Court File No. CV-17-587463-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E N:

THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION

Plaintiffs

and

WEST FACE CAPITAL INC., GREGORY BOLAND, M5V ADVISORS INC. C.O.B. ANSON GROUP CANADA, ADMIRALTY ADVISORS LLC, FRIGATE VENTURES LP, ANSON INVESTMENTS LP, ANSON CAPITAL LP, ANSON INVESTMENTS MASTER FUND LP, AIMF GP, ANSON CATALYST MASTER FUND LP, ACF GP, MOEZ KASSAM, ADAM SPEARS, SUNNY PURI, CLARITYSPRING INC., NATHAN ANDERSON, BRUCE LANGSTAFF, ROB COPELAND, KEVIN BAUMANN, JEFFREY MCFARLANE, DARRYL LEVITT, RICHARD MOLYNEUX, GERALD DUHAMEL, GEORGE WESLEY VOORHEIS, BRUCE LIVESEY and JOHN DOES #4-10

Defendants

A N D B E T W E N:

WEST FACE CAPITAL INC. and GREGORY BOLAND

Plaintiffs by Counterclaim

and

THE CATALYST CAPITAL GROUP INC., CALLIDUS CAPITAL CORPORATION, NEWTON GLASSMAN, GABRIEL DE ALBA, JAMES RILEY, VIRGINIA JAMIESON, EMMANUEL ROSEN, B.C. STRATEGY LTD. D/B/A BLACK CUBE, B.C. STRATEGY UK LTD. D/B/A BLACK CUBE and INVOP LTD. D/B/A PSY GROUP

Defendants to the Counterclaim

BRIEF OF AUTHORITIES OF THE RESPONDING PARTIES (PLAINTIFFS BY COUNTERCLAIM)
WEST FACE CAPITAL INC. AND GREGORY BOLAND

(RE: Catalyst Defendants' Partial Anti-SLAPP Motion returnable May 17-21, 2021)
Volume 2 of 3

May 12, 2021

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Defendant to the Counterclaim

INDEX

Volume 1

Volume 2

Volume 3

17. *Lascaris v. B'nai Brith Canada*, 2019 ONCA 163, *leave to appeal refused,* 2020 CanLII 76226 (SCC)

18. *Levant v. Day*, 2019 ONCA 244, *leave to appeal refused*, 2019 CanLII 101530 (SCC)

19. *LIUNA, Local 183 v. Castellano*, 2020 ONCA 71

20. *Montour v. Beacon Publishing Inc.*, 2019 ONCA 246, *leave to appeal refused*, 2019 CanLII 94477 (SCC)

21. *Nanda v. McEwan*, 2020 ONCA 431

22. *Subway Franchise Systems, Inc. v. C.B.C.*, 2021 ONCA 26

23. *WIC Radio Ltd. v. Simpson*, 2008 SCC 40

Please see paras. 9-13, 105 & 126-131

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

Affirmed by the ONCA and leave to appeal refused by the SCC

Please see related costs endorsement

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

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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

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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

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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

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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

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

Please see paras. 7, 10, 11 & 17

CITATION: Catalyst Capital Group Inc. v. Moyse, 2016 ONSC 6285
COURT FILE NO.: CV-16-11272-00CL
DATE: 20161007

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

BETWEEN: THE CATALYST CAPITAL GROUP INC

Plaintiff

Costs endorsement following from Justice Newbould's ruling in the "Moyse Action"

AND:

BRANDON MOYSE and WEST FACE CAPITAL INC

Defendants

BEFORE: Newbould J.

COUNSEL: *Rocco DiPucchio, Andrew Winton and Bradley Vermeersch*, for the plaintiffs

Robert A. Centa, Kris Borg-Olivier and Denise M. Cooney, for the defendant Brandon Moyse

Kent E. Thomson, Matthew Mile-Smith and Andrew Carlson, for the defendant West Face Capital Inc.

COST ENDORSEMENT

[1] I have now received cost submissions from the parties following the dismissal of this action.

West Face costs

[2] West Face claims costs on a substantial indemnity basis. The normal rule is that costs are to be paid on a partial indemnity basis. However, conduct of a party that is reprehensible, scandalous or outrageous are grounds for costs to be awarded on a substantial or complete indemnity basis. See *Young v. Young*, [1993] 4 S.C.R. 3. The conduct giving rise to such an award can be conduct either in a circumstances giving rise to the cause of action or in the proceedings themselves. See Orkin, *The Law of Costs*, 2nd ed. at para. 219 and *Ford Motor Company of Canada v. Ontario Municipal Employees Retirement Fund* (2006), 17 B.L.R. (4th) 169 (Ont. C.A.).

[3] Unfounded allegations of improper conduct seriously prejudicial to the character or reputation of a party can give rise to costs on a substantial indemnity scale. See *131843 Canada Inc. v. Double "R" (Toronto) Ltd.* (1992), 7 C.P.C. (3d) 15 per Blair J. (as he then was). In *Re Bisyk (No. 2)* (1980), 32 O.R. (2d) 281; aff'd [1981] O.J. No. 1319 (C.A.), Robins J. (as he then was), held that unproven allegations of undue influence in the preparation of a will were allegations of improper conduct seriously prejudicial to the character or reputation of a party deserving of costs on a solicitor and client basis. Both of these cases were referred with acceptance in *Davies v. Clarington (Municipality)* (2009), 100 O.R. (3d) 66 (C.A.) at para. 47.

[4] In *Thoughtcorp Systems Inc. v. Tanju*, [2009] O.J. No. 1856, it was alleged that the defendant formed a competing business in breach of his fiduciary duties to the plaintiff and his non-competition agreement, hired a former employee of the plaintiff in breach of non-competition and non-solicitation clauses in her employment agreement, appropriated the plaintiff's confidential information, knowingly participated in the former employee's breach of fiduciary duties to the plaintiff, interfered with economic relations and unlawfully conspired with the former employee to the plaintiff's detriment. Hoy J. (as she then was) viewed the allegations

as harmful to the defendant's integrity and awarded costs on a substantial indemnity basis. She said:

> **21** The allegations in this case go beyond breach of employment contract. Allegations of appropriation of confidential information and knowingly participating in breach of a fiduciary duty appear to me to be seriously prejudicial to, and to impugn the integrity of, a young professional developing a career in the "trusted intelligence services" field and, in the absence of a release which effectively puts an end to the allegations, to, in appropriate cases, justify costs on a substantial indemnity scale in the event of a discontinuance.

[5] In this case, the claim against West Face was pleaded as follows:

> 34.6 West Face wrongfully used Catalyst's Confidential Information, which it solicited and obtained from Moyse, to obtain an unfair advantage over Catalyst in its negotiations with Wind. But for the transmission of confidential information concerning Wind from Moyse to West Face, West Face would not have successfully negotiated a purchase of Wind.

[6] On the face of it, this is an accusation of soliciting and misusing confident information. To solicit it indicates an intention to obtain confidential information. In the industry in which both West Face and Catalyst participated, personal integrity is extremely important. The accusation that West Face knowingly solicited confidential information from an employee of Catalyst and used it against Catalyst was an allegation of wrongdoing that attacked the integrity of West Face and its executives.

[7] In this case, Catalyst was aware before it amended its statement of claim to make this claim that West Face had set up a confidentiality wall before Mr. Moyse began working for West Face. It was also aware that Mr. Griffin of West Face had sworn two affidavits denying that West Face had obtained any confidential information about Catalyst from Mr. Moyse or had used such information in its dealings to acquire an interest in Wind. It was also aware of affidavits from Messrs. Leitner and Burt, principals of two of the partners of West Face in the bid for Wind, denying that they had received any information from West Face about Catalyst's

dealings regarding Wind. Catalyst had also received extensive production of all of West Face's productions. Catalyst openly admitted at the opening of trial that it had no "direct" evidence that Mr. Moyse communicated confidential Catalyst information about Wind to West Face.

[8] This was not a case in which it was acknowledged by West Face that it had obtained Catalyst information from Mr. Moyse and the issue was whether it constituted confidential information or was used by West Face. Rather it was a straight contest as to whether West Face had obtained confidential Catalyst information about Wind and had used it. Catalyst was aware aware that in order to prove its allegations it had to establish that West Face witnesses were lying. There was no way around that. In its closing argument it alleged "subterfuge and secrecy" as being as essential part of the asserted tort.

[9] Thus the allegations not only impugned the integrity of Mr. Griffin and other persons at West Face by asserting a solicitation and misuse of confidential Catalyst information but also attacked their honesty in their asserting that no confidential information regarding Catalyst was obtained from Mr. Moyse or used by West Face.

[10] This law suit was driven by Mr. Glassman. He was not able to accept that he lost his chance to acquire Wind by being outsmarted by someone else. He set out to prove his belief that the West Face witnesses were lying and that West Face had obtained confidential Catalyst information from Mr. Moyse that they used to defeat Catalyst's bid to acquire Wind. He was certainly playing hardball attacking the reputation and honesty of West Face. However, in spite of the best efforts of Catalyst's very able and skilled lawyers, he utterly failed.[1]

[11] In these circumstances I am of the view that West Face is entitled to costs on a substantial indemnity basis.

[1] I in no way impugn the integrity of Catalyst's lawyers who conducted the case in an entirely professional manner.

[12] Regarding the amount of the costs claimed by West Face on a substantial indemnity basis, Catalyst raises no argument on the quantum. West Face claims substantial indemnity costs totalling $1,239,970.41, including fees of $1,053,238.29, disbursements and HST.

[13] West Face in its bill of costs claimed $843,246.50 on a partial indemnity basis, including fees of $702,155.18, disbursements and HST. Catalyst accepts that that claim on a partial indemnity basis is reasonable. Under rule 1.03 the definition of substantial indemnity cost means 1.5 times partial indemnity costs. 1.5 times $702,155.18, the amount of fees claimed by West Face on a partial indemnity basis and accepted by Catalyst as reasonable, comes to $1,053,232.77, which is within $5 dollars of the amount claimed by West Face for substantial indemnity fees.

[14] Thus I fix the substantial indemnity costs to be paid by Catalyst to West Face at $1,239,965.

Brandon Moyse

[15] Mr. Moyse also claims costs on a substantial indemnity basis. In many ways he is entitled to costs on that scale for the same reasons that West Face is entitled to substantial indemnity costs. His reputation and integrity were attacked. Had the allegation stuck that he disclosed confidential Catalyst information to West Face, it would have had a very detrimental effect on his career prospects at a very early stage of his career. As it was, the allegations alone caused Mr. Moyse great difficulty. As a result of the litigation, Mr. Moyse was off work from July 16, 2014 until December 2015, and had significant difficulties securing a new job.

