Riley swore a second and subsequent affidavit. It refers to the affidavit of Brandon Moyse and indicates that it was only upon its receipt that Catalyst learned that Brandon Moyse

---

[11] *Affidavit of Thomas Dea*, sworn July 7, 2014, at para. 42.
[12] *Affidavit of Brandon Moyes*, sworn July 7, 2014, at para. 2.
[13] *Ibid*, at paras. 9-13.
[14] *Ibid*, at para. 15.
[15] *Affidavit of James Riley*, sworn June 26, 2014, at para. 8.
[16] *Ibid*, at para. 67.

had sent "....Catalyst's confidential information to West Face as part of his efforts to secure employment there".[17] James Riley deposed that, prior to receiving the affidavit of Brandon Moyes, West Face did not inform Catalyst that it had received the memos attached to the e-mail of March 27, 2014.[18] He contested the assertions of Brandon Moyse that the information delivered was not confidential and publicly available:

> Moyse's analysis of active and potential investments contain highly confidential information belonging to Catalyst which Moyse should not have shared with a competitor such as West Face under any circumstances.[19]

[13] What is clear from this review is that, despite their assurances that there was no reason for concern, West Face and Brandon Moyse were both aware that memos, regarded by West Face as confidential, had been sent by Brandon Moyse to Thomas Dea with the e-mail of March 27, 2014. The memos, as delivered, each say on the first page, "Confidential" and "For Internal Discussion Purposes Only".[20] There can have been little doubt that West Face would have and did understand the perspective of those at Catalyst. Having received the memos, Thomas Dea circulated them to the other partners and a Vice-President at West Face.[21] He did this understanding that the information was confidential and of the concern associated with its disclosure. When he was cross-examined, Thomas Dea was asked and answered:

> Q. Did any of the partners, or did Mr. Zhu express any concern about the fact that Mr. Moyse had sent West Face Catalyst's confidential information?
>
> A. Yes. Prior to us extending the offer I discussed with one of the partners, with Tony, we were generally favourably disposed to his capabilities, but one concern we had was that he had conveyed confidential information to us, and I agreed with that, and so I asked our General Counsel to have a discussion with him specifically about that, to convey to him the seriousness with which we view the protection of confidential information, to make sure that -- and to explain that we'd have the highest expectation that he would uphold that if he were to come and work for us.[22]

[14] For his part, when cross-examined, Brandon Moyse professed not to understand what makes a memo confidential:

---

[17] *Affidavit of James Riley*, sworn July 14, 2014, at para. 12.
[18] *Ibid*, at para.13.
[19] *Ibid*, at para. 12.
[20] *Affidavit of Thomas Dea*, sworn July 7, 2014, at Exhibit L (The e-mail of Mach 27, 2014 and the enclosed "writing samples".
[21] *Cross-examination of Thomas Dea*, July 31, 2014, at q. 313.
[22] *Ibid*, at q. 335.

> Q. So what makes a memo confidential?
>
> A. I'm not sure really.[23]

And, later, in the same cross-examination, after some discussion about the substance of confidentiality:

> Q. Right. Right? It's the level of analysis, that's the work product that's being performed for your employer; you surely understand that.
>
> A. Yes.
>
> Q. And that's what makes it confidential.
>
> A. I don't know.
>
> Q. Do you disagree with that?
>
> A. I don't know what makes it confidential.[24]

[15] I note that, during the course of his submissions, counsel for Brandon Moyes acknowledged that it was an error to deliver these memos to West Face. He referred to this as a "rookie mistake". I assume this refers to the idea that Brandon Moyes was young and inexperienced. He may be. Often, the term "rookie mistake" is used in the context of professional athletics. In hockey or football, or any other sport, a "rookie" (a first-year player) who makes a mistake, and in so doing breaks the rules, is penalized in the same way as a more experienced participant. The fact that Brandon Moyes is young, and may be inexperienced, does not serve to decrease any responsibility or liability for the harm that may attach to his actions.[25]

[16] What appears to have happened is that, rather than be forthcoming and allow Catalyst to understand what had happened and to consider what, if any, impact there was to its business, West Face and Brandon Moyse determined to take the position that there was no impact. They sought to have Catalyst rely on their assurances that this was so. Once it became known that information that was considered by Catalyst to be confidential had been delivered, West Face and Brandon Moyse chose to argue that the information really should not be considered as being confidential or proprietary. On his cross-examination, Brandon Moyes was asked and said:

---

[23] *Cross-examination of Brandon Moyse*, July 31, 2014, at q. 429.
[24] *Ibid*, at qq. 435-437.
[25] During his cross-examination, Thomas Dea also referred to the delivery of these memos as a "rookie error" (*Cross-examination of Thomas Dea*, July 31, 2014, at q. 336). I confess I find this peculiar in circumstances where Thomas Dea says and Brandon Moyse acknowledges that when asked to provide samples of his written work, Brandon Moyse was cautioned not to send material that was confidential (see: fn. 10).

> Q. Okay. And in terms of the actual confidential information, you say it didn't include any confidential information, you don't mean to suggest again that the analysis that you're performing is not confidential?
>
> A. I don't believe it is. It was based on publicly available information.
>
> Q. Right. But lots of things are based on publicly available information, but the fact that you're performing an analysis that may not be readily available to the public is what makes it confidential. That's your work product is analyzing.
>
> A. I agree it's a work product and proprietary.
>
> Q. And that's what makes it confidential. That's what you're being paid for, to perform this analysis that's not publicly available.
>
> A. I multiply publicly available numbers by publicly available numbers. Like-minded people would have done the same thing.[26]

At this point, counsel for Catalyst makes the following comment and receives the following response:

> Q. You do far more than multiply, Mr. Moyes. Let's be fair. Anybody can take a calculator. You're not hired to be a calculator. You're hired to bring your experience and expertise in performing an analysis, right? That's why you're being paid $200,000 a year.
>
> A. One sixty-two.[27]

[17] Thomas Dea recognized that the information he received from Brandon Moyse was "confidential to Catalyst"[28]. Nonetheless, West Face concluded that the information disclosed was not particularly sensitive or damaging to Catalyst. Based on a review of the documents, West Face had concluded that the information in the documents was primarily a recitation of public information and contained a pedestrian analysis.[29]

[18] The determination of Brandon Moyse and those at West Face as to what constitutes confidential information that should be protected is too narrow. This is demonstrated by the assertion of Brandon Moyse that all he did he was to multiply publically-available numbers by

---

[26] *Cross-examination of Brandon Moyse*, July 31, 2014, at qq. 431-433.
[27] *Ibid*, at q. 434.
[28] *Cross-examination of Thomas Dea*, July 31, 2014, at q. 328.
[29] *Ibid*, at qq. 311-312.

publically-available numbers and that, in some way, this removes his work from being considered confidential. There is more to the question than that:

> A person who has obtained information in confidence is not allowed to use it as a springboard for activities detrimental to the person who made the confidential communication and springboard it remains even when all the features have been published or can be ascertained by actual inspection by any member of the public . . . the possessor of the confidential information still has a long start over any member of the public . . . the possessor of such information must be placed under a special disability in the field of competition in order to ensure that he does not get an unfair start.[30]

and:

> Even when all of the information becomes public, if an ex- employee is able, by information provided by or developed for the previous employer, to gain an advantage that the ex-employee would not have had if he or she had to check only public sources such ex-employee would still be liable for breach of confidence despite public disclosure. This reflects an obligation to pay for the advantage gained from the 'convenient' confidential source, or the head start that the disclosure had given such employee over other members of the public.
>
> What is really being protected in situations of this nature is the original process of mind. The protection is enforced against persons who wish to use the confidential information without spending time, trouble and expense of going through the same process. One can reconcile the springboard principle with the overriding principle denying confidence and information in the public domain, by describing the 'springboard' as a measure of the scope and duration of the obligation enforcing good faith upon an ex-employee while the rest of the world catches up.[31]

[19] When, in the letter sent by its counsel on June 3, 2014, West Face told Catalyst: "Your assertion that West Face induced Mr. Moyse to breach his contractual obligation to [Catalyst]

---

[30] *Terrapin Ltd. v. Builders Supply Co. (Hayes) Ltd.*, [1967] R.P.C. 375, at pp. 391-92, quoted in *Omega Digital Data Inc. v. Airos Technology Inc.*, 32 OR (3d) 21, at p. [29].

[31] *Matrox Electronic Systems Ltd. v. Godrow*, [1993] R.J.Q. 2249 (S.C.), at pp. 2463-64, quoted in *Omega Digital Data Inc. v. Airos Technology Inc.*, 32 OR (3d) 21, at p. [29].

is…baseless"[32], it may have been technically accurate. (This depends on how you interpret the fact that Thomas Dea asked for the samples of the work of Brandon Moyse.) However, it is clear that this and the other assurances found in the letter were written knowing that West Face had received information marked "Confidential" and that West Face was sufficiently concerned that it felt it was necessary to remind Brandon Moyse of his obligations. Despite this, West Face said nothing to Catalyst other than to provide, what I believe can fairly be called, its ineffectual assurances.

[20] Similarly, Brandon Moyse knew he had sent material marked "Confidential" and "For Internal Discussion Purposes Only" to West Face. More than that, he knew that the information it contained was confidential and should not have been given to West Face. Having come to this realization, he had deleted the e-mail:

> Q. Now, you yourself had actually deleted a copy of that March 27th email from your computer system, right?
>
> A. Yes.
>
> Q. And the reason you chose to delete that particular email, I take it, as opposed to other emails which you didn't delete, was because you thought that there was something perhaps improper about your having sent that email?
>
> A. Upon, further reflection after sending it, yes.
>
> Q. And that is what you thought was wrong about that? That you had disclosed confidential information to West Face?
>
> A. That I had disclosed information to West Face.
>
> Q. And you're not denying that your analysis and the analysis of other people at Catalyst in those memos that you did send to West Face was proprietary and that belonged to Catalyst?
>
> A. I agree it's proprietary.
>
> Q. And you're not denying I take it that the analysis that was performed, in particular – and we'll look in some detail at these presentations or memos. But some of the analysis that was performed was certainly confidential?
>
> A. Yes.

---

[32] *Supra*, (fn. 4).

> Q. In other words, it wouldn't be known by third parties?
>
> A. Yes.
>
> Q. The, how long did it take you to come to that realization?
>
> A. That I shouldn't have sent it?
>
> Q. Yes.
>
> A. I don't remember exactly.
>
> Q. And was around the time that you came to that realization that you thought you might cover your tracks deleting it?
>
> A. No. I deleted it within a week of sending it probably I just don't remember exactly the date.[33]

[21] Yet, in the letter sent, on behalf of Brandon Moyse, on June 5, 2014[34], nothing was said about this. The letter makes the general assertion to the effect that Brandon Moyes, in performing valuations of companies, did not use "proprietary valuation methodologies" and that while he is aware of "3 to 5 prospective acquisitions", he would not disclose any confidential information concerning them. He said he is prepared to sign a letter confirming he would abide by the confidentiality provisions in his contract of employment, an agreement to which he was already bound.

[22] What is apparent is that both West Face and Brandon Moyse did not provide information or respond to the concerns of Catalyst, in a meaningful way, until the evolution of this motion required them to do so. They waited until Catalyst discovered that information it considered to be confidential had been delivered before acknowledging there was an issue and then proclaimed that, based on their analysis, the material should not be considered to be confidential.

[23] This is to be contrasted to the approach taken by the defendants in *GDL Solutions In. v. Walker*.[35] In that case, a business was sold. As part of the sale, a non-competition provision was negotiated and agreed to. The vendor and others joined a new company that was in direct competition with the business that had been sold. It was alleged that they had misappropriated confidential information. Upon the commencement of the ensuing action, they undertook to and

---

[33] *Cross-examination of Brandon Moyse*, July 31, 2014, at qq. 412-420.
[34] *Supra*, (fn. 5).
[35] [2102] O.J. No. 3768; 2012 ONSC 4378.

did review their files and "promptly" returned all confidential proprietary information. They undertook to and did preserve the electronic and other records of the employees who had left.[36]

[24] In the case I am to decide, it is a question whether, in the end, the approach adopted by Brandon Moyse and West Face will meet the test that allows a party to obtain equity.

[25] It is important to note that Catalyst is adamant that the investment memos delivered with the March 27, 2014 e-mail were sensitive and confidential. [37] For his part, Brandon Moyse acknowledged that these memos may disclose strategies that Catalyst could employ in a given situation. In his cross-examination, Brandon Moyes did agree that these memos contain information that Catalyst would not want disclosed to a third party.[38] Thomas Dea acknowledged that West Face considered its investment strategies to be confidential and that West Face has a proprietary interest in protecting that confidentiality.[39]

THE AFFIDAVIT OF DOCUMENTS

[26] This is not the first time this motion for an interlocutory injunction has been to court. On July 16, 2014. Mr. Justice Firestone made a consent order imposing interim terms that were to remain in place until August 7, 2014, the date it was, at that time, anticipated that this motion would be heard. It was subsequently re-scheduled to today. The order of Mr. Justice Firestone includes the following term:

> THIS COURT FURTHER ORDERS that prior to the return of interlocutory motion, Moyse shall deliver a sworn affidavit of documents to Catalyst, including copies of Schedule 'A' documents, setting out all documents in his power, possession or control, that relate to his employment with Catalyst (the 'Documents'). Moyse shall also advise whether any of the Documents have been disclosed to third parties, including West Face, and the details of any such disclosure.

---

[36] *Ibid*, at para. 92.
[37] *Affidavit of James Riley*, sworn July 14, 2014, at para.12.

[38] *Cross-examination of Brandon Moyse*, July 31, 2014, at qq. 685-691.

[39] *Cross-examination of Thomas Dea*, July 31, 2014, at qq. 252-259.

[27] By letter, dated July 22, 2014[40], counsel for Brandon Moyse delivered an Affidavit of Documents, as required by the order of Mr. Justice Firestone. Like the letter, the Affidavit of Documents is dated July 22, 2014.[41] It lists 819 documents. The accompanying letter states that:

> Many (and possibly most) of the enclosed documents are public documents (publicly available financials/presentations/research, etc.) with many duplicates and various versions of the same document.[42]

[28] In a third affidavit, this one sworn on July 24, 2014, James Riley contests this understanding. From a review of the titles alone, he says that he, and a colleague, identified "at least 245 confidential documents that were in Moyse's possession on July 22, 2014".[43] He provides some examples:

- Document 27: a spreadsheet created by Catalyst to analyze the debt structure and asset valuation of an identified prospective investment. Catalyst used the spreadsheet to decide whether and how to invest in the situation and at what price.[44]

- Document 82: a presentation Catalyst gave to potential investment bankers it was interviewing to walk them through the concept, strategy and results of a situation. The aim was to explore the potential for debt and equity financing.[45]

- Document 88: is related to the presentation referred to in Document 82. It is a spreadsheet containing full details of the company's operating model, including projections on a granular, store-by-store basis.[46]

- Document 163: is one of many documents that contain Catalyst's analysis of information received pursuant to non-disclosure agreements.[47]

[29] James Riley summarizes this portion of his affidavit of July 22, 2014 with the following two paragraphs:

---

[40] *Affidavit of James Riley*, sworn July 28, 2014, at Exhibit B.
[41] *Ibid*, at Exhibit A.
[42] *Supra*, (fn. 38).
[43] *Affidavit of James Riley*, sworn July 28, 2014, at para. 5.
[44] *Ibid*, at para. 7.
[45] *Ibid*, at para. 8.
[46] *Ibid*, at para. 8.
[47] *Ibid*, at para. 9.

> The confidential documents identified by Michaud and I contain information that is not publicly available. In many cases, the documents disclose Catalyst's confidential financial modeling and/or analyses of situations and investments it is either considering or that it has invested in. In other cases, the documents shed insight into Catalyst's management of its investments, including its associates, which if shared with a competitor would give the competitor an insight into Catalyst's confidential operations.
>
> In all cases, the documents contained in the information that Moyse, as a former employee of Catalyst, should not have retained in his power, possession or control when he resigned from Catalyst, especially when he intended to immediately begin working for a competitor to Catalyst in the special situations investment industry.[48]

[30] As with the March 27, 2014 e-mail and enclosures, it took the processes of this motion before Catalyst learned that the documents it alleges are confidential had been retained by Brandon Moyse. In his initial affidavit, Brandon Moyse said:

> It is noteworthy that neither Mr. Riley nor Mr. Musters provide any actual evidence that I transferred information, confidential or otherwise, from Catalyst's services to my Dropbox or Box accounts or other personal devices. Instead, Mr. Riley and Mr. Musters rely solely on unsupported speculation and innuendo.[49]

[31] At his cross-examination, Brandon Moyse said that, when he made this statement, he did so in circumstances where his search of his personal electronic devices had not been "exhaustive enough".[50] He conceded that, at the time, he did have "confidential information on [his] personal computer devices".[51]

[32] It took the appearance before Mr. Justice Firestone and the order it produced to demonstrate that Brandon Moyse had retained documents belonging to Catalyst, some of them allegedly confidential. It is possible that there is more. At the cross-examination of Brandon Moyse, he could not say with absolute certainty that his most recent search had been exhaustive.[52]

---

[48] *Ibid*, at paras. 10-11.
[49] *Affidavit of Brandon Moyes*, sworn July 7, 2014, at para. 36.
[50] *Cross-examination of Brandon Moyse*, at qq. 326-331.
[51] *Ibid*, at qq. 343-344.
[52] *Ibid*, at qq. 332-333

[33] It bears asking if a party questions the concerns of the other as "speculation and innuendo" when it knew or should have realized that it was wrong to do so, does it come to court in a fashion that allows it to ask that equity balance in its favour?

[34] Having said this, counsel for Brandon Moyse, joined by counsel for West Face, pointed out that there is no evidence to suggest that any of these documents have been delivered to, or are in the possession of West Face. In the letter enclosing the Affidavit of Documents, counsel for Brandon Moyes, in compliance with the order of Mr. Justice Firestone, states: "save the March 27, 2014 email from [Brandon] Moyse to West Face Capital, there has been no documentary disclosure or dissemination to any third-party."[53]

THE PERSONAL COMPUTER OF BRANDON MOYSE

[35] The order of Mr. Justice Firestone included the following provisions:

> THIS COURT FURTHER ORDERS that Moyse shall turn over any personal computer and electronic devices owned by him or within his power or control (the "Devices") to his legal counsel, Grossman, Grossman and Gale LLP ("GGG") for the taking of a forensic image of the data stored on the Devices (the "Forensic Images"), to be conducted by a professional firm as agreed to between the parties.

[36] It is not just that documents thought by Catalyst to be confidential have been found in the possession of Brandon Moyse. On June 19, 2014, Catalyst learned that not only was Brandon Moyse leaving Catalyst, but also that he had accepted employment with West Face. Catalyst sees West Face as a competitor. Although the factum filed on behalf of West Face tends to minimize competition between the two firms ("…while West Face and Catalyst do compete in certain respects, their primary business focuses are different"[54]), at the hearing of the motion, counsel for West Face conceded the two firms do compete. The next day, on June 20, 2014, Computer Forensics Inc., a company that "…specializes in the retrieval of data from hard drives, servers, laptops, cell phones… and other devices"[55] was retained, on behalf of Catalyst, to produce a forensic image of a desktop computer that had been used by Brandon Moyse. Martin Musters is the Director of Forensics at Computer Forensics Inc. In the affidavit he swore, Martin Musters said that, as a result of the analysis undertaken in respect of the desktop computer, he was able to determine that, on specific dates, Brandon Moyes had accessed particular files[56]:

---

[53] *Affidavit of James Riley*, sworn July 28, 2014, at Exhibit B.
[54] *Factum of the Defendant/Responding Party, West Face Capital Inc.*, at para. 18.
[55] *Affidavit of Martin Musters*, sworn June 26, 2014, at para. 2.
[56] *Ibid*, at para. 11.

- on March 28, 2014, over an eleven-minute period, Brandon Moyse accessed a series of files from an 'Investors Letters' directory;[57]

- on April 25, 2014, over a seventy-minute period, Brandon Moyse accessed several files which contain the word 'Stelco' in the file directory or in the file name; [58]

- on May 13, 2014, over a sixty-one-minute period, Brandon Moyse accessed several files through his Dropbox account which had the name 'Masonite' in the file name;[59]

- also, on May 13, 2014, over a twenty-four-minute period, Brandon Moyse accessed several files from a '2014 Potential Investment' directory.[60]

- on May 26, 2014, at 12:31 p.m., Brandon Moyse accessed a document entitled '14-05-26 Notes' from a directory entitled 'Monday Meeting'.[61]

[37] Brandon Moyse has answers that explain each of these inquiries. He wanted to review the Investment Letters (March 28, 2014) because he was thinking of leaving Catalyst and wanted to understand what might be said about him if he left.[62] Brandon Moyse reviewed the Stelco files (April 25, 2014) out of personal curiosity. At the time, the transaction was no longer active.[63] The Masonite material (May 13, 2014) he reviewed was not found in files that belonged to Catalyst. It was part of an exercise associated with an interview process being conducted by, or on behalf of, Mackenzie Investments. The material was provided to Brandon Moyse by Mackenzie Investments or obtained from Masonite's website.[64] On May 13, 2014, Brandon Moyse also accessed files related to WIND Mobile. This was done as part of his duties at Catalyst. He was working on a chart to include in an investment memo.[65] Lastly, the reference to Monday Meeting Notes (May 26, 2014) were his notes for, not from, that meeting.[66]

---

[57] *Ibid*, at para. 12 and Exhibit C. The exhibit suggests that, at that time, Brandon Moysse accessed 18 "files".
[58] *Ibid*, at para. 13 and Exhibit D. The exhibit suggests that, at that time, Brandon Moyse accessed 63 "files".
[59] *Ibid*, at para. 14 and Exhibit E. The exhibit suggests that, at that time, Brandon Moyse accessed 43 "files".
[60] *Ibid*, at para. 14 and Exhibit F. The exhibit suggests that, at that time, Brandon Moyse accessed 29 "files".
[61] *Ibid*, at para. 15 and Exhibit G.
[62] *Affidavit of Brandon Moyes*, sworn July 7, 2014, at para. 45.
[63] *Ibid*, at para. 48.
[64] *Ibid*, at paras. 51-52.
[65] *Ibid*, at para. 55.
[66] *Ibid*, at para. 60.

[38] Martin Musters has indicated that he cannot determine whether any Catalyst files were transferred by Brandon Moyse from his computer to any other device[67]; for example; to any personal computer he owned. There is no evidence that any of the material accessed by Brandon Moyse through the files of Catalyst have been disclosed to West Face. On the other hand, there is no certainty that everything that was accessed has been disclosed or discovered through the work of Martin Musters. At his cross-examination, Brandon Moyse admitted that, between March and May 2014, he deleted documents.[68] As already noted, one of these was the e-mail of March 27, 2014.[69]

[39] Pursuant to the order of Mr. Justice Firestone, forensic images of the electronic devices belonging to Brandon Moyse have been created. They are being held in trust by his counsel. At this point, it appears that any evidence of the presence and use of any confidential information belonging to Catalyst would be found on the personal computers and other electronic devices of Brandon Moyes.

THE MOTION

[40] On June 19, 2014, counsel for Brandon Moyse wrote to counsel for Catalyst reiterating the assurance that had already been given and that Brandon Moyse remained "amenable to confirming these legal obligations in writing".[70] Any effort to resolve the issues having failed, counsel for Catalyst responded by e-mail to counsel for Brandon Moyse, with a copy to counsel for West Face. He indicated that he had received instructions to commence proceedings and went on:

> I will try to get our materials to you and [counsel for West Face] forth with, but in the event that we cannot get the matter heard before next Monday, we trust that no steps will be taken by each of your clients to alter the existing status quo prior to the matter being heard by the court.[71]

[41] The only response, also dated June 19, 2014, was from counsel for West Face. It said that Brandon Moyse had "agreed, contractually with West Face" that he would maintain confidentiality over any confidential information he had obtained through his employment with Catalyst. The letter reiterates that Catalyst had not provided any evidence that Brandon Moyse had breached those obligations and that a "confidentiality wall" had been put in place in respect

---

[67] *Affidavit of Martin Musters*, sworn June 26, 2014, at para. 18.
[68] *Cross-examination of Brandon Moyse*, at qq. 346-354.
[69] *Ibid*, at qq. 355-357; and, see para. [20], above.
[70] *Affidavit of James Riley*, sworn June 26, 2014, at Exhibit M.
[71] *Ibid*, at Exhibit N.

of a "telecom deal" that had been a particular concern of Catalyst. The letter indicated that any "litigation-related material" be directed to a particular lawyer in the firm.[72]

[42] Counsel for Catalyst took this as an indication that the status quo would not necessarily be maintained. On that basis, counsel "moved with urgency" to seek interim relief. Counsel for Catalyst says that receipt of the affidavits of Brandon Moyes and Thomas Dea, both sworn on July 7, 2014, "confirmed Catalyst's worst fears: [Brandon] Moyse had transferred Catalyst's confidential information to West Face....".[73] I understand this to refer to the e-mail of March 27, 2014, and the accompanying four "Investment Memos".

[43] As matters have developed:

- where West Face and Brandon Moyse provided assurance that no confidential information had been or would be received by West Face, material that Catalyst believes to be confidential had been delivered to West Face by Brandon Moyse; and,

- where Brandon Moyes challenged Catalyst on the basis that the allegation that he had maintained confidential information of Catalyst on his 'personal devices' was only speculation and innuendo, he has subsequently found such documents on a personal computer.

[44] Now, as part of the position taken on this motion, counsel for West Face and Brandon Moyse, submit that, in the absence of any immediate proof, the court should accept the assurances of Brandon Moyse that his accessing files of Catalyst between March 28, 2014 (two days after he met with Thomas Dea) and May 26, 2014 (two days after he resigned from Catalyst) was, in every respect, proper, innocent and should be of no concern to Catalyst.

[45] I repeat what was said at the outset. An injunction is an equitable remedy. Reliance on that premise is challenged where the assurances of parties who seek what equity offers are, based on past actions, open to question.

[46] The test for an interlocutory injunction is well-known. It asks three questions:

(i) Is there a serious issue to be tried?

(ii) Will the moving party suffer irreparable harm if the injunction is not granted?

---

[72] *Ibid*, at Exhibit O.
[73] *Plaintiff's Factum (Motion for Interlocutory Relief)*, at para. 31.

(iii) Where does the balance of convenience lie?[74]

(i) Is there a serious issue to be tried?

[47] There is a clause in the Employment Agreement signed by Brandon Moyse that deals with the requirement to maintain confidentiality. It says:

> You understand that, in your capacity as an equity holder and employee, you will acquire information about certain matters and things which are confidential to the protected entities, including, without limitation... and the like (collectively 'Confidential Information'). Further, you understand that each of the protected entities' Confidential Information has been developed over a long period of time and at great expense to each of the protected entities. You agree that all Confidential Information is the exclusive property of each of the protected entities. For greater clarity, common knowledge or information that is in the public domain does not constitute 'Confidential Information'.
>
> You also agree that you shall not, at any time during the term of your employment with us or thereafter reveal, divulge or make known to any person, other than to [Catalyst] and our duly authorized employees or representatives or use for your own or any other's benefit, any Confidential Information, which during or as a result of your employment with us, has become known to you.
>
> After your employment has ended, and for the following one year, you will not take advantage of, derive a benefit or otherwise profit from any opportunities belonging to the Fund to invest in particular businesses, such opportunities that you become aware of by reason of your employment with [Catalyst].

[48] It is not possible on an interlocutory motion to determine if such a clause has been breached. The threshold is low:

> It is not possible on an interlocutory motion with conflicting affidavit evidence to determine finally whether or not the plaintiff is entitled to succeed at trial and whether or not the defendants are, in fact, guilty of copying or misappropriating confidential information acquired from the plaintiff. The test, as these cases hold, is whether there is a serious question to be tried. The Supreme Court in RJR MacDonald made it clear that, as Justices Sopinka and Cory put it: 'The threshold is a low one. The judge on the application must make a preliminary assessment of

---

[74] *R.J.R.- MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311; [1994] S.C.J. No. 17, at paras. 82-85.

> the merits. . . . A prolonged examination of the merits is generally neither necessary nor desirable'.[75]

[49] It is necessary that the threshold be low in light of the evidentiary challenges which face a moving party in cases involving confidential business information:

> In cases involving confidential business information misuse can rarely be proved by convincing direct evidence. In most cases employers must construct a web of perhaps ambiguous circumstantial evidence from which the Court may draw inferences which convince it that it is more probable than not that what employers alleged happened, did in fact take place. Against this often delicate construct of circumstantial evidence there frequently must be balanced the testimony of employees and their witnesses who directly deny everything.[76]

[50] The parties agree that the Confidentiality clause applies to Brandon Moyse. It is enforceable. Given the evidence that the Investment Memos included with the e-mail of March 27, 2014 are marked confidential, were recognized as such by Thomas Dea and could demonstrate strategies in a narrow, competitive business, I have no trouble in finding that the standard has been met. There is a serious issue to be tried. This conclusion is strengthened by the demonstration that, despite his assurances to the contrary, there were confidential documents on personal electronic devices belonging to Brandon Moyse.

[51] This does not fully resolve the issue of whether the first of the three components of the test for an interlocutory injunction have been met. Counsel for Catalyst seeks an order that Brandon Moyse be prohibited from "commencing or continuing employment at [West Face] until December 25, 2014".[77] Counsel for West Face submitted that this request engages the non-competition clause also found within the Employment Agreement of Brandon Moyse. Counsel said only if that clause is enforceable and has been breached, can the court restrain Brandon Moyse from working. It is not clear that this is so. If it is apparent that without such restraint breaches of the confidentiality clause would or could be expected to continue and cause irreparable harm, why would it not be open to the court to require that a former employee not work in order to ensure the promised confidentiality is maintained? Thomas Dea had no compunction about taking documents he recognized as confidential and distributing them to other partners and senior management. Brandon Moyse had difficulty understanding the line that separates what is confidential from that which is not.

---

[75] *Omega Digital Data Inc. v. Airos Technology Inc.*, 32 O.R. (3d) 21, [1996] O.J. No. No 5382 (Gen, Div.), at para. 10.
[76] *Ibid*, quoting *Matrox Electronic Systems Ltd. v. Godrow*, [1993] R.J.Q. 2249 (S.C.), at p. 2246.
[77] *Notice of Motion*, dated June 26, 2014, at para. (f).

[52] The non-competition clause found in the contract of employment of Brandon Moyse states:

> You agree that while you are employed by the Employer and for a period of six months thereafter, if you leave of your own volition or are dismissed for cause and three months under any other circumstances, you shall not, directly or indirectly within Ontario:
>
> > (i) engage in or become a party with an economic interest in any business or undertaking of the type conducted by [Catalyst] or the Fund or any direct Associate of [Catalyst] within Canada, as the term Associate is defined in the *Ontario Business Corporations Act* (collectively the 'protected entities'), or attempt to solicit any opportunities of the type for which the protected entities or any of them had a reasonable likelihood of completing an offering while you were under [Catalyst]'s employees; and
> >
> > (ii) render any service of the type outlined in subparagraph (i) above, unless such services are rendered as an employee of or consultant to [Catalyst].
>
> [Emphasis by underlining added]

[53] It may be that covenants in restraint of trade are generally unenforceable as contrary to the public interest. Nonetheless, reasonable restraints of trade may be enforceable:

> The jurisprudence has recognized the reasonableness of restrictive covenants in two circumstances: (i) covenants which restrain competition by an employee with his former employer, and (ii) those restraining the vendor of a business from competing with its purchaser.[78]

[54] The validity of a restrictive covenant of employment is subject to a two-stage inquiry: the proponent of the covenant (in this case, Catalyst) must establish that it is reasonable, as between the parties, at which point the party seeking to challenge the covenant (in this case, Brandon Moyse) bears the onus of proving that the covenant is contrary to the public interest.[79]

[55] Reasonableness is to be determined by examining the details of the case being considered:

---

[78] *The Dent Wizard (Canada) Ltd. v. Catastrophe Solutions International Inc.* 2011 ONSC 1456, at para. 10.

