Court File No. 38746

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

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

APPLICANT
(Appellant)

A N D:

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

RESPONDENTS
(Respondents)

RESPONSE TO THE APPLICATION FOR LEAVE TO APPEAL
(UBS SECURITIES CANADA INC., RESPONDENTS)
Pursuant to Rule 27 of the Rules of the Supreme Court of Canada

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1. Response

PART I - OVERVIEW AND STATEMENT OF FACTS

A. Overview

1 For the second time in the past year, the applicant asks this Honourable Court for leave to appeal a decision of the Ontario Court of Appeal relating to a claim for breach of confidence arising from the same underlying transaction. The first application, in *The Catalyst Capital Group Inc.* ("**Catalyst**") *v. Moyse et al* (the "***Moyse* Action**"), was dismissed. This one should be as well. The applicant asks this Court to overturn its earlier decisions and pronounce new law. This application is nothing more than a "hail mary pass" to try to salvage one remnant of the applicant's serial litigation following its failure in 2014 to acquire the interest of the respondent VimpelCom Ltd. ("**VimpelCom**") in WIND Mobile Corp. ("**WIND**"). No issue of national or public interest has been raised.

2 This responding memorandum of argument is submitted by UBS Securities Canada Inc. ("**UBS Securities**"), a Canadian investment bank that acted as financial advisor to VimpelCom in the 2014 sale of its interest in WIND. UBS Securities relies on the submissions of the other respondents, especially with respect to Catalyst's contention that the application of the abuse of process doctrine in this case offends the principles of proportionality expounded by this Court in *Hyrniak v. Mauldin.* After very briefly discussing proportionality, this memorandum will focus on the applicant's second contention: that there is a national and public interest in overturning Canada's established law on the test for breach of confidence.

3 To obtain a remedy for breach of confidence, Canadian courts -- including this one -- have required a plaintiff to establish detriment. The applicant contends that this requirement should be removed. In doing so, it relies on a misreading of various UK authorities; a 2002 article penned by Paul Perell (as he then was); and two B.C. decisions which suggest, in *obiter* and without explanation, that whether detriment is required in a claim for breach of confidence is unsettled in Canadian law.

4 UBS Securities respectfully requests that this application be dismissed.

5 **First**, the decisions below raise no proportionality issues that give rise to a national or public interest. These so-called proportionality issues were not raised or argued below, but were instead made out of whole cloth on this application for leave to appeal.

6 **Second**, there is no compelling national or public interest in eliminating the requirement for a plaintiff to show detriment to establish liability for breach of confidence. Canadian courts have shown a willingness to broadly interpret "detriment" and have not limited it to compensable financial loss. Courts have fashioned appropriate remedies *when liability for breach of confidence is otherwise established*. Despite this flexible approach, the trial judge in the *Moyse* Action, Newbould J., found that even if there were a misuse of confidential information (he did not find one), Catalyst could not establish detriment.

7 **Third**, even if this Court saw a potential national or public interest in overturning the established test for breach of confidence, this is not an appropriate case to deal with the issue. This proposed appeal arises out of an order granting a motion to strike on the grounds of *res judicata* and abuse of process. The motion judge found, and the Ontario Court of Appeal agreed, that if this action were allowed to proceed it would require, to be successful, a relitigation of determinative findings in the *Moyse* Action. In effect this proposed appeal is a belated appeal of the trial judgment in the *Moyse* Action. In that decision, Newbould J. set out the test for breach of confidence and included, consistent with this Court's authority (and consistent with Catalyst's arguments in the *Moyse* Action), the requirement that the plaintiff establish detriment from the misuse of confidential information.

8 Newbould J. found that Catalyst could not show detriment because:

(a) There was "no chance that Catalyst would have successfully concluded a deal with VimpelCom";[1] and

(b) "Catalyst had no intention of closing a deal with VimpelCom if it could not obtain the concessions it was looking for from the [Canadian] Government" and "from

[1] *Catalyst Capital Group Inc. v. Moyse*, 2016 ONSC 5271 at para 131 [*Moyse Decision*].