[16] Mr. Moyse made some mistakes at the outset of this sorry saga. He destroyed evidence of his web browsing history out of a concern that it would show he had accessed adult entertainment websites and become part of the public record. He wiped his blackberry to remove personal information. He always asserted that they were honest mistakes and that he never passed on to West Face any confidential Catalyst information regarding its Wind initiative or

destroyed any evidence of any such activities. Mr. Moyse was a young man at that time who had a very close relationship with his girlfriend who is now his fiancée.

[17] Mr. Glassman caused Catalyst to assert a full scale attack on this young man. No thought was given to all of the denials by Mr. Moyse as well as by the West Face witnesses that there had not been any confidential Catalyst information regarding Wind given to West Face by Mr. Moyse. Catalyst claimed general damages against Mr. Moyse. What those would be were not particularized, which in a case involving a claim by Catalyst against West Face in excess of $500 million, would leave Mr. Moyse in a perilous state. It was only in its closing submissions on a question from the bench that Catalyst counsel said that damages equivalent to an award covering its costs of the case would be appropriate. That amount in this expensive litigation would be something that Mr. Moyse would in all likelihood be unable to pay.[2]

[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.

[19] Mr. Moyse claims partial indemnity costs of $339,500.18, made up of fees to the end of trial of $282,330.50, disbursements of $20,466.71 and HST. Catalyst argues that the fees claimed are excessive. It has filed a bill of costs of its own costs on a partial indemnity basis with fees to the end of trial being $455,381 plus HST. The arguments of Catalyst essentially come down to an assertion that the spoliation case against Mr. Moyse was a separate claim that did not require

[2] One might wonder why the action against Mr. Moyse was continued after his leave of absence from West Face. He was in no position to pay any substantial award of damages. If Catalyst was hoping that in order to get out of the impending financial disaster, Mr. Moyse would "turn state's evidence" and say that he had disclosed confidential Catalyst information regarding its Wind initiative to West Face, it did not work. The fact that West Face has paid Mr. Moyse's legal fees may have had something to do with that, although West Face has not indemnified Mr. Moyse against any damage award. Mr. Moyse continued his denial of making any such disclosure and I accepted his evidence.

all of the time spent. I do not accept that argument. Mr. Moyse had to be represented throughout the case, including discoveries and cross-examinations of West Face witnesses and at trial. The spoliation case against him was not divorced from the evidence led against West Face and he was exposed to a very large judgment that could have been affected by an award against West Face.

[20] The fees claimed by counsel for Mr. Moyse are approximately 61% of the fees claimed in the Catalyst bill of costs. The fees claimed by counsel for Mr. Moyse are 40% of the fees claimed by counsel for West Face on a partial indemnity basis. It is evident that the work done by counsel for Mr. Moyse was substantially less than the work done for Catalyst and West Face.

[21] It is not the court's function when fixing costs to second guess successful counsel of the amount of time spent unless the time spent was obviously too much. See *Fiorillo v. Krispy Kreme Doughnuts Inc.* [2009] O.J. No. 3223 and the authorities cited in it. I am in no position to say that the time spent was obviously too much.

[22] There are three areas specified by Catalyst in its critique of the bill of costs of Mr. Moyse:

(a) Mr. Moyse claimed 15 hours for Commercial List attendances. It is said there were six attendances since January 2016 and that none lasted more than one hour. This ignores preparation time. It is said no costs were sought, awarded or reserved for those attendances. That is irrelevant. Attendances at 9:30 am conferences are the norm in the Commercial List and they save a lot of time and expense, as acknowledged by Catalyst in its costs submissions that costs were reduced because disputes between the parties were resolved at those appointments without fully briefed motions. Counsel are entitled to their costs of those attendances as they are steps in the proceeding.

(b) Mr. Moyse claimed 151.4 hours for oral discoveries. It is said that the only discovery that Mr. Moyse conducted was of Catalyst's witness for thirty minutes and that he only gave six undertakings during his one day of discovery. It is said that it is not possible for one day of defending a witness and preparing for a 30 minute oral discovery to take 140 hours of preparation. This ignores the fact that counsel for Mr. Moyse had 7800 productions to consider, including 3400 documents produced by Catalyst between late March and May, 2016 and also attended, quite properly, the other discoveries. To have ignored those would have been foolhardy.

(c) Catalyst complains that counsel for Mr. Moyse claimed 218.3 hours for direct and cross-examination preparation yet he only called two witnesses during trial and only cross-examined four witnesses. It should be pointed out that 70 hours were spent by a law clerk for preparing briefs of documents for witnesses and 5 hours were for a student. It is said counsel for Mr. Moyse need not have spent so much preparation time. I cannot say that the time spent was obviously too much. Second-guessing successful counsel in a complex case such as this, particularly the spoliation case, is a difficult thing to do on the basis of simply looking at the hours.

[23] In this case, with the personal attack made on Mr. Moyse by Catalyst that affected Mr. Moyse's livelihood, Catalyst had to know that Mr. Moyse had no alternative but to take every possible step he could to defend himself.

[24] Taking into account the factors in rule 57.01 and discussed in *Andersen v St. Jude Medical Inc.*, [2006] O.J. No. 508 (Div. Ct.), I fix the partial indemnity costs to be paid to Mr. Moyse by Catalyst at the amount claimed of $339,500.18.

Newbould J.

Date: October 7, 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)

Affirming Justice Newbould's ruling in the "Moyse Action"

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."

COURT OF APPEAL FOR ONTARIO

CITATION: The Catalyst Capital Group Inc. v. Moyse, 2018 ONCA 447
DATE: 20180511
DOCKET: C62655

Doherty, MacFarland and Paciocco JJ.A.

BETWEEN

The Catalyst Capital Group Inc.

Appeal costs endorsement in the "Moyse Action"

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.

COSTS ENDORSEMENT

[1] The respondent, West Face Capital Inc. ("West Face"), seeks costs in the amount of $250,000, inclusive of disbursements and HST. The respondent, Brandon Moyse, seeks costs in the amount of $149,905.18, also inclusive of disbursements and HST.

[2] The appellant, Catalyst Capital Group Inc. ("Catalyst"), argues that West Face should have its costs in the amount of $150,000 and that Mr. Moyse should have no costs or, alternatively, costs in an amount well below the amount requested by Mr. Moyse.

[3] The respondents were entirely successful on the appeal. They are entitled to reasonable costs on a partial indemnity basis.

[4] The costs claimed, for what was basically a one-day appeal, are high. They reflect a full-out, no expense spared defence of the trial judgment. Catalyst did not provide the court with its bill of costs, but we have no doubt that it would reflect the same "leave no stone unturned" approach to the appeal. Given the history of this litigation, both sides would reasonably expect that the other side would pursue all legal avenues vigorously and thoroughly without financial restraint.

[5] The nature of the appeal also justifies significant preparation-related costs. Although the legal issues raised were, with one exception, not complex or novel,

the appeal record was large. The grounds of appeal were essentially attempts to re-litigate most of the crucial findings of fact. The appellant's written arguments were lengthy and replete with detailed references to the evidence. The respondents were required to engage in a detailed, careful and time-consuming review of the full record. Given the manner in which the appeal was advanced, the respondents had to prepare to virtually retry the crucial factual issues on appeal.

[6] The appeal was adjourned at the last moment in September at the request of Catalyst. The adjournment turned out to be unnecessary. There were considerable costs thrown away and those costs should be included in the amounts awarded to the respondents.

[7] The respondents brought a motion related to the fresh evidence in November 2017. That motion was never heard on its merits. We would impose no costs in respect of matters relating to that motion.

[8] Having regard particularly to the success of the respondents, the nature of the appeal, and the costs thrown away when the appeal was adjourned, we award costs to West Face in the amount of $200,000 and costs to Mr. Moyse in the amount of $100,000. Both are inclusive of disbursements and HST.

"Doherty J.A."
"J. MacFarland J.A."
"D.M. Paciocco J.A."

Catalyst Capital Group Inc. v. Moyse

Supreme Court of Canada Rulings on Applications for Leave to Appeal and Other Motions

Supreme Court of Canada

Record created: August 8, 2018.

Record updated: March 28, 2019.

File No.: 38232

[2018] S.C.C.A. No. 295 | [2018] C.S.C.R. no 295

Catalyst Capital Group Inc. v. Brandon Moyse and West Face Capital Inc.

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Case Summary

Status:

Application for leave to appeal dismissed with costs (without reasons) March 28, 2019.

Catchwords:

Appeals — Evidence — Spoliation — Appropriate legal tests to be applied to determine whether spoliation has occurred in a case involving the admitted destruction of unknown electronically stored information — Whether trial judge erred in law in legal tests applied to determine whether spoliation had occurred — Whether Court of Appeal erred in law by upholding trial judge's decision in respect of spoliation, and, by holding that it need not consider issues of law argued because of trial judge's findings in respect of spoliation.

Case Summary:

The applicant, Catalyst Capital Group Inc. and the respondent, West Face Capital Inc. are Toronto-based investment management firms. Catalyst brought an action against West Face for an alleged misuse of confidential Catalyst information regarding WIND Mobile Inc. that Catalyst claimed was obtained by West Face from the respondent, Mr. Moyse who had previously worked for Catalyst before joining West Face. Catalyst claimed that West Face had used that confidential information to successfully acquire an interest in WIND.

The trial judge dismissed all claims against West Face and Mr. Moyse and awarded costs to West

Face on a substantial indemnity basis and costs to Mr. Moyse on a partial indemnity basis. Catalyst appealed from the dismissal of its claims and sought leave to appeal from the costs order.

The Court of Appeal dismissed Catalyst's appeal from the bench with reasons to follow and reserved judgment on the costs-related appeals. The Court of Appeal went on to dismiss the application for leave to appeal the costs judgment.

Counsel

David C. Moore (Moore Barristers), for the motion.

Robert A. Centa (Paliare, Roland, Rosenberg, Rothstein LLP), contra.

Chronology:

1. Application for leave to appeal:
   FILED: August 8, 2018.

   SUBMITTED TO THE COURT: February 25, 2019.

   DISMISSED WITH COSTS: March 28, 2019 (without reasons)

   Before: M.J. Moldaver, A. Karakatsanis and S. Côté JJ.

   The motion for an extension of time to serve and file the application for leave to appeal is granted. The application for leave to appeal from the judgments of the Court of Appeal for Ontario, Number C62655, dated February 21, 2018, Number C62655, 2018 ONCA 283, dated March 22, 2018, and Number C62655, 2018 ONCA 447, dated May 11, 2018, is dismissed with costs.