[79] *Ibid.*

> The test of reasonableness can be applied, however, only in the peculiar circumstances of the particular case. Circumstances are of infinite variety. Other cases may help in enunciating broad general principles but are otherwise of little assistance.
>
> . . .
>
> The validity, or otherwise, of a restrictive covenant can be determined only upon an overall assessment, of the clause, the agreement within which it is found, and all of the surrounding circumstances.[80]

[56] In *The Dent Wizard (Canada) Ltd. v. Catastrophe Solutions International Inc*.[81], Mr. Justice David Brown posited that, where the nature of the employment may result in the employee gaining significant influence over the employer's customers, a non-solicitation covenant might be inadequate to protect the employer's interests and a non-competition clause would be reasonable.[82] Could it be that a similar idea is raised here? Could it be that the same principle applies to the potential harm arising from the misuse of confidential information? Counsel for Catalyst suggests that there may be circumstances where the advantage gained by the employee in taking and mis-using confidential information demonstrates that a confidentiality covenant will be inadequate to protect the employer's proprietary interests.

[57] In such circumstances, the non-competition clause would be available to protect against the harm caused by a breach of the confidentiality clause.

[58] For their part, counsel for West Face and Brandon Moyse say that the non-competition clause is ambiguous and overbroad and, on that basis, is unreasonable and unenforceable.[83] Counsel for West Face referred to the wording of the clause and pointed to the following areas of concern:

- What is the scope of the restraint? What "Fund" is being referred to? What businesses are caught by the terms "Associate" and "undertaking of the type conducted by Catalyst"?

- What is the time duration that would reasonably protect the interests of Catalyst, is it three months or six month?

---

[80] *Elsley v. J.G. Collins Ins. Agencies*, [1978] 2 S.C.R. 865, at pp. 923-924, quoted in *The Dent Wizard (Canada) Ltd. v. Catastrophe Solutions International Inc., supra*, (fn. 75), at para. 11.
[81] *Supra*, (fn. 75).
[82] *Ibid*, at para. 17. In saying this, the Court referred to *Elsley v. J.G. Collins Ins. Agencies, supra*, (fn. 77), at 926-7.
[83] *KRG Insurance Brokers (Western) Inc. v. Shafron* 2009 S.C.C. 6, 2009 CarswellOnt 79, at para. 27.

- What is the reasonable geographic limit? Is it Ontario, as stated in the contract, or should it be Toronto?[84]

[59] This kind of dissection is not helpful. It considers the issue of whether the clause is reasonable out of any context and presumes no knowledge of the business involved:

> It is important, I think, to resist the inclination to lift a restrictive covenant out of an employment agreement and examine it in a disembodied manner, as if it were some strange scientific specimen under microscopic scrutiny.[85]

[60] Presumably, the requirement that a non-competition clause not be ambiguous is so that the limits it imposes are clearly understood by the employee. The prescription that it should not be overly-broad is to allow the employee to find work and not be limited in that regard by the overreaching of the employer. There is a question as to whether such concerns are warranted in the present case. In *GDL Solutions Inc. v. Walker*, in examining the scope of a restrictive covenant, Madam Justice C.J. Brown took into account what the employee would have known and understood:

> The plaintiff submits that on cross-examination, Walker agreed that he understands what the terms 'same as' and 'competitive with' mean.[86]

[61] It cannot be that Brandon Moyse was unaware that working for West Face was going to be a breach of the clause. The firms compete. Brandon Moyse knew it. In an e-mail, dated February 8, 2013, he observed:

> They've [meaning West Face] been hammered on one activist play we're [meaning Catalyst] looking at (though we don't like)---and we're fighting them on a different distressed name right now.[87]

[62] In *GDL Solutions Inc. v. Walker*, the judge found that a non-competition clause covering businesses "similar to or competitive with" the business of concern (in that case, a business that had been sold) was not vague. "Similar to" is plain language. It is clear what it means.[88] The same could be said for "any business … of the type conducted by [Catalyst]."[89]

---

[84] See para. [52], above where the non-competition clause is quoted and each of these terms underlined.
[85] *Elsley v. J.G. Collins Ins. Agencies, supra*, (fn. 77), at pp. 923-924, quoted in *The Dent Wizard (Canada) Ltd. v. Catastrophe Solutions International Inc., supra*, (fn. 75), at para. 11.
[86] *GDL Solutions Inc. v. Walker, supra*, (f.n. 35), at paras. 61-63.
[87] *Affidavit of James Riley*, June 26, 2014, at Exhibit D.
[88] *GDL Solutions Inc. v. Walker, supra*, (fn. 35), at para. 63.
[89] See para. [52], above.

[63] For the purposes of the non-competition clause, "Associates" is to be taken as defined in the *Ontario Business Corporations Act*. Catalyst has only seven. The clause only applies to four of them. The other three are not located "within Canada".[90] It may be, as suggested by counsel for West Face and Brandon Moyse, that as a result of there being an "Associate" in the restaurant business[91], Brandon Moyse is unable, during the currency of the clause, to work in that industry.[92] I do not agree that this would have a "profound effect on [Brandon] Moyse's career options".[93] The clause, in these circumstances, is only effective for six months. It may be, as was suggested during the course of the hearing, that Brandon Moyse never did any work with the restaurant company, but he has made it plain that he reviewed files he was not working on. It is in the nature of its business that Catalyst would have various investments. I do not find it unreasonable that it would, for a brief time, seek to protect them all.

[64] Catalyst and West Face are in the same city. Regardless of whether "Ontario", as used in the non-competition clause, is vague when examined outside any particular context or whether, as suggested on behalf of Catalyst, the boundaries of "Toronto" are difficult to determine with certainty, it must have been clear that going to work with a competitor in Toronto would offend the clause.[94]

[65] It was suggested that there was some uncertainty as to how long the non-competition clause was to be effective. Was it six months? Was it three months?[95] The difference is both understandable and justified. When an employee leaves of his own volition or is terminated for cause, the company will not be ready. If the parting is cordial, or accompanied by working notice, the employer will be able to prepare. The employer will not require protection of the same duration.

[66] Taken as a whole, read in context, I would not be prepared to find the non-competition clause unreasonable.

[67] Little was said and I am not prepared to find that the public interest militates against the acceptance of this non-competition clause. There are two competing policy concerns. On the one hand, there is a reticence to allow a restraint of trade. On the other hand, parties should be left free to contract.[96] In this case, there was consideration to be accounted for by Brandon Moyse if

---

[90] *Ibid*.
[91] National Markets Restaurant Corporation described as a retail food and restaurant company.
[92] *Cross-examination of James Riley*, July 29, 2014, at q. 591.
[93] *Factum of the Responding Party, Brandon Moyse*, at para. 69.
[94] Catalyst is or was located at 77 King Street West, Royal Trust Tower, TD Bank Centre in Toronto (see: *Affidavit of James Riley*, sworn June 26, 2014, at Exhibit A) and West Face Capital is located at 2 Bloor St. East, in Toronto (see: *Statement of Claim*).
[95] See para. [52], above.
[96] *GDL Solutions Inc. v. Walker*, *supra*, (fn. 34), at para. 44, quoting *Elsley v. J.G. Collins Ins. Agencies*, *supra*, (fn. 79), at pp. 923-924.

he was considering leaving Catalyst. In addition to his base salary and annual bonus, Brandon Moyse participated in "Catalyst's 60/40 Scheme", whereby sixty percent of the carried interest from Catalyst's investment funds is allocated to the professionals who participated on the deals made by the fund. By May 2014, that is, within one- and-a-half years of his joining Catalyst, Brandon Moyse had accrued over $500,000 in this scheme.[97]

[68] In the circumstances, I find that there is, at least, a serious case to be tried:

- Was information confidential to Catalyst delivered to West Face and was it used by West Face to the detriment of Catalyst?

  and

- Was the non-competition clause found in the employment contract of Brandon Moyse enforceable and, if it was enforceable, has it been breached?

[69] Counsel for West Face and counsel for Brandon Moyse say that, in the circumstances, this is not enough to demonstrate that the first test from *R.J.R.- MacDonald v. Canada (Attorney General)*[98] has been met. Counsel for Brandon Moyse relied on cases which demonstrate that "when the injunction sought is intended to place restrictions on a person's ability to engage in their chosen vocation and to earn a livelihood, the higher threshold of a strong *prima facie* case is the more appropriate test to be applied".[99]

[70] In *Kohler Canada Co. v. Porter,* [100] the defendant had worked for Kohler, in its plumbing products business, since his graduation from university in 1988. He was promoted from time to time until he became Sales Manager for Central and Western Canada, In 2001, for the first time, he was asked to sign an employment contract. It contained a non-competition clause. He signed without giving the matter much thought. In 2002, he accepted a job, offered by a competitor, with more responsibility and better pay. Kohler sought an injunction to restrain its former employee from working for his new employer on the grounds that he was in breach of the agreement he had signed. The judge observed that the overwhelming preponderance of case authority supported applying the strong *prima facie* test in non-competition injunction cases. The higher standard was not met; the injunction was refused.

---

[97] *Affidavit of James Riley*, sworn June 26, 2014, at paras. 11-13 and 16; *Affidavit of James Riley*, sworn July 14, 2014, at para. 9; and, *Cross-examination of Brandon Moyes*, July 31, 2014, at qq. 160-168 .
[98] *Supra*, (fn. 72).
[99] *Jet Print Inc. v. Cohen*, 1999 CarswellOnt 2357 (Sup. Ct. J.), at para. 11, relying on *Gerrard v. Century 21 Armour Real Estate Inc.* (1991), 35 C.C.E.L. 128, 4 O.R. (3d) 191, 35 C.P.R. (3d) 448 (Ont. Gen. Div.); and see: *Kohler Canada Co. v. Porter* 2002 CarswellOnt 2009 14-16.
[100] *Ibid*, (*Kohler Canada Co. v. Porter*).

[71] In the case I am asked to decide, there is a strong *prima facie* case that Brandon Moyse had breached the confidentiality clause of his Employment Agreement. He has taken and delivered to his new employer confidential information which may demonstrate strategies his former employer used in a narrow and competitive business. Upon receipt, the new employer understood the material would be seen by the former employer as confidential, warned the employee that he should do nothing similar with any information he obtained while in its employ and distributed the information to each of the partners and a Vice-President. When the former employer raised concern, it was met with assurances that did not stand up. It is difficult to see how, in such circumstances, the higher standard should necessarily inure to the benefit of the employee and the new employer. Put another way, it is with this analysis that the direction that one who seeks equity should do equity becomes relevant to this situation.

[72] In *Jet Print Inc. v. Cohen*,[101] a principal of the plaintiff had two brothers. They worked for the company. They both fell out with their brother (the principal of the company): one because he was accused of submitting fraudulent invoices to the plaintiff; and the other because the plaintiff did not pay him a bonus he said he was owed. Subsequently, the brothers who had left went into business for themselves. The plaintiff brought a motion for an interlocutory injunction prohibiting the two brothers from soliciting the business of the plaintiff, contrary to the employment agreements they had entered into. The higher standard, the requirement that there be a strong *prima facie* case, was applied. The motion did not succeed. In that case, the non-competition clause was so onerous that it made it almost impossible for the two brothers to work. First, it applied for two years. Second, under the terms of the employment agreement, they were not permitted to solicit work from any client of the employer. "Client" was defined to include "...clients existing at the time of the termination of the contractual relationships together with any clients during the proceeding year [*sic*] and any prospective clients to which the Employer had a presentation within the proceeding two years [*sic*]." The employment agreement went on to specify that any breach of these restrictions "...will cause irreparable injury to the Employer and that any money damages will not provide an adequate remedy to the Employer".[102] At the time the employment agreement was presented, the two brothers (the employees) were denied the time to seek legal advice. They were instructed that they must sign the agreements and were not provided with copies until after the litigation seeking the injunctions against them had been commenced. It is not difficult to see that these agreements were unremittingly burdensome, unfair and contrary to the broader public concern that people should be permitted to work. If the contract had been sustained, employers could effectively ruin the careers of former employees and make it impossible for them to continue to earn a living in areas of work with which they were familiar.

[101] *Ibid.*
[102] *Jet Print Inc. v. Cohen, supra*, (fn. 72), at para. 5.

[73] This is not the case here. Where the employee left of his or her own volition, the non-competition clause at issue would apply for six months. Brandon Moyse left Catalyst on June 23, 2014. This matter was heard on October 27, 2014. If an order is made requiring Brandon Moyse to abide by the non-competition clause, it can be for no longer than to December 22, 2014, that is less than two months. Moreover, counsel for Catalyst, while not agreeing, acknowledged that it would be possible for the court to order that Catalyst pay the salary of Brandon Moyse for the few weeks remaining before the non-competition clause expires. This situation is not comparable to that confronting the two brothers in *Jet Print Inc. v. Cohen*. There is no long-term inability to work and there need be no short-term material loss.

[74] The better view is that the failure to satisfy the higher standard does not inexorably lead to the refusal of an interlocutory injunction. In *GDL Solutions Inc. v. Walker*, Madam Justice C. J. Brown considered the impact of any determination that there was more than a serious issue to be tried. She considered several lines of cases and opted for the view that, where a strong *prima facie* case can be made out, there is no need to give great regard to the second and third parts of the injunction test (irreparable harm and the balance of convenience). Where only a serious issue to be tried can be established, greater regard should be given to those considerations:[103]

> …[I]n the case of an interlocutory injunction to restrain a breach of a negative covenant, irreparable harm and the balance of convenience need to be still considered. The extent of the consideration, however, will be directly influenced by the strength of a plaintiff's case. Even where there is a clear breach of a negative covenant which is reasonable on its face, the issues of irreparable harm and balance of convenience cannot be ignored. They may, however, become less of a factor in reaching the final determination of the issue depending on the strength of the plaintiff's case.[104]

[75] In this case, I do not propose to forego or limit consideration of the second and third parts of the test for an interlocutory injunction. For that reason, I see no reason to go beyond finding that there is a serious issue to be tried and, on that basis, to conclude that the first part of the test

---

[103] *GDL Solutions Inc. v. Walker, supra*, (fn. 35), at para. 34.

[104] *Van Wagner Communications Co., Canada v. Penex Metropolis Ltd.*, [2008] O.J. No. 190 (S.C.), at para. 39, leave to appeal refused, [2008] O.J. No. 1707 (Div. Ct.). In coming to this conclusion, Mr. Justice Pattillo "pointed to statements from *Canada (Attorney General) v. Saskatchewan Water Corp.*, [1991] S.J. No. 403, at para. 37 (Sask. C.A.), which had been adopted in *CBJ International Inc. v. Lubinsky*, [2002] O.J. No. 3065 (Div. Ct.); and see Sharpe, *Injunctions and Specific Performance*, looseleaf, (Toronto: Canada Law Book, 2013, at para. 9.40:

> ….The stronger the plaintiff's case, however, the less emphasis should be placed on irreparable harm and balance of convenience and, in cases of a clear breach of an express negative covenant, interlocutory relief will ordinarily be granted.

has been met. Before going further, it may be as well to recall that the three tests which mark the standard for the granting of an interlocutory injunction are, in any event, not to be seen as a checklist:

> The list of factors which the courts have developed – relative strength of the case, irreparable harm and balance of convenience – should not be employed as a series of independent hurdles. They should be seen in the nature of evidence relevant to the central issue of assessing the relative risks of harm to the parties from granting or withholding interlocutory relief.[105]

> *(ii) Will the moving party suffer irreparable harm if the injunction is not granted?*

[76] I turn to irreparable harm. Catalyst is concerned that the delivery of confidential material will, or has, put it at a competitive disadvantage. In particular, reference was made to a "telecom situation". This refers to a matter that was clearly of some sensitivity. West Face constructed a "confidentiality wall". While there is considerable disagreement about its effectiveness, the fact that it was put in place substantiates the concern. As already noted, among the Catalyst documents accessed by Brandon Moyse on May 13, 2014, were files related to WIND Mobile.[106] As I understand it, this relates to the "telecom situation" of concern. The chart Brandon Moyse was working on was to be included with an investment memo. The delivery of the information it contained would be advantageous to West Face, which had an interest in the same opportunity. Unfair competition can lead to irreparable harm:

> Cases of unfair competition have often been recognized as ones in which damages may not adequately compensate the plaintiff for the loss suffered due to the defendant's conduct. Not only is it difficult to quantify the loss of goodwill or market share suffered by the plaintiff due to the defendant's actions, but the damage to relationships with customers is inherently difficult to assess. In a competitive industry, where there can be considerable fluidity of customer allegiances, it may be difficult for the moving party to establish an accurate measure of damages.[107]

[77] As this suggests, misappropriation and use of confidential information can give rise to irreparable harm:

---

[105] *Ibid*, (Sharpe, *Injunctions and Specific Performance* looseleaf), at para. 2.630.
[106] See para. [37], above.
[107] *Precision Fine Papers Inc. v. Durkin*, [2008] O.J. No. 703, at para. 25, which, in turn, refers to *EJ Personnel Services Inc. v. Quality Personnel Inc.* (1985), 6 C.P.R. (3d) 173 (Ont. H.C.J.); *Sheehan & Rosie Ltd. v. Northwood*, 2000 CarswellOnt 670 (S.C.J.); and, *KJA Consultants Inc. v. Soberman*, 2002 CarswellOnt 467 (S.C.J.).

> Messa has no way of knowing the extent to which Phipps might be using successfully any confidential information from Messa to effectively compete with Messa; and therefore Messa cannot easily quantify damages in this action.[108]

[78] In such circumstances, it is not possible to quantify the damage. The harm that may be caused would be irreparable. In this case, the problem is underscored by the apparent uncertainty of Brandon Moyse as to what is confidential information, that he accused Catalyst of innuendo and speculation as to the possibility that he had maintained confidential information when, in fact, he had and that information that was considered by Catalyst to be confidential and was marked as such had been delivered to West Face despite assurances that suggested the contrary. This points, again, to the proposition that those seeking to rely on equity must act in a fashion that is consistent with the request; they have to do equity. In this situation, how can the court be certain that, if Brandon Moyse goes to work for West Face, confidential information won't slide through some crack in whatever protections are erected? I am not sure it can be. This is all the more true where Thomas Dea, rather than returning the material, decided, in effect on behalf of Catalyst, that the material was not confidential and distributed it to partners and a Vice-President at West Face.

(iii) Where does the balance of convenience lie?

[79] To take into account the balance of convenience, I turn to the possible impact on Brandon Moyse. I cannot see how delaying his career at West Face until December 22, 2014 would have any lasting effect.

[80] I pause to point out that the order of Mr. Justice Firestone contains the following paragraph:

> THIS COURT FURTHER ORDERS that the above terms are being agreed to on a without prejudice basis and shall not be voluntarily disclosed by the parties. The parties are agreed and request that the court hearing the interlocutory motion shall not consider or draw any inference from the terms of this consent order.

[81] I draw no inference from this order. On the other hand, it is difficult to ignore the fact that, pursuant to this order, Brandon Moyse agreed to be bound by the non-competition clause in his Employment Agreement until this interlocutory injunction is determined. This being so, he has not been at work. An order requiring him to continue to abide by the non-competition clause would prevent him from working at West Face for approximately seven more weeks. This does not, nor would the full six months, constitute irreparable harm. Nor will it have any short term effect if Calalyst is required to continue to pay Brandon Moyse while he waits for the period affected by the non-competition clause to wind down.

---

[108] *Messa Computing Inc. v. Phipps*, [1997] O.J. No. 4255, at para. 32.

[82] The balance of convenience favours Catalyst.

CONCLUSION

[83] This is not a case where the actions of Brandon Moyse and West Face demonstrate that equity should balance in their favour. In the circumstances, I make the following orders:

In order to ensure that any information, confidential to Catalyst, that may remain in the possession of Brandon Moyse is not provided to West Face.

1. An interlocutory injunction enjoining the defendant, Brandon Moyse, or anyone acting on his behalf or at his direction from using, misusing or disclosing any and all confidential and/or proprietary information, including all records, materials, information, contracts, policies, and processes of The Catalyst Capital Group Inc.

To ensure that Brandon Moyse does not, through carelessness, by accident or with intention, communicate information, confidential to Catalyst, to representatives of West Face and, thus, create unfair competition.

2. A further interlocutory injunction enjoining the defendant, Brandon Moyes, from engaging in activities competitive to Catalyst in compliance with the non-competition clause of his employment agreement (clause 8) until its expiry six months after his leaving his employment with The Catalyst Capital Group Inc., being December 22, 2014.

3. On the understanding that, as a result of this order, Brandon Moyse will be unable to commence his employment with West Face until December 22, 2014, The Catalyst Capital Group Inc. shall pay Brandon Moyse his West Face Capital Inc. salary until December 21, 2014.

Finally, counsel for Catalyst submitted that an independent supervising solicitor should be identified and required to review the forensic images that have been created and held in trust by counsel for Brandon Moyse to identify what, if any, material these images may contain that are confidential to Catalyst. What is personal to Brandon Moyse would be returned to him. Counsel for Brandon Moyse opposed this request. It would be an extraordinary order. It is the view of counsel for Brandon Moyse that material that is confidential to Catalyst will have to be produced. It should be left to Brandon Moyse to review and determine what must be produced. The difficulty with this is that it is another assurance where those made in the past were not sustained.

4. The forensic images that were created in compliance with the order of Mr. Justice Firestone shall be reviewed by an independent supervising solicitor identified, pursuant to a protocol to be jointly agreed to by counsel for the parties, or, failing such agreement, by way of further direction of the court.

5. The review of the forensic images by the independent supervising solicitor shall be completed before any examinations-for-discovery are conducted in this action.

[84] The order will recognize the undertaking made by The Capital Catalyst Group Inc. that it will comply with any order regarding damages the court may make in the future, if it ultimately appears that this order ought not to have been granted, and that the granting of this order has caused damage to Brandon Moyse and West Face Inc. for which The Capital Catalyst Group Inc. should compensate them.

COSTS

[85] If the parties are unable to agree as to costs, I will consider written submissions on the following terms:

1. On behalf of The Catalyst Capital Group Inc., within fifteen days of the release of these reasons, such submissions are to be no longer than five pages, double-spaced, not including any Bill of Costs, Costs Outline or caselaw that may be referred to.

2. On behalf of Brandon Moyse, within ten days thereafter, such submissions ae to be no longer than four pages, double-spaced, not including any Bill of Costs, Costs Outline or caselaw that may be referred to.

3. On behalf of West Face Capital Inc., within ten days thereafter, such submissions are to be no longer than four pages, double-spaced, not including any Bill of Costs, Costs Outline or caselaw that may be referred to.

4. If necessary, in reply, on behalf of The Catalyst Capital Group Inc., within five days thereafter such submissions to be no longer than four pages, double-spaced (two pages with respect to any submissions made on behalf of Brandon Moyse and two pages with respect to any submissions made on behalf of West Face Capital Inc.).

LEDERER J.

Released: 20141110

CITATION: The Catalyst Capital Group Inc. v. Moyse, 2014 ONSC 6442
COURT FILE NO.: CV-14-507120
DATE: 20141110

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

– and –

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants

JUDGMENT

LEDERER J.

Released: 20141110

CITATION: Catalyst Capital Group Inc. v. Moyse, 2016 ONSC 5271
COURT FILE NO.: CV-16-11272-00CL
DATE: 20160818

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

BETWEEN:	)	
	)	
THE CATALYST CAPITAL GROUP INC.	)	Rocco DiPucchio, Andrew Winton and Bradley Vermeersch, for the Plaintiff
Plaintiff	)	
	)	Robert A. Centa, Kris Borg-Olivier and Denise M. Cooney, for the Defendant Brandon Moyse
– and –	)	
BRANDON MOYSE and WEST FACE CAPITAL INC.	)	
	)	Kent E. Thomson, Matthew Mile-Smith and Andrew Carlson, for the Defendant West Face Capital Inc.
Defendants	)	
	)	
	)	**HEARD:** June 6, 7, 8, 9, 10 and 13, 2016

NEWBOULD J.

TABLE OF CONTENTS

Page No.

REASONS FOR JUDGMENT

Nature of action

[1] The Catalyst Capital Group Inc. (“Catalyst”) brings this action against West Face Capital Inc. (“West Face”) for an alleged misuse of confidential Catalyst information regarding WIND Mobile Inc. (“WIND”) that Catalyst claims was obtained by West Face from the defendant Brandon Moyse who had previously worked for Catalyst before joining West Face. Catalyst claims that West Face used that confidential Catalyst information to successfully acquire an interest in WIND.

[2] Both Catalyst and West Face are Toronto-based investment management firms and have been competitors on potential deals. They were competitors in the chase for WIND.

[3] West Face was part of a consortium that acquired WIND. Before it did so, Catalyst was a bidder for WIND and had an exclusive right for a period of time to negotiate a purchase. When Catalyst failed to conclude a purchase of WIND, West Face and its consortium partners acquired an indirect interest in WIND on September 16, 2014 based on an enterprise value of WIND of $300 million.

[4] Mr. Moyse was an analyst at Catalyst for a little under two years. He left Catalyst in May 2014 and worked at West Face for three and a half weeks from June 23 to July 16, 2014. It is alleged that at some time between March 14, 2014 when Mr. Moyse first spoke to West Face and July 16, 2014 when he stopped working at West Face he gave West Face confidential information regarding Catalyst's strategy to acquire WIND that was used by West Face to structure its bid for WIND.

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

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

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

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

Assessment of the evidence

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

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

[10] In this case, the evidence in chief for all witnesses was given by way of affidavits, and all witnesses were cross-examined at the trial. There is great benefit in proceeding this way. What it can lead to in some cases however, as to some extent in this case, is the repetition of evidence by more than one witness. This occurred, for example, in Messrs. Glassman and De Alba of Catalyst both stating in their affidavits that Mr. Moyse "led the preparation" of a PowerPoint presentation that Catalyst used in making a presentation to Industry Canada in Ottawa. This

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

evidence was given to support the assertion of the deep knowledge that Mr. Moyse possessed of the strategic position being taken by Catalyst with the Government and thus with the negotiating strategy that Catalyst was taking with VimpelCom Ltd. regarding the acquisition of WIND. As I will discuss, this evidence was an overstatement of what occurred.

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

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

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

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

(d) Yet from the start Government officials had made clear that no such concessions would be given. Mr. Glassman's own email of May 7, 2014 stated that he had been told by Catalyst's public relations consultant Mr. Bruce Drysdale, who had extensive experience in working with the Government, that the Government would not give in writing the right to sell spectrum in five years and that this took his preferred option to set up a fourth retail carrier in Canada off the table. Catalyst's lawyers Faskens advised Catalyst on July 25, 2014 that the current Government had made it clear that any proposed transfer of commercial mobile spectrum to an incumbent would be subject to very close scrutiny and, in the current climate, most unlikely to succeed. Mr. Glassman's response was that he had more experience in this than the writer did, which was clearly not the case. On July 25, 2014 Mr. Drysdale said that Industry Canada reached out to him and said that seeking concessions was a dead end. Mr. Glassman's response was that he had more experience in this than Mr. Drysdale did, which was clearly not the case, and he went so far as to say that no one in Canada had the experience except him. On August 3, 2014 Mr. Drysdale told Mr. Glassman that Industry Canada, the PCO/PMO and Prime Minister Harper were entrenched on this. Mr. Glassman's response was that the email confirmed to him that the Government was trying desperately to set the table for future discussion about regulatory concessions. When pressed further on the email, Mr. Glassman said "with the greatest of respect, there is a big difference between people's words and people's

> actions. We were depending on people's actions. And that is a very telling development." There was no evidence of any Government action that could lead one to expect the Government would relent and grant concessions. Nor is there a single contemporaneous document evidencing Mr. Glassman's view of a softening of the Government's position or that eventually the Government would grant concessions.

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

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

[14] I viewed the West Face witnesses as being straightforward. They were impressive and did not engage in overstatement. They were not any more argumentative than most intelligent witnesses although Mr. Griffin had a tendency from time to time to stray from the question. On

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

[15] Criticism is made by Catalyst of the truthfulness of the evidence of Mr. Moyse. He admittedly wiped his BlackBerry before giving it back to Catalyst. He deleted during the hiring process with West Face an email sent to West Face that included confidential Catalyst information not involving WIND. He wiped his internet browsing history from his personal computer before turning it over to his counsel to permit an image to be taken of his hard drive to look for any communications by him of confidential Catalyst information to West Face. He acknowledged at trial his error in doing these things, but it raised a question of why he had done those things and whether his explanations were to cover up improper activity in providing confidential Catalyst information regarding WIND to West Face. I have therefore given a critical eye to all of Mr. Moyse's evidence. On the crucial point of the case I have accepted his evidence that he did not communicate anything about Catalyst's dealings regarding WIND to West Face.

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

Brief history of WIND

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

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

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

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

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

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

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

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

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

[26] Verizon was a bidder but chose in late 2013 not to pursue it. At this point, VimpelCom had grown increasingly frustrated with its inability to either acquire voting control of WIND or to conclude a transaction to allow it to exit the investment. In addition to its voting and non-voting shares, VimpelCom held (both directly and through Orascom) over $1.5 billion in debt

owed by WIND, which WIND had no way of re-paying. WIND was also subject to approximately $150 million in third party vendor debt that was coming due on April 30, 2014. WIND's tenuous financial position at the time created a real risk that its creditors would call its debt, put WIND into insolvency, and allow its creditors to recover the proceeds from the sale of WIND's assets.

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

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

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

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

[31] On August 7, 2014 Tennenbaum on behalf of itself and West Face and 64NM Holdings (the vehicle set up by LG Capital LLC for the WIND acquisition) sent a proposal to VimpelCom

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

Brandon Moyse's role at Catalyst

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

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

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

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

[36] As an analyst, Mr. Moyse performed financial and qualitative research both on Catalyst's potential investment opportunities, and on portfolio companies already owned by Catalyst. During his last six months at Catalyst, Mr. Moyse spent the majority of his time working on two Catalyst portfolio companies. His responsibilities on these portfolio companies required him to

spend a significant amount of time outside the office, and he spent approximately half his time travelling throughout the United States.

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

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

[39] In the case of the WIND project, it would not have been necessary for Mr. Moyse to be intimately involved in all of the strategic decisions and I do not think he was. Although Mr.

Glassman testified that Mr. Moyse would have been involved in all discussions regarding strategy, and asserted that Mr. Moyse had the most knowledge of the WIND file, he admitted on cross-examination that Mr. De Alba, the chief negotiator on the WIND initiative, had more knowledge than Mr. Moyse on the WIND file. That is hardly surprising.

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

[41] On March 7 and 8, 2014, after he was assigned to the core telecommunications team, Mr. Moyse prepared a *pro-forma* statement that showed a combined WIND and Mobilicity entity. This was done under Mr. Michaud's supervision. Mr. Moyse collected data which was either publicly available or known to Catalyst, and then performed basic arithmetic to yield the final product. Mr. Michaud identified the specific data inputs he wanted to assess for the combined entity (i.e. network value, spectrum value, subscribers). No knowledge of Catalyst's plans or strategy was required for Mr. Moyse to complete this assignment. Mr. De Alba has blown out of all proportion what this assignment involved.