> the start Government officials had made clear that no such concessions would be given."[2]

9 Accordingly – for reasons other than the claimed breach of confidence in the *Moyse* Action; and for reasons other than the allegations in the present action – Catalyst would never have completed the WIND transaction with VimpelCom. Notably, in its appeal to the Ontario Court of Appeal in the *Moyse* Action, Catalyst *did not even appeal* Newbould J's clear determination that detriment is a required element of the test for breach of confidence, and that Catalyst was unable to establish detriment for misuse of confidential information. As set out in the memorandum of argument of the respondent West Face Capital Inc. ("**West Face**"), Catalyst itself argued in the *Moyse* Action that detriment is a required element of the test for breach of confidence.

10 The applicant now asks this Court, at the pleadings stage of the present action, to overturn its well-established requirement that a plaintiff show detriment to establish liability for breach of confidence. The decisions below properly found that the doctrines of *res judicata* and abuse of process preclude Catalyst from seeking to relitigate the issue of whether Catalyst can meet the test for breach of confidence. The applicant cannot circumvent these doctrines by arguing, for the first time in the present action, that the trial judge in the *Moyse* Action applied the wrong test for breach of confidence.

B. Key Facts

11 UBS Securities relies on the facts set out in in the memoranda of argument of the other respondents.

PART II - QUESTIONS IN ISSUE

12 The sole issue is whether this application for leave to appeal raises issues of national and public importance. It does not.

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[2] *Ibid* at paras 124 and 11(d).

PART III - ARGUMENT

A. Proportionality is a Red Herring

13 As noted above, UBS Securities primarily relies on the submissions of the other respondents with respect to Catalyst's contention that the application of the abuse of process doctrine by the courts below is somehow contrary to the principle of proportionality expounded by this Honourable Court in *Hyrniak v. Mauldin.*

14 Among the numerous problems addressed by the other respondents, this claimed concern about proportionality is a red herring. There is no national and public interest in assessing how the decisions below interrelate with principles of proportionality because those decisions bear no connection to the purported proportionality concerns now raised for the first time by Catalyst on this application. As set out in the memorandum of argument of West Face, the only connection between the decisions below and this Court's discussion of proportionality in *Hyrniak* is that those decisions were *consistent* with the Court's message that in the appropriate case justice may be served without the need for a full trial.

15 The motion judge, Hainey J., did not find that this action is an abuse of process because, as argued by Catalyst, "the claims against the eleven defendants in the VimpelCom Action should have been advanced with the Moyse Action." The motion judge struck the action because it constituted a relitigation of issues that were "front and centre" in the *Moyse* Action, were resolved against Catalyst, and are determinative of the claims advanced in this action.[3]

16 As stated by the motion judge, allowing the present action to proceed "would result in the relitigation of the reason why Catalyst's bid to acquire Wind failed" and that such relitigation "would impeach the integrity of the judicial system".[4] This application of the abuse of process doctrine bears no connection to the proportionality concerns raised by the applicant.

17 Similarly, while the Ontario Court of Appeal in its decision below makes the point that Catalyst could have brought its claims against the current respondents in the *Moyse* Action, this is only one element of its decision on *res judicata* and abuse of process. The Court of Appeal,

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[3] *The Catalyst Capital Group Inc. v. VimpelCom Ltd*., 2018 ONSC 2471, at para 87-88.
[4] *Ibid* at paras 86 & 88.

consistent with the motion judge, also found that the current action "directly overlaps with the issues that were before the court in the Moyse Action" and "can only be successful if the court rejects the findings made by Newbould J."[5] (emphasis in original) The concern about avoiding the risk of inconsistent findings stands on its own as a fundamental component of the abuse of process doctrine and is entirely disconnected from the applicant's purported concerns about proportionality.

B. There is No Reason to Change the Breach of Confidence Test

i. *Detriment is Required to Establish Liability for Breach of Confidence*

18 Detriment is a requisite element to establish liability for breach of confidence. The applicant has not cited a single case in which a remedy for breach of confidence was awarded in the absence of a finding that the confider of confidential information experienced detriment from the misuse of that information. There is no national or public interest in removing the requirement for detriment.