Procedural History:

Action dismissed.
August 18, 2016
Ontario Superior Court of Justice
Newbould J.
2016 ONSC 5271

Appeal by Catalyst Capital Group Inc. dismissed from bench.
February 21, 2018
Court of Appeal for Ontario
Doherty, MacFarland and Paciocco JJ.A.

Appeal by Catalyst Capital Group Inc. dismissed; Application for leave to appeal trial cost judgment dismissed.
March 22, 2018
Court of Appeal for Ontario
Doherty, MacFarland and Paciocco JJ.A.
2018 ONCA 283; File No.: C62655

Catalyst ordered to pay West Face costs of the appeal in amount of $200,000; Catalyst ordered to pay Mr. Moyse costs of the appeal in amount of $100,000.
May 11, 2018
Court of Appeal for Ontario
Doherty, MacFarland and Paciocco JJ.A.
2018 ONCA 447; [2018] O.J. No. 2501; File No.: C62655

End of Document

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

This is the "Vimpelcom Action" trial ruling. Affirmed by the ONCA and leave to appeal refused by the SCC

ONTARIO

SUPERIOR COURT OF JUSTICE

(COMMERCIAL LIST)

BETWEEN:	)	
	)	
THE CATALYST CAPITAL GROUP INC.	)	*Rocco DiPucchio, Andrew Winton, Brad Vermeersch* and *David Moore* for 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.	)	*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.
Defendants/Moving Parties	)	*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.

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

[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.

[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 <u>not</u> 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.
>
> …

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

> 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 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,

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

> 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.

[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.

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?

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[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*].

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.

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[6] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

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,
>
> (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.

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[7] *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, [*Danyluk*].
[8] *Martin v. Goldfarb*, [2006] O.J. No. 2768, [2006] O.T.C. 629 (Ont. S.C.).

[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 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:

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[9] *Dableh v. Ontario* Hydro, [1994] O.J. No. 2771, 51 A.C.W.S. (3d) 836 (Gen. Div.), [*Dableh*].

(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 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

[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.*

> 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

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[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 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

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

> 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

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[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

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

inconsistent findings from Newbould J.'s findings because he found at para. 127 of his reasons for judgment that:

> … 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

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

> itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

[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

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

> 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'.

[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.

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

[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 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.

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

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 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

[28] *Supra* note 6.

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 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.

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[29] *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, [*Sattva*].
[30] *Ibid* at para. 50.

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.

[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:

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[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.).

> 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.

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 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.

Ruling of Justice Hainey in the "Vimpelcom Action" affirmed. Leave to appeal refused by the SCC

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: “M.H.T.” May 2, 2019

“M. Tulloch J.A.”
“I agree. M.L. Benotto J.A.”
“I agree. Grant Huscroft J.A.”

Catalyst Capital Group Inc. v. Vimpelcom Ltd.

Supreme Court of Canada Rulings on Applications for Leave to Appeal and Other Motions

Supreme Court of Canada

Record created: August 1, 2019.

Record updated: November 14, 2019.

File No.: 38746

[2019] S.C.C.A. No. 284 | [2019] C.S.C.R. no 284

Catalyst Capital Group Inc. v. 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.

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Case Summary

Status:

Application for leave to appeal dismissed with costs (without reasons) November 14, 2019.

Catchwords:

Civil procedure — Abuse of process — Estoppel — Applicant's bid to purchase interest in a mobile carrier unsuccessful — Mobile carrier thereafter purchased by a consortium that included a competing firm — Applicant unsuccessful in action claiming competing firm used confidential information to acquire mobile carrier — Applicant starting new action against additional defendants and claiming further causes of action — Motion to dismiss new action allowed on the basis of abuse of process and, as against some defendants, on the basis of issue estoppel and cause of action estoppel — Appeal dismissed — How should courts and parties balance the interests of proportionality while protecting a party's right to pursue claims in cases involving multiple parties with different and separate causes of action? — Whether proof of detriment is a necessary element for a party to obtain equitable remedies for the tort of breach of confidence.

Case Summary:

This case arises out of the failed attempt by the applicant, Catalyst Capital Group Inc., to purchase Wind Mobile from the respondent VimpelCom Ltd. VimpelCom's interest in Wind Mobile was ultimately purchased by a consortium of purchasers (made up of most of the other respondents). Catalyst sued the respondents, alleging they committed the torts of inducing breach of contract, conspiracy, and breach of confidence which prevented it from acquiring Wind Mobile. It also alleged that VimpelCom breached its exclusivity agreement and confidentiality agreement. Catalyst's claim was introduced five days before the commencement of the trial in another action it had initiated relating to its failed attempt at purchasing Wind Mobile. The Superior Court of Justice dismissed that action and the Court of Appeal upheld that dismissal. The defendants to the current action moved to dismiss Catalyst's statement of claim on the basis of issue estoppel, cause of action estoppel, and abuse of process. The motions judge allowed the respondents' motion. He dismissed the claim against all the defendants as an abuse of process and the claim against most of the defendants on the basis of issue estoppel and cause of action estoppel. The Court of Appeal dismissed Catalyst's appeal.

Counsel

Callaghan, John E. (Gowling WLG (Canada) LLP), for the motion.

Pasparakis, Orestes (Norton Rose Fulbright Canada LLP), contra.

Chronology:

1. Application for leave to appeal:
   FILED: August 1, 2019.

   SUBMITTED TO THE COURT: October 15, 2019.

   DISMISSED WITH COSTS: November 14, 2019 (without reasons)

   Before: M.J. Moldaver, S. Côté and S.L. Martin JJ.

Procedural History:

Respondents' motion to dismiss applicant's statement of claim
allowed; applicant's action dismissed as an abuse of process
April 18, 2018
Ontario Superior Court of Justice
Hainey J.
2018 ONSC 2471

Appeal dismissed
May 2, 2019
Court of Appeal for Ontario
Tulloch, Benotto, and Huscroft JJ.A.
2019 ONCA 354; [2019] O.J. No. 2286; Docket: C65431

End of Document

Please see paras. 9(d), 12, 28, 29, 31-106, 113-116, 276, 297, 299, 316-318, 337, 353-354 & 367-368

CITATION: The Catalyst Capital Group Inc. v. West Face Capital Inc., 2021 ONSC 125
COURT FILE NO.: CV-17-587463-00CL
DATE: 20210111

Leave to appeal refused by the Divisional Court

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION Plaintiffs	)	*David C. Moore, Kenneth G. Jones, John E. Callaghan, Benjamin Na* and *Matthew Karabus* for the Plaintiffs and for Newton Glassman, James Riley and Gabriel De Alba, Defendants by Counterclaim
– and –	)	
WEST FACE CAPITAL INC., GREGORY BOLAND, M5V ADVISORS INC. C.O.B. ANSON GROUP CANADA, ADMIRALTY ADVISORS LLC, FRIGATE VENTURES LP, ANSON INVESTMENTS LP, ANSON CAPITAL LP, ANSON INVESTMENTS MASTER FUND LP, AIMF GP, ANSON CATALYST MASTER FUND LP, ACF GP, MOEZ KASSAM, ADAM SPEARS, SUNNY PURI, CLARITYSPRING INC., NATHAN ANDERSON, BRUCE LANGSTAFF, ROB COPELAND, KEVIN BAUMANN, JEFFREY MCFARLANE, DARRYL LEVITT, RICHARD MOLYNEUX, GERALD DUHAMEL, GEORGE WESLEY VOORHEIS, BRUCE LIVESEY and JOHN DOES #4-10 Defendants	)	*Kent E. Thomson, Matthew Milne-Smith, Andrew Carlson* and *Maura O'Sullivan* for West Face Capital Inc. and Gregory Boland *Linda M. Plumpton, Andrew Bernstein* and *Leora Jackson* for M5V Advisors c.o.b. Anson Group Canada, Admiralty Advisors LLC, Frigate Ventures LP, Anson Investments LP, Anson Capital LP, Anson Investments Master Fund LP, AIMF GP, Anson Catalyst Master Fund LP, ACF GP, Moez Kassam, Adam Spears and Sunny Puri (collectively, the "Anson Defendants") *Devin Jarcaig* for Bruce Langstaff *Phil Tunley, Jennifer Saville, Alexi Wood* and *Lillian Cadieux-Shaw* for Rob Copeland *Kevin Baumann* in person
– and –	)	
CANACCORD GENUITY CORP. Third Party	)	

AND BETWEEN:

WEST FACE CAPITAL INC. and GREGORY BOLAND

Plaintiffs by Counterclaim

– and –

THE CATALYST CAPITAL GROUP INC., CALLIDUS CAPITAL CORPORATION, NEWTON GLASSMAN, GABRIEL DE ALBA, JAMES RILEY, VIRGINIA JAMIESON, EMMANUEL ROSEN, B.C. STRATEGY LTD. D/B/A BLACK CUBE, B.C. STRATEGY UK LTD. D/B/A BLACK CUBE and INVOP LTD. D/B/A PSY GROUP

Defendants to the Counterclaim

John Adair and *Michael Darcy* for B.C. Strategy Ltd. d/b/a Black Cube and B.C. Strategy U.K. Ltd. d/b/a Black Cube

AND BETWEEN:

BRUCE LANGSTAFF

Plaintiff by Counterclaim

– and –

THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION

Defendants to the Counterclaim

HEARD BY ZOOM CONFERENCE: December 2, 3 and 4, 2020

RULING ON PRIVILEGE MOTIONS

C. BOSWELL J.

> For millions of years, mankind lived just like the animals. Then something happened which unleashed the power of our imagination. We learned to talk and we learned to listen. Speech has allowed the communication of ideas, enabling human beings to work together to build the impossible. Mankind's greatest achievements have come about by talking, and its greatest failures by not talking. It doesn't have to be like this. Our greatest hopes could become reality in the future. With the technology at our disposal, the possibilities are unbounded. All we need to do is make sure we keep talking.
>
> *Stephen Hawking*

[1] Sometimes people talk *too* much. Sometimes they get themselves into trouble doing so. Sometimes they hurt other people by what they say. And sometimes they do so intentionally.

[2] Dr. Hawking was right, of course. It's impossible to overstate the important place that communication has had in much of human achievement. But language can also be used to demean and demoralize, provoke and offend. It can be used to shape public perception and behavior. It can be used to discredit known facts or promote false narratives. It can be weaponized.

[3] This multi-tentacled lawsuit is all about the trouble that talking – both the written and spoken word – can create. At the core of the lawsuit are two very wealthy and powerful men; competitors of one another in the private equity investment business. Each accuses the other of weaponizing language against him and his business. Each seeks hundreds of millions of dollars from the other as damages for defamation.