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

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

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

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

[46] Nor do I accept Mr. Glassman's undocumented and unspecified assertion that Mr. Moyse was privy to all of Catalyst's deal priorities, internal conclusions, formal and informal discussions with Catalyst's advisors, and any advances Catalyst had made with the regulators on

these issues leading up to the March 27, 2014 meeting with the Government of Canada. Great store by Catalyst witnesses is put on what were described as Monday morning meetings that were said to be required meetings at which it is said that full discussion of all aspects of the proposed WIND opportunity was regularly held. I have difficulty with this evidence. Mr. Glassman described them as Monday morning meetings in his affidavit but in evidence at trial said they were over lunch. He testified there was a schedule of what was to be discussed and that their proprietary software produced a package for everyone to take a copy of at the beginning of the meeting. Yet no notes of any kind have been produced by Catalyst regarding these Monday meetings and Mr. Glassman said he had no idea why they had not been. Mr. De Alba testified that only a one-page agenda was prepared for the meetings and that no written materials were generally prepared. He also testified that it would not be the general practice for any presentation regarding WIND to be prepared for the meetings. In answer to undertakings, Catalyst stated that Catalyst's investment team has reviewed all notebooks and notes and could not locate any existing notebooks or notes concerning WIND.

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

that he could not recall specific discussions at a Monday meeting in which Catalyst's strategy with the Government or VimpelCom was discussed.

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

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

[2] Catalyst contends that in his earlier affidavit of July 7, 2014, filed for the pending injunction motion that did not proceed, Mr. Moyse understated at paragraph 11 his role at Catalyst regarding WIND and that this is an indication that Mr. Moyse has something to hide about the extent of his knowledge of WIND. I do not accept that contention. In the affidavit Mr. Moyse stated that he had typed notes of Mr. De Alba, Mr. Riley and Mr. Michaud into a PowerPoint presentation in the Mobilicity file. In his evidence he said that was his recollection at the time and that he was wrong as it was in the WIND file that the PowerPoint presentation was made. There was no PowerPoint in the Mobilicity file. Mr. Moyse was obviously mistaken and I do not accept that Mr. Moyse intentionally misled the Court. There was also a mistake in paragraph 56 of the affidavit in which Mr. Moyse said he was not privy to any internal discussions about the strategy behind Catalyst's potential acquisition of WIND. He was privy to the extent he participated in the preparation of the PowerPoint, and Mr. Moyse readily acknowledged at trial he was partly wrong but said that he didn't remember at the time the details of the PowerPoints given how frantic the pace of work was, and in terms of structuring, was still not sure he really knew anything about that. I do not accept that Mr. Moyse intended to mislead the Court.

were later destroyed by Catalyst, said by Mr. Glassman to have been at the request of Government personnel.[3]

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

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

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

largely administrative role, Mr. Moyse put little thought or analysis into the PowerPoint, and whatever work he did, he was instructed to do by one of Messrs. De Alba, Michaud or Riley.

[52] Mr. Moyse left for Southeast Asia on a vacation on May 16, 2014. He resigned by email from Catalyst on May 24, 2014, the second last day of his vacation. He told Mr. De Alba when they met in person on May 26, 2014 that he was going to work at West Face. Mr. Moyse was sent home by Mr. Riley on May 26, 2014, and he did no further Catalyst work after this date. Catalyst contacted its IT provider to revoke Mr. Moyse's access to Catalyst's servers.

Mr. Moyse's hiring by West Face

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

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

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

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

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

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

[59] Catalyst is quite critical of Mr. Moyse in sending the memoranda and of West Face in how it dealt with them, and invites inferences to be drawn from what it says is the cavalier way

in which West Face treated confidential information. In general, I agree with West Face that this issue is a red herring with little or no substance regarding the alleged obtaining and misuse by West Face of confidential Catalyst information. The memoranda had nothing to do with WIND or the confidential Catalyst information alleged to have been obtained and used by West Face.

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

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

[62] On May 30, 2014 counsel for Catalyst wrote to Mr. Boland, the CEO of West Face, and gave notice of a six month non-compete provision in Mr. Moyse's employment agreement with Catalyst and a confidentiality provision. The letter expressed concern that Mr. Moyse had or would be providing confidential Catalyst information to West Face. On June 3, 2014 employment counsel to West Face replied to counsel for Catalyst and took the position that the

non-compete provision was unenforceable. The letter also stated that West Face had impressed on Mr. Moyse that he was not to divulge any confidential information he had obtained while employed at Catalyst.

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

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

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

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

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

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

Test for breach of confidence

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

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

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

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

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

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

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

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

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

> The general rule with respect to inference drawing is that the inference must be reasonably and logically drawn from a fact or group of facts established by evidence. The first step in the inference-drawing process is that the primary facts which provide the basis for the inference must be established by the evidence. Inferences can be drawn on the basis of reasonable probability.

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

> 52. A trier of fact may draw factual inferences from the evidence. The inferences must, however, be ones which can be reasonably and logically drawn from a fact or group of facts established by the evidence. An inference which does not flow logically and reasonably from established facts cannot be made and is condemned as conjecture and speculation. As Chipman J.A. put it in *R. v. White* (1994), 89 C.C.C. (3d) 336 at p. 351, 28 C.R. (4th) 160 (Nfld. C.A.):
>
> > These cases establish that there is a distinction between conjecture and speculation on the one hand and rational conclusions from the whole of the evidence on the other. The failure to observe the distinction involves an error on a question of law.

Allegation of breach of confidence

[76] Catalyst contends that a number of things were confidential to it and that the confidential information was conveyed to West Face by Mr. Moyse. Catalyst contends that the information in its presentations to the Government contained key confidential information, including (i) that Catalyst was in advanced discussions with VimpelCom to gain control of WIND[5], (ii) that to

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

build a fourth wireless carrier, which was the Government of Canada's stated goal, would require concessions from the Government including an unrestricted ability to sell the business to an incumbent (Rogers, Bell or Telus) in five years, and (iii) that if the Government did not agree to such concessions, litigation would likely follow against the Government (by someone other than Catalyst) caused by the Government's retroactive change to the 2008 spectrum licenses which would likely be successful and force the Government to give concessions. That retroactive change precluded new entrants from indefinitely selling its spectrum to an incumbent carrier. The earlier licences had permitted such a sale after five years.

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

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

[79] Catalyst claims that Mr. Moyse knew that Catalyst would not bid for WIND without the agreement being conditional on regulatory approval that provided concessions permitting WIND

---

stated that the purchase price for WIND was $500 million, which was far less than the price of $300 million that VimpelCom through UBS made known to Catalyst when it began its negotiations in May, 2014.

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

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

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

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

[6] I reject the assertion made by Catalyst on the last day before the trial that in the interview of Mr. Moyse by Mr. Zhu, the vice-president of West Face, on April 15, 2014 they discussed WIND. The notes made by Mr. Zhu of the brief interview with Mr. Moyse list a number of things under a heading of Catalyst, including “live deals”. Mr.

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

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

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

---

Zhu’s evidence is that he had no discussion with Mr. Moyse about WIND and that the reference to “live deals” was that Mr. Moyse said he had been working on live deals at Catalyst. He said he did not ask Mr. Moyse what the deals were and Mr. Moyse did not say what they were. Mr. Zhu was a straightforward witness and I accept his evidence. It would be sheer speculation to read into the words “live deals” a reference to any particular deal or to WIND.

Catalyst to negotiate with VimpelCom. Mr. Leitner's evidence was not shaken at all and I accept it.

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

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

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

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

[90] Mr. Griffin of West Face had seen press discussion in 2013 of an interest of Catalyst in Mobilicity and WIND and of combining them and Mr. De Alba acknowledged that by 2013 at the latest, there was public discussion of Catalyst's interest in merging Mobilicity and WIND.

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

[91] Mr. Leitner’s evidence was that when he learned that VimpelCom had granted an exclusivity negotiating period to a party, he was fairly confident that the other party was Catalyst, given that Catalyst had been actively seeking financing in the market. He testified that Tennenbaum is a debt provider and that in that capacity had been told that there was a party looking for financing for an upstart wireless carrier in Canada and he presumed that to be Catalyst as it could not be West Face. Mr. Leitner was very knowledgeable of the wireless industry in North America and it would not have been a stretch for him to think that Catalyst was a bidder at the time for WIND. In an email of July 21, 2014 Mr. Leitner told Mr. Boland of West

Face and said that he "heard Catalyst is seeking exclusivity this week". His evidence was that he was assuming without actual knowledge that Catalyst was a bidder and seeking exclusivity. I accept his evidence that he did not know for certain that Catalyst was a bidder. However, even if someone had told Mr. Leitner that week that Catalyst was seeking exclusivity, it would not have been information he got from West Face (or from Mr. Moyse through West Face) as he would have had no reason to email West Face to tell them what he had heard. The week in question was long after Mr. Moyse had left Catalyst on May 26, 2014 and Mr. Moyse was in no position to know in July what Catalyst was doing with VimpelCom.

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

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

[94] Regarding the offer made by the consortium to acquire WIND based on an enterprise value of $300 million, this price was made known to the market place by VimpelCom as early as April, 2014. At that time, West Face was attempting to acquire WIND on its own without consortium partners. On April 21, 2014 Mr. Griffin, the lead partner on the WIND file for West Face, told Mr. Boland, the President and CEO of West Face, that he had had a discussion with Mr. Lacavera a few days before in which he was told that VimpelCom were sellers of their interest in WIND at a "$300 million EV". On May 4, 2014, West Face sent VimpelCom and the other shareholders of WIND a proposal to address VimpelCom's required deal terms that included a purchase of 100% of WIND's equity, based on the $300 million enterprise value that

had been communicated by Mr. Lacavera of Globalive and by VimpelCom's financial advisor UBS Securities. On June 10, 2014 UBS again told West Face that the objective for VimpelCom was a clean exit at a $300 million enterprise value. On July 23, 2014 Mr. Friesel of Oak Hill, who at the time was interested in WIND, advised West Face, Tennenbaum and LG Capital that UBS had called to say that VimpelCom had entered into exclusivity at the reserve price of $150 million, which amount when added to the debt of $150 million resulted in an enterprise value of $300 million. It was also reported in the press on July 31, 2014 that VimpelCom had put a $300 million price tag on WIND.

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

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

[97] Mr. Griffin's evidence is that West Face knew that any transaction involving a change of control of WIND and a transfer of its spectrum licenses would require regulatory approval, but West Face did not see the need for any concessions in terms of future transferability of spectrum. He said that based on West Face's due diligence efforts and analysis of WIND and the regulatory environment, West Face was confident Industry Canada would approve any sale to West Face. West Face concluded that the regulatory considerations were manageable and ultimately not a material risk to West Face's investment thesis. Mr. Griffin's evidence was that all that West Face wanted from Industry Canada was more certainty regarding when, how, and at what cost WIND would be able to acquire additional spectrum to upgrade its network from a 3G (third generation) wireless network to an LTE ("long term evolution" or fourth generation) network. Mr. Griffin

testified that West Face did not believe that WIND or purchasers of WIND would need the ability to sell spectrum after five years. In his words, WIND was a business "that could stand on its own two feet with the right ownership structure and the right oversight from management. We knew this was a business that would turn into a solid business and a credit that arm's length parties would be willing to underwrite".

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

[99] A further proposal by West Face to VimpelCom and the other shareholders of WIND made on June 3, 2014 provided for $160 million in bridge financing to fund the repayment of WIND's existing third party vendor debt and the entering into a share purchase agreement for 100% of WIND for deferred contingent consideration of $100 million, payable to VimpelCom upon West Face obtaining sufficient spectrum within 12 months to support WIND's LTE rollout strategy. The response of UBS on behalf of VimpelCom was that VimpelCom wanted a clean

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

exit at a $300 million enterprise value and that VimpelCom was not prepared to have any portion of the proceeds contingent on a future event such as the acquisition of spectrum.

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

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

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

[103] Tennenbaum then reached out to West Face as a potential debt financing party as Tennenbaum's $300 million proposal to VimpelCom had included the refinancing of the $150

million vendor debt. Tennenbaum had worked with West Face before and knew that West Face was a Canadian entity knowledgeable of the telecom sector in Canada and well known. In early June 2014, Tennenbaum had discussions with West Face but at that stage West Face was not interested in going in with Tennenbaum. In July 2014, Oak Hill Capital and Blackstone lost interest and so Tennenbaum again approached West Face. LG Capital, a U.S. firm, had earlier been in discussions with Tennenbaum and became a member of the consortium.

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

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

[106] The intent of the proposal was that the acquisition of VimpelCom's interest in WIND was the first step of a two-step process. The second step would later be taken effectively to reorganize the entities that funded step one to become direct owners of WIND which would

require regulatory approval as it would then have amounted to a change of control of WIND. Mr. Leitner's evidence was that this two-step process was proposed to him by Mr. Guffey of LG Capital and it was then discussed with the other members of the group[8].

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

[108] In his affidavit, Mr. Leitner stated that the "advantage" of their August 7, 2014 proposal was to meet VimpelCom's desire for a speedy transaction that carried little to no regulatory risk to VimpelCom. It was put to him on cross-examination that he was referring to an advantage of the proposal over the Catalyst offer that was being dealt with by VimpelCom and that Tennenbaum and the consortium knew from Mr. Moyse that Catalyst could not waive regulatory approval. Mr. Leitner denied this and said the advantage referred to was an advantage over the earlier proposal made by Tennenbaum with Oak Hill Capital and Blackrock that was for control of WIND that would require Governmental approval. As I read Mr. Leitner's affidavit, his explanation makes sense and I accept it. He knew that VimpelCom wanted a deal with no risk of Governmental rejection and it was an advantage to VimpelCom to have an offer without such a

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

condition. In any event, there is no evidence to support an inference that whatever the advantage was, Mr. Leitner obtained his information from Mr. Moyse.

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

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

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

belief that ownership of the outstanding debt of WIND that was in default would end up in their obtaining equity ownership of WIND in an insolvency proceeding under the CCAA. Mr. Griffin shared this view.

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

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

[113] Catalyst lays great store on this email and contends that it could only have been written by Mr. Leitner with knowledge of the terms of the Catalyst offer to VimpelCom. Unfortunately this email was not put to Mr. Leitner on his cross-examination and it would be unfair to him to

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

draw conclusions as to his knowledge and where it came from. Mr. Burt of 64NM testified that they assumed, but did not know, that Catalyst's bid would be conditional on obtaining regulatory approval, because VimpelCom's standard form of agreement included such a term. Given that evidence, and the lack of cross-examination of Mr. Leitner on the email, I would not find that the statement of Mr. Leitner regarding the consortium’s proposal being superior because it did not require regulatory approval was based on any knowledge by him of the Catalyst bid or that it came from Mr. Moyse. The same can be said for the balance of the email.

[114] I accept the evidence of Mr. Leitner that the proposal made by him to VimpelCom on behalf of the consortium on August 7, 2014 and the ultimate deal made with VimpelCom was not based on anything that Catalyst was doing but rather was based on what Tennenbaum had concluded from its own due diligence and understanding of WIND and its prospects and of the lack of regulatory risk to what it was proposing. I accept his evidence that the lack of a need for regulatory concessions, and the lack of a need for a condition in the offer to VimpelCom of Government regulatory approval, were not based on or derived from any knowledge of what Catalyst was doing with VimpelCom or of Catalyst's regulatory strategies.

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

[116] The evidence of Mr. Burt is to the same effect as Mr. Leitner. Mr. Burt worked with Mr. Guffey at LG Capital and was a member of the investment vehicle 64NM used to acquire the interest in WIND held by VimpelCom. He worked alongside Mr. Guffey on this acquisition. Their view was that there would be no issue with their participation in the consortium because

they had discussed the idea previously with the Government. Their view was that with the set-aside AWS3 spectrum auction, WIND could be a viable stand-alone business. Mr. Burt's evidence was that LG Capital had no knowledge of the details of Catalyst's offer or negotiations with VimpelCom. They assumed, but did not know that Catalyst's bid would be conditional on obtaining regulatory approval, because VimpelCom's standard form of agreement included such a term. I make the same findings regarding 64NM as I do with respect to Mr. Leitner.

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

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

Did West Face make use of any Catalyst confidential information?

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

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

[11] Mr. Glassman's evidence was that the industry generally held the view that Government regulations would have to change for a transaction such as the acquisition of WIND to work and that another bidder such as West Face would either assume or know that Catalyst was putting such a proposition to the Government. If this central point to the

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

[122] The basic strategy of Catalyst was based on its belief that WIND could not survive without Government concessions that would allow WIND to sell its spectrum to an incumbent by the end of five years. Even had West Face or its consortium members been told of this strategy by Mr. Moyse or anyone else, it played no part in the reasoning of West Face to bid as it did by itself and later with the consortium. West Face did not hold the same view regarding the need for concessions and held the view that so long as WIND would be able to acquire additional spectrum to upgrade its network from a 3G (third generation) wireless network to an LTE ("long term evolution" or fourth generation) network, which was made clear by the Industry Canada announcement on July 4, 2014, WIND would be a viable business. The other consortium members held the same view.[12]

[123] For the same reason, even if Mr. Moyse disclosed to West Face the views of Mr. Glassman that the potential litigation by some other party against the Government would force the Government to grant concessions and that the Government was therefore softening its

---

argument of Catalyst in this case was something that Catalyst believes a bidder such as West Face would assume, Catalyst is in no position to say that the information of what it was putting to the Government was confidential.

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

position on concessions, that disclosure played no part in the decision of West Face to make the bids that it did.

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

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

[13] I have considerable doubt of the plausibility of any theory that the Government would change its position on granting concessions based on Mr. Glassman's statements to Industry Canada or anyone else in Government. Mr. Glassman was the chief architect of Catalyst's regulatory strategy. The *NextWave* case that Mr. Glassman put so much store on does not appear to be of much if any relevance to the issue. While Mr. Glassman obtained a law degree, he never practised law. He admitted he is no specialist in communication law or the law concerning the management of wireless spectrum in Canada. It is difficult to accept that based on his analysis the Government would soften its position. The Government never said that it would. Mr. Drysdale, the Government relations expert retained by Catalyst made clear to Catalyst that the Government had said it would not grant concessions to Catalyst and that Industry Canada, the PCO/PMO and Prime Minister Harper were entrenched on this. Mr. Acker of Faskens, Catalyst's lawyers, an experienced communications lawyer advised Catalyst on July 25, 2014 that the current Government had made it clear that any proposed transfer of commercial mobile spectrum to an incumbent would be subject to very close scrutiny and, in the current climate, most unlikely to succeed.

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

Did Catalyst suffer any detriment or compensable damage?

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

[127] Catalyst has failed to establish that it suffered any detriment by any misuse of Catalyst confidential information. There is no evidence that the bid of the consortium of August 7, 2014 was even looked at by the board of VimpelCom during the period of exclusivity with Catalyst, or that it played any part in the position taken by VimpelCom with Catalyst that it wanted a break fee from Catalyst. It was that position taken by VimpelCom that caused Catalyst to terminate discussions with VimpelCom.

[128] On August 11, 2014 the Chairman of the Board of VimpelCom advised Mr. De Alba that the Board was concerned about the Government's behaviour and wanted protection in case the Government did not approve the transaction. The Chairman advised Catalyst that VimpelCom insisted on a new term that provided for a $5-20 million break fee if regulatory approval was not granted within 60 days. Mr. Glassman was furious and told his people on August 11, 2014 as well as Mr. Levin of Faskens who was advising Catalyst that VimpelCom had to announce the deal publicly that day or else there would be no deal. He stated "I am fed up. I do not want to hear a single more excuse from them". On August 14, 2014 Mr. Glassman told his people that the deal was technically dead or in deep trouble. The next day Mr. Levin advised that VimpelCom was "out to lunch and I think we should tell them". Mr. Babcock of Morgan Stanley, Catalyst's financial advisor, advised Catalyst to tell VimpelCom that "and then down communication. This needs to go past the exclusivity time and [VimpelCom] needs to see his alternatives and their terms."

[129] Catalyst then told VimpelCom that the request for a break fee was unacceptable and it shut down communications and let the period of exclusivity expire. It was after that that

VimpelCom and the consortium, including West Face, concluded a deal. Mr. Glassman acknowledged in his evidence that the reason the deal between Catalyst and VimpelCom fell through was because of the break fee that VimpelCom requested that Catalyst would not agree to.

[130] For the same reason, Catalyst has not established that it suffered any damages. Catalyst has not established that but for the misuse by West Face of the confidential Catalyst information that it says West Face was given by Mr. Moyse it would have acquired WIND from VimpelCom. It was Catalyst's refusal to agree to a break fee requested by VimpelCom that caused Catalyst to end negotiations with VimpelCom.

[131] There is another reason why Catalyst has not established any damages from misuse of confidential Catalyst information. It is clear that VimpelCom would not agree to any deal that carried any risk of the Government not approving the deal. Mr. Glassman's evidence throughout was that Catalyst would not agree to a deal without Government concessions permitting the sale of spectrum to an incumbent in five years. Mr. Riley in his affidavit of February 18, 2015 stated that during the exclusivity period, the only point over which VimpelCom and Catalyst could not agree was regulatory approval risk. Catalyst wanted to ensure that its purchase was conditional on receiving regulatory concessions from Industry Canada, but VimpelCom would not agree to the conditions Catalyst sought. Given that evidence, and VimpelCom's refusal to agree to a deal that contained any such condition, there was no chance that Catalyst could have successfully concluded a deal with VimpelCom.[14]

[14] Several drafts of an agreement between Catalyst and VimpelCom were exchanged. VimpelCom continuously refused to agree to a condition that would make closing the deal conditional on the Government granting concessions on transferring spectrum to an incumbent. In the last draft that Mr. Saratovsky of VimpelCom and Mr. De Alba agreed was substantially settled, it provided in section 6(d) that before closing Catalyst could not (i) develop, evaluate or analyze any studies, analyses, reports or plans relating to the sale of the Business, or any of its assets, by the Purchaser to an Incumbent; or (ii) discuss with any Governmental Authority the sale or transfer of the Business, or any of its assets, by the Purchaser to an Incumbent. In light of that, I have difficulty with the position of Mr. Glassman that he would not close without Government concessions regarding spectrum, unless he intended to breach the terms of the agreement. Section 6(e) did permit Catalyst after closing to pursue regulatory concessions from Industry Canada that WIND had been seeking. Mr. De Alba's said on cross-examination that he did not think WIND had been seeking concessions to permit the sale of spectrum to an incumbent and agreed that if Catalyst had signed that agreement, it would not have been able before closing to seek concessions from the Government about

Spoliation

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

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

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

[135] Spoliation is an evidentiary rule that gives rise to a rebuttable presumption that destroyed evidence would be unfavourable to the party that destroyed it. Catalyst argues that spoliation in

---

selling spectrum to an incumbent.. Mr. De Alba asserted that section 6(e) would permit Catalyst to seek concessions on the sale of spectrum if Catalyst were to operate a wholesale business with WIND and not a retail business. I do not understand what would give Catalyst that right but in any event it is clear that Catalyst was interested in acquiring WIND to operate a retail operation.

this case should be recognized as an independent tort. In argument Catalyst contended that damages could be assessed against Mr. Moyse and that an award covering the costs of the case would be appropriate. Catalyst also contended that West Face would be liable for the same amount on a theory of vicarious liability.

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

(1) the missing evidence must be relevant;

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

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

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

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

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

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

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

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

[141] Mr. Moyse's evidence is as follows. He understood that pursuant to the order of July 16, 2014, a forensic image would be created of his computer's hard drive for the purpose of determining what, if any, documents he had in his possession that related to Catalyst or to the issues raised in Catalyst's lawsuit. He was not concerned that his devices would be reviewed to identify relevant documents that related to Catalyst or to the issues raised in Catalyst's lawsuit as he had good, reasonable explanations for every Catalyst-related document that would be found and intended to disclose all such documents in his affidavit of documents, as required under the order. He was troubled that Catalyst would have access to his personal internet browsing history, and in particular that he had accessed adult entertainment websites. He was concerned that it might become part of the public record in this litigation.

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

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

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

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

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

[147] Catalyst has not established that Mr. Moyse looked at any documents in his Dropbox account dealing with Catalyst's WIND initiative or that he did so in order to discuss them with

West Face. Nor has Catalyst established that any evidence that might be relevant to this litigation was destroyed by the wiping of Mr. Moyse's internet browsing history.

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

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

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

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

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

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

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

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

> My conclusion is based on a number of factors. The program was purchased and paid for. The Secure Delete feature is a function of a program called the advanced system optimizer, and when you load -- when you launch advanced system optimizer, you get a home screen, and the Secure Delete feature is not on the home screen. There are about five options, if you will, on the left-hand side, one of them is security and privacy. If you then go to the security and privacy, it gives you, I believe, three options, one of them being Secure Delete. Underneath the Secure Delete it says this is how you permanently erase a file, its contents, never to be recovered, and then you launch -- then you click on that Secure Delete feature to launch that function. That's when the folder gets created. I draw my conclusion in 13 on the fact that the program was bought, paid, installed, it wasn't easy to get to that function, and it was done on the night before the ISS was to examine the computer.

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

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

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

concluded is too coincidental, as stated by Mr. Musters. Mr. Moyse's evidence that he has used the ASO software to optimize or clean up his computer since it has been returned to him was not challenged.

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

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

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

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

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

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

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

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

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

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

Conclusion

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

Newbould J.

Released: August 18, 2016

COURT OF APPEAL FOR ONTARIO

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

Doherty, MacFarland and Paciocco JJ.A.

BETWEEN

The Catalyst Capital Group Inc.

Plaintiff (Appellant)

and

Brandon Moyse and West Face Capital Inc.

Defendants (Respondents)

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

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

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

Heard: February 20 and 21, 2018

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

REASONS FOR DECISION

I

[1] The appellant, The Catalyst Capital Group Inc. ("Catalyst"), and the respondent, West Face Capital Inc. ("West Face"), two investment management firms, made separate efforts to acquire WIND Mobile Inc. ("WIND") in 2014. In early August, it appeared that Catalyst and the principal shareholder of WIND had reached an agreement for the sale of WIND to Catalyst. Within days, that agreement had fallen apart and West Face, along with other entities (the "consortium") had come forward with a new, and eventually, successful bid for WIND. The consortium and West Face later sold WIND for a very substantial profit to Shaw Communications.

[2] In this lawsuit, Catalyst alleged that West Face effectively "stole" the WIND deal from Catalyst by improperly using confidential information West Face obtained about Catalyst's strategies in respect of its negotiations for the purchase of WIND. According to Catalyst's claim, the confidential information came from the respondent, Brandon Moyse ("Mr. Moyse"). He had worked for Catalyst as an analyst for about two years until May 2014 when he quit Catalyst to go to work for West Face.

[3] Mr. Moyse had worked on the WIND file while at Catalyst, although the extent of his involvement in the file was a matter of dispute in the evidence. He

also actively pursued employment with West Face while at Catalyst and while involved in Catalyst's attempts to acquire WIND.

[4] In the lawsuit, Catalyst alleged that the misuse of confidential information by West Face and Mr. Moyse caused damage to Catalyst. Catalyst also sought an accounting of the profits made by West Face and the consortium when Shaw Communications purchased WIND from the consortium.

[5] In addition to the claims based on the misuse of confidential information, Catalyst sued West Face and Mr. Moyse for spoliation. This claim arose out of Mr. Moyse's destruction of what Catalyst claimed was relevant evidence contained on Mr. Moyse's cellphone and his personal computer. Catalyst advanced spoliation as a distinct tort claim, alleging damages equal to Catalyst's costs in pursuing the misuse of confidential information claim. Catalyst also advanced spoliation as an evidentiary rule available to assist Catalyst in proving the misuse of confidential information by West Face and Mr. Moyse.

[6] The trial judge dismissed all claims. He awarded costs to West Face on a substantial indemnity basis and costs to Mr. Moyse on a partial indemnity basis. Catalyst appeals from the dismissal of its claims and seeks leave to appeal from the costs order.

[7] At the end of oral argument, the court dismissed Catalyst's appeal from the judgment dismissing the action and reserved judgment on the costs-related appeals. These reasons address both.

II

[8] To succeed on the misuse of confidential information claim, Catalyst had to prove that:

- Mr. Moyse gave confidential information concerning Catalyst's bid to purchase WIND to West Face;
- West Face used that confidential information when pursuing its bid for WIND; and
- The misuse of that confidential information caused detriment to Catalyst.

[9] Catalyst did not have direct evidence to support its allegations. It relied on a body of circumstantial evidence and primarily on the testimony of its partners, Newton Glassman, Gabriel De Alba, and James Riley.

[10] On the first issue, whether Mr. Moyse had provided confidential information about Catalyst's strategies in respect of the acquisition of WIND to West Face, Catalyst relied heavily on inferences it claimed should be drawn from Mr. Moyse's conduct while he was pursuing employment with West Face, immediately after he left Catalyst to join West Face, and after this litigation was commenced. That evidence included the following:

- Mr. Moyse deliberately provided Catalyst's confidential information to West Face when he was trying to get a job with West Face. This information did not relate to WIND.
- Mr. Moyse erased emails that showed he provided that confidential information to West Face;
- Mr. Moyse erased all of the contents of the BlackBerry Catalyst had provided to him for work purposes before he returned it to Catalyst after he quit;
- Mr. Moyse made inaccurate and potentially misleading statements in affidavits filed on preliminary motions in this litigation;
- Mr. Moyse deleted his internet browsing history from his personal computer and installed programs to scrub the computer registry where deletions could otherwise be detected, in the face of a court order requiring that he turn his computer over to his lawyer so that the computer could be forensically examined for the purposes of this litigation.

[11] Catalyst claimed that Mr. Moyse's conduct was consistent only with him having provided confidential information about Catalyst's proposed acquisition of WIND to West Face.

[12] Mr. Moyse gave various "innocent" explanations for his conduct. West Face also led evidence that when Mr. Moyse was hired by West Face, extensive measures were taken to ensure that Mr. Moyse had no knowledge of, or

involvement in, West Face's ongoing negotiations for the purchase of WIND shares. The witnesses testified that there were no breaches of this confidentiality wall during the few weeks that Mr. Moyse was actually present in the West Face offices.

[13] The respondents also introduced a body of evidence, which they claimed demonstrated that no confidential information from Catalyst had been used in the ultimately successful bid for WIND. The respondents argued that the approach taken by West Face and its consortium to the acquisition of WIND, particularly with respect to the need to obtain certain concessions from the government, was fundamentally different than the approach taken by Catalyst. Consequently, West Face had no use for any information pertaining to Catalyst's strategies.

[14] The respondents also defended on the basis that the appellant had not proved any damages. The respondents claimed that Catalyst's bid to acquire WIND in August 2014 failed, not because of any competing bid made by West Face and the consortium, but because Catalyst chose to terminate negotiations with the vendor of the WIND shares after the vendor demanded a significant break fee very late in its negotiations with Catalyst. The respondents contended at trial that the evidence showed that Catalyst chose to end the negotiations rather than agree to the break fee demanded by the vendor. On this argument, which did not depend on the trial judge accepting the testimony of Mr. Moyse, or the West Face witnesses, Catalyst suffered no damages or detriment, even if Mr.

Moyse had given confidential information to West Face and West Face had attempted to use that information in its negotiations with the vendor of the WIND shares.

[15] The trial judge gave lengthy and detailed reasons for judgment. He found against Catalyst on almost every contested factual issue. Specifically, he found (paras. 126-30) that the appellant chose to terminate its negotiations with the vendor of the WIND shares when the vendor demanded a substantial break fee.