19 Catalyst has not shown any inconsistent decisions nor recent legal commentary identifying a problem in the present test for breach of confidence. What the applicant has done in its memorandum of argument is confuse, on the one hand, the well-established requirement that a plaintiff show detriment in order to establish liability for breach of confidence with, on the other hand, the willingness of courts to entertain *remedies* for breach of confidence in circumstances where a plaintiff has shown detriment but has difficulty establishing compensable financial loss.

20 The test for breach of confidence was set out by La Forest J. in *Lac Minerals Ltd. v. International Corona Resources Ltd*. as having three elements:

(a) That the information conveyed was confidential;

(b) That the information was communicated in confidence; and

[5] 2019 ONCA 354 at para 65 [*ONCA Decision*].

(c) That the information was misused by the party to whom it was communicated.[6]

21 To clarify the third element of the test, LaForest J. cited with approval the statement of Megarry J. (as he then was) in *Coco v. A.N. Clark (Engineers) Ltd.*[7] that under the third element of the test "there must be unauthorized use of that information [the confidential information] *to the detriment of the party communicating it*" [8] (emphasis added).

22 As LaForest J. held in *Lac Minerals*, there must be a detriment to the confider of information in order for the confider to be entitled to a remedy for breach of confidence:

> If, as we saw, each of the three elements of the above-cited test are made out, a claim for breach of confidence will succeed. The receipt of confidential information in circumstances of confidence establishes a duty not to use that information for any purpose other than that for which it was conveyed. *If the information is used for such a purpose, and detriment to the confider results, the confider will be entitled to a remedy*.[9] (emphasis added)

23 The test for breach of confidence as stated in *Lac Minerals* remains the law. Contrary to the applicant's submissions, this Court's majority decision in *Cadbury Schweppes Inc. v. FBI Foods Inc.*,[10] did not question the necessity of detriment to the test for breach of confidence. Binnie J. noted that La Forest J. "regarded detriment as a broad concept",[11] and proceeded to acknowledge that "[t]he concept of detriment need not be explored on this occasion" because the parties had agreed prior to trial that any evidence regarding losses suffered by the plaintiffs would be deferred to a post-trial reference.[12]

24 Binnie J. was, however, especially concerned that the plaintiffs only be compensated for the losses they suffered as a result of the defendants making an unauthorized use of their confidential information to launch a competing product in the same market earlier than they otherwise would have been able to: "while equity is thus quick to protect confidences, it cannot

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[6] [1989] 2 S.C.R. 574 at para 10 [*Lac Minerals*].
[7] [1969] R.P.C. 41 (Ch.)
[8] Cited in *Lac Minerals*, *supra* note 6 at para 10.
[9] *Lac Minerals*, *supra* note 6 at para 16.
[10] [1999] 1 S.C.R. 142 [*Cadbury Schweppes*].
[11] *Ibid* at para 53.
[12] *Ibid* at para 54.

be blind to the nature of the opportunity lost to the respondents, or the value of their information, when consideration turns to remedies."[13]

25 Binnie J. set out in *Cadbury Schweppes* that the mandate of the reference was "to *assess the loss attributable to the breach of confidence*, if any, sustained by the respondents"[14] (emphasis added), and "to restore to the respondents *what the respondents have lost* as a result of the appellants' breach of confidence"[15] (emphasis added). In other words, the goal of the reference was to determine the detriment to the confider.

26 In *Cadbury Schweppes* this Court also addressed the "springboard" doctrine and noted that this doctrine derives from the English case of *Terrapin Ltd. v. Builders' Supply Co. (Hayes) Ltd*., in which Roxburgh J. explains the doctrine as "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"[16] (emphasis added).

27 Thus, there is no contradiction between the "springboard doctrine" and the necessity of detriment to the confider in the test for breach of confidence. The "springboard" *is the detriment*; the resulting challenge is not in the assessment of liability, but in the appropriate remedy. Two of the five UK cases relied upon by the applicant (*Terrapin* and *Seager v. Copydex Ltd.*[17]) directly engage the "springboard doctrine", as do both of the Alberta cases cited by Catalyst (*Stonetile (Canada) Ltd. v. Castcon Ltd*.[18] and *Pat's Off-Road Transport v. Campbell*[19]).