[4] This ruling will not offer any conclusions about whether either man's allegations are well-founded. This is, in effect, a disclosure motion – just one small battle in a larger war.

[5] One of the protagonists (Mr. Boland) says the other (Mr. Glassman) directed agents to conduct a smear campaign against him and his business. He alleges that the agents engaged in some unethical behavior, including (1) conducting pretext interviews of his employees in an attempt to elicit confidential information from them; and (2) publishing, or attempting to publish, false and defamatory statements about him and his business in social and mainstream media outlets. He seeks production of any documents relating to the activities of those agents.

[6] The documents have not been produced, not because they are not relevant to the live issues between the parties, but because the plaintiff, Catalyst, alleges that they are subject to either solicitor-client privilege or litigation privilege.

[7] West Face, the Anson Defendants and Mr. Baumann, supported by Mr. Copeland and Mr. Langstaff, ask, on motion, that the court declare Catalyst's privilege claims to be unsustainable and that the court order production of the documents in issue.

[8] This ruling is unavoidably lengthy and somewhat dense, so a roadmap may be helpful. I intend to proceed as follows.

[9] First, I will provide an overview of the context in which the motions are situated. Because of the detail required, I will break the overview down into six parts:

(a) An introduction of the parties involved in the motions;

(b) A description of the sale of WIND Mobile, which was a triggering event to a series of lawsuits between the principal parties;

(c) A review of the "Moyse" action, which was the first lawsuit between the parties subsequent to the WIND Mobile transaction;

(d) An overview of "Project Maple Tree" which was a code-named operation involving a host of projects undertaken by agents of Catalyst. One of the goals of the operation was to undermine the integrity of the trial judgment in the Moyse action. The documents generated in the course of the planning and implementation of Project Maple Tree are the subject matter of these motions;

(e) A general description of the core aspects of this lawsuit, known by the parties as the "Wolfpack" action; and,

(f) A brief history of the privilege motions now before the court. They were initiated over two years ago but never heard. They were revived as an interlocutory step to a number of pending anti-SLAPP motions, which is significant for reasons I will outline.

[10] With the contextual overview in place, I will expand on the live issues and the parties' positions with respect to them.

[11] Finally, at the discussion stage of these reasons, I will analyze a jurisdictional issue raised by Black Cube as well as Catalyst's assertions of solicitor-client and litigation privilege.

I. OVERVIEW

[12] The Catalyst Capital Group Inc. and West Face Capital Inc. are both significant players in the Canadian private equity market. Both were suitors of WIND Mobile when it was put up for sale in 2014. West Face prevailed. Catalyst cried foul and sued. West Face prevailed again. Catalyst appealed. While the appeal was pending, agents of Catalyst engaged in a systematic effort to unearth fresh evidence that might undermine the integrity of the judgment in favour of West Face, to diminish the public reputation of West Face and to promote the public image of Catalyst. Some of their tactics were ethically dubious.

[13] This lawsuit is the fourth in a string of actions involving Catalyst and West Face. Each accuses the other of manipulating public discourse to unfairly influence the private equity market.

[14] Catalyst claims that West Face and others conspired to harm it and a related company – Callidus Capital Corporation – through false, negative publicity and a targeted short-selling of the publicly-traded shares of Callidus. West Face countersues, claiming that Catalyst engaged in a course of conduct designed to defame West Face and its principals and to unfairly harm its position in the market.

[15] The underlying action is complex to say the least. The stakes are a half a billion dollars. There are multiple parties and layers of claims, counterclaims and claims over. The pleadings are voluminous. The materials filed on this motion are similarly voluminous and run to the many thousands of pages.

[16] Understanding the privilege issues engaged by this motion requires at least some appreciation of the broader issues in the action. That said, it would be easy to get lost in the labyrinthine factual context in which these motions are situated. Any attempt to summarize all of it is a fool's errand. While a somewhat detailed overview is necessary, I will do my best to keep it manageable by focusing on only what is relevant and material to this particular battle. I begin with a brief introduction of the central parties.

1. THE PRINCIPAL PARTIES

[17] There are close to forty parties involved in this lawsuit in one capacity or another. Most of them are not directly engaged in this particular skirmish. I will identify only those who played an active role in the motions.

[18] Catalyst, as I alluded to, is a private equity investment firm based out of Toronto.

[19] Callidus is a private lender specializing in loans to financially distressed borrowers. Catalyst and Callidus are related companies. Specifically, a number of Catalyst funds hold, in the aggregate, the majority of the shares of Callidus.

[20] Newton Glassman is a founding partner of Catalyst, the chief executive officer of Callidus and one of the two principal protagonists I referred to above.

[21] James Riley and Gabriel De Alba were also executives at Catalyst at all material times.

[22] Like Catalyst, West Face is a private equity investment firm based out of Toronto. West Face and Catalyst are competitors.

[23] Gregory Boland is the chief executive officer of West Face. He is the other principal protagonist I referred to above.

[24] The Anson Defendants are a related group of hedge funds and some of their principals.

They are alleged to have participated in a defamation campaign against Catalyst and Callidus as part of a "Wolfpack" of conspirators whose aim was to drive down the price of Callidus shares, whilst short-selling them.

[25] Bruce Langstaff is a former employee of Canaccord Genuity Corp. Canaccord is an independent investment dealer. Mr. Langstaff was its managing director of Canadian equity sales. He is alleged to have facilitated short-selling trades by Wolfpack members in Callidus shares.

[26] Rob Copeland is a reporter for the Wall Street Journal (the "WSJ"). He is alleged to have penned a defamatory article, published in August 2017, that had the effect of driving down the Callidus share price.

[27] Kevin Baumann is the former president of Alken Basin Drilling Inc., a borrower of Callidus. He is alleged to have made, in a conspiracy with West Face and others, defamatory statements against Catalyst and Callidus including false "whistleblower" complaints to the Ontario Securities Commission.

[28] Black Cube is a private investigation firm based in Israel and comprised of former members of the Israeli Defence Force and the Mossad, Israel's national intelligence agency. They ostensibly provided "litigation support" services to Catalyst. They are a central party to these motions and I will explore their role in these proceedings in some detail as these reasons unfold.

[29] Other companies and individuals, while not active participants in the motions, do assume prominent roles and are worth a mention. They include:

(a) Brian Greenspan is a prominent Toronto criminal lawyer and has acted as counsel to Catalyst from time to time;

(b) Tamara Global Holdings Ltd. is an Israeli security and litigation support firm, whose principal is Yossi Tanuri. Tamara was retained by Catalyst in the summer of 2017 to provide litigation support services as the date scheduled for the hearing of Catalyst's appeal of the judgment in the Moyse action approached;

(c) Invop Ltd. is a now-insolvent Israeli public relations firm that carried on business as "Psy Group". They specialized in influencing public opinion through the dissemination of information in mainstream and social media platforms. Royi Burstein was the CEO of Psy Group. Emmanuel Rosen was employed with Psy Group as a public relations specialist. Psy Group and Black Cube were subcontractors of Tamara;

(d) Phillip Elwood is a Washington, D.C.-based independent public relations consultant. He was retained by Psy Group to assist them in their role as a subcontractor to Tamara;

(e) Virginia Jamieson is a New York City-based public relations consultant. She was also retained by Psy Group for reasons similar to Mr. Elwood;

(f) Christie Blatchford was a well-known writer for the National Post. She authored an article in late November 2017 titled, "*The Judge, The Sting, Black Cube and Me*"; and,

(g) Frank Newbould is a former justice of this court. He presided at the trial of the Moyse action and rendered a judgment that Catalyst found to be entirely unsatisfactory.

[30] The roles each of the parties played in the complex history to this proceeding will become clearer as this ruling unfolds. For our purposes, the story begins in 2014 with the sale of WIND Mobile.

2. THE WIND MOBILE DEAL

[31] WIND Mobile was a wireless telecommunications provider founded in 2008. It was substantially funded through foreign parties. The Canadian government restricts foreign ownership of telecommunications companies operating in Canada. To comply with Canadian regulations, WIND Mobile's ownership structure was as follows: Globalive Communications Corporation, a Canadian company, held two-thirds of the voting shares in WIND Mobile, but one-third of the equity. VimpelCom Inc., a Russian company, held the other two-thirds of the equity and one-third of the voting shares.

[32] In 2014, VimpelCom made it known that it was going to sell its ownership stake in WIND Mobile at a fixed price of $300 million.

[33] Catalyst soon found itself in the catbird seat, having secured exclusive negotiating rights with VimpelCom beginning in the third week of July 2014. Catalyst was not able, however, to reach an agreement with VimpelCom and their period of exclusivity expired in mid-August, 2014. It proved to be a missed opportunity of epic proportions.

[34] A month after Catalyst's exclusive negotiating window closed, VimpelCom sold its interest in WIND Mobile to a consortium of investors that included West Face. About a year and a half later, that consortium sold WIND Mobile to Shaw Communications Inc. for $1.6 billion.

3. THE MOYSE ACTION

[35] Catalyst and West Face have been litigating hard against one another since June 2014. The commencement of legal friction between them corresponds with the sale of WIND Mobile from VimpelCom to the West Face consortium.

[36] In 2014 Brandon Moyse was a young financial analyst. He had been working for Catalyst in that capacity for about two years. For reasons best known to him, he left that employment in May 2014. He joined West Face a month later, notwithstanding that he had a six month non-competition clause in his contract of employment with Catalyst.

[37] Mr. Moyse had been part of Catalyst's "core telecommunications team". He was aware that Catalyst was interested in acquiring WIND and he had done some work on that project.

Catalyst was concerned that he would share confidential information with their competitor, West Face. They sued West Face and Mr. Moyse to enforce the provisions of the non-competition clause, alleging that Mr. Moyse may have imparted unspecified confidential information to West Face. Shortly after the lawsuit commenced, the parties consented to an order that Mr. Moyse would be placed on leave. As it happens, he never returned to work at West Face and his total tenure there was less than a month.

[38] When Catalyst subsequently learned of the acquisition of WIND Mobile by West Face and others in September 2014, they amended their claim. They alleged that in acquiring WIND, West Face had improperly used confidential information about Catalyst's negotiations with WIND, given to them by Mr. Moyse. Catalyst sought a constructive trust interest in West Face's interest in WIND and an accounting of any profits earned by West Face as a result of its acquisition of WIND.

[39] The Moyse action came on for trial in early June 2016 and was heard over six days before Justice Frank Newbould, at the time the lead judge of the Commercial Court in Toronto. Catalyst's case was constructed on a body of circumstantial evidence from which it asked Justice Newbould to infer that West Face and Mr. Moyse had improperly made use of Catalyst's confidential information.