[16] In his reasons, the trial judge made strong credibility findings against the appellant's primary witnesses, particularly Mr. Glassman, and equally strong credibility findings in favour of the respondents' witnesses, including Mr. Moyse. The trial judge accepted the explanations offered by Mr. Moyse for his conduct outlined above, at para. 10. The trial judge found, as a fact, that Mr. Moyse had not provided any confidential information to West Face in relation to the appellant's negotiations for the purchase of the WIND shares.

III

[17] Catalyst advanced essentially three arguments on appeal. The first asserts alleged errors in the trial judge's fact-finding process, the second alleges procedural unfairness, and the third relates to the trial judge's treatment of the spoliation arguments.

A. THE ALLEGED FACT-FINDING ERRORS

[18] The appellant submits that the trial judge's factual findings cannot stand, first, because they are the product of an unfair and uneven scrutiny by the trial judge of the competing versions of the relevant events and, second, because they are tainted by several material misapprehensions of the evidence.

[19] Counsel for the appellant candidly acknowledge that they face an uphill climb in their assault on the fact-finding at trial. This was a hard-fought trial. The result was almost entirely fact-driven. The trial judge's findings of fact turned on his assessment of the credibility of the key witnesses, the reliability of their evidence, and the inferences to be drawn from certain primary findings of fact. All of those tasks engage a myriad of considerations by the trial judge. His determinations are owed strong deference on appeal. The appellant must overcome that deference in the face of reasons by the trial judge that display a strong command of the evidentiary record and a full understanding of the issues and positions of the parties.

(i) The Alleged Uneven Scrutiny of the Evidence

[20] In support of the uneven scrutiny argument, counsel submits that the credibility of the Catalyst witnesses was subject to a hypercritical microscopic examination by the trial judge. Any misstep or inconsistency in their testimony, no matter how apparently minor, became, for the trial judge, a reason to reject the

evidence of those witnesses. In contrast, argues counsel for the appellant, the trial judge forgave or ignored similar, and much more serious, defects in the evidence of witnesses for the respondents.

[21] To demonstrate the unevenness of the trial judge's consideration of the evidence, counsel compared the trial judge's treatment of Mr. Moyse's testimony with that afforded Mr. Glassman's evidence. The appellant argues that the trial judge excused the litany of serious misconduct by Mr. Moyse, including a deliberate breach of a court order, as mere "mistakes" or "errors" explainable by Mr. Moyse's youth or his fatigue. Counsel contrasts the trial judge's benign treatment of Mr. Moyse's evidence with his aggressive rejection of Mr. Glassman's evidence on what counsel argues are much weaker and more subjective grounds.

[22] The appellant submits that the trial judge totally rejected Mr. Glassman's evidence because on occasion he slipped into the role of advocate when testifying and overstated certain matters. Counsel submits that even if this characterization is accurate, Mr. Glassman's transgressions pale beside the egregious misconduct of Mr. Moyse. Counsel submits that the trial judge's complete acceptance of Mr. Moyse's evidence and his total rejection of Mr. Glassman's evidence can be explained only by the application of very different levels of scrutiny to their testimony.

[23] Counsel devoted much of their oral argument to their uneven scrutiny submission. They referred to various examples from the trial judge's reasons, which they claimed demonstrated his uneven scrutiny of the evidence.

[24] Counsel's submissions make a case for different credibility and reliability assessments than those made by the trial judge. Unfortunately for the appellant, that is not enough to warrant appellate intervention. It is not for this court to consider what alternative findings may have been reasonably available on the trial record.

[25] The trial judge approached the evidence of the respondents' witnesses no differently than he did the evidence of the appellant's witnesses. The trial judge's reasons must be considered in their entirety. Mr. Moyse's evidence that he did not provide confidential information concerning the WIND negotiations to West Face did not stand alone. The evidence found considerable, largely uncontradicted support in the testimony of the West Face witnesses. It also gained some inferential support in the trial judge's findings as they related to the West Face strategy in respect of the WIND negotiations, and the ultimate reason for the breakdown of the negotiations between the appellant and the vendor of the WIND shares.

[26] The trial judge was alive to the details of the evidence said to demonstrate Mr. Moyse's dishonesty and the unreliability of his evidence. He appreciated the

appellant's argument and the need to carefully and critically examine Mr. Moyse's evidence. The trial judge examined the evidence at length, particularly as it related to the allegation that Mr. Moyse had deliberately deleted material from his personal computer and installed programming to hide that deletion and prevent any recovery of the material. In the end, the trial judge accepted Mr. Moyse's explanations for what he had done, and concluded that it could not be established that Mr. Moyse had actually used the programs he had installed on the computer to hide the deletions.

[27] The trial judge approached Mr. Moyse's evidence by examining the substance of that evidence in the context of the entirety of the evidence. He also considered, as a trial judge is entitled to do, his impressions of Mr. Moyse as he testified. The trial judge took the same approach to Mr. Glassman and other witnesses for the appellant. As often occurs, the same approach to the evidence of different witnesses yielded very different credibility and reliability assessments. Those different assessments are not indicative of any flawed fact-finding process, but instead reflect the essential witness-specific nature of credibility and reliability determinations.

[28] We do not propose to examine all of the passages from the trial judge's reasons relied on by the appellant to demonstrate the asserted different levels of scrutiny of the evidence. Each argument fails for a variety of reasons.

[29] For example, the appellant argues that the trial judge used Mr. Glassman's repetition of parts of his evidence as a reason for finding that Mr. Glassman was not credible, but did not give the same effect to the repetition of evidence by witnesses for the respondents. This submission is not supported by the reasons. The trial judge referred to repetition of parts of the evidence as a by-product of the manner in which the trial was conducted. We do not read his reasons as using the repetition of evidence as a basis for disbelieving Mr. Glassman or otherwise discounting his evidence.

[30] The appellant also argues that the trial judge treated inconsistencies or overstatements in the evidence of the appellant's witnesses much more harshly than he did similar deficiencies in the respondents' witnesses. The appellant submits that the trial judge did the same thing when he faulted Mr. Glassman for not making obvious concessions, but made no comment when the same reluctance was evident in the testimony of witnesses for the respondents.

[31] The evaluation of the impact on credibility and reliability of specific inconsistencies and similar flaws in a witness's testimony lies at the very core of the trial judge's function. His conclusion that a certain inconsistency negatively impacted on the credibility of one witness, while a different inconsistency did not have the same negative impact on the credibility of a different witness testifying about an entirely different topic, does not, on its own, establish that the trial judge applied different levels of scrutiny to the evidence of those witnesses. Instead, it

demonstrates that credibility and reliability assessments are fact and witness-specific.

[32] In support of the unequal scrutiny argument, the appellant also submitted that the trial judge proceeded from the assumption that the West Face witnesses were credible, while the appellant had to demonstrate the credibility of its witnesses. In support of this argument, counsel relies on observations made by the trial judge in his costs reasons.

[33] Setting aside whether a judge's comments in his costs reasons can assist in interpreting his reasons for judgment, the trial judge's comments do not support the appellant's submission. In his reasons for costs, the trial judge observed that the appellant could not have succeeded at trial without establishing that the West Face witnesses were lying when they claimed they had not received any confidential information from Mr. Moyse. This observation was correct, having regard to the nature of the claim advanced by the appellant, the respective positions of the parties, and the burden of proof on the appellant.

(ii) The Alleged Misapprehensions of the Evidence

[34] The appellant alleged three material misapprehensions of evidence in the body of its factum and listed several others in an appendix to the factum. We see no misapprehension of any material facts by the trial judge, and do not propose to review the appellant's claims one-by-one.

[35] Some of the appellant's allegations of material misapprehensions of the evidence fail because the trial judge did not make the factual finding said to constitute the material misapprehension. For example, the appellant argues that the trial judge wrongly held that Mr. Moyse did not have any confidential information about the WIND negotiations when he left the employment of Catalyst. The trial judge did not make any such finding. He did find that Mr. Moyse was not aware of the negotiating strategy of Catalyst with the government of Canada and the vendor of the WIND shares (para. 48). That finding was open on the evidence of Mr. Moyse.

[36] Other submissions made by the appellant alleging material misapprehensions of the evidence fail because, even if valid, they relate to factual issues that were relatively insignificant and not material to the outcome of the trial. For example, the appellant argues that the trial judge misapprehended the evidence pertaining to West Face's need for an analyst when it hired Mr. Moyse. Even if it could be said that the trial judge went beyond the evidence in describing the extent to which West Face needed an analyst, that error could not possibly have impacted on his overall assessment of the evidence, or the ultimate findings of fact he relied on in dismissing the claim.

[37] Most of the appellant's arguments, however, fail because they do not reveal any misapprehension of the evidence, but instead reveal that the trial judge preferred the evidence of the respondents' witnesses and the inferences

that flowed from that evidence over the competing evidence and inferences relied on by the appellant. For example, the trial judge found that West Face and others in the consortium did not have actual knowledge of the Catalyst bid for the shares of WIND in August 2014. That finding is supported by the respondents' witnesses who testified that they deduced that Catalyst was a bidder in light of "market chatter", comments in the media, and a statement made by counsel for the appellant to counsel for West Face when Mr. Moyse joined West Face. This evidence provided ample grounds for the trial judge's factual finding that West Face and the consortium had no actual knowledge of the bid.

[38] The appellant's submissions go no further than to suggest that the evidence could also have justified the further inference that West Face was aware of the actual bid. The trial judge did not make that inference, no doubt because he accepted the evidence of the West Face witnesses that West Face did not have knowledge of the actual bid. The trial judge's preference for the direct evidence of the West Face witnesses over the inference urged by the appellant is a function of the trial judge's fact-finding responsibilities and does not reflect any misapprehension of the evidentiary record.

B. THE PROCEDURAL UNFAIRNESS ARGUMENT

[39] The appellant argues that the trial judge made a series of factual findings against the appellant in respect of the dealings between the vendor of the WIND

shares and West Face and the consortium in August 2014. The appellant argues that these findings were made despite the trial judge having refused to allow the appellant to amend its claim to allege that West Face had induced the vendor of the WIND shares to breach its agreement with the appellant in the course of those August dealings. The appellant contends that the trial judge's findings were beyond the scope of the claim as framed in the pleadings before him and were based on an inadequate evidentiary record.

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

[41] More to the point, evidence of the dealings between West Face and the consortium on one side and the vendor of the WIND shares on the other side in August 2014 was germane to the appellant's claim and West Face's defence that it pursued its own strategies in seeking to purchase the WIND shares, which were very different from those employed by the appellant. That strategy was reflected, in part, in the unsolicited proposal to purchase the WIND shares made by West Face and the consortium in early August 2014.

[42] The trial judge heard a great deal of evidence about the dealings between the vendor of the WIND shares and West Face and the consortium, particularly in August 2014. The appellant did not object to any of this evidence and, indeed, elicited most of it. In their closing arguments at trial, counsel for the appellant and the respondents urged the trial judge to make certain findings in respect of the dealings between West Face, the consortium and the vendor of the WIND shares. The trial judge's findings reflect those arguments and a preference for the position put forward by the respondents. We see no unfairness to the appellant in the manner in which these issues were litigated at the trial. The trial judge's findings of fact in respect of these issues are supported by the evidence.

C. THE SPOLIATION ARGUMENT

[43] The spoliation submission began as an argument that the trial judge had failed to properly identify the elements of the tort of spoliation. In oral argument, counsel abandoned any reliance on the tort of spoliation.[1]

[44] Counsel argued that the trial judge erred in holding that an adverse evidentiary inference could be drawn against the respondents as a result of Mr. Moyse's destruction of relevant evidence only if the appellant established that Mr. Moyse and/or West Face destroyed that evidence for the specific purpose of affecting the outcome of the litigation. Counsel submitted that the adverse

---

[1] The existence of an independent tort of spoliation is an open question in this court: *Robb Estate v. Canadian Red Cross Society* (2001), 152 O.A.C. 60, at 203-208.

inference was appropriately drawn if relevant evidence was destroyed in the face of pending or reasonably foreseeable litigation.

[45] The appellant's argument faces an insurmountable factual hurdle. Any inference that may be drawn against the respondents can arise only after a finding that Mr. Moyse destroyed relevant evidence. The trial judge found as a fact that Mr. Moyse did not destroy relevant evidence (paras. 147, 165). The appellant has not established any basis upon which this court can interfere with that factual finding. That finding puts an end to any argument that Mr. Moyse's deletion of data from his computer and cellphone supports an adverse inference against Mr. Moyse or West Face.

[46] As this argument runs aground on the trial judge's factual finding, we need not consider the merits of the substance of the argument. We should not be taken as agreeing that the appropriate evidentiary approach to evidence that a party to a proceeding destroyed relevant evidence should be functionally different from the approach to be taken to other kinds of circumstantial evidence.

D. THE COSTS APPEAL

[47] The appellant seeks leave to appeal the costs order. The appellant recognizes that this court grants leave to appeal from costs orders only sparingly. It submits, however, that the orders made in this case reveal errors in principle that warrant leave and intervention by this court.

[48] The trial judge awarded costs to West Face on a substantial indemnity basis because the appellant had made serious and unfounded allegations impugning the honesty and integrity of West Face and its senior executives. He concluded that the lawsuit was precipitated primarily by Mr. Glassman's frustration over losing out on the acquisition of the WIND shares. The trial judge said, at para. 10:

> He [Mr. Glassman] set out to prove his belief that the West Face witnesses were lying and that West Face had obtained confidential Catalyst information from Mr. Moyse that they used to defeat Catalyst's bid to acquire WIND. He was certainly playing hardball, attacking the reputation and honesty of West Face. However, in spite of the best efforts of Catalyst's very able and skilled lawyers, he utterly failed.

[49] The appellant submits that the trial judge in effect awarded costs on a substantial indemnity basis because the appellant failed to prove its case at trial. The appellant argues that substantial indemnity costs are the exception and not the rule. To base an award of substantial indemnity costs on a failure to prove one's case is to ignore the exceptional nature of an award of costs on a substantial indemnity basis.

[50] We are satisfied that the trial judge awarded costs on a substantial indemnity basis, not because the appellant failed to prove its case, but rather because the appellant chose to make very serious allegations against West

Face, maintain those allegations in the face of substantial evidence refuting the allegations, and in the end "utterly failed" to substantiate any of the claims.

[51] Unfounded allegations like those made by the appellant in this case can warrant the exercise of discretion in favour of costs on a substantial indemnity basis. We see no error in principle in the trial judge's decision to award costs on a substantial indemnity basis to West Face. We would not grant leave to appeal the order as it relates to West Face.

[52] The trial judge found that the appellant had made an unwarranted attack on the reputation and integrity of Mr. Moyse. He went on, however, to indicate, at para. 18:

> However, the steps that Mr. Moyse took that he has readily acknowledged were mistakes, albeit with no intention to destroy any relevant evidence, must be considered in deciding what level of costs to be awarded to Mr. Moyse. In my view, it is a reason not to award costs on a substantial indemnity basis, and I award costs only on a partial indemnity basis.

[53] The characterization of some of Mr. Moyse's conduct as "mistakes" is charitable. This is particularly true in respect of his conduct when ordered by the court to turn his personal computer over to his lawyer so that it could be forensically examined. His decision to delete material from the computer without speaking to his lawyer and before turning the computer over to his lawyer was a serious breach of the court order, even given that he did not delete information relevant to the allegations.

[54] The fact remains, however, that the trial judge recognized that Mr. Moyse's conduct should be taken into account in assessing the appropriate costs order. He determined in the exercise of his discretion that it should reduce the order from one of costs of substantial indemnity to one of costs on a partial indemnity basis. Even if other judges might have gone further, the trial judge made no error in the exercise of his discretion in considering the impact of Mr. Moyse's conduct on the costs award.

[55] We would not grant leave to appeal from the order awarding costs to Mr. Moyse on a partial indemnity basis.

E. CONCLUSION

[56] The appeal is dismissed. The application for leave to appeal the costs order is dismissed.

[57] Counsel should exchange and file submissions on the costs of the appeal within 30 days of the release of these reasons. The submissions should not exceed 7 pages.

"Doherty J.A."
"J. MacFarland J.A."
"D.M. Paciocco J.A."

CITATION: Catalyst Capital Group Inc. v. Moyse, 2016 ONSC 5271
COURT FILE NO.: CV-16-11272-00CL
DATE: 20160818

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

BETWEEN:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

– and –

BRANDON MOYSE and
WEST FACE CAPITAL INC.

Defendants

REASONS FOR JUDGMENT

Newbould J.

Released: August 18, 2016

CITATION: Re: Mid-Bowline Group Corp, 2016 ONSC 669
COURT FILE NO.: CV-15-11238-00CL
DATE: 20160126

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

IN THE MATTER OF the *Business Corporations Act*, R.S.O. 1990, c. B.16, as amended, Section 182

AND IN THE MATTER OF Rule 14.05(2) of the *Rules of Civil Procedure*

AND IN THE MATTER OF a proposed arrangement involving Mid-Bowline Group Corp., its shareholders and optionholders, Shaw Communications Inc., and 1503357 Alberta Ltd.

BEFORE: Newbould J.

COUNSEL: *Kent E. Thomson and Matthew Milne-Smith*, for the Applicant

Rocco DiPucchio and Lauren P.S. Epstein, for The Catalyst Capital Group Inc.

Michael Schafler and Ara Basmadjian, for Shaw Communications Inc.

Robert A. Centa, for Brandon Moyse

HEARD: January 25, 2016

REASONS FOR JUDGMENT

[1] This is an application by Mid-Bowline Group Corp. pursuant to section 182 of the Ontario *Business Corporations Act* for approval of a proposed plan of arrangement. The arrangement contemplates that a subsidiary of Shaw Communications Inc. will acquire all of the

outstanding shares of Mid-Bowline, the owner of WIND Mobile Corp., for approximately $1.6 billion.

[2] WIND is a private Ontario company. It is Canada's fourth largest wireless carrier, currently serving approximately 940,000 subscribers in British Columbia, Alberta and Ontario. WIND was formed in 2008. The majority of its voting shares were held by Globalive Capital Inc. ("Globalive Capital"), while the majority of its total equity was held by Orascom Telecom Holdings S.A.E. ("Orascom"). In 2011, Orascom's majority equity stake in the company was acquired indirectly by VimpelCom Ltd. ("VimpelCom").

[3] Mid-Bowline is an Ontario private, closely-held company that indirectly owns 100 percent of WIND. The shareholders of Mid-Bowline include, among others, funds managed by West Face Capital Inc. ("West Face"), Tennenbaum Capital Partners, LLC (Tennenbaum"), Globalive Capital and 64NM Holdings, LP (together the "Investors").

[4] The plan is opposed by The Catalyst Capital Group Inc. by reason of its claim that one of the shareholders of Mid-Bowline, West Face, acquired confidential information belonging to Catalyst that was used by West Face in its acquisition of an interest in WIND through Mid-Bowline. Catalyst claims a constructive trust over the Mid-Bowline shares owned by West Face. The terms of the plan of arrangement would release any constructive trust claim that Catalyst has over the shares of Mid-Bowline owned by West Face that are being sold to Shaw.

[5] The plan of arrangement, as amended, provides that Shaw shall acquire the shares of Mid-Bowline free of any claim against those shares, including the shares of West Face, but that Catalyst shall continue to have the right to claim against West Face the profits earned by West Face from the sale to Shaw. That is, the claim by Catalyst for a constructive trust over the shares of Mid-Bowline owned by West Face is released in order to permit Shaw to acquire the shares of Mid-Bowline free of any claim against those shares but the right of Catalyst to pursue its claims for the profit earned by West Face on those shares survives.

[6] The only reason that this transaction is proceeding by way of plan of arrangement is to provide Shaw with clear title to the shares of WIND. Had this not been required because of the

Catalyst claim, the shareholders of Mid-Bowline were prepared to proceed by a share purchase agreement without any requirement of Court approval. During negotiations with Shaw, Mid-Bowline disclosed the claim of Catalyst to a constructive trust over the shares of Mid-Bowline owned by West Face. Shaw made clear that it would not acquire WIND unless it acquired the shares free and clear of any claim to them.

[7] So far as the requirements of section 182 of the OBCA are concerned, I am satisfied that the statutory procedures in section 182 have been met and that the application has been put forward in good faith. Trying to deal with the Catalyst claim in the manner proposed by Mid-Bowline in the circumstances of this case was not, as claimed by Catalyst, an exercise of bad faith. It was put forward in an open and transparent manner and designed to protect any legitimate right that Catalyst may have.

[8] The third requirement of section 182 is that the arrangement is fair and reasonable. Catalyst says that it is not and that this Court has no authority under section 182 to exterminate the substantive or procedural rights of third parties.

The Catalyst claim and its background

[9] In 2013, VimpelCom decided to divest its interest in WIND, and a number of interested potential buyers came forward. Ultimately, in September 2014, the Investors, acting through Mid-Bowline, acquired VimpelCom's debt and equity interest in WIND. The ownership structure of WIND was subsequently reorganized so that WIND became an indirect, wholly-owned subsidiary of Mid-Bowline.

[10] Catalyst was a bidder for WIND and from July 23 to August 18, 2014 VimpelCom conducted exclusive negotiations with Catalyst for Catalyst to buy WIND. No agreement was reached.

[11] The Catalyst litigation arises out of West Face's hiring of Brandon Moyse, then a 26 year-old junior analyst at Catalyst. Mr. Moyse applied for a job at West Face in March 2014 and received an offer of employment on May 26, 2014. He started work at West Face on June 23,

2014 and ceased working there three and a half weeks later, on July 16, 2014. Mr. Moyse was not recruited or otherwise solicited for employment by West Face. He applied to West Face on his own initiative.

[12] At the time of Mr. Moyse's hiring, West Face had already been pursuing an acquisition or financing of WIND for over six months, since November 2013. It was well-known throughout the industry that VimpelCom wanted to sell its interest in WIND because of the well-publicized regulatory challenges it had faced as a foreign owner. West Face conducted due diligence and made a series of offers to VimpelCom before Mr. Moyse was ever hired.

[13] Upon learning of Mr. Moyse's move to West Face, Catalyst immediately advised West Face of its position that Mr. Moyse was prohibited from working for West Face as a result of a non-competition clause in his employment agreement. Catalyst also advised West Face that Mr. Moyse had received access to confidential information regarding a "telecom file" during his employment with Catalyst. This was the first time, after it had already hired Mr. Moyse, that West Face learned that Catalyst had been pursuing what West Face assumed to be the WIND opportunity.

[14] The evidence of Mr. Griffin of West Face, which has not been denied in any way, is that upon learning of Catalyst's objections to Mr. Moyse's hiring, West Face took the position that Mr. Moyse's non-competition covenant was unenforceable, and denied receiving any confidential information from Mr. Moyse. Out of an abundance of caution, given Catalyst's express concerns about the "telecom file", West Face nonetheless established strict firewalls around West Face's own work on WIND. Mr. Moyse was denied access to computer files relating to that project, and all members of the WIND team at West Face were explicitly instructed not to speak to Mr. Moyse about that transaction.

[15] Two days after Mr. Moyse's departure from West Face on July 18, 2014, the strategic partner with whom West Face had been working on a potential acquisition of WIND for the previous month backed out. The WIND deal that West Face had been pursuing while Mr. Moyse had worked there became a dead end.

[16] The further evidence of Mr. Griffin, which has also not been denied, is that one week after Mr. Moyse left West Face, on July 23, 2014, VimpelCom informed West Face that it had entered into exclusive negotiations with another bidder, which West Face presumed to be Catalyst (and which Catalyst ultimately confirmed in this litigation). Nonetheless, West Face decided to join with a group of investors in the event that VimpelCom's preferred bidder was unable to reach an agreement during the period of exclusivity. This group ("New Investors") included Tennenbaum and 64NM who had themselves been pursuing the investment independently for a number of months.

[17] The further evidence of Mr. Griffin, which has also not been denied, is that on August 6, 2014, uncertain as to when the exclusivity period would end, the New Investors, which did not include Globalive Capital, submitted an unsolicited offer for WIND. A more formal proposal followed the next day, August 7. The proposal left Globalive Capital's voting majority voting interest in WIND undisturbed. On August 7 however, Globalive Capital agreed to a support agreement with VimpelCom, which obliged Globalive Capital to support VimpelCom in its exclusive negotiations with Catalyst.

[18] The further evidence of Mr. Griffin, which has also not been denied, is that upon the expiry of exclusivity, the New Investors revived their efforts with VimpelCom and, subject to VimpelCom's approval, with Globalive Capital. Ultimately a a definitive purchase agreement was signed by all parties and the purchase of WIND closed on September 16, 2014 pursuant to which Mid-Bowline became the owner of WIND.

[19] On June 25, 2014 Catalyst commenced an action against Brandon Moyse and West Face. It claimed injunctive relief, including preventing Mr. Moyse from disclosing confidential information. An interlocutory motion by Catalyst regarding Mr. Moyse was heard on October 27, 2014 by Mr. Justice Lederer who on November 10 granted an interlocutory injunction enjoining Mr. Moyse from disclosing any confidential information belonging to Catalyst, or competing with Catalyst until December 22, 2014 (being the date six months after he left Catalyst's employment).

[20] On December 16, 2014, Catalyst delivered an Amended Amended Statement of Claim in which it alleged that Mr. Moyse while employed by Catalyst was a member of the team studying the WIND opportunity and privy to Catalyst confidential information concerning that opportunity. It alleged that West Face obtained that confidential information to obtain an unfair advantage over Catalyst in its negotiations with VimpelCom regarding WIND and that but for the transmission of the confidential information West Face would not have successfully negotiated a purchase of WIND. Catalyst claimed a constructive trust over West Face's interest in WIND and an accounting of all profits earned by West Face as a result of its misuse of confidential information obtained from Mr. Moyse.

Catalyst claims a need for a trial

[21] Catalyst claims that it requires the full panoply of a trial process in its action against West Face, saying that the action it started in June, 2014 is at an early stage and that there has been no discovery or production of documents. It says that on this application its rights are being decided without any witnesses. This ignores the history of the action and what has occurred to date.

[22] So far as the plan of arrangement application is concerned, a four day hearing was established on January 4, 2016 for four days beginning January 25, 2016. Catalyst had the draft material of Mid-Bowline in December and was served with the motion record on January 8, 2016 that included the affidavit of Mr. Griffin as well from the other investors in Mid-Bowline, being representatives of Globalive Capital, Tennenbaum and 64NM. Four days was scheduled for evidence and it was anticipated that the deponents of the affidavits at least would be examined and cross-examined. However, no evidence was filed by Catalyst to contradict the Mid-Bowline evidence, and no request was made by Catalyst to cross-examine any Mid-Bowline witness. As a result, the reporter was cancelled and the matter proceeded by oral argument on the material filed.

[23] I adjourned the hearing on Monday January 5 until 2 pm to give Mr. DiPuccio a chance to get instructions from Catalyst. Later in the morning Mr. DiPuccio delivered an affidavit of James Riley of Catalyst sworn that morning. It contained a statement that Mr. Riley understood from Mr. DiPuccio that the Plan hearing would not be decided on its merits as originally

scheduled pending a discussion on the terms on which the Plan might be amended so that West Face's proceeds from the sale to Shaw could be held in escrow pending an expedited trial of Catalyst's claim.

[24] This statement was allegedly based on discussions held earlier in January in chambers in which the parties discussed trying to agree on a term that would allow the plan of arrangement to be approved on some terms that would protect Catalyst's rights. At that discussion counsel for Mid-Bowline made clear that it would not agree to hold the funds for West Face in escrow for reasons he explained. It was left that the parties would try to negotiate some other protection for Catalyst. However it was never discussed that the hearing scheduled for four days starting January 25th would be put off or that the plan approval application would not be heard on its merits at that time. The failure of Catalyst to file any evidence in opposition to the plan of arrangement was a decision of its own choosing. Its decision not to cross-examine on any of the affidavits filed by Mid-Bowline was also of its choosing.

[25] There is a history of full document production by West Face in the claim against it by Catalyst and of cross-examination on affidavits. There has also been delay caused by Catalyst sitting on its hands.

[26] On July 16, 2014 a consent order of Justice Firestone ordered Mr. Moyse to turn his computer over to his counsel for the taking of a forensic image of the data kept by him on his computer, to be conducted by a professional firm. On November 10, 2014 Justice Lederer ordered that the forensic images that had been created were to be reviewed by an independent supervising solicitor ("ISS"). The ISS subsequently released a draft report on February 1 and its final report on February 17. As set out therein, the ISS found no evidence that Mr. Moyse had provided any of Catalyst's confidential information to West Face. It did, however, find evidence suggesting that Mr. Moyse had deleted his browser history.

[27] On January 13, 2015, Catalyst commenced a motion for interlocutory relief against West Face for an order prohibiting West Face from playing any role in the management of WIND and an order requiring West Face to provide electronic images of all of its computers to the ISS for review. One of the stated purposes of Catalyst's motion for the imaging order was to determine

"whether [Mr.] Moyse in fact communicated Catalyst's Confidential Information to West Face and what use West Face made of such information". Catalyst amended its notice of motion on February 6 to also seek an order jailing Mr. Moyse for contempt of the earlier interim consent order of Justice Firestone.

[28] Catalyst's motion was heard by Justice Glustein on July 2, 2015. Although West Face delivered its responding motion record on March 10, 2015, 20 days after receiving Catalyst's materials, Catalyst did not deliver its reply materials until May 1, 2015, almost two months after receiving West Face's materials.

[29] Justice Glustein rendered his decision five days after argument, on July 7, 2015, and dismissed Catalyst's motion in its entirety. With respect to the request that West Face provide electronic images of all of its computers to the ISS for review, Justice Glustein held that there was no evidence that West Face has failed to comply with its production obligations, let alone intentionally delete materials to thwart the discovery process or evade its discovery obligations. Justice Glustein noted that West Face had offered to turn over its own confidential information created, accessed or modified by Mr. Moyse to the ISS, but Catalyst has not accepted this offer. Regarding the productions of West Face, Justice Glustein stated:

> **56** Further, West Face has produced voluminous records relating to the allegations Catalyst has made, even before discovery, and in particular: (i) filed a four-volume responding motion record attaching 163 exhibits regarding WIND, the AWS-3 auction (since abandoned) and Callidus, (ii) produced a copy of the notebook Moyse used during his three and a half weeks at West Face, redacted only for information about West Face's active investment opportunities, (iii) produced all non-privileged, non-confidential emails sent to or from Moyse's West Face email account or known personal email accounts which were on West Face's servers, and (iv) produced 19 additional exhibits in response to undertakings given and questions taken under advisement at the cross-examination of Griffin on May 8, 2015.

[30] There was filed on the motion before Justice Glustein five affidavits of Mr. Riley of Catalyst, affidavits of Mr. Moyse, two affidavits of Mr. Griffin of West Face, an affidavit of Mr. Dea of West Face, an affidavit of Mr. Burt-Gerrans who was the computer expert who imaged the West Face computer records and an affidavit of Mr. El Shanawany who was the corporate

planning and control officer of WIND. There were also voluminous transcripts of the cross-examination of all of these persons.

[31] After receiving Justice Glustein's decision on July 7, 2015, Catalyst appealed the decision to the Court of Appeal, even though Justice Glustein's decision was interlocutory. Within two days of receiving the notice of appeal, on July 24, 2015 counsel to West Face immediately notified Catalyst's counsel that it was not entitled to appeal directly to the Court of Appeal. Catalyst ignored this advice, following which West Face served a notice of motion to quash Catalyst's appeal on August 5, and an amended notice of motion, factum and book of authorities on September 11, 2015. Catalyst never responded to this motion, but instead on November 5, 2015, consented to an order quashing the appeal. Catalyst then waited until December 10, 2015 to deliver a notice of motion to extend the time for it to seek leave to appeal to the Divisional Court.