28 Neither *Stonetile* nor *Pat's Off-Road* have been read as questioning whether detriment is a necessary element in the test for breach of confidence. Instead, the breach of confidence cases

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[13] *Ibid* at para 76.
[14] *Ibid* at para 94.
[15] *Ibid* at para 101.
[16] [1960] R.P.C. 128 (Eng. C.A.) [*Terrapin*].
[17] [1967] 1 W.L.R. 923 (Ch.D, C.A.)
[18] 2010 ABQB 392 [*Stonetile*].
[19] 2010 ABQB 443 [*Pat's Off-Road*].

which cite *Stonetile* correctly state that unauthorized use of confidential information "to the detriment of" the confider is a necessary element of the test.[20]

29 The applicant's attempt to sow confusion on this point is exemplified by its statement, before listing various UK cases at paragraph 64 of its memorandum of argument, that "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." (emphasis added) This raises several key points:

(a) **First**, the UK cases relied upon by the applicant do not stand for the proposition that no detriment is required in a breach of confidence action;

(b) **Second**, the "springboard" cases clearly state that the springboard was to the competitive detriment of the confider of confidential information;

(c) **Third**, the two cases involving spies breaching their contractual and common law duties of confidentiality to the Crown (*Attorney General v. Guardian Newspapers Ltd. (No. 2)*[21] *and Attorney General v. Blake*[22]) expressly find that there must be a detriment to the "public interest" from the disclosure of confidential information;

(d) **Fourth**, the remaining case, *Experience Hendrix LLC v. PPX Enterprises Inc.*[23], is a breach of contract case not a breach of confidence case; and

(e) **Fifth**, the issue in the present case is not whether Catalyst established "financial" detriment in the *Moyse* Action, but whether it established detriment *at all*. Newbould J. found that it did not, and that finding was never appealed.

30 The applicant refers to commentary from Mr. Perell (as he then was) in 2002, which suggests that there had been uncertainty in the case law about how broadly the concept of

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[20] *Catalyst Canada Services LP v. Catalyst Chargers Inc*., 2013 ABQB 73 at para 50*; 2909732 Canada Inc. v. Toews*, 2016 BCSC 852 at para 58.
[21] [1990] 1 A.C. 109 (U.K.H.L.).
[22] [2001] 1 A.C. 268 (H.L.).
[23] [2003] E.W.C.A. Civ 323.

detriment should be defined.[24] Mr. Perell does not however suggest that detriment should not be an element of the test, and states that "[t]he 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." The applicant has not pointed to any relevant commentary related to the role of detriment in the test for breach of confidence within the last 17 years.

31 The B.C. cases relied upon by the applicant do not in any way support the contention at paragraph 63 of its memorandum of argument that "Canadian courts have been and continue to be inconsistent in the application of the legal requirements for breach of confidence." Both cases cited involve findings of whether detriment was shown to establish liability for breach of confidence. In *Minera Aquiline Argentina SA v. IMA Exploration Inc.*[25], the B.C. Court of Appeal stated in *obiter* that whether detriment is a necessary element of the test for breach of confidence does not appear to be "entirely settled", but cited no authority and did not discuss the point further. In assessing whether to award damages in *Minera*, the B.C. Court of Appeal followed this court's decision in *Lac Minerals* related to how detriment is necessary to obtain a remedy.[26]

32 The connection between the detriment to the confider and the entitlement to a remedy is central to the decision in the other B.C. case cited by the applicant: *Seaway Marine Services Ltd. v. Weiwaikum General Partner Ltd.*[27] In *Seaway* there was an unauthorized use of confidential information, but Thompson J. found that the confider was "in no different position than it would have been in had the misuse not occurred" and on that basis did not award a remedy for breach of confidence.[28] Thompson J. explicitly found that the confidant did not make use of the confidential information as a "springboard for activities detrimental to the person who made the confidential communication."[29] In other words, because there was no detriment, there was no remedy awarded for breach of confidence.