[40] On August 18, 2016 Justice Newbould released a 49 page decision. He did not draw the inferences urged upon him by Catalyst. Instead, he dismissed the claim in its entirety.

[41] Compounding the loss were two aspects of Justice Newbould's ruling that appear, in my view, to have stuck in Catalyst's craw.

[42] First, the less than favourable observations he made about the evidence of Mr. Glassman and Mr. De Alba.

[43] Second, the rejection by the trial judge of Catalyst's claims of spoliation in relation to digital evidence deleted by Mr. Moyse.

[44] Mr. Moyse admitted that he transferred confidential Catalyst information to West Face during his interview process. He then covered his tracks by deleting evidence of that communication. His testimony was to the effect that the transfer was inadvertent and that the information in issue had nothing to do with WIND.

[45] Of arguably greater concern was the deletion by Mr. Moyse of the browsing history on his personal computer immediately prior to a scheduled forensic imaging of the computer's hard drive.

[46] On July 16, 2014 West Face and Mr. Moyse consented to an order that Mr. Moyse would preserve his records relevant to his activities from and after March 27, 2014. Mr. Moyse further agreed to have his personal electronic devices, including his computer, forensically imaged. Subsequently, the court authorized an independent supervising solicitor to review the forensic images.

[47] The report of the independent supervising solicitor included a finding that, on the morning of July 16, 2014, Mr. Moyse downloaded deletion software to his personal computer. He used that software to delete his internet browsing history before his computer was forensically imaged.

[48] Counsel to Catalyst urged Justice Newbould to reject Mr. Moyse's evidence and to infer that he likely destroyed relevant evidence supportive of the plaintiffs' claim.

[49] Justice Newbould again rejected the inferences urged upon him by counsel to Catalyst. Instead he accepted Mr. Moyse's explanation that he deleted his browser history because he was concerned that it would show he had visited adult entertainment websites. Newbould J. found that Catalyst had failed to establish that Mr. Moyse deleted any documents relevant to the WIND transaction and that Mr. Moyse never communicated to anyone at West Face anything about Catalyst's dealings with WIND Mobile or about their strategy to acquire WIND. He found that even if Mr. Moyse *had* breached his duty of confidentiality, Catalyst had failed to establish that it suffered any resulting detriment or damage. He concluded that Catalyst failed to acquire WIND because of the positions it took in the negotiations with VimpelCom and not because of any misuse of confidential information by West Face or anyone else. In short, Catalyst was the author of its own misfortune.

[50] The day after Justice Newbould's ruling was released, an article about the trial appeared in the Financial Post. It quoted a spokesperson from Catalyst as saying:

> We are deeply disappointed by the decision and the severe indications of possible bias displayed by Judge Newbould. We believe that he did not give fair consideration to all of the evidence presented, ignored contradictory statements made by the defendants that are part of the court record and delivered a judgement containing clear misstatements of fact.

[51] The principals of Catalyst were clearly unhappy with Justice Newbould's decision.

[52] Catalyst appealed the judgment. The appeal was scheduled to be heard September 26, 2017.[1] What happened in the weeks leading up to the scheduled appeal date is at the heart of these motions.

4. PROJECT MAPLE TREE

[53] Project Maple Tree is the name given to a multi-pronged, joint operation undertaken by foreign agents hired by Catalyst to provide what they describe as "litigation support". The agents involved were engaged by Tamara Global, which had been retained by Catalyst in late August 2017. The documents over which privilege is asserted by Catalyst and challenged by the moving parties relate to the creation and implementation of Project Maple Tree, so I will describe it in some detail.

[1] Catalyst's appeal in the Moyse action was adjourned to February 2018 and dismissed at that time. A motion for leave to appeal to the Supreme Court of Canada was dismissed on March 28, 2019.

4.1 The Retainer of Tamara Global

[54] Mr. Glassman executed an affidavit in response to these motions on November 24, 2020. He described in it a number of growing concerns that were troubling him in the summer of 2017. He was concerned, he said, that he and his family, his business partners and their families and Catalyst and Callidus were under attack by persons who, because of a strongly held animus, were intent on destroying his business interests.

[55] His concerns were based on factors which included:

(a) A sophisticated cyber attack on Callidus' computer system on July 22, 2017;

(b) The appearance of factually false communications about Catalyst and Callidus on Twitter and other social media platforms;

(c) Being advised by reporters at Thomson Reuters that they were going to publish a story that Catalyst and Callidus were the subject of an active police investigation (which was false);

(d) The publication of an article in the WSJ on August 9, 2017 which suggested that the Security Exchange Commission and the Toronto Police Service were each investigating Catalyst for fraud. Mr. Glassman refers to this article as the "False Fraud Article" because its contents were untrue – there were no fraud investigations. Publication of the article caused a dramatic drop in the price of Callidus shares;

(e) The receipt, on August 11, 2017, of an email from someone named Vincent Hanna, who advised Mr. Glassman that a "cabal of conspirators" caused the publication of the WSJ article. Mr. Hanna advised him that a group of funds were targeting Callidus and Mr. Glassman personally. They were spreading false rumours through the market and acting in concert to short Callidus stock. The cabal purportedly included Mr. Boland of West Face, some of the Anson Defendants and others;

(f) The discovery by maintenance staff of a person rummaging through the garbage containers at Mr. Glassman's Muskoka cottage;

(g) The discovery in early September 2017 that the backup generator at Mr. Glassman's Toronto home had been compromised, which he believes was an attempt to compromise his home security system; and,

(h) Two "brush pass" verbal threats on the sidewalk in Toronto's financial district, during which a man threatened that Mr. Glassman and his young son would be "gotten to" shortly.

[56] Mr. Glassman deposed that he considered it essential to obtain and understand the best possible information about what was transpiring so that a fully informed legal strategy could be formulated. He thought he knew the ideal person to help.

[57] Yossi Tanuri is Mr. Glassman's friend. They have participated together in numerous philanthropic activities. Mr. Glassman knew Mr. Tanuri to have been a member of an elite commando unit in the Israeli Defence Forces known as "Matkal". He now operates Tamara Global – an investigation and security company. Mr. Glassman determined that Mr. Tanuri's firm was ideally suited to help him get the information he thought was essential to address the issues that were troubling him in the summer of 2017.

[58] The Tamara retainer was handled by one of Catalyst's lawyers, Brian Greenspan.

[59] Mr. Greenspan executed an affidavit on November 10, 2018 in relation to a prior iteration of these privilege motions. It was refiled as part of Catalyst's response to the current motions. Mr. Greenspan deposed that, on instructions from Catalyst, he retained Tamara on August 31, 2017 to conduct a "qualitative property, personnel and equipment assessment of the current needs and future requirements of the Catalyst Defendants".[2] It is unclear to me how a retainer of that description matches up with the concerns identified as troubling Mr. Glassman.

[60] At any rate, Mr. Greenspan noted that Tamara's retainer included the authorization to retain subcontractors or consultants. He went on to say,

> Consequently, Tamara Global retained [Black Cube] as a subcontractor to conduct investigations relating to ongoing and potential litigation of the Catalyst Defendants, including litigation between the Catalyst Defendants and West Face. Pursuant to the resulting retainer arrangement between Tamara Global and [Black Cube], [Black Cube] was to undertake any such investigative work in accordance with its best professional judgment and in compliance with all local laws.
>
> The purpose of the retainer arrangements and the work undertaken by [Black Cube] on behalf of the Catalyst Defendants were (*sic*) in support of litigation…and/or were used by the Catalyst Defendants to obtain legal advice.

[61] As Mr. Glassman recounts, Mr. Tanuri flew to Toronto to meet with him on an urgent basis in late August 2017. He was accompanied by a man named Gadi Ben Efraim who was apparently, at that time, still an active agent in one of the Israeli intelligence services. Mr. Glassman wouldn't say what was discussed at this urgent meeting; he asserts privilege over the communications he had with Messrs. Tanuri and Ben Efraim. But he *was* willing to say that as a result of the discussion, he decided that the inclusion of media advice and assistance was "a part of any litigation plan and legal advice going forward". He reached that conclusion because of his perception that weaponized language was being used against him and his business interests through a variety of media sources.

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[2] By the "Catalyst Defendants" he meant Catalyst, Callidus, Mr. Glassman, Mr Riley and Mr. De Alba, each of whom is a named defendant to the counterclaim of West Face.

[62] More particularly, Mr. Glassman concluded that "any litigation plan had to include and be coordinated with a positive media strategy to counteract and mitigate" the effects of false social media attacks and the WSJ False Fraud article. He thought it was necessary to "set the record straight".

[63] While Mr. Glassman did not elaborate on the instructions he gave to Mr. Tanuri, I think it can be readily inferred that they included the need to create a counter-strike media strategy.

4.2 The September 6, 2017 Meeting in London

[64] September 6, 2017 was a pivotal date in the course of the battle between Catalyst and West Face. On that date, Mr. Glassman flew to London, England for a meeting with Mr. Tanuri and Mr. Ben Ephraim. He had been invited there by Mr. Tanuri to meet, he said, with a group of investigators that Mr. Tanuri had hired to provide litigation support. Those investigators were, for the most part, Black Cube employees.

4.3 The September 13, 2017 Email

[65] Tamara retained not only Black Cube agents, but agents of Psy Group as well. It appears that at least one representative from Psy Group attended the meeting in London on September 6, 2017.

[66] A week after that meeting, the CEO of Psy Group, Royi Burstein, sent an email to a number of Psy Group employees, including, but not limited to, Emmanuel Rosen, Avi Eliyahou, Ori Amir and someone named Yossef. The subject-line of the email was, "Project Maple Tree".

[67] According to the content of the email, Project Maple Tree had four missions. Those missions were loosely organized around (1) Justice Newbould; (2) the Wolfpack conspirators; (3) West Face and Mr. Boland; and (4) Catalyst and Callidus. A fifth mission, described as "HUMINT Mission 1" was also discussed.

[68] The email contains information provided by "the client", presumably Mr. Glassman, in respect of each mission. It does not, however, go into any detail about what each mission will entail.

[69] The discussions surrounding Mission 1 and HUMINT Mission 1 provide at least some clues about the type of activities Black Cube and Psy Group were retained to conduct.

[70] Mission 1 had a target – Justice Newbould – and a target audience – the Court of Appeal. It had a six-week timeframe. Its goal was to promote the message that Justice Newbould was racist, anti-Semitic and biased. Further, that he disregarded evidence in the Moyse trial and approved of the destruction of evidence by Mr. Moyse.