[32] Catalyst's motion to extend the time to appeal to the Divisional Court and the appeal were heard together by Justice Swinton on January 21, 2016 and dismissed the following day. Justice Swinton was critical of Catalyst for appealing the decision of Justice Glustein to the Court of Appeal as the law was clear that interlocutory orders are appealable to the Divisional Court and Catalyst was represented by experienced litigation counsel. She also held that Catalyst had not given a reasonable explanation for the lengthy delay given the state of the law with respect to appeals to the Court of Appeal and the facts of this case. As to the merits of an appeal, Justice Swinton held there were none.

[33] I can only conclude that Catalyst has purposely delayed its claim against West Face for tactical reasons. As long as a claim for an order of a constructive trust against the shares of Mid-Bowline held by West Face is outstanding, Catalyst knows that West Face cannot realistically sell those shares. Catalyst had to understand that WIND might well be sold, taken the Canadian market for spectrum and the fact that Mid-Bowline is owned by financial interests and is not an operator in the wireless business. Catalyst has been deeply involved in that market, not only with its failed negotiations to acquire WIND from VimpelCom but also with its large financial position in Mobilicity, another regional wireless carrier that had filed for CCAA protection.

Fair and reasonable test

[34] In *BCE v. 1976 Debentureholders,* [2008] 3 S.C.R. 560 the Supreme Court of Canada held that determining whether a plan of arrangement is fair and reasonable involves two inquiries:

(a) whether the arrangement has a valid business purpose; and

(b) whether the arrangement resolves the objections of those whose legal rights are being arranged in a fair and balanced way.

[35] The valid-purpose inquiry is invariably fact-specific and the nature and extent of the evidence needed to satisfy this requirement will depend on the circumstances. See *BCE* at para. 146. The inquiry requires only the demonstration of a prospect of clearly identified benefits to the corporation that have a reasonable prospect of being realized if the proposed arrangement is implemented. See *Magna International Inc. (Re)* (2010), 75 B.L.R. (4th) 163 at para. 50 (Div Ct).

[36] The s. 192 process is generally applicable to change of control transactions that share two characteristics: the arrangement is sponsored by the directors of the target company; and the goal of the arrangement is to require some or all of the shareholders to surrender their shares to either the purchaser or the target company. See *BCE* at para. 126. This is precisely the situation here.

[37] The benefit to Mid-Bowline and its shareholders is obvious. The sale to Shaw is at a tremendous price and if the sale does not close, there is no guarantee that another transaction would come along with a price of $1.6 billion. The purpose in being able to sell the interest of West Face in Mid-Bowline free of any constructive trust claim of Catalyst is required for the sale to occur.

[38] Regarding the second part of the fair and reasonable test, whether the arrangement resolves the objections of those whose legal rights are being arranged in a fair and balanced way, it was stated in BCE:

> **147** The second prong of the fair and reasonable analysis focuses on whether the objections of those whose rights are being arranged are being resolved in a fair and balanced way.
>
> **148** An objection to a plan of arrangement may arise where there is tension between the interests of the corporation and those of a security holder, or there are conflicting interests between different groups of affected rights holders. The judge must be satisfied that the arrangement strikes a fair balance, having regard to the ongoing interests of the corporation and the circumstances of the case. Often this will involve complex balancing, whereby courts determine whether appropriate accommodations and protections have been afforded to the concerned parties. However, as noted by Forsyth J. in *Trizec*, at para. 36:
>
> > [T]he court must be careful not to cater to the special needs of one particular group but must strive to be fair to all involved in the transaction depending on the circumstances that exist. The overall fairness of any arrangement must be considered as well as fairness to various individual stakeholders.

[39] I do not agree with Catalyst that there is no jurisdiction under section 192 to compromise rights of Catalyst. Section 192 is a flexible provision that has been broadly interpreted. In *BCE* it was stated:

> **124** In light of the flexibility it affords, the provision has been broadened to deal not only with reorganization of share capital, but corporate reorganization more generally. Section 192(1) of the present legislation defines an arrangement under the provision as including amendments to articles, amalgamation of two or more corporations, division of the business carried on by a corporation, privatization or "squeeze-out" transactions, liquidation or dissolution, or any combination of these.
>
> **125** This list of transactions is not exhaustive and has been interpreted broadly by courts. Increasingly, s. 192 has been used as a device for effecting changes of control because of advantages it offers the purchaser: C. C. Nicholls, *Mergers, Acquisitions, and Other Changes of Corporate Control* (2007), at p. 76....

[40] In undertaking the fair and reasonableness inquiry, the interests of shareholders and other stakeholders is to be considered. See *BCE* at para. 115.

[41] In this case, the claim of Catalyst is that it is entitled to a constructive trust over the shares of Mid-Bowline owned by West Face. It is not an equity owner at the moment, but would be if a constructive trust were ordered in its favour. It is a stakeholder in West Face's interest in

Mid-Bowline to that extent. To say that a Court is powerless to make any order compromising the rights of Catalyst would be to give Catalyst a veto over the plan of arrangement merely by reason of its claim.

[42] The voluminous evidence filed by the parties on the previous motion before Justice Glustein and now on this application (which is largely the same as previously filed before Justice Glustein) has disclosed no confidential information of Catalyst regarding WIND provided by Mr. Moyse to West Face. It is clear that West Face has produced all of its relevant documents. The case of Catalyst at this stage looks weak.

[43] The provision added to the plan of arrangement to protect the right of Catalyst to damages is as follows:

> From and after the Effective Time: (i) this Plan of Arrangement shall take precedence and priority over any and all Purchased Shares or Options issued prior to the Effective Time; (ii) the rights and obligations of the Former Shareholders and the former holders of Options shall be solely as provided for in this Plan of Arrangement; and (iii) 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 except as set forth herein; provided, however, that nothing in this section 4.5 shall be construed to extinguish the right of The Catalyst Capital Group Inc. to continue to assert its claims against West Face Capital Inc. in Ontario Superior Court of Justice Court File No.: CV-14-507120 (provided that the potential liability of West Face Capital Inc. is limited to the net profit of West Face Capital Inc. in respect of this Arrangement), with the exception of any constructive trust or equivalent remedy which shall be deemed to have been settled, compromised, released and determined without liability, along with all other claims in this section 4.5. (Underlining added).

[44] Apart from releasing its constructive trust claim, Catalyst has a concern that this provision would prevent it from tracing money paid to West Face in the event it were entitled to a judgment against West Face. It also is concerned that the words "net profit" are unclear because what is meant by "net" is unclear. I would direct that the provision be amended to make clear that the provision does not prevent Catalyst from proceeding with a tracing claim of the

money received by West Face from the sale of its share interest in Mid-Bowline. I would also direct that the word "net" be removed.

[45] On the state of the record before me, and taking into account the interests of all concerned, including Catalyst, I am of the view that the plan of arrangement is fair and reasonable.

What should be done?

[46] Although Catalyst has not produced any evidence on this application, a decision of its own making, I would give Catalyst one last chance to call evidence, so long as it is done quickly. Shaw hopes to close the transaction on March 1, 2016 but this may be unlikely. The outside date for the closing of the transaction is July 1, 2016.

[47] Contrary to the argument of Catalyst, it does not have a right to a lengthy process leading to a trial. This is particularly the case when Catalyst has purposely delayed pursuing its claim against West Face and taken clearly inappropriate proceedings to appeal the interlocutory decision of Justice Glustein. Apart from that appeal process, it did nothing to further the action.

[48] The Supreme Court of Canada has made it clear that a cultural shift in the civil process is required. In *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87 Karakatsanis J. stated:

> **2** Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.
>
> **27** There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for adjudication, and impacts the role of counsel and judges. This balance must recognize that a process can be fair and just, without the expense

> and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.
>
> **28** This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible -- proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.

[49] The reality in this case is that the issue needs to be decided quickly for all concerned. The wireless industry in Canada is in a state of flux and whether Shaw is or is not entitled to acquire WIND is important to that industry. This issue raised by Catalyst must be decided quickly. In light of all that has gone on in the past year and a half in its case against West Face and Mr. Moyse, that can be accomplished while protecting the rights of the parties.

[50] Taking into account appeal periods, a further hearing involving this application and the claim of Catalyst against West Face and Mr. Moyse should proceed quickly, and I set four days from February 22 to 26, 2016, with further steps in the interim as follows:

(i) The issue to be tried is whether Catalyst has a right to a constructive trust of the share interest of West Face in Mid-Bowline. Whether this includes the issue as to whether Catalyst has any claim for misuse of Catalyst confidential information is up to Mid-Bowline. Counsel are to attempt to agree on the language of the issue to be tried, failing which it shall be settled at a 9:30 a.m. appointment with me on February 1, 2016.

(ii) The pleadings to date will be used.

(iii) The affidavits to date in the Catalyst action against West Face and Mr. Moyse and in this application may be used at the hearing.

(iv) Any party may conduct further cross-examinations on the deponents of affidavits on matters not yet covered in the cross-examinations to date.

(v) Catalyst may cross-examine Messrs. Lockie, Burt and Leitner on their affidavits filed in this matter.

(vi) Mr. Moyse as a party has a right to participate.

(vii) Any further issues regarding the hearing are to be dealt with promptly at a 9:30 a.m. appointment with me.

Claim for inducing breach of contract

[51] On Monday, in his affidavit sworn that morning, Mr. Riley made a statement indicating Catalyst intends to seek as relief in the action an order tracing all of the proceeds of the sale, relief that would involve amendments to the existing claim and that would "at first" glance be precluded by the proposed plan. His statement was that "In lieu of a claim for a constructive trust and an order holding the West Face proceeds of the Transaction in escrow, Catalyst intends to seek as relief in the Action an order tracing all of the proceeds of sale".

[52] During argument, it became clear that the basis for this intended claim would be a claim for inducing breach of contract made against the parties that participated in the unsolicited bid to VimpelCom to acquire its interest in WIND during the period that Catalyst and VimpelCom were having exclusive discussions. Those parties apart from West Face were Tennenbaum and 64NM. This intended claim for tracing would be to trace all of the proceeds paid to all shareholder of Mid-Bowline and not just those paid to West Face. It would obviously require the addition of the other shareholders of Mid-Bowline.

[53] Mr. Riley stated in his affidavit that the information giving rise to this new claim came from "information learned for the first time through the materials filed on this application". What information he was referring to was not stated. In argument it was stated that what he learned was that others were involved besides West Face in the unsolicited bid. However, it is quite clear that the information regarding the unsolicited bid was known by Mr. Riley early in 2015. It was contained in Mr. Griffin's affidavit sworn March 7, 2015 in response to Catalyst's motion seeking interlocutory relief against West Face.

[54] On his cross-examination on May 13, 2015 Mr. Riley, the chief operating officer of Catalyst, discussed the notion of inducing a breach of contract when it was put to him that Catalyst had not sued VimpelCom for breach of the exclusivity terms between VimpelCom and Catalyst. He would not agree that VimpelCom had not breached its exclusivity clause and said further:

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

[55] Mr. Riley is a very experienced lawyer. He was aware of the case of *Lumley v. Guy*, (1853) 118 ER 749, a case in England in which an opera singer was induced by Covent Garden to leave another theatre at which the singer had an agreement to perform. It was in that case that the modern action for inducing breach of contract was established.

[56] 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[1].

[57] The reason I believe why this was said was that late last week Mid-Bowline delivered its amended plan to permit Catalyst to continue with its damage claim against West Face but removing the right to continue with its constructive trust claim against West Face. Such a claim would not allow the proposed plan of arrangement to proceed and would give Catalyst leverage in any negotiations with Mid-Bowline.

[58] In his letter of January 6, 2016 written with prejudice, Mr. DiPuccio asserted that Catalyst was not interested in holding up a sale of the shares of WIND to Shaw. I have some

---

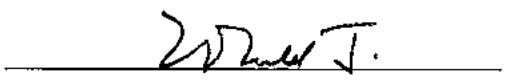
[1] I do not accept Catalyst's contention that the letter of January 6, 2016 from Mr. DiPuccio to counsel for Mid-Bowline and Shaw disclosed any such intent. That letter dealt entirely with the claim of Catalyst against Mid-Bowline.

doubts about that statement. The terms put in the letter to West Face were terms that Catalyst had to know would not be agreeable to West Face, and indeed Catalyst was told that shortly after the letter was sent. The proposed action now is also intended to interfere with the sale to Shaw. The vendors are all financial concerns with fund investors and to hold up the proceeds of the sale or to require their tracing in the hands of their fund investors that would be claimed in the claim against them for inducing a breach of contract is something that Catalyst has to know would not be agreeable to them.

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

[60] The evidence on the record is that VimpelCom told the parties who made the unsolicited bid that it could not deal with it while under an exclusivity arrangement with Catalyst and it did not do so. The proposed claim of Catalyst looks weak on the strength of the record before me and Catalyst has done nothing to adduce evidence to support the intended claim.

[61] In the circumstances, I disregard the statement of Mr. Riley as to the intended claim Catalyst says it will bring. It is too late in the process and the provision in the amended plan of arrangement that would prevent such a claim being made is fair and reasonable. The trial of the issue I have ordered is not to consider any such claim.



Newbould J.

Date: January 26, 2016

AMENDED THIS May 30, 2017 PURSUANT TO
MODIFIÉ CE CONFORMÉMENT À
☑ RULE/LA RÈGLE 26.02 (A)
☐ THE ORDER OF
L'ORDONNANCE DU
DATED/ FAIT LE
C. Irwin
REGISTRAR
SUPERIOR COURT OF JUSTICE
Reg
DEFENDER
COUR SUPÉRIEURE DE JUSTICE

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

BETWEEN:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

and

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

Defendants

AMENDED AMENDED AMENDED STATEMENT OF CLAIM

TO THE DEFENDANT(S):

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The Claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the *Rules of Civil Procedure*, serve it on the Plaintiff's lawyer or, where the Plaintiff does not have a lawyer, serve it on the Plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this Statement of Claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your Statement of Defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a Statement of Defence, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your Statement of Defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES,

~~CLAIM~~

1. The Plaintiff claims:

(a) against the Defendants VimpelCom Ltd. ~~and~~, UBS Securities Canada Inc. and Globalive Capital Inc., on a joint and several basis, damages in the amount of ~~$750,000,000~~ $1,300,000,000 for breach of contract and breach of confidence;

(b) against the Defendants Globalive Capital Inc., Tennenbaum Capital Partners LLC, 64NM Holdings GP LLC, 64 NM Holdings LP, LG Capital Investors LLC, Serruya Private Equity Inc., Novus Wireless Communications Inc., West Face Capital Inc., UBS Securities Canada Inc., ~~and Mid-Bowline Group Corp.,~~ on a joint and several basis:

(i) damages in the amount of ~~$750,000,000~~ $1,300,000,000 for misuse of confidential information, conspiracy, and inducing breach of contract; and

(ii) Punitive damages in the amount of $1,000,000;

(c) Against the Defendants John Doe #1 LP, John Doe #2 LP, and John Doe #3 LP, an Order tracing any portion of the proceeds from the sale of Wind (defined below) that were transferred to them by the Conspirators;

~~(c)~~(d) against all of the Defendants on a joint and several basis:

(i) Prejudgment and postjudgment interest in accordance with sections 128 and 129 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;

(ii) The costs of this action, plus the applicable taxes; and

(iii) Such further and other relief as to this Honourable Court may seem just.

The Plaintiff – The Catalyst Capital Group Inc. ("Catalyst")

2. Catalyst is a corporation with its head office located in Toronto, Ontario. Catalyst is widely recognized as the leading firm in the field of investments in distressed and undervalued Canadian situations for control or influence, known as "special situations investments for control".

The Defendants

3. VimpelCom Ltd. ("VimpelCom") is a company subsisting under the laws of the Netherlands in the field of telecommunications services. Its headquarters is located in Amsterdam, Netherlands.

4. Globalive Capital Inc. ("Globalive") is private equity corporation based in Toronto. Globalive was one of the founders of Wind Mobile Canada ("Wind").

5. UBS Securities Canada Inc. ("UBS") is an investment bank that provides advisory services to clients.

6. Tennenbaum Capital Partners LLC ("Tennenbaum") is an alternative investment management firm headquartered in Los Angeles, California.

7. 64NM Holdings GP, LLC ("64NM GP") is the general partner of 64NM Holdings, LP ("64NM LP"), a limited partnership organized under the laws of the State of Delaware in the United States of America. 64NM GP is headquartered in New York, New York. 64NM was

formed by LG Capital Investors LLC ("LG") for the purpose of participating in the acquisition of Wind.

8. Serruya Private Equity Inc. ("Serruya") is a private equity investment fund headquartered in Markham, Ontario.

9. Novus Wireless Communications Inc. ("Novus") is a telecommunications provider based in Vancouver, British Columbia.

10. West Face Capital Inc. ("West Face") is a Toronto-based private equity corporation with assets under management of approximately $2.5 billion.

~~11. Mid-Bowline Group Corp. ("Mid-Bowline") is an entity incorporated by the members of the Consortium (defined below) for the purpose of purchasing VimpelCom's interest in Wind.~~

11. John Doe #1 LP, John Doe #2 LP and John Doe #3 LP are limited partners of Tennebaum, 64 NM GP, 64NM LP, LG and West Face. The Defendants refuse to disclose the identities of the limited partners. The Plaintiff will substitute the actual names after they are disclosed.

Wind Mobile's Inception

12. Wind was founded in 2008. It acquired Advanced Wireless Services spectrum licences during an auction open to small entrants in Canada's telecommunications industry held by the Government of Canada.

13. Wind was initially jointly owned by Globalive and Orascom Telecom Holdings ("Orascom") through a holding company called Globalive Investment Holdings Corp. ("GIHC"). Globalive indirectly held 67% of Wind's voting shares and 34% of its total equity. Orascom

indirectly held 100% of Wind's non-voting shares, 32% of its voting shares and 65% of its total equity. The remaining 1% of Wind's voting shares and total equity was held by a former Orascom employee.

14. In 2011, VimpelCom acquired the majority shareholder of Orascom, and, as a result, acquired Orascom's interest in GTHC and Wind.

15. In June 2012, VimpelCom and Globalive entered into negotiations to determine whether one could buy the other's interest in Wind. As the negotiations progressed, VimpelCom became increasingly interested in acquiring Globalive's interest in Wind and the parties ultimately entered into a share purchase agreement whereby VimpelCom agreed to purchase Globalive's equity in Wind. Ultimately, VimpelCom could not secure the required regulatory approval from Industry Canada ("IC") to purchase Globalive's equity and the agreement was terminated.

VimpelCom Intends to Exit Wind

16. In early 2013, VimpelCom engaged UBS for the purpose of finding a purchaser for its debt and equity interests in Wind.

17. At all material times, UBS was VimpelCom's agent for the purpose of finding a purchaser for VimpelCom's debt and equity interests in Wind and completing the transaction.

18. ~~17.~~ By the fall of 2013, VimpelCom had financed Wind's capital purchases and operating expenses through shareholder loans that Wind could not repay. As a result of Wind's massive debts owed to VimpelCom, VimpelCom controlled the sale process for Wind despite only owning a minority voting interest in the company.

~~19.~~ ~~18. In the fall of 2013 and winter of 2014, several parties, including Catalyst, expressed~~ an interest in purchasing VimpelCom's interest in Wind.

20. ~~19.~~ VimpelCom negotiated with numerous bidders in 2013, including Verizon Wireless, a U.S. wireless company, and Birch Hill, a private equity firm.

21. ~~20.~~ In December 2013, Catalyst negotiated in earnest potential terms for a deal with VimpelCom to acquire its interest in Wind. On January 2, 2014, Catalyst delivered a letter of intent to VimpelCom whereby it offered to purchase Globalive Wireless Management Corp. for C$550,000,000, all-cash on closing. VimpelCom did not accept Catalyst's offer.

Globalive Seeks a Financier

22. ~~21.~~ At the same time as VimpelCom was seeking to sell its interest in Wind, and entirely separate from that process, Globalive approached a number of parties, including Catalyst, in an attempt to find capital to purchase VimpelCom's shares in Wind. Globalive wanted to control the identity of the other shareholder of Wind.

23. ~~22.~~ Anthony Lacavera ("Lacavera") is the principal of Globalive. At all material times, Lacavera was the former chief executive officer of Wind. Lacavera directed Globalive to seek out funding to purchase VimpelCom's shares in Wind.

VimpelCom Writes Down its Investment in Wind

24. ~~23.~~ On March 6, 2014, VimpelCom announced that it had written off its investment in Wind as a result of challenges it was facing in the Canadian market. It was apparent to all bidders that VimpelCom was motivated to sell its share in Wind. It was also widely known to all

bidders that if VimpelCom did not receive a suitable offer for its interest in Wind, it would likely push Wind into insolvency proceedings.

25. ~~24.~~ VimpelCom continued to aggressively pursue purchasers for its interest in Wind. Given the nature of the sale process and the fact that Wind was a privately held company, VimpelCom demanded that interested bidders execute a non-disclosure agreement.

Catalyst Executes Confidentiality Agreement and Continues Negotiations with VimpelCom

26. ~~25.~~ In March 2014, Catalyst re-engaged with VimpelCom through UBS.

27. ~~26.~~ On March 23, 2014, Catalyst executed a confidentiality agreement with VimpelCom and Global Telecom Holding S.A.E (the "Confidentiality Agreement"). The Confidentiality Agreement was intended in part, to protect the confidentiality of information exchanged during the diligence process. It also mandated complete confidentiality over the sale process:

> Agreement and Related Negotiations. Each Party agrees that, unless required (pursuant to the advice of reputable outside legal advisors) by applicable law or by the rules of any national stock exchange on which such Party's securities are listed or by any competent regulator authority (in any such case such Party will promptly advise and consult with the other Party and its legal advisers prior to such disclosure), without the prior written consent of the other Party, such Party will not, and will cause its Authorised Persons not to, disclose to any person other than the other Party and its Authorised Persons (a) the fact that discussions or negotiations are taking place with the other Party concerning the Project, (b) any of the terms, conditions or other facts related to the other Party's participation in the Project, including the status thereof, or (c) the existence of this Agreement, the terms hereof or that Confidential Information has been made available pursuant to this Agreement.

28. VimpelCom, Global Telecom Holding S.A.E and Catalyst are parties to the Confidentiality Agreement.

29. UBS was also bound by the terms of the Confidentiality Agreement:

> "**Authorized Person**" shall mean, in relation to a Party, any Affiliate, agent, director, officer, employee, representative or professional advisor (including without limitation legal advisors, auditors and accountants) and potential financing sources and the professionals advisors of such Party, excluding in relation to the Company only, the Dave Entities.

30. Pursuant to the Confidentiality Agreement, UBS could not reveal, *inter alia*, that Catalyst and VimpelCom were in negotiations to anyone other than a Party or Authorized Person, as defined by the Confidentiality Agreement.

31. ~~27.~~ Between March and May of 2014, Catalyst and UBS negotiated terms upon which Catalyst would acquire VimpelCom's interest in Wind.

Wind Defaults on Vendor Debt and Catalyst Negotiations Continue

32. ~~28.~~ On May 1, 2014, Wind defaulted on $150 million in vendor debt. It had until May 30, 2014 to cure the default.

33. ~~29.~~ On May 6, 2014, Catalyst and VimpelCom agreed to preliminary terms for an acquisition of Wind: Catalyst would purchase Wind based on an enterprise value of ~~$300 million~~ $1.3 billion, with a closing date of no later than May 30, 2014.

34. ~~30.~~ Catalyst's review of documents stored in VimpelCom's confidential "data room" commenced on May 9, 2014, after its meeting with Wind's management in Toronto.

35. ~~31.~~ Catalyst negotiated with VimpelCom and its advisors, UBS and Bennett Jones LLP, throughout May and June of 2014, but it could not finalize terms of a share purchase agreement during this period.

Other Suitors Pursue Transaction with VimpelCom

36. ~~32.~~ At the same time that Catalyst was negotiating with VimpelCom, VimpelCom was negotiating with other parties, including Tennenbaum and West Face.

37. ~~33.~~ In May 2012, Tennenbaum, together with an unknown partner, acquired certain vendor debt owed by Wind. During 2013 and 2014, Tennenbaum and its partner reached out to VimpelCom and Wind to offer to provide additional debt and equity capital to fund the business.

38. ~~34.~~ After Wind defaulted on its vendor debt on May 1, 2014, including the debt owed to Tennenbaum, VimpelCom informed Tennenbaum that it was selling its stake in Wind. Tennenbaum met with Wind's management in early May 2014 and started negotiating a proposal to acquire Wind. Tennenbaum's negotiations continued through May and June 2014.

39. ~~35.~~ While Tennenbaum negotiated with VimpelCom, it also began building a consortium of equity partners, including Oak Hill, Blackstone and LG. This initial consortium was permitted to conduct diligence on Wind.

40. ~~36.~~ In May 2014, West Face separately conducted diligence and negotiated with VimpelCom regarding a potential purchase of VimpelCom's interest in Wind.

41. ~~37.~~ West Face was unable to pursue the transaction on its own. In June 2014, it reached out to a strategic partner and worked with that partner on a potential acquisition of Wind, but ultimately the strategic partner backed out.

Catalyst Enters Into Exclusivity With VimpelCom

42. ~~38.~~ In July 2014, Catalyst reached a critical point with VimpelCom such that a deal was imminent. In an effort to control the negotiations, Catalyst proposed that the parties enter into an

~~exclusivity agreement which would allow Catalyst and VimpelCom to continue negotiating for a~~ defined period without the possibility of a competing bid interfering with those negotiations.

43. ~~39.~~ On July 23, 2014, Catalyst and VimpelCom entered into an exclusivity agreement that provided for exclusive negotiations between the parties (the "Exclusivity Agreement"). The Exclusivity Agreement contained the following express and implied terms:

> (a) VimpelCom and Catalyst shall and shall cause their respective Affiliates to deal exclusively with each other in connection with the Transaction and VimpelCom shall use its reasonable efforts to ensure that GWMC and its subsidiaries deal exclusively with Catalyst and its respective Affiliates in connection with the Transaction;
>
> (b) VimpelCom shall not, shall ensure that its Affiliates will not, and shall use its reasonable efforts to ensure that GWMC and its subsidiaries do not, directly or indirectly, through any of its or their respective Representatives, solicit or encourage offers from, participate in any negotiations or discussions with, enter into any agreements with, or furnish any information to, any person regarding any alternative transaction to the Transaction (including but not limited to an acquisition, merger, arrangement, amalgamation, other business combination, joint venture or equity or other financing) involving GWMC or any of its subsidiaries, their respective voting or equity shares or any of their respective material assets (an "Alternative Transaction");
>
> (c) VimpelCom shall, shall cause its Affiliates and its and their respective Representatives to and shall use its reasonable efforts to ensure that GWMC and its subsidiaries, (A) discontinue or cause to be discontinued any existing activity of the nature described in Section 2(a), including but not limited to precluding access to any due diligence data room (except for access provided to Catalyst and its Representatives) and (B) enforce and not release any third party from, or otherwise waive, any standstill covenants or obligations owed by any such third party to VimpelCom and/or its Affiliates and/or GWMC or its subsidiaries under any confidentiality agreement entered into with respect to a potential Transaction involving GWMC or any of its subsidiaries, their respective voting or equity shares or any of their respective material assets; and

(d) VimpelCom and Catalyst would undertake to negotiate with each other in good faith during the exclusivity period and would not take any steps to undermine the purpose and intent of the Exclusivity Agreement.

44. Pursuant to the Exclusivity Agreement, VimpelCom and its agents and advisors, including UBS, were not permitted to negotiate with any party other than Catalyst during the term of the Agreement.

45. ~~40.~~ The Exclusivity Agreement also required that the parties and their agents and advisors, including UBS, keep the existence and terms of the Exclusivity Agreement confidential.

46. ~~41.~~ The Exclusivity Agreement is governed by the laws of the Province of Ontario.

47. ~~42.~~ VimpelCom instructed Wind's management, including Lacavera, that all discussions with any other prospective purchaser of GWMC, its subsidiaries or any of their material assets must cease until the end of the exclusivity period. Although not a party to the Exclusivity Agreement, Lacavera was obligated not to take any steps that undermined its purpose and intent.

48. ~~43.~~ Catalyst's reasonable expectation was that during the exclusivity period, VimpelCom and Lacavera could not and would not negotiate with any party, including West Face or Tennenbaum, regarding an alternative transaction, and that VimpelCom would honour its obligation to negotiate with Catalyst in good faith.

49. ~~44.~~ Catalyst also understood that during the exclusivity period, Wind's management, including Lacavera, was instructed to and was obligated to assist in exclusively attempting to conclude a deal between Catalyst and VimpelCom.

50. VimpelCom, UBS and Lacavera had no intention of abiding by the terms of the Confidentiality or Exclusivity Agreements.

Other Bidders for ~~the Consortium~~ Wind

51. Prior to July 21, 2014, Tennenbaum, West Face, LG, Serruya, and Novus engaged in discussions regarding the formation of a consortium to pursue the purchase of VimpelCom's interest in Wind (the "Consortium").

52. On July 21, 2014, West Face sought VimpelCom's permission to join the Consortium. VimpelCom consented.

53. ~~45. By July 2014, Tennenbaum, West Face, LG, Serruya, and Novus had formed a consortium to pursue the purchase of VimpelCom's interest in Wind (the "Consortium").~~The Consortium received Lacavera's and Globalive's support in the form of information provided to the Consortium by Lacavera and other senior managers of Globalive that was not provided to Catalyst.

54. At all material times, VimpelCom, UBS and Globalive knew of the existence of the Consortium and the Consortium's goal of concluding a transaction with VimpelCom for its debt and equity interests in Wind.

UBS and Globalive Inform Consortium of the Terms of the Exclusivity Agreement

55. While Catalyst and VimpelCom were negotiating the Exclusivity Agreement between July 21 to 23, 2014, Globalive and UBS revealed the state of these negotiations to Tennenbaum.

56. On July 23, 2014, UBS communicated to Oak Hill Capital ("Oak Hill"), a former member of the Consortium, Catalyst's confidential information, including the existence and

terms of the Exclusivity Agreement. UBS told Oak Hill that VimpelCom had entered into exclusivity with Catalyst at the "reserve price" and would be in exclusivity for five to seven days.

57. Oak Hill transmitted the confidential information received from UBS to Tennenbaum, LG and West Face.

58. On July 29, 2014, UBS and Globalive communicated Catalyst's confidential information to Tennenbaum, the specified date on which the term of the Exclusivity Agreement expired. Tennenbaum communicated this confidential information to West Face.

59. At all times, Tennenbaum, West Face and LG knew that information about the Exclusivity Agreement, that were communicated by UBS and Globalive was Catalyst's confidential information.

Catalyst Extends the Exclusivity Agreement

60. ~~46.~~ By way of written extensions to the Exclusivity Agreement, Catalyst and VimpelCom agreed to extend the exclusivity period to August 18, 2014.

61. ~~47.~~ On or about August 3, 2014, VimpelCom and Catalyst reached an agreement in principle for the purchase of Wind by Catalyst.

62. ~~48.~~ In violation of the Confidentiality Agreement and the Exclusivity Agreement, VimpelCom, UBS, and Globalive informed the Consortium that an agreement had been reached with Catalyst in principle.

The Consortium Forms a Conspiracy

63. ~~49.~~ On or around July 23, 2014, UBS breached the Exclusivity Agreement and revealed to the Consortium that VimpelCom had entered into the Exclusivity Agreement.

