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September 9, 2019

Via Email (Registry-Greffe@SCC-CSC.ca)

Registrar
Supreme Court of Canada
301 Wellington Street
Ottawa ON K1A 0J1

Dear Registrar:

Re: ***The Catalyst Capital Group Inc. v. VimpelCom Ltd. et al***
SCC Court File No. 38746, Ontario Court of Appeal File No. C-65431

We are counsel to the Respondent, Novus Wireless Communications Inc. ("**Novus**"). Novus requests that this application for leave to appeal be dismissed, with costs, and relies on the written submissions of the other Respondents (together with the reasons given by Justice Hainey of the Ontario Superior Court of Justice[1] and unanimously upheld by Justices Tulloch, Benotto and Huscroft of the Ontario Court of Appeal[2]).

This application is without merit and raises no issues of national importance. The sole issue advanced by the Applicant with respect to Novus is whether this Court ought to consider how the principles of proportionality espoused in *Hyrniak* should apply to preclusive doctrines (estoppel and abuse of process). The Applicant's argument relies on an incorrect recitation of the facts, a new theory not previously advanced in this proceeding, and an untenable view of proportionality.

First, the Applicant offers this Court a revisionist history of this proceeding. As set out in the Memorandum of Argument of the Respondent West Face Capital Inc., the Applicant was never barred from advancing its claims against the Respondents in its previous action arising from the Applicant's failure to acquire WIND (the "**Moyse Action**"[3]). The Applicant was *only* precluded from advancing a claim for inducing breach of contract in the plan of arrangement proceeding for the sale of WIND (which trial was not required after Catalyst abandoned the claim it asserted in the plan of arrangement).[4]

The Moyse Action was not subject to *any* prohibition, as confirmed in both Courts below.[5] In fact, the Applicant was expressly invited to amend its claim in the Moyse Action and bring all of its claims together. It elected not to do so despite being previously admonished by Justice Newbould in the plan

[1] *The Catalyst Capital Group Inc. v. VimpelCom Ltd.*, 2018 ONSC 2471.

[2] *The Catalyst Capital Group Inc. v. VimpelCom Ltd.*, 2019 ONCA 354.

[3] *The Catalyst Capital Group Inc. v. Moyse et al*, 2016 ONSC 5271, aff'd 2018 ONCA 283, leave to appeal ref'd 2019 CanLII 23865 (SCC).

[4] *The Catalyst Capital Group Inc. v. VimpelCom Ltd.*, 2018 ONSC 2471, at para. 79.

[5] *The Catalyst Capital Group Inc. v. VimpelCom Ltd.*, 2018 ONSC 2471 at para. 80; *The Catalyst Capital Group Inc. v. VimpelCom Ltd.*, 2019 ONCA 354 at paras 39 and 40.

of arrangement proceeding for its tactic of "lying in the weeds" and "waiting and seeing how things are going in the litigation process before springing a new theory at the last moment."[6]

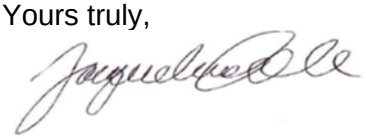
Second, and contrary to the Applicant's submissions, the Applicant raised no argument regarding proportionality in the Courts below. Despite the Applicant's late-breaking theory of the importance of "proportionality" in this application, its extensive written and oral submissions in both the Ontario Superior Court of Justice and the Ontario Court of Appeal made no such reference to the principle. "Proportionality" did not prevent Catalyst from litigating all of its claims in the Moyse Action; rather, the Court of Appeal specifically found that "Catalyst could have raised the claims it advances in the Current Action in the Moyse Litigation. It elected not to."[7]

Finally, the Applicant's submission that the preclusive doctrines (specifically, with respect to Novus, the abuse of process doctrine) are somehow inconsistent with the principle of proportionality is tortured, without merit, and of no national importance. The doctrines – which may dispose of claims without a full trial where appropriate – are inherently consistent with the principles of proportionality in *Hyrniak*.

The very purpose of the abuse of process doctrine is to enable Courts, in their discretion, to prevent relitigation so as to preserve the integrity of the Court's process.[8] The doctrine is characterized by flexibility.[9] Accordingly, the Court considers each case on its facts. In this case, Justice Hainey concluded – and the Court of Appeal unanimously agreed – that why Catalyst failed to acquire WIND was "front and centre" in the Moyse Action, and that the Applicant's attempt at relitigation would impeach the integrity of the judicial system. This is in fact consistent with the English cases on which the Applicant relies in its memorandum of argument: in those cases, as in this one, the Courts were tasked with preserving the integrity of their process, considered the cases on their facts, and decided whether to exercise judicial discretion. There is no issue of national importance in what is clearly a fact-driven and case-by-case analysis.

For these reasons, together with the reasons set out in the submissions of the other Respondents, Novus requests this application be dismissed, with costs.

Yours truly,



Junior Sirivar and Jacqueline Cole

JS/jc

cc. John E. Callaghan/Benjamin Na/Matthew Karabus/David C. Moore/D. Lynn Watt, The Catalyst Group Inc.
Orestes Pasparakis/Rahool Agarwal/Michael Bookman, VimpelCom Ltd.
James D. G. Douglas/Caitlin Sainsbury, Globalive Capital Inc.
David R. Byers/Daniel Murdoch, UBS Securities Canada Inc.
Michael Barrack/Kiran Patel, Tennenbaum Capital Partners LLC, 64NM Holdings GP LLC, 64NM Holdings LP and LP Capital Investors LLC
Lucas E. Lung, Serruya Private Equity Inc.
Matthew Milne-Smith/Andrew Carlson, West Face Capital Inc.

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[6] *The Catalyst Capital Group Inc. v. VimpelCom Ltd.*, 2018 ONSC 2471, at para. 82.

[7] *The Catalyst Capital Group Inc. v. VimpelCom Ltd.*, 2019 ONCA 354 at para. 67.

[8] *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at para. 42.

[9] *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26 at para 40.