[71] HUMINT Mission 1 also had a target – Bei Heung – a controller at West Face. She purportedly advised a close friend of Mr. Glassman that West Face was "imploding" and that the partners were fighting. The mission was to approach her, determine her motives and obtain information about the real situation at West Face.

4.4 The September 14, 2017 Meeting in New York

[72] Philip Elwood, as I noted earlier, is a public relations consultant based in Washington, D.C. He swore an affidavit dated May 12, 2020 which was filed by West Face in support of this motion.

[73] Mr. Elwood deposed that he was retained by Psy Group in September 2017 to work on a matter for Catalyst and Mr. Glassman. He described Psy Group's business as "collecting business intelligence and then deploying that intelligence for the benefit of its clients." He said Psy Group's operatives were former members of the Mossad or the intelligence branch of the Israeli Defence Force. Psy Group and Black Cube were in competition with one another.

[74] Collecting business intelligence, he said, could take a number of forms. It could include online research. It could also involve covert operations including physical surveillance or contacting targets under false pretenses, as well as the making of surreptitious audio and video recordings of targets discussing sensitive topics.

[75] Though not entirely clear from his affidavit, it appears that Mr. Elwood's role was not in the collection of intelligence, but in its deployment. That deployment, he said, could involve working with legitimate journalists, creating websites, manipulating Google search results or publishing messages favourable to the client on social media platforms.

[76] Mr. Elwood deposed that he was contacted by Royi Burstein in late August or early September 2017 about meeting with a new client (Mr. Glassman) in New York City. Mr. Elwood was not clear on the date of the meeting, but Mr. Glassman's daytimer provides clear evidence that the meeting occurred on the morning of September 14, 2017.

[77] Mr. Elwood said that in addition to him and Mr. Glassman, there were a number of representatives from Psy Group in attendance at the meeting including Royi Burstein, Emmanuel Rosen, Ori Amir, Abraham Ronan, Avi Eliyahou and someone named Yossef.

[78] The meeting, according to Mr. Elwood, lasted all day. The first half was taken up by Mr. Glassman explaining his concerns about a "Wolfpack" of hedge funds conspiring against him; trying to harm him in litigation and in the financial markets. His focus appeared to be on West Face and Mr. Boland.

[79] The second half of the meeting involved Mr. Burstein describing a two-pronged operation known as Project Maple Tree. There was to be a "white prong" and a "black prong". The white prong involved utilizing mainstream media sources to generate positive publicity for Catalyst and Mr. Glassman. The black prong involved generating stories about the Wolfpack conspiracy; publishing any kind of negative information possible about West Face and Mr. Boland; and portraying Justice Newbould as corrupt and anti-Semitic.

4.5 The September 16, 2017 Emails

[80] Royi Burstein sent out two emails to Psy Group agents on September 16, 2017 that elaborate on the contours of Project Maple Tree.

[81] The first was sent at 7:15 p.m. to a group that included Emmanuel Rosen, Phil Elwood, Abraham Ronen, Avi Eliyahou and Yossef. Mr. Burstein stressed the importance of the upcoming week and he provided more details on 3 projects:

(i) The negative campaign. He identified the most urgent mission as follows:

> [To] hear/see 'chatter" on social media etc of rumors of an alleged Wolfpack, rumors of west face/anson partners involvement therein, rumors of 8 or more victims, rumors of boland being looked at (not yet criminal investigation) for criminality etc.

He also instructed "Emmanuel" and "Phil" to move forward with organizing the materials for the journalists they wanted to contact.

(ii) The Humint campaign. Mr. Burstein stressed the urgency of moving on this aspect of the project as quickly as possible. He said he expected to "have targets by Monday latest". He alluded to Black Cube's involvement in the project as well, saying,

> As you all know, here we are under competition with the Cubes. According to client they have already made headway with one of the targets and intend to meet him this week. We need to MOVE FAST.

(iii) The positive campaign. This was also stressed as urgent and Mr. Burstein instructed that they should be already "working on the obvious components, such as posting positive articles.

[82] Mr. Burstein sent a second email to a similar group of individuals at 10:24 p.m. that same day. The subject of the email was "notes from second meeting with client – Sep 15".

[83] In this email, Mr. Burstein identified the "mission priorities" as:

1. Discredit Westface

2. (indirectly) discredit newbould

4.6 The Implementation of Project Maple Tree

[84] Given the state of disclosure at this point, the details of how Project Maple Tree was implemented are somewhat sketchy. Certain elements of it have come to light and they are the driving factors behind this motion.

[85] Philip Panet is the chief operating officer and general counsel of West Face. He swore a lengthy affidavit which was filed by West Face in support of these motions. He deposed that within several days of Mr. Burstein's September 13, 2017 email, a "wave of false and defamatory statements concerning West Face (and other members of the purported 'Wolfpack') began to appear on the internet."

[86] He mentioned two examples. The first was a silent video posted on YouTube on September 19, 2017 by a person using the pseudonym, "Wolf Pack". Titled, "Judicial and Economical Corruption in Canada", it said that West Face, Anson Funds and others had formed a "Wolf pack" designed to target companies and bring them down.

[87] The second was an internet posting that appeared on a number of websites on September 19, 2017 which suggested that West Face, Anson Funds and others were co-operating to "bring down stock and purchase floundering companies at rock bottom prices."

4.7 The Sting on Justice Newbould

[88] Justice Newbould retired from the Superior Court of Justice in June 2017. He joined an arbitration practice following his retirement.

[89] A Black Cube operative approached him on September 13, 2017 posing as a potential arbitration client. They met at his office on September 18, 2017 and arranged to have dinner together later that evening. Justice Newbould was unaware, of course that the entire engagement was a pretext. During both meetings he was baited by the operative in an effort to elicit antiJewish sentiments. Both meetings were secretly recorded.

[90] Mr. Glassman deposed that he was contacted by Mr. Tanuri on September 18, 2017 and told that he needed to travel to London the next day for an important briefing. He said he was not aware, before this meeting, of any plan to conduct a pretext investigation on Justice Newbould. He did not authorize such an operation and his counsel have made it clear that their camp does not approve of it having been done. Indeed, Mr. Greenspan's firm made it clear to Black Cube that they were to immediately desist in any further such investigations because that is not how things are done in Canada.

[91] Nevertheless, Mr. Glassman was, as he said, "troubled" by what he heard in the taped conversations and, later, by what he read in the transcripts of the recordings. He formed the view that it may be pertinent "fresh evidence" to be adduced on Catalyst's appeal of the Moyse trial decision.

[92] At the same time, the sting on Justice Newbould and some of the content of the recorded discussions created difficulties between Catalyst and its then counsel, Lax, O'Sullivan, which resulted in a break in that relationship. Catalyst was required to retain new counsel on the eve of the hearing of the Moyse appeal.

[93] The appeal was adjourned from September 2017 to February 2018 to permit new counsel to be retained and for counsel to consider whether there was merit to a fresh evidence application. It was ultimately determined that the transcripts of the sting on Justice Newbould would not be submitted to the Court of Appeal as fresh evidence.

4.8 The Approach to Christie Blatchford

[94] A different decision appears to have been made about submitting the transcripts to the press.

[95] On September 15, 2017, Virginia Jamieson, an independent public relations consultant in New York City, initiated contact with several journalists, including Christie Blatchford, then a reporter with the National Post. This was a cold call. Ms. Jamieson said only that she understood Ms. Blatchford had covered "Judge Neubolt" and that she had a source who wanted to talk to Ms. Blatchford about how "Judge Neubolt" had allowed the destruction of evidence in the Catalyst/West Face action.

[96] The evidentiary record is unclear as to exactly how Ms. Jamieson came to be retained, but it is apparent from other email communications that she was receiving instructions from Emmanuel Rosen of Psy Group. Mr. Rosen, for instance, sent an email to Ms. Jamieson on September 17, 2020 under the subject line, "The Story". It attached an article (or proposed article) titled, "Judge Frank Newbould's record might unravel September 20th." The article is critical of Justice Newbould's decision in the Moyse trial, suggesting that he ignored a "cascade of confidential documents having been passed by Moyse" to West Face. It suggests that Justice Newbould was biased. The author of the article is unknown to me.

[97] Ms. Jamieson sent a copy of the same article to Ms. Blatchford later that same day.

[98] Ms. Blatchford passed away in February 2020, but she swore an affidavit on May 21, 2019 outlining her involvement with Ms. Jamieson and attempts made by a number of the defendants to the counterclaim of West Face to induce her to write an article about Justice Newbould and a "Wolfpack" of companies seeking to profit by disseminating false information about public companies. Counsel to West Face filed a copy of that affidavit in support of its motion.

[99] I need only hit the highlights of Ms. Blatchford's affidavit. It outlines the initial contact made by Ms. Jamieson and proceeds chronologically to cover the increasing pressure directed at her to publish a story damaging to Justice Newbould and to the "Wolfpack" members.

[100] On September 19, 2017, Ms. Jamieson emailed a document to Ms. Blatchford which contained edited extracts from the trial ruling of Justice Newbould. Later that day, she offered to arrange a meeting between Ms. Blatchford and one of the principals of Catalyst. The suggested meeting never occurred.

[101] On September 21, 2017, Ms. Jamieson met with Ms. Blatchford at a café in Toronto. There, Ms. Blatchford was provided with a USB flash drive which contained edited portions of the surreptitiously recorded conversations between a Black Cube operative and Justice Newbould. I am satisfied that the USB drive was provided to Ms. Jamieson by James Riley.

[102] On October 12, 2017, Ms. Blatchford met with Psy Group's Emmanuel Rosen in Toronto. They discussed the contents of the USB key. She deposed that Mr. Rosen encouraged her to publish an article portraying Justice Newbould as corrupt. She said she became suspicious about Mr. Rosen's motives, given that she did not believe the contents of the USB key supported his position.

Moreover, Mr. Rosen advanced the implausible suggestion that an Aboriginal group was responsible for the sting on Justice Newbould.

[103] Ms. Blatchford came to believe that she was being duped into writing an article to advance someone's individual agenda. She began to press Ms. Jamieson for answers about who was giving her instructions. She pursued information from Mr. Greenspan, who was authorized to speak on Catalyst's behalf. Mr. Greenspan made it clear, she said, that the principals of Catalyst did not approve or even know of, the sting on Justice Newbould before it happened.

[104] Ms. Blatchford eventually did write an article, but not the one Ms. Jamieson's principals had hoped for. Her article was published in the online version of the National Post on November 24, 2017 and it was entitled *The Judge, The Sting, Black Cube and Me*. The article highlighted Catalyst's unhappiness with the Moyse ruling, it's hiring of Black Cube for security reasons and the sting perpetrated on Justice Newbould by Black Cube agents. The overall tone of the article was singularly unflattering to Catalyst.