64. ~~50.~~ Further, or in the alternative, VimpelCom breached the Exclusivity Agreement and revealed to the Consortium that it had entered into the Exclusivity Agreement.

65. ~~51.~~ Together with Lacavera and Globalive, the Consortium began discussing how they might cause VimpelCom to breach the Exclusivity Agreement so as to prevent Catalyst from successfully acquiring Wind.

66. ~~52.~~ The Consortium's and Globalive's joint intention was to induce VimpelCom to breach the Exclusivity Agreement knowing that, in so doing, they would cause damage to Catalyst.

67. ~~53. In or About~~ On August 1, 2014, the members of the Consortium, Globalive, ~~and~~ Lacavera and UBS (together, the Conspirators") entered into a conspiracy. ~~t~~The predominant purpose of which was to induce VimpelCom to breach the Exclusivity Agreement, to cause VimpelCom to cease negotiating with Catalyst in good faith and to thereby cause harm to Catalyst (the "Conspiracy").

68. ~~54.~~ The following parties ~~met in in or about~~ attended a call on August ~~2016~~ 1, 2014 to discuss how to induce VimpelCom to breach the Exclusivity Agreement, as particularized below:

(a) Michael Leitner ("Leitner"), as the principal of Tennenbaum;

(b) Lawrence Guffy ("Guffy") and Hamish Burt, ("Burt") as principals of LG Capital Investors LLC (~~"LG"~~) and the manager of the managing member of 64NM GP;

(c) Greg Boland ("Boland"), Anthony Griffin ("Griffin"), Tom Dea ("Dea") and Peter Fraser ("Fraser"), as principals of West Face;

(d) Michael Serruya ("M. Serruya"), Aaron Serruya ("A. Serruya"), and Simon Serruya ("S. Serruya"), as principals of Serruya;

(e) Terence Hui ("Hui"), as principal of Novus; ~~and~~

(f) Lacavera, as the principal of Globalive ~~(together, the "Conspirators");~~ and

(g) Jonathan Herbst, on behalf of UBS (together, the "Conspirators").

69. By August 1, 2014, Globalive and UBS had communicated the following confidential information to the Conspirators:

(a) Catalyst and VimpelCom were negotiating a transaction to purchase VimpelCom's equity and debt interests in Wind;

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

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

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

(e) The term of the Exclusivity Agreement.

70. ~~55.~~ The Conspirators knew that VimpelCom and Catalyst were party to the Exclusivity Agreement and were aware that a term of the Exclusivity Agreement was that VimpelCom could not negotiate a potential sale of its interest in Wind with any other purchaser during ~~the term of the Agreement~~ its term.

71. Between August 1 and 10, 2014, Lacavera and UBS provided confidential information to the other Conspirators concerning the state of negotiations between VimpelCom and Catalyst. In particular, Lacavera and UBS informed the other Conspirators about the structure of the deal that Catalyst believed it had with VimpelCom and the communication VimpelCom's Board of Directors were having about the negotiations with Catalyst.

72. On or about August 1, 2014, UBS and Globalive communicated the impending vote to Tennenbaum in contravention to the Confidentiality Agreement, the Exclusivity Agreement and their duty of confidence to Catalyst.

73. On August 1, 2014, Tennenbaum informed the Consortium that VimpelCom's Board of Directors intended to vote on the share purchase agreement proposed by Catalyst.

74. Tennenbaum and the other members of the Conspiracy knew that the information was confidential.

75. On August 4, 2014, the Consortium, including Lacavera, met to discuss the terms of their offer to VimpelCom to induce it to breach the Exclusivity Agreement.

76. ~~56.~~ Together, the Conspirators prepared terms of an offer to VimpelCom that were designed to induce VimpelCom to breach the Exclusivity Agreement and to cause VimpelCom to negotiate with Catalyst in bad faith during the terms of the Exclusivity Agreement. The Conspirators used their extensive knowledge of the Exclusivity Agreement to design their offer.

77. ~~57.~~ The Conspirators agreed that one of the terms they would offer to VimpelCom would be that the closing of their offer would not be conditional on any regulatory approval from IC.

The Conspirators included this term in their offer with the knowledge that Catalyst had not offered this term and would not do so.

78. ~~58.~~ Lacavera knew that the proposed offer that all the conspirators crafted would have the effect of causing VimpelCom to breach the Exclusivity Agreement and cause damage to Catalyst.

79. ~~59.~~ Leitner agreed to be the individual who would submit the terms agreed to by the Conspirators to VimpelCom. In so doing, Leitner was acting on his own behalf and on behalf of his fellow co-Conspirators, who in turn were acting for the benefit of the investments funds with which they were associated.

80. ~~60.~~ Tennenbaum is vicariously liable for all conduct of Leitner pleaded herein.

81. ~~61.~~ Lacavera agreed that Leitner should send an offer to VimpelCom in furtherance of the Conspiracy. Additionally, Lacavera agreed that Globalive would join the Conspiracy.

82. ~~62.~~ Globalive is vicariously liable for all conduct of Lacavera pleaded herein.

83. ~~63.~~ At all material times, Guffy was acting as principal of LG, 64NM GP and 64NM LP and agreed that LG, 64NM GP and 64NM LP would participate in the Conspiracy. Guffy agreed that Leitner should send an offer to VimpelCom in furtherance of the Conspiracy.

84. ~~64.~~ LG, 64NM GP and 64NM LP are vicariously liable for all conduct of Guffy pleaded herein.

85. ~~65.~~ At all material times, Burt was acting as principal of LG, 64NM GP and 64NM LP and agreed that LG, 64NM GP and 64NM LP would participate in the Conspiracy. Burt agreed that Leitner should send an offer to VimpelCom in furtherance of the Conspiracy.

86. ~~66.~~ LG, 64NM GP and 64NM LP are vicariously liable for all conduct of Burt pleaded herein.

87. ~~67.~~ At all material times, Boland, Griffin, Dea and Fraser were acting as principals of West Face and agreed that West Face would participate in the Conspiracy. Boland, Griffin, Dea and Fraser agreed that Leitner should send an offer to VimpelCom in furtherance of the Conspiracy.

88. ~~68.~~ West Face is vicariously liable for all conduct of Boland, Griffin, Dea and Fraser pleaded herein.

89. ~~69.~~ At all material times, M. Serruya, A. Serruya, and S. Serruya were acting as principals of Serruya and agreed that Serruya would participate in the Conspiracy. M. Serruya, A. Serruya, and S. Serruya agreed that Leitner should send an offer to VimpelCom in furtherance of the Conspiracy.

90. ~~70.~~ Serruya is vicariously liable for all conduct of M. Serruya, A. Serruya, and S. Serruya pleaded herein.

91. ~~71.~~ At all material times, Hui was acting as a principal of Novus and agreed that Novus would participate in the Conspiracy. Hui ~~instructed~~ agreed that Letiner should send an offer to VimpelCom in furtherance of the Conspiracy.

92. ~~72.~~ Novus is vicariously liable for all conduct of Hui pleaded herein.

93. At all material times, Herbst was acting on behalf of UBS and agreed that it would participate in the Conspiracy.

94. UBS is vicariously liable for all conduct of Herbst pleaded herein.

~~Misuse of Catalyst's~~ Lacavera Transmits Confidential Information ~~by~~ to the Consortium

95. ~~73.~~ While Tennenbaum and West Face were engaged in negotiations with VimpelCom beginning in May 2014, Lacavera was in constant communication with them in his capacity as Chief Executive Officer ("CEO") of Wind.

96. ~~74.~~ Lacavera had intimate knowledge of Catalyst's confidential negotiations with VimpelCom, which he received in his role as CEO of Wind, including Catalyst's regulatory strategy ~~and~~, its negotiating positions with VimpelCom and the terms of the Exclusivity Agreement ("Catalyst's Confidential Information").

97. ~~75.~~ Lacavera knew that if Catalyst was the successful bidder, it intended to terminate his position as CEO of Wind and to eliminate his equity position in the company. In order to prevent this from occurring, and contrary to his contractual obligations to Catalyst under the Confidentiality Agreement, Lacavera shared Catalyst's Confidential Information with West Face and Tennenbaum, including the fact that Catalyst was negotiating with VimpelCom with regard to Wind.

98. ~~76.~~ Between April 2014 and August 18, 2014, Lacavera repeatedly communicated Catalyst's Confidential Information to the Consortium, either jointly or to individual members of

the Consortium, to assist the Conspirators in their efforts to prevent Catalyst from successfully purchasing Wind.

~~77. The Confidential Information that Lacavera transmitted included critical information regarding Catalyst's confidential negotiation communications with VimpelCom.~~

99. After Lacavera and Globalive signed a support agreement whereby they agreed to support VimpelCom's negotiations, including the Exclusivity Agreement with Catalyst, Lacavera continued to communicate Catalyst's Confidential Information to the Consortium through Serruya.

100. ~~78.~~ Lacavera knew that ~~this~~ the information he was communicating was confidential and that information was shared with him on the condition that he not communicate this information to other parties bidding for Wind. In breach of this obligation, Lacavera shared this information with the other bidders, including West Face, to give those other bidders an unfair advantage in their pursuit of Wind.

101. ~~79.~~ The Consortium knowingly received and misused Catalyst's Confidential Information to create the Proposal and gain an unfair advantage over Catalyst in its negotiations with VimpelCom.

102. ~~80.~~ By wrongly transmitting Catalyst's Confidential Information to the Consortium, Lacavera, acting on behalf of Globalive, and, separate and apart from the interests of Wind and VimpelCom, knew that the transmission would (and did) cause damage to Catalyst.

UBS Transmits Confidential Information to the Consortium

103. UBS had intimate knowledge of Catalyst's Confidential Information, which it received in confidence by virtue of its relationship of confidence with Catalyst as VimpelCom's agent.

104. Between July 21 2014 and August 18, 2014, UBS repeatedly communicated Catalyst's Confidential Information to the Consortium, either jointly or to individual members of the Consortium, for the purpose of assisting the Conspirators in their efforts to prevent Catalyst from successfully purchasing Wind.

105. The Confidential Information that UBS transmitted included Catalyst's negotiating positions with VimpelCom, the terms of the Exclusivity Agreement, and the status of the negotiations between Catalyst and VimpelCom.

106. UBS knew that this information was confidential and that information was shared with it on the condition that it not communicate this information to other parties bidding for Wind. UBS repeatedly breached Catalyst's confidence by transmitting this information to the Consortium, including Tennenbaum and West Face, to give those other bidders an unfair advantage in their pursuit of Wind.

107. The Consortium knowingly received and misused Catalyst's Confidential Information to create the Proposal (defined below) and to gain an unfair advantage over Catalyst in its negotiations with VimpelCom.

108. UBS knowingly and willingly participated in the conspiracy by transmitting Catalyst's Confidential Information to the other Conspirators in furtherance of the Conspiracy's predominant purpose which was to induce VimpelCom to breach the Exclusivity Agreement.

109. By wrongly transmitting Catalyst's Confidential Information to the Consortium, UBS knew that the transmission would (and did) cause damage to Catalyst.

The Consortium Induces VimpelCom to Breach the Exclusivity Agreement

110. ~~81.~~ On August 6, 2014, acting in furtherance of the Conspiracy, Leitner sent a proposal to VimpelCom and UBS entitled "Superior Proposal to purchase WIND Canada" (the "Proposal"). The Proposal included the following terms:

(a) Binding commitments to purchase VimpelCom's equity and debt interests for a cash amount that approximates the net amounts distributed to VimpelCom based on the "reserve price";

(b) The proposal would not require regulatory approval and requires no engagement with regulatory authorities;

(c) The proposal would close quickly; and

(d) The Consortium would purchase Wind's Vendor Loans at par and refinance them.

111. ~~82.~~ Leitner delivered the Proposal with authorization and instructions from Tennenbaum, 64NM GP, 64NM LP, LG, Serruya, Novus, West Face, Globalive, Guffy, Burt, M. Serruya, A. Serruya, and S. Serruya, Hui, Boland, Griffin, Dea, Fraser and Lacavera.

112. ~~83.~~ In furtherance of the Conspiracy, Leitner submitted the Proposal with the intent that VimpelCom would breach the terms of the Exclusivity Agreement and prevent Catalyst and VimpelCom from completing any deal, thereby causing damage to Catalyst.

113. On August 8, 2014, West Face, in furtherance of the Conspiracy, contacted Felix Saratovsky of VimpelCom to discuss the Proposal. West Face told Saratovsky that it was sending further details about the Proposal.

VimpelCom Uses Catalyst as a Stalking Horse Bid and Causes Catalyst Harm

114. ~~84.~~ The Conspiracy had the desired effect of causing VimpelCom to breach the Exclusivity Agreement. Between August 6 and August 18, VimpelCom and UBS engaged in discussions and negotiations with the Consortium, Globalive and Lacavera over the Proposal, in breach of the Exclusivity Agreement.

115. ~~85.~~ Following receipt of the Proposal, on August 7 and 8, 2014, VimpelCom ceased negotiating with Catalyst in good faith. Instead, it used its negotiations with Catalyst as a stalking horse to improve the terms of the Proposal.

116. On or about August 8, 2014, VimpelCom instructed UBS to inform the Consortium that VimpelCom was interested in concluding a transaction with the Consortium.

117. On or about August 10, 2014, Leitner engaged in negotiations with UBS and provided details of further equity commitments to bolster the Proposal. Leitner intended that UBS transmit this information to VimpelCom in furtherance of the Conspiracy.

118. ~~86.~~ On or about August 11, 2014, VimpelCom and Catalyst contacted IC to provide an update on the negotiations. During the conference call, Catalyst and VimpelCom told IC that the "deal was done".

119. ~~87.~~ VimpelCom continually and repeatedly stalled its negotiations with Catalyst by, among other things, insisting on the need for approvals from its Board and its finance committee.

The Board and the finance committee then insisted on additional, commercially unreasonable terms with the knowledge and intent that Catalyst could not agree to these new terms.

120. While VimpelCom stalled negotiations with Catalyst, UBS, on VimpelCom's instruction, continued to communicate with the Consortium in contravention of the Exclusivity Agreement. On August 12, 2014, UBS informed Leitner of the term of the Exclusivity Agreement. and the state of negotiations between Catalyst and VimpelCom.

121. ~~88.~~ Despite the representations to IC on August 11, 2014 that the deal was, in fact, done, on or about August 15, 2014, VimpelCom demanded that Catalyst agree to a $5-20 million break-fee to be paid in the event that Catalyst's purchase of Wind did not receive regulatory approval. Prior to this date, VimpelCom had never requested a break fee from Catalyst.

122. ~~89.~~ VimpelCom's intention was to frustrate and defeat the purpose and intent of the Exclusivity Agreement so that its exclusivity period with Catalyst would expire without a signed agreement. While doing so, VimpelCom and the Conspirators continued to negotiate and discuss the terms of an agreement.

Exclusivity ~~W~~with Catalyst Ends

123. ~~90.~~ On August 19, 2014, the exclusivity between VimpelCom and Catalyst terminated without a signed agreement.

124. ~~91.~~ 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.

Harm to Catalyst

125. ~~92.~~ As a result of VimpelCom, UBS and Lacavera's breaches of the Confidentiality Agreement, the Exclusivity Agreement, and their duties of confidence, the Conspiracy was formed with the intent of harming Catalyst.

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

127. ~~94.~~ 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 ~~$750,000,000~~ $1,300,000,000, thereby crystallizing Catalyst's damages as a result of the Conspirators' and VimpelCom's wrongful conduct, as described above.

Catalyst Discovers the Conspiracy in January 2015

128. ~~95.~~ In December 2014, Mid-Bowline commenced an application to seek Court approval of a plan of arrangement pursuant to which Shaw intended to acquire all of the equity in Mid-Bowline. ~~The application~~ (the "Arrangement Proceeding"). The Arrangement Proceeding originally sought a release of an unrelated claim by Catalyst to a constructive trust over West Face's interest in Wind.

129. ~~96.~~ In January 2015, Catalyst brought a motion to oppose the ~~plan of arrangement.~~ Arrangement Proceeding. In the course of those proceedings, Griffin filed an affidavit in support of the plan of arrangement. In it, Griffin described in detail the Consortium's efforts to purchase Wind.

130. ~~97.~~ Simon Lockie (Chief Legal Officer of Globalive) ("Lockie"), Leitner and Burt also filed detailed affidavits in support of the plan of arrangement. In each affidavit, the respective affiant described the Consortium's efforts to purchase Wind and Globalive's role in assisting the Consortium members.

131. ~~98.~~ Catalyst carefully reviewed the affidavits of Griffin, Lockie, Leitner and Burt after they were filed in the public record. This new evidence, when considered in the context of the timing of the Exclusivity Agreement and VimpelCom's change in negotiation posture with Catalyst in August 2014, as detailed above, revealed the details of the Conspiracy, including the common intent of the Conspiracy, Consortium's efforts to induce VimpelCom to breach the Exclusivity Agreement and the Consortium's misuse of Confidential Information.

132. ~~99.~~ 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 throughout the exclusivity period.

Damage to Catalyst

133. ~~100.~~ As a result of the Consortium's inducement of breach of contract and VimpelCom's breach of the Exclusivity Agreement, Catalyst has suffered damages, which are crystallized in the form of the profits realized by the Conspirators from the sale of Wind to Shaw, which Catalyst estimates to ~~$750,000,000~~ $1,300,000,000~~.~~ (the "Proceeds").

Distribution of Proceeds

134. The Plaintiff initially opposed the Arrangement Proceeding. During January and February 2016, the Plaintiff negotiated an agreement with the Applicants to withdraw its continued opposition to the Arrangement Proceeding in exchange for, among other things, the

right to pursue tracing claims against parties that received proceeds from the sale of Wind to Shaw.

135. On or about April 5 2017, the Plaintiff discovered, for the first time, that West Face had distributed a significant portion of the Proceeds to its limited partners after this action was commenced.

136. West Face refuses to disclose the identity of the limited partners in receipt of the distributed Proceeds.

137. Other Conspirators, including Tennenbaum, LG, 64NM, and Serruya, have also distributed their share of the wrongfully acquired Proceeds to their limited partners. Despite requests from the Plaintiff, the Conspirators have not disclosed the identity of the limited partners who received distributions of the proceeds. The Plaintiff do not know the identities of the recipients of the distributed Proceeds at this time.

138. John Doe #1 LP, John Doe #2 LP and John Doe #3 LP are wrongfully in receipt of any share of the Proceeds. The Proceeds were obtained by the Conspirators by unlawful means.

139. John Doe #1 LP, John Doe #2 LP and John Doe #3 LP received their share of the Proceeds with knowledge of the Plaintiff's claim against the Defendants and its entitlement to Proceeds.

Punitive Damages

~~134.~~140. ~~101.~~ Catalyst claims that the Defendants' egregious actions, as pleaded above, were so high-handed, wilful, wanton, reckless, contemptuous and contumelious of Catalyst's

rights and interests so as to entitle Catalyst to a substantial award of punitive, aggravated and exemplary damages.

~~135.~~141. ~~102.~~ Accordingly, the Defendants are liable, on a joint and several basis, to Catalyst for $1 million in punitive damages.

Service *Ex Juris*

~~136.~~142. ~~103.~~ The Defendants' actions include torts committed in Ontario. At all material times, the Defendants carried on business in Ontario. The matters at issue in this proceeding concern contracts entered into and governed by the laws of Ontario.

~~137.~~143. ~~104.~~ Pursuant to the terms of the Exclusivity Agreement, VimpelCom attorned to the jurisdiction of the courts of the Province of Ontario.

~~138.~~144. ~~105.~~ Catalyst pleads reliance on Rule 17.02(f), (g) and (p) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194.

~~139.~~145. ~~106.~~ Catalyst proposes that this action be tried at Toronto.

LAX O'SULLIVAN LISUS GOTTLIEB LLP
Counsel
Suite 2750, 145 King Street West
Toronto, Ontario M5H 1J8

Rocco Di Pucchio LSUC#: 38185I
Tel: (416) 598-2268
rdipucchio@counsel-toronto.com

Andrew Winton LSUC#: 54473I
Tel: (416) 644-5342
awinton@counsel-toronto.com

Bradley Vermeersch LSUC#: 69004K
Tel: (416) 646-7997
bvermeersch@counsel-toronto.com

Fax: (416) 598-3730

Lawyers for the Plaintiff

EXCLUSIVITY AGREEMENT

THIS EXCLUSIVITY AGREEMENT (the "**Exclusivity Agreement**") is made as of the 23rd day of July, 2014.

AMONG:

THE CATALYST CAPITAL GROUP INC., a corporation subsisting under the laws of Ontario, on behalf of Funds managed by it ("**Catalyst**")

AND:

VIMPELCOM LTD., a company subsisting under the laws of the Netherlands ("**VimpelCom**")

WHEREAS Catalyst and VimpelCom (the "**Parties**") are considering a possible business transaction involving the acquisition by Catalyst of 100% of the common shares of Globalive Wireless Management Corp. ("**GWMC**")(the "**Transaction**");

AND WHEREAS the Parties have entered into that certain confidentiality agreement dated March 21, 2014 (the "**Confidentiality Agreement**") in connection with the Transaction;

NOW THEREFORE THIS EXCLUSIVITY AGREEMENT WITNESSES that in consideration of each of the Parties continuing discussions concerning, and committing time and effort to assess, the Transaction and the negotiation of definitive agreements in respect thereof (the "**Transaction Agreements**"), and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by each of the Parties, the Parties hereby agree as follows:

1. **Definitions**

In this Exclusivity Agreement, the following words, phrases and expressions shall have the following meanings, together with the definitions set out above:

(a) "**Affiliate**" means a person, company or other form of entity or enterprise which, directly or indirectly, Controls or is Controlled by a Party, or is under Control of a third party which also Controls a Party, where "**Control**" means possession, directly or indirectly, of the power to direct or cause direction of management and policies through ownership of voting securities, contract, voting trust or otherwise, provided; however, that, for purposes of this Agreement:

(i) Global Telecom Holding S.A.E., a company subsisting under the laws of the Netherlands and its subsidiaries (which term, as used in this Agreement, has the meaning attributed to it in the Ontario *Business Corporations Act*) shall be considered to be Affiliates of VimpelCom; and

(ii) AAL Telecom Holdings Incorporated, a company controlled by Anthony Lacavera, and its subsidiaries (which, for greater certainty do not include GWMC and its subsidiaries) are not Affiliates of VimpelCom;

(b) "**Alternative Transaction**" has the meaning given to such term in Section 2(b);

(c) "**Confidentiality Agreement**" has the meaning given to such term in the recitals;

(d) "**Parties**" has the meaning given to such term in the recitals;

(e) "**Representative**" means any director, officer, employee, agent, advisor, banker or consultant of a Party or any of such Party's Affiliates;

(f) "**Transaction**" has the meaning given to such term in the recitals;

(g) "**Transaction Agreements**" has the meaning given to such term in the recitals; and

(h) "**VimpelCom**" has the meaning given to such term in the recitals.

2. **Exclusivity**

From the date hereof until the earlier of (i) the execution of the Transaction Agreements, and (ii) 11:59 pm on July 30, 2014 (the "**Expiry Time**"):

(a) VimpelCom and Catalyst shall and shall cause their respective Affiliates to deal exclusively with each other in connection with the Transaction and VimpelCom shall use its reasonable efforts to ensure that GWMC and its subsidiaries deal exclusively with Catalyst and its respective Affiliates in connection with the Transaction;

(b) VimpelCom shall not, shall ensure that its Affiliates will not, and shall use its reasonable efforts to ensure that GWMC and its subsidiaries do not, directly or indirectly, through any of its or their respective Representatives, solicit or encourage offers from, participate in any negotiations or discussions with, enter into any agreements with, or furnish any information to, any person regarding any alternative transaction to the Transaction (including but not limited to an acquisition, merger, arrangement, amalgamation, other business combination, joint venture or equity or other financing) involving GWMC or any of its subsidiaries, their respective voting or equity shares or any of their respective material assets (an "**Alternative Transaction**");

(c) VimpelCom shall, shall cause its Affiliates and its and their respective Representatives to and shall use its reasonable efforts to ensure that GWMC and its subsidiaries, (A) discontinue or cause to be discontinued any existing activity of the nature described in Section 2(a), including but not limited to precluding access to any due diligence data room (except for access provided to Catalyst and its Representatives) and (B) enforce and not release any third party from, or otherwise waive, any standstill covenants or obligations owed by any such third party to VimpelCom and/or its Affiliates and/or GWMC or its subsidiaries under any confidentiality agreement entered into with respect to a potential Transaction

involving GWMC or any of its subsidiaries, their respective voting or equity shares or any of their respective material assets; and

(d) VimpelCom shall:

(i) ensure that its Representatives who are aware of the potential Transaction are made aware of the provisions of this Section 2;

(ii) use its reasonable efforts to ensure that the Representatives of GWMC and its subsidiaries who are aware of the Potential Transaction are made aware of the provisions of this Section 2;

(iii) direct the Representatives referred to in (i) to comply with the terms of this Exclusivity Agreement; and

(iv) use its reasonable efforts to cause the Representatives referred to in (ii) to comply with the terms of this Exclusivity Agreement.

3. **No Obligation to Complete Transaction**

The Parties acknowledge that the terms of this Exclusivity Agreement do not obligate them to proceed with a Transaction and that no such obligations will arise unless and until written Transaction Agreements between the Parties have been executed and delivered.

4. **Confidentiality**

Each Party shall hold the existence and terms of this Exclusivity Agreement in confidence in accordance with the terms of the Confidentiality Agreement and shall only disclose the existence and terms of this Exclusivity Agreement to its Representatives who have a *bona fide* need to know such information in connection with such Party's evaluation of the Transaction.

5. **Binding Nature, Term and Termination of Exclusivity Agreement**

Pending the execution by the Parties of the Transaction Agreements, this Exclusivity Agreement shall constitute a legally enforceable agreement between the Parties. The execution of the Transaction Agreements does not constitute a condition precedent to this Exclusivity Agreement. This Exclusivity Agreement shall terminate without any further action of the Parties immediately upon the earliest of: (i) the execution of the Transaction Agreements, (ii) the Parties agreeing in writing to terminate this Exclusivity Agreement; and(iii) the Expiry Time. For greater certainty and notwithstanding any other provision hereof, the terms of Section 4 shall survive any such termination of this Exclusivity Agreement.

6. **General**

(a) Headings in this Exclusivity Agreement shall not affect the interpretation of this Exclusivity Agreement. If any provision or part of this Exclusivity Agreement is unenforceable, such unenforceability shall not affect the enforceability of the

balance of this Exclusivity Agreement which shall be interpreted as if the unenforceable provision had not been a part hereof.

(b) Neither Party may assign this Exclusivity Agreement or any part hereof without the other Party's prior written consent.

(c) Without prejudice to any other rights or remedies that Catalyst may have, Catalyst shall be entitled, without proof of special damages, to the remedy of injunction or such other equitable relief for any threatened or actual breach of this Exclusivity Agreement.

(d) This Exclusivity Agreement shall enure to the benefit of and be binding upon the Parties hereto and their respective successors and permitted assigns.

(e) This Exclusivity Agreement shall be governed by the laws of the Province of Ontario and the federal laws of Canada applicable therein and the Parties hereby attorn to the non-exclusive jurisdiction of the courts of the Province of Ontario.

(f) This Exclusivity Agreement may be executed in one or more counterparts, all of which together shall constitute one and the same document. This Exclusivity Agreement and any counterpart thereof may be delivered by facsimile or other electronic transmission and when so delivered will be deemed to be an original.

(g) This Exclusivity Agreement, together with the Confidentiality Agreement, constitutes the Parties' entire agreement and understanding relating to the subject matter hereof and supersedes all previous or contemporaneous agreements, arrangements, negotiations or understandings between the Parties (whether written or oral) with respect to the subject matter hereof.

(h) Time is of the essence of this Exclusivity Agreement.

IN WITNESS WHEREOF this Exclusivity Agreement has been executed by each of the Parties as of the date first written above.

THE CATALYST CAPITAL GROUP INC.,

on behalf of Funds managed by it

By: _____
Authorized Signatory

VIMPELCOM LTD.

By: _____
Authorized Signatory

AMENDMENT NO. 2 TO EXCLUSIVITY AGREEMENT

THIS AMENDMENT NO. 2 TO EXCLUSIVITY AGREEMENT (the "**Amending Agreement**") is made as of the 8th day of August, 2014.

AMONG:

THE CATALYST CAPITAL GROUP INC., a corporation subsisting under the laws of Ontario, on behalf of Funds managed by it ("**Catalyst**")

AND:

VIMPELCOM LTD., a company subsisting under the laws of the Netherlands ("**VimpelCom**")

WHEREAS Catalyst and VimpelCom (the "**Parties**") entered into an exclusivity agreement dated July 23, 2014, as amended on July 30th, 2014 (the "**Exclusivity Agreement**") in connection with a possible business transaction involving the acquisition by Catalyst of 100% of the common shares of Globalive Wireless Management Corp. (the "**Transaction**");

AND WHEREAS the Parties wish to amend certain terms of the Exclusivity Agreement in accordance with the terms of this Amending Agreement;

NOW THEREFORE THIS AMENDING AGREEMENT WITNESSES that in consideration of each of the Parties continuing discussions concerning, and committing time and effort to assess, the Transaction and the negotiation of definitive agreements in respect thereof, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by each of the Parties, the Parties hereby agree as follows:

1. **Definitions**

Capitalized terms used herein that are not otherwise defined have the meaning ascribed thereto in the Exclusivity Agreement.

2. **Amendment to Exclusivity Agreement**

(a) The first paragraph of Section 2 of the Exclusivity Agreement is hereby deleted and replaced with the following:

"From the date hereof until the earlier of (i) the execution of the Transaction Agreements, and (ii) 11:59 PM (Toronto time) on August 18, 2014 (the "**Expiry Time**")."

(b) This Amending Agreement is an amendment to the Exclusivity Agreement. Unless the context of this Amending Agreement otherwise requires, the

Exclusivity Agreement and this Amending Agreement shall be read together and shall have effect as if the provisions of the Exclusivity Agreement and this Amending Agreement were contained in one agreement. The term "Agreement" when used in the Exclusivity Agreement means the Exclusivity Agreement, as amended by this Amending Agreement and as further amended, revised, replaced, supplemented or restated from time to time.

3. **General**

(a) Headings in this Amending Agreement shall not affect the interpretation of this Amending Agreement. If any provision or part of this Amending Agreement is unenforceable, such unenforceability shall not affect the enforceability of the balance of this Amending Agreement which shall be interpreted as if the unenforceable provision had not been a part hereof.

(b) This Amending Agreement shall enure to the benefit of and be binding upon the Parties hereto and their respective successors and permitted assigns.

(c) This Amending Agreement shall be governed by the laws of the Province of Ontario and the federal laws of Canada applicable therein and the Parties hereby attorn to the non-exclusive jurisdiction of the courts of the Province of Ontario.

(d) This Amending Agreement may be executed in one or more counterparts, all of which together shall constitute one and the same document. This Amending Agreement and any counterpart thereof may be delivered by facsimile or other electronic transmission and when so delivered will be deemed to be an original.

(e) This Amending Agreement, together with the Exclusivity Agreement and the Confidentiality Agreement, constitutes the Parties' entire agreement and understanding relating to the subject matter hereof and supersedes all previous or contemporaneous agreements, arrangements, negotiations or understandings between the Parties (whether written or oral) with respect to the subject matter hereof.

(f) Time is of the essence of this Amending Agreement.

IN WITNESS WHEREOF this Amending Agreement has been executed by each of the Parties as of the date first written above.