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[24] Paul Perell, "Breach of Confidence to the Rescue", (2002) 25:2 ADVOC Q 199, Application for Leave to Appeal of the Catalyst Capital Group Inc., Tab I.
[25] 2007 BCCA 319.
[26] *Ibid* at para 96-107.
[27] 2014 BCSC 2102.
[28] *Ibid* at para 86.
[29] *Ibid* at para 89.

33 For thirty years, Canadian courts have applied the test for breach of confidence set out in *Lac Minerals*. Canadian courts, including this one, have recognized that the nature of detriment experienced by a party whose confidential information was misused is to be interpreted broadly. The applicant has failed to show an inconsistency in the manner in which this test has been applied, or any national or public interest in revisiting the test.

ii. *This is Not an Appropriate Case to Reconsider the Test for Breach of Confidence*

34 In his trial judgment for the *Moyse* Action, with the benefit of a complete evidentiary record, Newbould J. held that "Catalyst has failed to establish that it suffered any detriment by any misuse of Catalyst confidential information."[30] Catalyst did not appeal this determination.

35 In fact, as set out in the West Face memorandum of argument, Catalyst's own submissions in the *Moyse* Action recognized that detriment was an element of the test for breach of confidence, and Catalyst sought, unsuccessfully, to establish detriment at trial on the basis of a full evidentiary record. Catalyst never argued in the *Moyse* Action that detriment was not, or should not be, an element of the test for breach of confidence.

36 Catalyst is now requesting that this Court grant leave to revisit the test for breach of confidence in the present action. This is a proposed appeal of an order granting a motion to strike on the grounds of *res judicata* and abuse of process. The motion was granted, as set out above, on the grounds that Newbould J.'s determination that Catalyst could not establish detriment from any misuse of confidential information would apply equally to the facts of this case, and as a result, for Catalyst to succeed in the present action it would require both a relitigation of the issues that were before Newbould J. in the *Moyse* Action and an inconsistent finding as to whether Catalyst could establish detriment.

37 Accordingly, the proposed appeal does not ask this Court to overturn any decision of the motion judge or the Court of Appeal in the present action – *it asks this Court to overturn the trial judgment in the Moyse Action in respect of whether Catalyst can establish detriment.*

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[30] *Moyse Decision, supra* note 1 at para 127.

38 At paragraph 36 of its decision below, the Ontario Court of Appeal sets out that Newbould J.'s findings with respect to detriment applied no matter what confidential information was or was not received by West Face or other members of the consortium that acquired VimpelCom's interest in WIND. The Court of Appeal determined, with respect to the *Moyse* Action, that "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."[31]

39 In other words, if the applicant wanted to argue whether detriment is an appropriate element of the test for breach of confidence, it should have done so in the *Moyse* Action. The proposed appeal is properly understood as an abuse of process and collateral attack on the trial judgment in the *Moyse* Action by seeking to argue that there should be a different legal test applied to the same set of facts. It should be dismissed.

PART IV - SUBMISSIONS CONCERNING COSTS

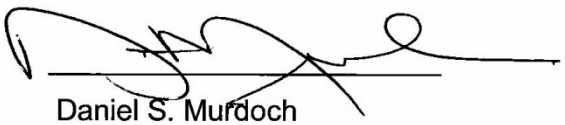
40 UBS Securities asks for its costs in responding to Catalyst's leave application.

PART V - ORDER SOUGHT

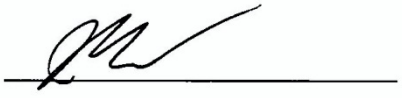
41 UBS Securities seeks an order dismissing Catalyst's application for leave to appeal, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 9th day of September, 2019.

David R. Byers



Daniel S. Murdoch



Jordan S.A. Moss

[31] *ONCA Decision, supra* note 5 at para 36.

PART VI – TABLE OF AUTHORITIES

CASE	PARAS. CITED
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