4.9 Additional Stings

[105] Justice Newbould wasn't the only one subjected to a pretext operation. A number of West Face's current and former employees were as well, including Brandon Moyse, Alexander Singh, Bei Huang and Yujia Zhu.

[106] Mr. Singh was pursued in an a particularly aggressive manner. Black Cube agents posed as recruiters for a European private equity firm interested in hiring him. He had been general counsel to West Face at the time of the WIND deal. Black Cube agents met with him in Toronto and subsequently flew him to London, England to meet with him again. They questioned him extensively about the hiring of Brandon Moyse and the Moyse litigation in an apparent effort to obtain evidence that would support Catalyst's assertion that Mr. Moyse provided West Face with confidential information about Catalyst's WIND strategy.

5. THE WOLFPACK ACTION

[107] On November 7, 2017, Catalyst and Callidus commenced this action. The parties refer to it as the "Wolfpack" action.

[108] Two other actions were commenced by Catalyst against West Face and others between the Moyse action and the Wolfpack action. They warrant brief mention.

[109] On June 18, 2015 Catalyst issued a claim against West Face and a company named Veritas Investment Research Corporation. Veritas is an independent equity research firm.

[110] In the Veritas action, Catalyst and Callidus allege that West Face and Veritas published defamatory statements about Callidus with the intention of driving down the share value of Callidus and profiting on that decline by short-selling Callidus stock. Mr. Glassman describes their strategy as a "short and distort" campaign.

[111] Catalyst's assertion is that when it amended its claim in the Moyse action to assert a constructive trust interest in West Face's stake in WIND Mobile, West Face conspired with Veritas to interfere with the financial interests of Callidus by publishing false and defamatory statements about Callidus. The alleged goal was to induce a sell-off of Callidus stock, which would drive down its market price. Concurrently West Face and Veritas short-sold Callidus stock and thereby profited from the decline in share price.

[112] The Veritas action has not proceeded past the exchange of affidavits of documents.

[113] On May 31, 2016, just days before the trial of the Moyse action began, Catalyst initiated a claim against VimpelCom, Globalive, West Face and others. Catalyst alleged that West Face had participated in a conspiracy to induce VimpelCom to breach its exclusivity arrangement with Catalyst. More broadly, Catalyst alleged that a number of the defendants to the action committed the torts of inducing breach of contract, conspiracy and breach of confidence which had the effect of preventing Catalyst from acquiring WIND Mobile.

[114] The VimpelCom action had no legs. West Face moved in August 2017 to dismiss it on the basis of the equitable doctrines of issue estoppel, cause of action estoppel and abuse of process. The motion came before Hainey J. in August 2017 and proceeded over two days in August and a further day in April 2018.

[115] Justice Hainey released an endorsement on the motion on April 18, 2018. He concluded that the VimpelCom action was barred by each of the three equitable doctrines relied upon by the defendants. He dismissed the action.

[116] Catalyst appealed the decision of Justice Hainey. Their appeal was dismissed on May 2, 2019. A motion for leave to appeal to the Supreme Court of Canada was dismissed on November 14, 2019.

[117] The Wolfpack action appears to me to be a significantly expanded version of the Veritas action. It includes similar allegations of a conspiracy to harm the financial interests of Catalyst and Callidus through a strategy of using defamatory statements and misinformation to drive down the market value of Callidus' shares and targeted short-selling[3] to profit from the falling stock price.

[118] More particularly, the plaintiffs allege in the Wolfpack action that a group of investors – the "Wolfpack" – conspired to manipulate the market price of Callidus shares through the

[3] The basics of short-selling are straightforward enough. "Going short" is the opposite of a buy and hold strategy or playing the long game – buying a stock and holding it with the hope that it will increase in value over time. Shortselling is based on the expectation that a stock price is going to drop. A short-seller will often borrow stock from a broker and sell it. Eventually the borrowed stock has to be returned to the broker and when that time arrives, the borrower must go into the market and purchase the shares to be returned. Provided the market price has dropped between the sale of the borrowed shares and the purchase of the replacement shares, the short-seller will make a profit.

publication of false and defamatory statements about Catalyst and Callidus. They intended to, and did, drive the share price down, at a time when they were shorting Callidus stock.

[119] The defamation campaign alleged by the plaintiffs reflects the weaponization of language through the following means:

(a) Utilizing the Bay Street "rumour mill" to circulate negative information about Catalyst and Callidus;

(b) The generation of negative stories about Callidus in the press;

(c) Making "whistleblower" complaints about Catalyst and Callidus with the Ontario Securities Commission and the U.S. Securities and Exchange Commission, consistent with the negative stories circulated through the press; and,

(d) The publication of the WSJ False Fraud Article on August 9, 2017.

[120] The alleged Wolfpack conspirators include West Face, its principal, Mr. Boland, numerous other investors (largely the Anson Defendants), certain guarantors of Callidus loans, Mr. Langstaff (who purportedly facilitated the short-sell trades) and members of the media.

[121] West Face and Mr. Boland filed a defence and counterclaim to the Wolfpack action on December 29, 2017. Their counterclaim, seeking $450 million in damages for defamation, names Catalyst, Callidus, Messrs. Glassman, De Alba and Riley, Virginia Jamieson, Emmanuel Rosen, Black Cube and Psy Group as defendants.

[122] West Face and Mr. Boland allege that Mr. Glassman has directed a campaign of defamation against them, carried out by the defendants to the counterclaim. That campaign – essentially Project Maple Tree – has included:

(a) Retaining Black Cube to conduct a number of pretext operations including:

(i) stings against current and former employees of West Face, with the goal of obtaining confidential information of West Face; and,

(ii) a sting against former Justice Newbould in an effort to embarrass and humiliate him, to undermine the integrity of his judgment in the Moyse action and to shroud West Face in controversy; and,

(b) Retaining Psy Group to publish false and defamatory statements about them, primarily on websites, blogs and social media sites.

[123] The theory of West Face is that Mr. Glassman orchestrated the campaign of defamation against them as retaliation for their successes, both in the acquisition of WIND Mobile and in the litigation that has followed. The ultimate goal, they suggest, is to damage the reputations of West Face and Mr. Boland and to discourage market participants from doing business with them.

[124] I want to again be clear, this ruling has nothing to do with the merits of the claim or counterclaim. This ruling is only about whether documents generated during the planning and implementation of Project Maple Tree must be disclosed.

6. THE PRIVILEGE MOTIONS

[125] The moving parties want access to all communications and documents associated with Project Maple Tree. Catalyst resists. It maintains that Tamara Global was retained to provide litigation support with respect to ongoing and contemplated litigation. Their position is that any communications between Catalyst's counsel and Tamara or any of Tamara's subcontractors are privileged, as are any documents generated by Tamara and its subcontractors during the course of carrying out the litigation support roles they were retained to engage in.

[126] West Face does not accept the validity of Catalyst's assertions of privilege. They first moved for production of all Black Cube documents in September 2018. The motion was scheduled to be heard on November 27, 2018. The hearing was postponed, however, as a result of an agreement between the parties that they would engage in mediation with Justice Hainey in an attempt to resolve some or all of Catalyst's privilege claims. The mediation commenced in October 2018 and continued for several months.

[127] The mediation ultimately failed. I am unclear about why the privilege motion was not rescheduled. I suspect because it was overtaken by a series of anti-SLAPP motions initiated in the latter half of 2019.

[128] Litigating in court is very expensive; everyone knows that. Some parties are better able to afford it than others. Sometimes parties are able to use the cost of litigation to their advantage. As an example, some parties have historically been able to use the cost and aggravation of defamation litigation to suppress free speech. Lawsuits of that nature are often referred to as "gag" proceedings because they have the effect of stifling free expression. For those who prefer more cumbersome language, they are known as "strategic lawsuits against public participation" ("SLAPP").

[129] The Supreme Court recently referred to SLAPPs as "façades" for plaintiffs who are "manipulating the judicial system in order to limit the effectiveness of the opposing party's speech and deter that party, or other potential interested parties, from participating in public affairs." See *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 at para. 2 ("*Pointes Protection*").

[130] To combat the menace posed by SLAPPs to Ontarians' freedom of expression, the provincial government introduced the *Protection of Public Participation Act,* S.O., 2015, c. 23. That Act brought into force anti-SLAPP provisions by way of amendments to the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the "*CJA*"), specifically by adding sections 137.1-137.5.

[131] The purposes of the Ontario anti-SLAPP provisions are identified in s. 137.1(1) of the *CJA*, and broadly include promoting open discourse on matters of public interest and discouraging the use of litigation as a means of limiting such public discourse.

[132] Justices of this court have been granted the discretion to dismiss a proceeding against any person who satisfies the justice that the proceeding arises from an expression made by a person that relates to a matter of public interest. See *CJA* s. 137.1(3).

[133] In November 2019, a number of parties to these proceedings initiated anti-SLAPP motions seeking to have claims or counterclaims dismissed as against them. Those motions are being case-managed by Justice McEwen and are scheduled to be heard by him in early March 2021.

[134] In the course of the anti-SLAPP motions, West Face filed the affidavit of Philip Elwood sworn May 12, 2020. Attached to his affidavit were a number of emails that referenced Project Maple Tree, including some of the emails I referred to earlier as being sent by Mr. Burstein to Psy Group agents on September 13 and 16, 2017. I will refer to these documents, as the parties have, as the "Elwood Documents".[4]

[135] Mr. Elwood had disclosed the Elwood Documents to West Face in September 2019 and they appeared in the affidavit of documents of West Face circulated amongst the parties in December 2019.

[136] Whether and how Catalyst first asserted privilege over the Elwood Documents is a matter of debate. Catalyst certainly claimed privilege over them when Mr. Elwood's affidavit was circulated in relation to the anti-SLAPP motions. Their assertion of privilege triggered the motions now before the court.

[137] West Face moves for an order declaring that Catalyst has no sustainable claim of privilege over the Elwood Documents or Mr. Elwood's affidavit more generally, as well as any documents relating to the planning and implementation of Project Maple Tree. They are already in possession of the Elwood Documents and they seek production orders in relation to the balance of Project Maple Tree documents.

[138] The Defendants, Bruce Langstaff and Rob Copeland, each filed factums joining in the relief requested by West Face.

[139] The Anson Defendants and Kevin Baumann each filed their own notices of motion seeking an order declaring that Catalyst has no sustainable claim to privilege over the Elwood Documents.