THE CATALYST CAPITAL GROUP INC.,

on behalf of Funds managed by it

By: _____
Authorized Signatory

VIMPELCOM LTD.

By: _____
Authorized Signatory

CONFIDENTIALITY AGREEMENT

THIS CONFIDENTIALITY AGREEMENT (this "**Agreement**") is dated the 21st day of March 2014.

BY AND BETWEEN:

VimpelCom Ltd., a limited liability company under Bermuda law, having its business address at Claude Debussylaan 88, 1082MD Amsterdam, the Netherlands, and registered with the Dutch Commercial Register under the number 34374835 ("**VimpelCom**");

Global Telecom Holding S.A.E., a company under Egyptian law, having its business address at 2005A Nile City Towers, South Tower, Corniche El Nile, Ramlet Beaulac, 11221, Cairo, Egypt ("**GTH**");

and

The Catalyst Capital Group Inc., a subsisting corporation under the laws of Ontario, on behalf of Funds managed by it (the "**Company**")

(hereinafter collectively referred to as the "**Parties**" and individually as a "**Party**").

*****

WHEREAS each Party has agreed to disclose to the other Party and has agreed to keep confidential certain Confidential Information (as defined below) subject to the terms and conditions hereinafter contained in relation to a potential transaction regarding the acquisition, merger, business combination, financing or other investment of and in VimpelCom's direct and indirect interest in Globalive Investment Holdings Corp. and its direct and indirect subsidiaries (the "**Project**");

NOW, THEREFORE the Parties have agreed as follows:

1. Definitions and Interpretation. The following expressions shall unless the context otherwise admits have the following meanings:

   "**Agreement**" has the meaning set out in the preamble to this Agreement.

   "**Affiliate**" shall mean any entity that controls, is controlled by, or is under common control with the Party (or such other entity for which such determination is being made).

   "**Authorised Person**" shall mean, in relation to a Party, any Affiliate, agent, director, officer, employee, representative or professional advisor (including without limitation legal advisors, auditors and accountants) and potential

financing sources and the professional advisors of such Party, excluding in relation to the Company only, the Dave Entities.

"**Claim**" has the meaning set out in clause 18 of this Agreement.

"**Company**" has the meaning set out in the preamble to this Agreement.

"**Confidential Information**" means any and all non public, confidential and/or proprietary knowledge, data, or information of the Disclosing Party or its Affiliate, including, without limitation, any: (A) trade secrets, drawings, inventions, methodologies, mask works, ideas, processes, formulas, source and object codes, data, programs, software source documents, works of authorship, know-how, improvements, discoveries, developments, designs and techniques, and all other work product of the Disclosing Party or its Affiliate, whether or not patentable or registrable under trademark, copyright, patent or similar laws; (B) information regarding plans for research, development, new service offerings and/or products, marketing, advertising and selling, distribution, business plans, acquisition plans, business forecasts, budgets and unpublished financial statements, licenses, prices and costs, suppliers, customers or distribution arrangements; (C) any information regarding the skills and compensation of employees, suppliers, agents, and/or independent contractors of the Disclosing Party or its Affiliate; (D) concepts and ideas relating to the development and distribution of content in any medium or to the current, future and proposed products or services of the Disclosing Party or its Affiliate; (E) any other information, data or the like that is labelled confidential or orally disclosed as confidential; or (F) Notes. Confidential Information does not include any information that (i) becomes generally available to the public other than as a result of a disclosure by the Receiving Party or any of the Authorised Persons of the Receiving Party in violation of this Agreement; (ii) was in the Receiving Party's possession prior to the disclosure of the Confidential Information by the Disclosing Party pursuant to this Agreement, provided that the source of such information was not known by the Receiving Party to be subject to an obligation not to disclose such information; or (iii) becomes available to the Receiving Party or the Authorised Persons of the Receiving Party on a non-confidential basis from a source other than the Disclosing Party or any Authorised Person of the Disclosing Party, provided that such source was not known by the Receiving Party to be subject to an obligation not to disclose such information;.

"**Disclosing Party**" shall mean the Party to which the Confidential Information relates.

"**GTH**" has the meaning set out in the preamble to this Agreement.

"**LCIA**" has the meaning set out in clause 18 of this Agreement.

"**Notes**" shall mean any memoranda, reports, analyses, extracts or notes that the Receiving Party or any Authorised Person of the Receiving Party produced that are based on, reflect or contain any of the Confidential Information.

"**Party**" has the meaning set out in the preamble to this Agreement.

"**Project**" has the meaning set out in the recital to this Agreement.

"**Purpose**" shall mean the analysis, evaluation, structuring and negotiation of the Project.

"**Receiving Party**" shall mean a Party that has received Confidential Information relating to the other Party.

"**VimpelCom**" has the meaning set out in the preamble to this Agreement.

2. Term of the Agreement. This Agreement shall remain in force until three years from the date hereof.

3. Obligations of the Receiving Party. Each Party shall agree that, as the Receiving Party, it and its Authorised Persons:

3.1. shall take all measures reasonably practicable to ensure the continued confidentiality of the Confidential Information;

3.2. shall not use the Confidential Information or any part of it for any purpose other than the Purpose;

3.3. shall not disclose the Confidential Information or any part thereof to any person other than an Authorised Person under the terms and conditions of clause 3.4;

3.4. shall (i) disclose the Confidential Information to an Authorised Person only to the extent necessary to allow such Authorised Person to assist the Receiving Party in the Purpose; (ii) prior to disclosing any Confidential Information to any Authorised Person, inform such Authorised Person of the confidential nature of the Confidential Information and of the terms of this Agreement; (iii) be responsible for any breach of this Agreement by any Authorised Person of the Receiving Party; and (iv) reimburse, indemnify and hold harmless the Disclosing Party and the Authorised Persons of the Disclosing Party from any damage, loss or expense incurred as a result of the use of the Confidential Information by the Receiving Party or any Authorised Person of the Receiving Party contrary to the terms of this Agreement;

3.5. shall not take any copies or make any summaries or transcripts of the whole or any part of the Confidential Information save as is necessary for the Purpose;

3.6. shall notify the Disclosing Party immediately, if it becomes aware that any Confidential Information has been disclosed to or is in the possession of any person who is not an Authorised Person; and

3.7. shall, upon termination of this Agreement or at the written request of the Disclosing Party, either destroy or return to the Disclosing Party (as the Disclosing Party may reasonably direct) the Confidential Information that is in tangible form, including any copies that the Receiving Party has

made, and all Notes or other references to the Confidential Information in its documents. Notwithstanding the return or destruction of the Confidential Information, the Receiving Party and its Authorised Persons will continue to be bound by the Receiving Party's obligations of confidentiality and other obligations under this Agreement. The destruction or return of Confidential Information does not apply to any Confidential Information necessary to comply with any obligations or best practices under all applicable laws, rules, regulations or internal compliance policies and procedures or to any Confidential Information that cannot reasonably be destroyed (such as oral communications reflecting Confidential Information, firm electronic mail back-up records, back-up server tapes and any similar such automated record-keeping or other retention system), which shall remain subject to the terms of this Agreement.

4. Limitation of Applicability. Notwithstanding any other provisions hereof, if the Receiving Party or any Authorised Person of the Receiving Party is required to disclose any Confidential Information (including, but not limited to, any Notes) by any competent regulatory authority or in connection with any legal or administrative proceeding or in accordance with the rules of the stock exchange on which the shares of the Receiving Party and/or its Affiliates are traded, the Receiving Party will notify the Disclosing Party immediately of the existence, terms and circumstances surrounding such requirement so that the Disclosing Party may seek a protective order or other appropriate remedy and/or take steps to resist or narrow the scope of the disclosure sought by such requirement. The Receiving Party agrees to assist the Disclosing Party in seeking a protective order or other remedy, if requested by the Disclosing Party. If a protective order or other remedy is not obtained and disclosure is required (pursuant to the advice of reputable outside legal advisors), the Receiving Party may make such disclosure without liability under this Agreement, provided that the Receiving Party or its Authorised Persons furnish only that portion of the Confidential Information that is legally required to be disclosed, the Receiving Party gives the Disclosing Party notice of the information to be disclosed as far in advance of its disclosure as practicable and the Receiving Party uses its reasonable endeavours to ensure that confidential treatment will be accorded to all such disclosed information.

5. No Representation or Warranty. The Receiving Party acknowledges and agrees that neither the Disclosing Party nor any of its Authorised Persons or "controlling persons" (within the meaning of Section 20 of the United States Securities Exchange Act of 1934, as amended) (i) has made or makes any express or implied representation or warranty as to the accuracy or completeness of the Confidential Information or (ii) will have any liability whatsoever to the Receiving Party or any of its Authorised Persons resulting from or relating to any use of the Confidential Information or any errors therein or omissions therefrom. The Receiving Party further agrees that it is not entitled to rely on the accuracy or completeness of the Confidential Information, and that it will only be entitled to rely on such representations and warranties as may be included in any definitive agreement with respect to the Project, subject to such limitations and restrictions as may be contained therein.

6. Ownership of Confidential Information. All Confidential Information shall be deemed to be (and all copies thereof or of any part or parts thereof shall become upon the creation thereof) and shall remain the property of the Disclosing Party.

7. Intellectual Property. This Agreement shall not operate as an assignment to the Receiving Party of any patents, copyrights, registered designs, unregistered designs, trademarks, trade names or other intellectual property rights of the Disclosing Party as may subsist in or be contained in or reproduced in the Confidential Information and the Receiving Party shall not, nor shall any Authorised Person of the Receiving Party or persons on the Receiving Party's or any Authorised Person's behalf, apply for any patent or registration of any trademark or design or any other intellectual property right in respect of the Confidential Information or any part thereof.

8. Right to Disclose. Each Party warrants that it has the right to disclose the Confidential Information that it discloses under this Agreement and such disclosure shall not violate any obligation, covenant or restriction imposed upon such Party pursuant to any agreement, regulation, law or otherwise.

9. No Further Obligations. Nothing in this Agreement shall impose or be deemed to impose on either Party an obligation to disclose Confidential Information or to enter into any agreement or transaction and in particular shall not oblige either Party to enter into any agreement with respect to the Project.

10. No Assignment. The Parties shall not assign or otherwise transfer their rights or obligations under this Agreement.

11. Damages. The Receiving Party acknowledges and agrees that the Disclosing Party would be damaged irreparably if any provision of this Agreement were not performed in accordance with its specific terms or were otherwise breached. Accordingly, the Disclosing Party will be entitled to an injunction or injunctions to prevent breaches of the provisions of this Agreement and to enforce specifically this Agreement and its provisions by an action or proceeding instituted in any court having jurisdiction over the Receiving Party. Except as expressly provided herein, the rights, obligations and remedies created by this Agreement are cumulative and in addition to any other rights, obligations or remedies otherwise available at law or in equity. Except as expressly provided herein, nothing herein will be considered an election of remedies.

12. Execution of Additional Documents. The Receiving Party shall, as and when requested by the Disclosing Party, do all acts and execute all documents as may be reasonably necessary to prevent any loss, misuse or unauthorised disclosure of the Confidential Information or any part of it by any of its Authorised Persons.

13. Severability. The illegality, invalidity or unenforceability of any part of this Agreement for any reason whatsoever shall not affect the legality, validity or enforceability of the remainder of this Agreement.

14. Agreement and Related Negotiations. Each Party agrees that, unless required (pursuant to the advice of reputable outside legal advisors) by applicable law or by the rules of any national stock exchange on which such Party's securities are

listed or by any competent regulatory authority (in any such case such Party will promptly advise and consult with the other Party and its legal advisers prior to such disclosure), without the prior written consent of the other Party, such Party will not, and will cause its Authorised Persons not to, disclose to any person other than the other Party and its Authorised Persons (a) the fact that discussions or negotiations are taking place with the other Party concerning the Project, (b) any of the terms, conditions or other facts related to the other Party's participation in the Project, including the status thereof, or (c) the existence of this Agreement, the terms hereof or that Confidential Information has been made available pursuant to this Agreement.

15. Entirety of the Agreement; Previous and Subsequent Agreements. This Agreement constitutes the entire agreement and understanding between the Parties with respect to its subject matter and replaces all previous agreements between, or understandings by, the Parties with respect to such subject matter. This Agreement cannot be amended except by written instrument signed on behalf of both of the Parties.

16. Third Party Rights. A person who is not a party to this Agreement has no rights under the Contracts (Rights of Third Parties) Act of 1999 to enforce any term of this Agreement.

17. Applicable Law. This Agreement and any non-contractual obligations arising out of or in connection with it shall be governed by and construed in accordance with English law.

18. Arbitration. Any dispute, controversy or claim arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination (a "**Claim**"), may be referred to and finally resolved by arbitration under the Rules of the London Court of International Arbitration (the "**LCIA**"), which Rules are deemed to be incorporated by reference into this Clause 18. The dispute will be heard by a single arbitrator. If the Parties are unable to agree an arbitrator within 15 days, then any Party may ask the LCIA to appoint one. The arbitrator must have expertise in the matter(s) in dispute and not be a present or former officer, employee, director, consultant for, or a greater than 1% shareholder of any party to the arbitration. The place of arbitration will be the city of London, England. The language of the arbitral proceedings will be English, and the procedure (insofar as it is not governed by the Rules of the LCIA) will be governed by English law. Insofar as they are legally able to do so, the Parties hereby agree to exclude the jurisdiction of English courts. The decision of the arbitrators will be final, binding and enforceable against the Parties and a judgment upon any award rendered by the arbitrators may be entered in any court having jurisdiction thereof.

19. Insider Trading. The Company hereby acknowledges that it is aware, and will inform its Authorised Persons, that the securities laws of the United States (as well as stock exchange regulations) and the securities laws of any other country applicable to the Company prohibit any person who has material, non-public information concerning VimpelCom and GTH or a possible transaction involving VimpelCom and GTH from purchasing or selling VimpelCom's and GTH's securities when in possession of such information and from communicating such

information to any other person or entity under circumstances in which it is reasonably foreseeable that such person or entity is likely to purchase or sell such securities while in possession of such information. The Company hereby agrees, and will inform its Authorised Persons, that it will not use or cause a third party to use Confidential Information in contravention of the securities laws of United States or the securities laws of any other country applicable to the Company.

20. Headings. The headings to clauses in this Agreement are for reference only and shall not affect the interpretation of this Agreement.

21. Counterparts. This Agreement may be signed in two or more counterparts in the English language, each of which shall be an original, with the same effect as if the signatures thereto and hereto were upon the same instrument.

22. Non-Solicitation of Employees. Each Party agrees that, without the other Party's prior written consent, neither it nor any of its Authorised Persons will for a period of *one* year from the date of this Agreement directly or indirectly knowingly solicit any employee of the other Party (a) for employment by the Party or any of its controlled affiliates or (b) to provide consulting or other services to or on behalf of the Party or any of its controlled affiliates; provided, however, that the Parties shall not be prohibited from employing any such person who contacts such Party on his or her own initiative or in response to a published general solicitation not specifically targeted at such person, in either case without any direct or indirect solicitation by the other Party.

23. Nothing herein to apply to Data and Audio- Visual Enterprises. It is understood that the Company or investment funds managed by it or Affiliates of the Company (collectively the "**Company Entities**") are substantial creditors of Data and Audio-Visual Enterprises Wireless Inc. and/or one or more of its Affiliates (collectively the "**Dave Entities**"). Nothing herein shall be interpreted to restrict or limit the ability of the Company Entities to deal with the Dave Entities or any of them in such manner as the Company Entities shall deem fit in their discretion provided that the Company Entities do not disclose to the Dave Entities any Confidential Information.

[SIGNATURE PAGE FOLLOWS]

IN WITNESS whereof the duly authorised representatives of the Parties have executed this Agreement the day and year before written.

VimpelCom Ltd.

By: _____

Name: _____

Title: _____

Global Telecom Holding S.A.E.

By: _____

Name: _____

Title: _____

The Catalyst Capital Group Inc., on behalf of Funds managed by it

By: _____

Name: Gabriel de Alba

Title: Managing Director & Partner

BREACH OF CONFIDENCE TO THE RESCUE

*Paul Perell**

In *Cadbury Schweppes Inc. v. FBI Foods Ltd.*,[1] a breach of confidence claim[2] succeeded where the plaintiff's claim for breach of contract would have failed as a matter of contract interpretation and as a matter of want of privity of contract. In *Lac Minerals Ltd. v.*

---

* Weir Foulds, LLP.

1. [1994] 8 W.W.R. 727, 93 B.C.L.R. (2d) 318 (S.C.), vard 138 D.L.R. (4th) 682, [1996] 9 W.W.R. 609, 129 W.A.C. 56 (B.C.C.A.), supp. reasons 138 D.L.R. (4th) 708, [1996] 10 W.W.R. 752, supp. reasons [1997] 2 W.W.R. 149, 26 B.C.L.R. (3d) 308, vard [1999] 1 S.C.R. 142, 167 D.L.R. (4th) 577, 83 C.P.R. (3d) 289.

2. J. Hull, *Commercial Secrecy: Law and Practice* (London: Sweet & Maxwell, 1998); M. Gronow, "Restitution for Breach of Confidence" (1996), 10 I.P.J. 219; J.D. McCamus, "Equitable Compensation and Restitutionary Remedies: Recent Developments", [1995] L.S.U.C. Special Lectures 295; L.D. Smith, "Breach of Confidence — Constructive Trusts — Punitive Damages — Disgorgement of the Profits of Wrongdoing: *Ontex Resources Ltd. v. Metalore Resources Ltd.*" (1994), 73 Can. Bar Rev. 259; D. Capper, "Damages for Breach of the Equitable Duty of Confidence" (1994), 14 J. Leg. Stud. 313; L. Tsaknis, "The Jurisdictional Basis, Elements, and Remedies in the Action for Breach of Confidence — Uncertainty Abounds" (1993), 5 Bond L. Rev. 18; C.L. Kirby, "Accounting for Profits: The Canadian Approach" (1992-93), 7 I.P.J. 263; D. Vaver, "Keeping Secrets, Civilly Speaking" (1992), 13 Adv. Q. 334; R. Brait, "The Unauthorized Use of Confidential Information" (1991), 18 C.B.L.J. 323; P. Birks, "The Remedies for Abuse of Confidential Information", [1990] Lloyd's Mar. & Com. L.Q. 460; J.D. Davies, "Duties of Confidence and Loyalty", [1990] Lloyd's Mar. & Com. L.Q. 4; R.A. Brait, "Confidentiality in the Employment Relationship" (1990), 5 I.P.J. 187; P.D. Maddaugh, "Confidence Abused: *Lac Minerals Ltd. v. International Corona Resources Ltd.*" (1990), 16 C.B.L.J. 198; J.T. Ramsay, "Drafting Confidentiality Agreements in Canada" (1989), 4 I.P.J. 157; A.M. Tettenborn, "Damages for Breach of Confidence: An English Perspective" (1987), 3 I.P.J. 183; F. Gurry, "Breach of Confidence" in P.D. Finn, ed., *Essays in Equity* (Agincourt: The Carswell Company Ltd., 1985); F. Gurry, *Breach of Confidence* (Oxford: Clarendon Press, 1984); D. Vaver, "Civil Liability for Taking or Using Trade Secrets in Canada" (1981), 5 C.B.L.J. 253; R.J. Roberts, "Corporate Opportunity and Confidential Information: Birds of a Feather that Flock Together or Canaeros of a Different Colour" (1976), 28 C.P.R. (2d) 68; G. Jones, "Restitution of Benefits Obtained in Breach of Another's Confidence" (1970), 86 L.Q.R. 463.

International Corona Resources Ltd.,[3] and again more recently in *Visagie v. TVX Gold Inc.*,[4] a claim for breach of confidence succeeded where the plaintiff's claim for breach of fiduciary duty failed. This article discusses how a claim for breach of confidence can come to the rescue when other claims fail. The approach of the article will be to summarize the law about breach of confidence and then to discuss the *Cadbury Schweppes* and *Visagie* cases.

The case law establishes that a breach of confidence occurs when a confider discloses confidential information to a confidant in circumstances in which there is an obligation of confidentiality and the confidant misuses the confidential information. To establish a breach of confidence, a confider must show that: (a) it had information with the necessary quality of confidence; (b) it disclosed the confidential information to a confidant in circumstances in which there was an obligation of confidentiality; and (c) the confidant misused the confidential information.[5] More will be said below about whether misuse requires an element of detriment to the confider.

What is confidential information, when does an obligation of confidentiality arise, and what counts for a misuse of confidential information may be the subject of contract and the law recognizes fiduciary relationships, employment relationships and some other relationships as inherently having an obligation of confidentiality. However, a confider and confidant relationship does not necessarily require that there be any contractual, fiduciary or other direct relationship between the parties.[6] Confidential relationships may arise

---

3. (1989), 61 D.L.R. (4th) 14, [1989] 2 S.C.R. 574, 36 O.A.C. 57.
4. (2000), 49 O.R. (3d) 198, 187 D.L.R. (4th) 193, 132 O.A.C. 231 (C.A.), affg 42 B.L.R. (2d) 53 (Ont. Ct. (Gen. Div.)).
5. *Lac Minerals Ltd. v. International Corona Resources Ltd.*, *supra*, footnote 3; *Coco v. A.N. Clark (Engineers) Ltd.*, [1969] R.P.C. 41 (Ch.).
6. *Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.* (1948), 65 R.P.C. 203; *Seager v. Copydex Ltd.*, [1967] 2 All E.R. 415 (C.A.); *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, *supra*, footnote 2; *Attorney General v. Guardian Newspapers Ltd.*, [1988] 3 All E.R. 545 (H.L.); *Prince Albert v. Strange* (1849), 1 H. & Tw. 1, 47 E.R. 1302 (L.C.). If there is a contractual relationship that is silent about confidentiality, the law may imply a term to treat any confidential information in a confidential way: *Computer Workshops Ltd. v. Banner Capital Market Brokers Ltd.* (1988), 64 O.R. (2d) 266, 50 D.L.R. (4th) 118, 21 C.P.R. (3d) 116 (H.C.J.), affd on other grounds 74 D.L.R. (4th) 767, 33 C.P.R. (3d) 416, 1 O.R. (3d) 398*n* (C.A.). A former employee is under an implied obligation not to use or disclose confidential information acquired during employment: *International Tools Ltd. v. Kollar*, [1996] 2 O.R. 201, 56 D.L.R. (2d) 289, 48 C.P.R. 145 (H.C.J.), vard [1968] 1 O.R. 669, 67 D.L.R. (2d) 386, 54

as a matter of the common law and equity. A confidant may include any direct recipient of confidential information from the confider and any third party who uses or discloses information that is actually or constructively known to have been used or disclosed by someone in breach of confidence or that is subsequently discovered to have been so used or disclosed.[7]

The disclosure of information to the confidant includes giving him access to property or resources from which the confidant can obtain the information; in other words, a person, typically an employee or joint venturer, who gathers or creates the confidential information and who never discloses it to the confider, nevertheless qualifies as a confidant and may not misuse the confidential information.[8]

To have the quality of confidentiality, information may, but need not be, secret or unique; rather, the main attributes of confidential information are: (a) inaccessibility — the information is not public knowledge or generally available and effort is required for it to be obtained or known;[9] and (b) identifiability — the information can be demarcated or differentiated so that it can be traced to the source of its creation.[10] Factors that are relevant to determining whether information is confidential include its importance and value to the

---

C.P.R. 171 (C.A.); *Faccenda Chicken Ltd. v. Fowler*, [1985] 1 All E.R. 724 (Ch. D.), affd [1986] 1 All E.R. 617 (C.A.).

7. *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, *supra*, footnote 1; *Apotex Fermentation Inc. v. Novopharm Ltd.* (1997), 162 D.L.R. (4th) 111, [1998] 10 W.W.R. 455, 80 C.P.R. (3d) 449 (Man. C.A.); *International Tools Ltd. v. Kollar* (C.A.), *ibid.*, at p. 674; *Tenatronics Ltd. v. Hauf*, [1972] 1 O.R. 329, 23 D.L.R. (3d) 60, 4 C.P.R. (2d) 72 (H.C.J.); *Polyresins Ltd. v. Stein-Hall Ltd.*, [1972] 2 O.R. 188 (H.C.J.); *Lancashire Fires Ltd. v. SA Lyons & Co. Ltd.*, [1996] N.L.O.R. No. 3400 (Eng. C.A.); *Fraser v. Evans*, [1969] 1 Q.B. 349 (C.A.); *Lord Ashburton v. Pape*, [1913] 2 Ch. 469 (C.A.); *Prince Albert v. Strange*, *ibid.*

8. *Ontex Resources Ltd. v. Metalore Resources Ltd.* (1993), 13 O.R. (3d) 229, 103 D.L.R. (4th) 158, 63 O.A.C. 258 (C.A.), leave to appeal to S.C.C. refused 107 D.L.R. (4th) vii, 69 O.A.C. 160*n*; *Cranleigh Precision Engineering Ltd. v. Bryant*, [1964] 3 All E.R. 289.

9. *Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.* (1948), 65 R.P.C. 203 (C.A.) at p. 215; *Coco v. A.N. Clark (Engineers) Ltd.*, *supra*, footnote 5; *Visagie v. TVX Gold Inc.*, *supra*, footnote 4; *Promotivate International Inc. v. Toronto Star Newspapers Ltd.* (1985), 53 O.R. (2d) 9, 23 D.L.R. (4th) 196, 8 C.P.R. (3d) 546 (H.C.J.); *Sun-Can Developments Ltd. v. Korea Exchange Bank of Canada* (1992), 11 O.R. (3d) 265 (Gen. Div.); *Ansell Rubber Co. Pty. v. Allied Rubber Industries Pty. Ltd.*, [1972] R.P.C. 811 (Vict. S.C.).

10. *Terrapin Ltd. v. Builders Supply Co. (Hayes) Ltd.*, [1967] 15 R.P.C. 375 (Ch. D.) at p. 391, affd [1960] 5 R.P.C. 128 (C.A.); *Fraser v. Thames Television Ltd.*,

confider; the amount of time, money and effort required to obtain the information; the extent to which it is shared or made available; the extent to which efforts are made to keep it secret, the customs of the industry in which the information is used, and the extent to which the information is known internally and externally.[11]

A trade secret or information about a secret manufacturing process qualifies as confidential information[12] but confidential information is not confined to commercial information and may include personal, political, historical, literary, artistic or employment matters.[13] If it is sufficiently original and well enough developed to have a reasonable prospect of realization, an idea or concept for a film, play, advertising campaign or game etc. may constitute confidential information.[14] Information that is public knowledge is not confidential,[15] but publicly available information that has been transformed by ingenuity and creativity qualifies as confidential information.[16] However, unless there is an enforceable non-competition contract

---

[1983] 2 All E.R. 101 (Q.B.); *Peaker v. Canada Post Corp.* (1989), 68 O.R. (2d) 8 (H.C.J.), affd 24 A.C.W.S. (3d) 183 (Ont. C.A.).

11. *Pharand Ski Corp. v. Alberta* (1991), 5 B.L.R. (2d) 53 at para. 136, 80 Alta. L.R. (2d) 216, 37 C.P.R. (3d) 288 (Q.B.); *Ansell Rubber Co. v. Allied Rubber Industries Proprietary Ltd.*, [1967] V.R. 37; *Deta Nominees Proprietary Ltd. v. Viscount Plastics Products Proprietary Ltd.*, [1979] V.R. 167; *Lancashire Fires Ltd. v. SA Lyons & Co. Ltd.*, [1996] N.L.O.R. No. 3400 (Eng. C.A.).
12. *International Tools Ltd. v. Kollar*, *supra*, footnote 6.
13. *Slavutych v. Baker* (1975), 55 D.L.R. (3d) 224, [1976] 1 S.C.R. 254, [1975] 4 W.W.R. 620; *Attorney General v. Guardian Newspapers Ltd.*, *supra*, footnote 6; *Argyll v. Argyll*, [1965] 1 All E.R. 611 (Ch. D.); *Banks v. Boosey & Hawkes Music Publishers Ltd.*, [1998] E.W.J. No. 4569 (Ch. D.); *Lindsey v. LeSueur* (1913), 29 O.L.R. 648 (C.A.); *Pollard v. Photographic Co.* (1889), 40 Ch. D. 345; *Prince Albert v. Strange*, *supra*, footnote 6.
14. *Talbot v. General Television Corporation Pty. Ltd.*, [1980] R.P.C. 1; *Fraser v. Thames TV*, *supra*, footnote 10; *De Maudsley v. Palumbo*, [1996] F.S.R. 447.
15. *Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.* (1948), 65 R.P.C. 203 (C.A.); *Paul v. Vancouver International Airport Authority* (2000), 5 B.L.R. (3d) 135 (B.C.S.C.); *B.W. International Inc. v. Thomson Canada Ltd.* (1996), 137 D.L.R. (4th) 398, 68 C.P.R. (3d) 289, 3 C.P.C. (4th) 41 (Ont. Ct. (Gen. Div.)).
16. *Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.*, *ibid.*; *Seager v. Copydex Ltd.*, [1967] 2 All E.R. 415 (C.A.); *Computer Workshops Ltd. v. Banner Capital Market Brokers Ltd.* (1988), 64 O.R. (2d) 266, 50 D.L.R. (4th) 118, 21 C.P.R. (3d) 116 (H.C.J.), affd on other grounds 74 D.L.R. (4th) 767, 33 C.P.R. (3d) 416, 1 O.R. (3d) 398*n* (C.A.); *Embrace-Air Inc. v. Western Star Trucks Holding Ltd.* (2000), 3 B.L.R. (3d) 254 (B.C.S.C.) (information public and not confidential); *Schauenburg Industries Ltd. v. Borowski* (1979), 25 O.R. (2d) 737, 101 D.L.R. (3d) 701, 50 C.P.R. (2d) 69 (H.C.J.).

(that is, a contract not caught by the doctrine about the illegality of any unreasonable restraint of trade), personal aptitudes, techniques, expertise, general business methods and skills acquired during employment do not constitute confidential information that may not be used by a former employee.[17]

For information to be imparted in circumstances of confidentiality, the confidant knows or ought to know that it is being disclosed on the basis that it is confidential.[18] Frequently, parties sign confidentiality agreements that specify what is confidential and the circumstances of confidentiality, but confidentiality can arise independently from any contract. For example, security precautions, efforts to preserve secrecy, and limited or controlled access to a manufacturing process may show that information associated with the process is confidential information.[19] Circumstances of confidentiality, however, do not necessarily involve any formality such as a warning, agreement or security measures. Megarry J., in the leading case *Coco v. A.N. Clark (Engineering) Ltd.*,[20] said that the test was whether a reasonable man in the position of the recipient would have realized upon reasonable grounds that the information was given in confidence. Megarry J. also stated that where information of commercial or industrial value is given on a businesslike basis and with some avowed common object by one party to another, the recipient would bear a heavy burden to establish that there was not an obligation of confidence.[21]

For confidential information to be misused, it is disclosed or used for a purpose other than the one for which it was disclosed. In other words, any use of confidential information other than for a permit-

---

17. *International Tools Ltd. v. Kollar*, *supra*, footnote 6; *Faccenda Chicken Ltd. v. Fowler*, *supra*, footnote 6; *Lancashire Fires Ltd. v. SA Lyons & Co. Ltd.*, [1996] N.L.O.R. No. 3400 (Eng. C.A.); *Herbert Morris Ltd. v. Saxelby*, [1916] 1 A.C. 688 (H.L.).
18. *Coco v. A.N. Clark (Engineers) Ltd.*, *supra*, footnote 5.
19. *International Tools Ltd. v. Kollar*, *supra*, footnote 6.
20. *Supra*, footnote 5, at p. 48.
21. The reasonable person test from the *Coco* case was approved by the Supreme Court of Canada in *Lac Minerals Ltd. v. Corona Resources Ltd.*, *supra*, footnote 3. See also *Tree Savers International Ltd. v. Savoy* (1992), 87 D.L.R. (4th) 202, [1992] 2 W.W.R. 470, 84 Alta. L.R. (2d) 384 (C.A.); *Mancha Consultants Ltd. v. Canada Square Development Corp.* (1994), 14 B.L.R. (2d) 194 (Ont. Ct. (Gen. Div.)), revd 110 O.A.C. 52, 42 B.L.R. (2d) 289 (C.A.), supp. reasons 117 O.A.C. 312, leave to appeal to S.C.C. refused 120 O.A.C. 197*n*; *Pharand Ski Corp. v. Alberta*, *supra*, footnote 11.

ted use is a breach of confidence.[22] The relevant analytical question about misuse is not whether there is a prohibition but whether the confidant's use is authorized or permitted.[23] To advance its claim for breach of confidence, a confider must show that its confidential information was used by the confidant, and then the onus falls on the confidant to show that the use was permitted.[24] A confidant who receives confidential information, even if it later becomes public knowledge, may not use it to the detriment of the confider. This disability of the confidant is known as the springboard principle.[25] However, parties may, by the express or implied terms of a contract, exclude or limit the general law about the treatment of confidential information and allow the information to be used in some ways.[26] More about the relationship between contract and breach of confidence will be said below.

With roots in equity and the common law, an action for breach of confidence has developed its own unique character — it is now *sui generis* — and if a breach of confidence is established, the court has the jurisdiction to grant a wide range of both common law and equitable remedies.[27] The general goal of these remedies is to put the confider into as good a position as it would be but for the breach.[28] The topic of remedies is outside the scope of this article, but possible remedies include financial compensation based on the confider's loss; financial compensation based on the confidant's gain; compensation based on the market value of purchasing the confidential information; a *Mareva* injunction, an *Anton Piller* order, an inter-

---

22. *Lac Minerals Ltd. v. International Corona Resources Ltd.*, *supra*, footnote 3, at p. 22.
23. *Cadbury Schweppes Inc. v. FBI Foods Ltd.* (S.C.), *supra*, footnote 1, at paras. 50-75; *Sun-Can Developments Ltd. v. Korea Exchange Bank, supra*, footnote 9.
24. *Visagie v. TVX Gold Inc.*, *supra*, footnote 4, at paras. 73-74.
25. *Terrapin Ltd. v. Builders Supply Co. (Hayes) Ltd.* (Ch. D.), *supra*, footnote 10, at pp. 391-92; *Visagie v. TVX Gold Inc., ibid.*; *Apotex Fermenation Inc. v. Novopharm, supra*, footnote 7; *Omega Digital Data Inc. v. Airos Technology Inc.* (1996), 32 O.R. (3d) 21 (Gen. Div.); *Matrox Electronic Systems Ltd. v. Godrow*, [1993] R.J.Q. 2249 (S.C.); *Kamengo Systems Inc. v. Seabulk Systems Inc.* (1996), 26 B.L.R. (2d) 43, 67 C.P.R. (3d) 381 (B.C.S.C.).
26. *Cadbury Schweppes Inc. v. FBI Foods Ltd.* (S.C.C.), *supra*, footnote 1, at para. 36; *337965 B.C. Ltd. v. Tackama Forest Products Ltd.* (1992), 91 D.L.R. (4th) 129, 67 B.C.L.R. (2d) 1 (B.C.C.A.), supp. reasons 94 D.L.R. (4th) 767 (B.C.C.A.), leave to appeal to S.C.C. refused 98 D.L.R. (4th) viii, 50 W.A.C. 320*n*.
27. *Cadbury Schweppes Inc. v. FBI Foods Ltd, ibid.*
28. *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, *ibid.*, at para. 61.

locutory injunction; a permanent injunction; an accounting of the confidant's profits; a constructive trust or proprietary remedy.[29] Which remedy is appropriate will depend upon the particular facts of the case, a balancing of the equities, and a consideration of relevant policy objectives from the law associated with remedies.

A somewhat confusing aspect in the case law about claims for breach of confidence is the idea advanced in several cases that the confidential information must be misused to the detriment of the confider,[30] which element is relevant to both the cause of action and also to the appropriate remedy for a breach of confidence. The confusion arises because a required element of detriment suggests that the confider must suffer a loss to have a claim or a remedy for a breach of confidence, but such a prerequisite would seem to preclude claims or remedies where the culpable confidant makes a profit or gain but the confider suffers no pecuniary loss. However, the case law shows that without suffering their own damages, confiders have had successful breach of confidence claims that will support the remedies of an accounting, disgorgement of profits, and a constructive trust. The way out of this confusion is to understand that the element of detriment means that the confider must suffer a wrong or injury from the misconduct of the confidant, which injuries would include not only the confider's compensable losses but also the confidant's wrongful gains connected to the misconduct.[31] This understanding or approach to detriment is consistent with the analysis of the majority judgment of McLachlin J. in *Soulos v. Korkontzilas*, where she recognized that a constructive trust was an available remedy not only for unjust enrichment claims, where the claimant suffers a deprivation or detriment, but also for wrongful taking claims, such as breach of trust or fiduciary duty, where the beneficiary may not have suffered any loss but the fiduciary made

29. *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, *ibid.*; *Soulos v. Korkontzilas* (1987), 146 D.L.R. (4th) 214, [1997] 2 S.C.R. 217, 100 O.A.C. 241; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, *supra*, footnote 3.

30. *Ontex Resources Ltd. v. Metalore Resources Ltd.*, *supra*, footnote 8; *ICAM Technologies Corp. v. EBCO Industries Ltd.* (1993), 11 B.L.R. (2d) 205, [1994] 3 W.W.R. 419, 52 C.P.R. (3d) 61 (B.C.C.A.); *Mancha Consultants Ltd. v. Canada Square Development Corp.*, *supra*, footnote 21; *ATI Technologies Inc. v. Henry*, [2000] O.J. No. 4596 (QL), 5 C.C.E.L. (3d) 101 (S.C.J.).

31. See the useful discussion of this point in L.D. Smith, *supra*, footnote 2, and F. Gurry, "Breach of Confidence", *supra*, footnote 2, at p. 112. See also *Pharand Ski Corp. v. Alberta*, *supra*, footnote 11.

an ill-gotten gain. A breach of confidence claim may be treated in the same way.

With this background, it is now possible to discuss *Cadbury Schweppes Inc. v. FBI Foods Ltd.*[32] In this case, Cadbury Schweppes Inc. and its Canadian subsidiary, Cadbury Beverages Inc., as the successors to the Duffy-Mott Company (collectively referred to as "Cadbury"), granted a licence to Caesar Canning Ltd. to market a beverage known as Clamato juice. This juice was a combination of tomato juice, clam broth, and a secret mix of dry spices, including a special powder that Cadbury provided to Caesar Canning, which also received product-specific formula and process information. The evidence was that it was the custom of the food industry to regard such information as proprietary and confidential. Caesar Canning successfully made and sold the juice and, with Cadbury's consent, Caesar Canning signed an agreement with FBI Foods so that it could also be a producer. By this agreement, which was known as a Tolling Agreement, FBI Foods received the product information, which it knew to be confidential. Then, in April 1982, after four and one-half years, Cadbury gave Caesar Canning one year's notice that the licence was to be terminated effective April 1983. This, in turn, would terminate the Tolling Agreement.

During the period leading up to the termination of these agreements, using confidential information and, in particular, its knowledge of the Clamato juice recipe, Caesar Canning developed a juice known as Caesar Cocktail, which was very similar to Clamato juice in taste and in other qualities and ingredients but without the clam broth. By using the confidential information, Caesar Canning was able to develop this competing product internally and sooner than it could have had it hired the necessary skills. Caesar Canning enlisted FBI Foods to produce the new product, which went to market in April 1983. All the parties believed that the marketing of a juice without clam broth was not a breach of the licence agreement's restrictive covenant, which only prohibited Caesar Canning from producing a product having clams and tomato juice for five years after the termination of the licence. After receiving legal advice, Cadbury did not sue. In January 1986, FBI Foods purchased the assets of Caesar Canning, which had made an assignment into bankruptcy, and FBI Foods continued to sell Caesar Cocktail.

---

32. *Supra*, footnote 1.

In June 1987, for the first time, Cadbury took the position that the sale of Caesar Cocktail was a breach of confidence. About one year later, Cadbury sued FBI Foods and, among others, Larry Kurlender, its chief operating officer. It also sued Irving Glassner, the directing mind of Caesar Canning. In the trial court, Huddart J. granted judgment in favour of Cadbury. She held that there was a breach of confidence that was independent of any claim in contract and that FBI Foods, Kurlender and Glassner were all liable. While it was possible for parties to make a private agreement that would override the law's regulation of confidential information, in Huddart J.'s view either the contract did not permit the copying of the recipe or it prohibited copying. Therefore, the breach of confidence claim was not precluded by the contract provisions. While a breach of confidence claim could be barred by the doctrine of laches or acquiescence, it was appropriate to apply these doctrines in this case only with respect to several individual defendants from FBI Foods who did not know that the Clamato juice recipe was being copied. There was no claim for an accounting of profits,[33] and Huddart J. stated that an injunction was not available because of Cadbury's delay in seeking that remedy and because it was excessive for circumstances where competition was permissible and where a competing recipe could have been developed independently of any copying of the recipe within 12 months. She concluded that Cadbury, which continued to dominate the tomato juice market, was entitled to damages equal to the cost that Caesar Canning would have incurred by developing the new competing product without the head start of copying the recipe during the final year of its contract with Cadbury. These damages were later assessed by the Registrar to be $29,700.

Following an appeal by Cadbury for a better remedy, Newbury J.A. for the British Columbia Court of Appeal (Carruthers and Proudfoot JJ.A. concurring) varied Huddart J.'s judgment. The Court of Appeal held that it was not appropriate to assess damages by the saved cost of lawfully developing a competing juice; rather, damages should be assessed on the theory that during the 12-month head start, Clamato juice sales were lost to the sales of Caesar Cocktail. Further, the Court of Appeal held that FBI Foods and

33. After judgment, Cadbury unsuccessfully tried to change its claim for relief to the disgorgement of the defendants' profits from the use of the confidential information. See *Cadbury Schweppes Inc. v. FBI Foods Ltd.* (S.C.), *ibid.*

Kurlender should be permanently enjoined from using the confidential information that was not otherwise generally known.

FBI Foods and Kurlender appealed to the Supreme Court of Canada, which partially restored Huddart J.'s judgment in a unanimous judgment written by Binnie J. (L'Heureux-Dubé, Gonthier, McLachlin, Major and Bastarache JJ. concurring). There was no longer any issue that there had been a breach of confidence, and the Supreme Court agreed with the lower courts that the contract between Cadbury and Caesar Canning was not exhaustive and did not oust the duty of confidence imposed by law. The court held that the British Columbia Court of Appeal had erred in granting a permanent injunction and that compensation was an adequate and more appropriate remedy. The court reasoned that the loss suffered by Cadbury was that Caesar Canning, by the misappropriation of confidential information, was able to enter the marketplace as a competitor one year earlier than otherwise would have been the case. Cadbury thus had lost the advantage of being able to market Clamato juice free of FBI Food's competition for 12 months. The Supreme Court held that the Court of Appeal had been correct in rejecting Huddart J.'s "consulting fee" approach to the assessment of damages, which approach was not appropriate for this particular case, but in the Supreme Court's opinion, the Court of Appeal was wrong in assuming that Clamato juice would have been purchased instead of Caesar Cocktail. The nature of the relationship between the parties was commercial and not fiduciary, and remedies appropriate for a breach of trust or fiduciary duty were not called for in this case. The correct approach was to determine whether Cadbury itself lost profits for a 12-month period because of Caesar Canning's unfair competition, which might be provable by showing that customers were diverted, or that business was declined, or that Cadbury's market share declined.[34]

Pausing here, the thesis of this article, which is that a cause of action for breach of confidence can come to the rescue of other causes of action, can now be developed. This thesis can be proven

34. Subsequently, FBI Foods paid $300,000 to Cadbury to settle the breach of confidence claim and it successfully sued Glassner for contribution and indemnity in the amount of $150,000. Glassner had previously settled with Cadbury, but this did not preclude FBI's claim for contribution and indemnity. See *FBI Foods Ltd. v. Glassner*, [2001] B.C.J. No. 193 (QL), 86 B.C.L.R. (3d) 136 *sub nom. FBI Foods Ltd.-Aliments FBI Ltee v. Glassner*, 11 C.P.R. (4th) 176 (B.C.S.C.).

in part by highlighting several mixed legal and factual aspects of *Cadbury Schweppes Inc. v. FBI Foods Ltd.* The initial aspect to note is that Cadbury's breach of confidence claim succeeded against Glassner, Kurlender and FBI Foods, which was vicariously liable for Kurlender's breach of confidence. A breach of confidence claim came to Cadbury's rescue because there was no contractual or fiduciary relationship or direct relationship between Cadbury and these defendants; rather, these defendants were third parties who participated in Caesar Canning's breach of confidence. That said, the legal relationship between Cadbury and Caesar Canning remained important because the liability of the third parties was a derivative of that relationship, which was held to involve an obligation of confidentiality. Thus, it was necessary to determine the legal relationship between Cadbury and Caesar Canning. The next aspect to note is that the courts concluded in *Cadbury Schweppes* that there was a breach of confidence between Cadbury and Caesar Canning independent of any claim in contract or breach of fiduciary duty. It is also worth recalling that the parties themselves believed that there was no viable breach of contract claim against Caesar Canning, which was permitted to compete with its own tomato juice so long as it did not contain clam broth.

There is a subtle and important point to be made here about the relationship between contract and breach of confidence. In *Cadbury Schweppes*, the courts recognized a breach of confidence claim as independent and existing, unless expressly excluded by the contract. Put more pointedly, if the contract between Cadbury and Caesar Canning was interpreted to be silent about confidentiality, then this would not preclude an independent claim for breach of confidence based on confidential information, circumstances of confidentiality, and misuse of the information. In terms of the thesis of this article, this result shows again how a breach of confidence claim may rescue other failed causes of action because such a claim would have been available to Cadbury against Caesar Canning (and derivatively, against the third parties), even if a claim for breach of contract did not sound because of lacunae in the contract between Cadbury and Caesar Foods.

The approach of the courts appears to be that the contractual arrangements are not taken to be exclusive or comprehensive with respect to confidentiality unless the parties are clear in limiting or excluding the obligation of confidentiality. Practically speaking,

while a party obviously would prefer having concurrent claims for breach of contract and breach of confidence and, given the difficulties and realities of hard bargaining for the contract, a confider may be better off keeping silent and abandoning the comfort of certain and sufficient contractual language to rely on the breach of confidence claim to come to the rescue. The last aspect to note about *Cadbury Schweppes* — a point that will become clearer in the discussion of the *Visagie* case — is that the courts' seeming willingness to augment a contractual relationship with obligations of confidence is accompanied by a judicial reluctance to go further and use the obligation of confidence as a foundation for fiduciary obligations. Indeed, as will be seen, somewhat ironically, the existence of an obligation of confidentiality is used by courts as a reason for not imposing fiduciary obligations. But the result again is that the breach of confidence claim may succeed where a breach of contract or a breach of fiduciary duty claim would fail.

The discussion can now turn to *Visagie v. TVX Gold Inc.*[35] Its story begins with Hendrik Visagie, a geologist, and David Lean, a metals trader, who both held important positions at Curragh Resources Inc., a Canadian mining company. In 1991, at Lean's suggestion, Curragh investigated the Kassandra mines, a large lead and zinc mining operation in Northern Greece. There were gold resources at the mines, but because of the mixture of the gold with other elements, such as arsenic, the extraction of the gold was seen as problematic and uneconomical. The mine was in receivership and available for purchase subject to the approval of the Greek government. Visagie read the published information about the mine and made several visits to Greece. He became enthusiastic about the potential of the mine if better managed and, as his investigations progressed, his enthusiasm for Kassandra mines as a potential gold mine grew. In August 1992, Curragh Resources made a failed bid to purchase the mine, and throughout the fall of that year and into 1993, Visagie continued his work towards an acquisition of the mines.

In June 1993, Visagie left Curragh, which was suffering from financial and other serious problems arising from the tragic accident at its Westray Mine in Nova Scotia. In July 1993, joined by Lean and James Stephenson, a lawyer experienced in mining matters,

35. *Supra*, footnote 4.

Visagie decided to attempt to acquire the Kassandra mines. In August 1993, after another trip to Greece, Mr. Visagie decided that the mines definitely had great potential as a gold producer. Although both Visagie and Lean were still bound to Curragh by a broadly worded confidentiality agreement, they felt that with Curragh no longer pursuing the mines, they were free to do so. Later in 1993, Curragh Resources went into receivership. Visagie, Lean and Stephenson, now calling themselves the Alpha Group, needed financing for their acquisition and they approached several prospects, including TVX Gold Inc., a Canadian public corporation with mining interests across the world.

In October 1993, after signing a confidentiality agreement, TVX was advised by Visagie and Stephenson about the Kassandra mines. Under the confidentiality agreement, TVX agreed that it would not use Alpha Group's proprietary information for any purpose other than in connection with the acquisition of the Kassandra mines in a manner approved by the Alpha Group. Impressed by Visagie and Stephenson's presentation, TVX agreed to provide funding under a joint venture funding agreement, which was signed in November 1993. Under this agreement, a TVX company named Agean would take over the negotiations for the mines and, if they were acquired, TXV would acquire an 88% interest. The Alpha Group was to receive a 12% carried interest and the option to take up a further 12% participating interest. TVX had a right to terminate the agreement, in which case the Alpha Group was expressly permitted to purchase the Kassandra mines. The funding agreement was silent on TVX's rights, if any, to purchase the mines in the event of the termination of the agreement.

The Greek government released more information about the mines, and this information, unlike the earlier documentation, focused more attention on the gold production potential of the mines. Granted the exclusive right under the joint venture agreement to take over the negotiations that had been begun by the Alpha Group with the Greek government, TVX hoped to arrange a private sale agreement, but the government decided to proceed by way of a public tender. In these circumstances, TVX terminated the joint venture funding agreement, and it took the position that acting alone it could bid for the mine. Visagie and his Alpha Group neither agreed or disagreed, but when TVX was successful in acquiring the mine, Visagie took the position that the Alpha Group was entitled to its

rights as if under the joint venture funding agreement. When TVX refused to comply, Visagie, Lean and Stephenson sued it for breach of the confidentiality agreement, breach of confidence, and for breach of a fiduciary duty arising from the joint venture funding agreement.

The action was tried before Feldman J., who concluded, among other findings, that Visagie had provided TVX with valuable confidential information about the Kassandra mines that went beyond any information made public by the Greek government or that was otherwise publicly available; that TVX used Alpha Group's confidential information in its bid for the mines; that there was a mining industry custom or usage that after a senior mining company terminates a funding agreement for a joint project with a junior company, the senior company will not compete with the junior for the project for some period of time; that TVX had breached the confidentiality agreement; that it was concurrently liable for breach of confidence; and that it was concurrently liable for breach of fiduciary duty because joint venturers owe fiduciary duties to one another and in this immediate case the duties survived the termination of the joint venture agreement.[36] Further, Feldman J. held that the Alpha Group was entitled to rely on its contractual rights and it was not estopped from advancing its claims based on its failure to protest when TVX initially bid on the mines; that TVX's argument that the genuine complainant, if anyone, was Curragh was disingenuous, not supported by sufficient evidence to make a determination, and ultimately no obstacle to the success of the various claims; and that the appropriate remedy was that the Alpha Group was entitled to a 12% carried interest and a 12% participating interest in the Kassandra Mines.

TVX appealed to the Court of Appeal for Ontario and Visagie and his group cross-appealed. Both appeals were dismissed, as were motions for the admission of new evidence and for the joinder of 1235866 Ontario Inc., the purchaser of the residual assets of Curragh, as a necessary party in a new trial. Charron J.A. for a unanimous court (Carthy and Rosenberg, JJ.A. concurring) dismissed

---

36. She said (*supra*, footnote 4, at p. 124) that the factors in determining whether the fiduciary obligation continued were: (1) the duty of confidence; (2) the nature of the maturing business opportunity and of the leaving party's relationship to it; (3) the timing of the breach following the termination; (4) the circumstances of the termination; (5) vulnerability; and (6) industry practice.

both appeals and the motions. She held that while Feldman J. had erred in concluding that TVX had an ongoing fiduciary duty, she had been correct in holding that TVX was bound by the terms of the confidentiality agreement and by its common law duty not to misuse confidential information, and was also correct in her decision about the appropriate remedy. Charron J.A. also concluded that TVX had not satisfied the test for the introduction of new evidence and, given that there was a settlement in which TVX had agreed that if the Alpha Group was held to have no claim in the mines, then 235866 Ontario Inc. would have a 24% interest and 1235866 Ontario Inc. could advance its claim to displace the Alpha Group's interest in the mine in another proceeding.

The focal point of Charron J.A.'s judgment was that there never was a fiduciary relationship between the Alpha Group and TVX. (Thus, it was not necessary to analyze whether any fiduciary duties survived the termination of the joint venture funding agreement.) In reaching this conclusion, Charron J. rejected Feldman J.'s conclusion that an industry custom or usage had been established to augment the provisions of the joint venture agreement and she relied on Binnie J.'s observation in *Cadbury Schweppes* that fiduciary relationships will be rare in a commercial context between parties acting at arm's length. Although, strictly speaking, Binnie J.'s observations were made in a judgment about the appropriate remedy for a breach of confidence and not about the circumstances when fiduciary relationships exist, they are indicative of a judicial reluctance to impose trust-like or fiduciary responsibilities on parties to commercial relationships. In particular, Charron J.A. found in Binnie J.'s observations a reluctance to move from the vulnerability that is an incident of disclosing confidential information to the vulnerability that is an indicia of a fiduciary relationship. She quoted Binnie J.'s comment that:[37]

> In some sense, disclosure of almost any confidential information places the confider in a position of vulnerability to its misuse. Such vulnerability, if exploited by the confidee in a commercial context, can generally be remedied by an action for breach of confidence or breach of a contractual term, express or implied.

And, in the context of the *Visagie* case, she added that: "the vulnerability described by the trial judge simply flows from the terms of

37. *Supra*, footnote 1, at para. 32.

the agreement freely entered into by the parties" and "any resulting vulnerability, if exploited by TVX can be remedied in the action for breach of confidence or for breach of the confidentiality agreement".[38] Somewhat ironically, she said that it was not appropriate to augment the contractual obligations of the joint venture agreement with fiduciary duties. She stated:[39]

> The parties to this case have reduced their agreement to writing. It was open to them to include a non-competition clause that would prevent TVX from competing with Alpha for Kassandra. They have not done so. As stated above, the court should be extremely circumspect in adding to the bargain they have set down.

The irony here is that while courts are reluctant to add fiduciary obligations to commercial relationships where the parties could have done so when negotiating and contracting and where the parties are responsible for any weakness or vulnerability in their contracts, courts do not seem to be so reluctant to add confidentiality obligations to augment contracts that are silent on that issue, or to rescue parties who have not contracted at all. It may be recalled that this situation of breach of confidence coming to the rescue occurred in *Lac Minerals Ltd. v. International Corona Resources Ltd.*,[40] where Corona did not protect itself with a confidentiality agreement when it disclosed confidential information to Lac Minerals about a potential gold mine. Also illustrative is the situation in the *Cadbury Schweppes* case, in which had Caesar Canning survived to be joined as a defendant, it apparently would have been liable for breach of confidence notwithstanding the narrow wording of its contract with Cadbury, which permitted it to compete in selling tomato juice products. The irony is made sharper by the fact that there is no difference to the remedial resources available for breach of fiduciary duty or breach of confidence and, again, it may be recalled that a constructive trust was the remedy for breach of confidence in the *Lac Minerals* case as it was in *Visagie*, both being cases in which claims for breach of fiduciary duty failed. The irony is perhaps best seen from the perspective of the defendant in *Visagie*, who had the pyrrhic victory of defeating the claim for breach of fiduciary duty essentially because it was liable for breach of confidence. These ironical phenomena, however, do not mean that the courts are

38. *Supra*, footnote 4 (C.A.), at pp. 209-10.
39. *Ibid.*, at p. 213.
40. *Supra*, footnote 3.

wrong. The outcomes can be explained simply by stating that it is easier for a confider to prove the elements of breach of confidence than it is to prove the elements of a fiduciary relationship. That explanation, of course, also reveals why a claim for breach of confidence can come to the rescue.

Judicial Appointment (June 27, 2019) / Judicial Appointment (June 24, 2019)
Reference re Greenhouse Gas Pollution Pricing Act (GGPPA) (C65807) GGPPA Opinion, Orders and Filed Documents
Toronto (City) v. Ontario (Attorney General) (C65861) Orders and Filed Documents

Court of Appeal for Ontario
Decisions of the Court
Hearings Lists
Reference re GGPPA (C65807)
Toronto (City) v. Ontario (Attorney General) (C65861)
Information
Media Room
Practice Directions and Guidelines
How to Proceed in the Court of Appeal
Filing Information

RSS
Courthouse Accessibility
Links

Opening of the Courts of Ontario for 2016

Remarks of Chief Justice George Strathy at the Opening of Courts of Ontario, 2016

Honoured guests, ladies and gentlemen, Welcome to the opening of the courts for Ontario.

We often speak of the "justice system" as though it were a faceless monolith. This ceremony reminds us that the justice system is composed of people. People like the hard-working judges, masters and justices of the peace you see before you. People like the dedicated court staff who make the system work. People like the lawyers and paralegals who deliver every day on the promise of access to justice. People like our legislators, public servants and police officers – those who make, administer and enforce our laws.

And because we happen to be sitting in one of the largest courtrooms in the province, in downtown Toronto, it is important to remind ourselves that across this vast province, from urban centres to rural communities, in over 161 courthouses, from Kenora to Cornwall and from Gore Bay to Goderich, including fly-in courts across the north, thousands of dedicated people are serving the justice system and making it work.

Despite our geographic distance and distinct roles, we all share a common objective: we are all committed to maintaining and improving our justice system. Not as an end in itself, but because we know that a strong justice system is essential to maintaining a fair and just society.

Because we cherish our system of justice, we are not blinded to its shortcomings. While we celebrate its strengths, we seek to constantly improve it.

In past years, I have spoken of the need to improve the efficiency of the justice system. This summer, the Supreme Court of Canada brought this home with a thunderbolt in its reasons in *The Queen v. Jordan*. The Supreme Court implored us to work collectively to address what it called a "culture of delay" and established new guidelines for determining when delay is unreasonable in criminal proceedings.

"Real change" it said "will require the efforts and coordination of all participants in the criminal justice system." This includes legislators, public servants, and counsel, but it also includes the judiciary. The Supreme Court said this change may require new case management regimes and called upon trial judges to make "reasonable efforts to control and manage the conduct of trials." Its message did not end with the trial courts. It called upon appellate courts to show deference to case management efforts and be mindful of the impact our decisions have on the conduct of trials.

I know that the leadership of both the Superior Court and the Ontario Court of Justice have been working diligently this summer to promote compliance with the timelines set by Jordan. This is very much a continuation of the work these courts were already doing to promote efficiency.

Improvements in efficiency, will require a change in mindset - a culture change - on the part of everyone in this room. It will require a recognition that access to justice and public confidence are related to efficiency of justice.

Real change will also require significant investment in the modernization of the justice system, to equip us with the tools and technology we need to manage our caseload and better serve the public. I know the Attorney General and Ministry staff recognize this need and I hopeful the resources will be provided to address this need.

Some areas of law require acute attention. Both levels of government have shown renewed commitment to working together to address some of our most pressing concerns. Let me mention two.

First, the federal and provincial governments have made a commitment to address the aboriginal justice issues that were highlighted in the Report of the Truth and Reconciliation Commission. It is a matter of urgent and ongoing concern that, fifteen years after the Supreme Court's decision in *Gladue*, in which it highlighted the disproportionate rate of incarceration of aboriginal people, those rates of incarceration have continued to rise. As the Truth and Reconciliation Commission observed more than one quarter of people receiving custodial sentences are aboriginal, although they make up only 4% of the population. I am heartened that the Ministry of the Attorney General is making a renewed effort to work with all interested parties, including the three courts to address these issues as an immediate priority.

A second area where there is real reason for optimism is Family Law. In previous years I have emphasized the need for family law reform, and have noted that an expansion of the Unified Family Court could do much to address these concerns. I am very pleased to observe that both levels of government have shown a renewed interest in expanding Ontario's Unified Family Court. Chief Justice Smith and Chief Justice Maisonneuve have been working together with the Ministry of the Attorney General and are well on their way to developing practical plan for UFC expansion which will bring meaningful improvements for Ontarians. These developments demonstrate what we are capable of doing when we work together.

I turn now to the Court of Appeal for Ontario, the Court in which I have the honour to preside. I am assisted by Associate Chief Justice Alexandra Hoy, who is not only a wise judge and counsellor, but a tireless leader of the court. We are fortunate to serve on the Court with 27 exceptional jurists who care passionately about the law and the administration of justice. The nature and pace of our work is challenging. We hear approximately one thousand appeals and one thousand motions each year. In most instances we are the final court of appeal. The cases we hear are not only important to the parties, they also provide jurisprudential guidance and shape the future of our law. Despite the volume and complexity of our workload, we are able to discharge our responsibilities efficiently. The average appeal takes less than one year to complete - from the time the notice of appeal is filed to the release of reasons. The average time from perfection to hearing is approximately 5 months. Almost all our reserve judgments are released within a targeted six month period, and the average time for release of reserve judgments is only one and a half months.

The court continues to go through a period of unprecedented change in its complement. Almost two-thirds of our full-time judges have been appointed within the last five years. This pace of change is continuing. As a result, we currently have three vacancies and are expecting two more in the new year.

To maintain the quality and efficiency of our work we will require timely new appointments. I recently met with Minister Wilson-Raybould and I am confident she will make it a priority to fill vacancies on this and other courts across Canada in a timely manner.

In April our colleague Justice Michael Tulloch was appointed by the Ontario Government to conduct an independent review of police oversight. Justice Tulloch is now engaged in a province-wide consultation and is scheduled to deliver his report in 2017. While we miss his day-to-day presence as a colleague on our panels, we are pleased he was selected to undertake this important review and know his report will make a great contribution to justice in this province.

We know the bar would like to increase the availability and ease with which you can file materials electronically as well as improve the convenience with which you can make remote appearances. Minister Naqvi has committed to assist us with technological innovation. We are working closely with Deputy Minister Monahan and the newly appointed Assistant Deputy Ministers for Court Services and Modernization, Shelia Bristo and Lynn Norris, to review our options for technological improvement and we hope to make substantial improvements in the coming years.

In the year ahead we will be resuming our series of provincial outreach programs. In October the court's judges will be meeting with the bench and bar in London, Ontario.

While in London, we will also be meeting the students and faculty at Western Law as well as visiting local legal aid clinics and a regional detention centre. These outreach visits are an important way for us to learn more about the work of our justice sector partners across the province.

In closing, I return to my opening comments. At every level in this province, the justice system is administered and assisted by talented and committed people. We have many challenges: we need to improve efficiency and reduce delay. We have acute needs in certain areas, including aboriginal justice and family law. The justice sector needs substantial investment to bring it into the 21st century. I am confident, however that working together, we have the ability to make substantial improvements to address these needs in the coming years.