[140] The fact that the privilege motions are interlocutory to the anti-SLAPP motions may be of some consequence, given the operation of s. 137.1(5) of the *CJA* which provides:

[4] There were, in fact, 16 documents produced to West Face by Mr. Elwood in September 2019. Fifteen were identified in Schedule "A" to the affidavit of documents of West Face and 1 was identified in Schedule "C" . Only 12 of them were attached as exhibits to Mr. Elwood's affidavit. Any reference I make to the "Elwood Documents" includes all 16 documents disclosed by Mr. Elwood to West Face.

> Once a motion under this section is made, no further steps may be taken in the proceeding by any party until the motion, including any appeal of the motion, has been finally disposed of.

[141] The parties are not agreed on the impact of s. 137.1(5), or about a number of other issues. I will turn now to a summary of the issues in dispute and the parties' positions with respect to them.

II. THE LIVE ISSUES AND THE PARTIES' POSITIONS

[142] The motions were argued over three very full days. The parties' oral arguments were supplemented by 167 pages of facta. What follows are merely the highlights of the parties' positions on the live issues.

1. THE JURISDICTIONAL ISSUE

[143] The wording of s. 137.1(5) of the *CJA* is clear. Once an anti-SLAPP motion is initiated, no further steps may be taken in the proceeding until the anti-SLAPP motion has been fully adjudicated.

[144] Black Cube's counsel took the initiative on the jurisdictional issue. It had not otherwise been raised by any other party.

[145] Black Cube submits that s. 137.1(5) unequivocally stays any further steps in a proceeding until the conclusion of the anti-SLAPP motion.

[146] Black Cube recognizes that there may be interlocutory steps that must be taken within the context of an anti-SLAPP motion. Motions may be necessary, for instance, to compel answers to undertakings given or questions refused during cross-examinations. But Black Cube's counsel argues that stringent limitations must be applied to the conduct of anti-SLAPP motions, lest they become unwieldy or prolonged. Absent such controls, an anti-SLAPP motion could ironically become a proxy for the very mischief it is aimed at curtailing – gag litigation.

[147] In Black Cube's submission, interlocutory proceedings are permitted within an anti-SLAPP motion provided they truly arise within that process, are a necessary part of its proper adjudication and will not frustrate the goal of efficiency inherent in the statutory process.

[148] In this instance, Black Cube says, only the issue of privilege with respect to the Elwood Documents truly arises within the anti-SLAPP motions. Those documents were, for the most part, attached as exhibits to an affidavit filed in connection with those motions. The Black Cube and Psy Group documents are not in issue in the anti-SLAPP motions, according to Black Cube's counsel, and it cannot therefore be said that any dispute about privilege over those documents arises within the anti-SLAPP motions.

[149] In Black Cube's view, the fact that the Black Cube and Psy Group documents may be relevant in the broader context of the litigation as a whole does not assist. Anti-SLAPP motions are *not* the equivalent of summary judgment motions. The court is not to take a "deep dive" into

the merits of the proceeding. The Black Cube and Psy Group documents are not necessary for the proper adjudication of the anti-SLAPP motions and therefore proceedings regarding their disclosure are stayed by s. 137.1(5) of the *CJA*.

[150] Catalyst did not independently assert any jurisdictional impediment to the hearing of the motions, but their counsel tended to agree with Black Cube's submission that production of the documents in issue is not necessary for the proper adjudication of the anti-SLAPP motions.

[151] West Face contends that interlocutory proceedings are permitted within anti-SLAPP motions; on this point the parties appear to be in agreement.

[152] The privilege motions, it says, have been identified by the parties and the court as warranted and they have been case-managed. The documents in issue are, West Face suggests, unquestionably relevant to the anti-SLAPP motions.

[153] West Face does not appear to me to disagree with the general need for motions within anti-SLAPP proceedings to be proportionate and not inconsistent with the relevant statutory goals. But West Face argues that the motion is not disproportionate by any measure, in light of the overall litigation and the resources of the parties.

[154] West Face is dismissive of Black Cube's contention that the privilege motion with respect to Black Cube and Psy Group documents does not truly arise within the anti-SLAPP motions and is not necessary for its proper adjudication. The anti-SLAPP motions have been case managed. Within that managed context, the parties have agreed that these motions are appropriate and should be heard and determined.

[155] Finally, in any event, West Face argues that the motion was initiated well before the anti-SLAPP motions were served and recent appellate jurisprudence suggests that fact alone is sufficient to ground jurisdiction.

[156] The other moving parties adopt the position of West Face.

2. THE ASSERTION OF SOLICITOR CLIENT PRIVILEGE

[157] In Ontario, privilege may be established over documents and communications on a class basis or on a case-specific basis. There are no assertions of case-specific privilege here, so I will forego any discussion about the requirements to establish case-specific privilege over a communication.

[158] On the other hand, Catalyst and Callidus advance two assertions of class privilege.

[159] Class privileges presumptively arise when membership in the class is established. Two are in play here: solicitor-client privilege and litigation privilege.

[160] The main thrust of Catalyst's position is that the documents in issue are subject to solicitor-client privilege. Litigation privilege is asserted in the alternative.

[161] In Catalyst's submission, West Face has over-complicated the motion and has waded into issues well beyond the discrete matter of privilege; issues which go more to the merits of the litigation and the anti-SLAPP motions. Provided the court focuses on the discrete privilege arguments, it argues, a conclusion that all of the documents in issue are subject to privilege is inevitable.

[162] By way of context, the principal protagonists, Catalyst and West Face, were involved in a number of ongoing and pending lawsuits in the summer of 2017. Mr. Glassman found himself subjected to a number of attacks on a personal, professional and commercial level. He took the necessary steps to investigate and respond to these attacks including, through counsel, the retention of an investigative firm, Tamara Global.

[163] Catalyst's intention was that Tamara, and any agents retained by it, would be part of an integrated team, which included the principals of Catalyst and its counsel. This integration is crucial to Catalyst's assertions of privilege. In particular, Catalyst contends that the operations undertaken by Tamara, Black Cube and Psy Group were all intended to be used to obtain legal advice and to develop and implement a litigation strategy. There was, at all times, an expectation on the part of Catalyst, that all communications and documents generated within the investigative team would remain confidential.

[164] Catalyst submits that there are no circumstances set out in the record here that would abrogate Catalyst's claim to privilege, such as waiver or criminality.

[165] Black Cube supports Catalyst's position.

[166] West Face gave short shrift to Catalyst's assertion of solicitor-client privilege. Counsel to West Face asserts that solicitor-client privilege arguably attaches to only one document. Specifically, several pages of notes written by a lawyer in Mr. Greenspan's office in relation to a witness interview that came to be in the possession of Mr. Elwood. They were passed on to West Face and were identified at Schedule "C" to its affidavit of documents.

[167] In the submissions of West Face, solicitor-client privilege simply cannot attach to any of the Project Maple Tree documents – not Black Cube documents, Psy Group documents or the Elwood Documents. Solicitor-client privilege is confined to communications between a solicitor and his or her client.

[168] The balance of the moving parties adopt the position of West Face.

3. THE ASSERTION OF LITIGATION PRIVILEGE

[169] Catalyst also advances a claim to litigation privilege over a significant portion of the documents in issue. It again relies on the integration of its investigative team and its undiminished expectation of confidentiality. It submits that each of the documents in issue was created for the dominant purpose of obtaining legal advice and formulating a litigation strategy with respect to ongoing or contemplated litigation.

[170] The bulk of West Face's submissions focus on Catalyst's assertion of litigation privilege. Their counsel advances a four-pronged argument as to why that assertion is not sustainable:

(i) Catalyst has failed to tender sufficiently cogent evidence to establish that litigation privilege attaches to any of the documents in issue;

(ii) Any privilege that may have attached to the documents expired when the Moyse action and the VimpelCom action were disposed of on a final basis;

(iii) The misconduct of Catalyst, or of its principals, servants or agents vitiates any privilege that may have attached; and,

(iv) Any privilege that may have attached to the documents has been waived.

[171] In the submission of counsel to West Face, each prong of its argument is, on its own, sufficient to undermine Catalyst's assertion of litigation privilege. West Face, they say, need only prevail on any one of its arguments to succeed on this motion.

[172] The other moving parties join in the position of West Face, though each of the other moving parties is concerned only with the privilege claims being asserted over the Elwood Documents.

[173] The Anson Defendants emphasize the point that the Elwood Documents are not related to litigation but reflect a public relations strategy. They also emphasize the issue of waiver. They say they have received the Elwood Documents three times. First, they were produced by West Face in its Affidavit of Documents in December 2019. Second, they were included in West Face's motion record served in May 2020. Third, in August 2020, they got the motion record of Rob Copeland, which also included the Elwood Documents.

[174] While Catalyst has been aware of the production and circulation of the Elwood Documents on each occasion, they have not, at any time, contacted the Anson Defendants to assert privilege. It was not until they received Mr. Glassman's affidavit, affirmed November 24, 2020, that they first observed Catalyst claiming privilege.

[175] Catalyst's singular delay in asserting privilege is, in the view of the Anson Defendants, fatal to that privilege.

[176] Catalyst denies that privilege has been waived or vitiated in any way. It asserts that this Wolfpack litigation is closely related to all other litigation between the parties and therefore that the doctrine of expiration does not apply. It agrees that some of the conduct of Black Cube was regrettable. It submits, however, that it did not instruct Black Cube to undertake pretext investigations. Moreover, when those investigations came to light, it instructed Black Cube to desist in the further use of any such techniques. In the circumstances, Catalyst says it ought not to be painted with the brush of impropriety. At any rate, Catalyst's counsel points out that there is nothing inherently improper or illegal about the employment of pretext investigations, or about the use of the fruits of any such investigations.

[177] Black Cube weighed in on the allegations of impropriety. They submit that the evidentiary record is insufficient and lacking in detail and does not support a conclusion that privilege has been abrogated on the basis of malfeasance. Black Cube accuses West Face of making impassioned and sweeping allegations of misconduct and failing to tie any specific misconduct to any particular documents. Each document has to be considered separately and each party, counsel says, is entitled to careful consideration of his, her or its conduct and the consequences that might flow from it.

4. BLACK CUBE'S PUBLICATION BAN REQUEST

[178] As I noted, Black Cube's principal position is that the court does not have the jurisdiction to hear these motions. Should that position not prevail, however, they are concerned that any disclosure of Black Cube documents risks publicly identifying Black Cube agents. The ability of those agents to conduct covert investigations depends on their continued anonymity. Their counsel asks that the court permit the redaction of identifying information from any Black Cube documents that may be ordered produced.

[179] West Face opposes any such limitation on production. They urge the court to refuse to provide such discretionary relief because the foreign agents of Black Cube have conducted themselves in a manner abusive of the court and its processes.

5. THE FILING OF MOTION MATERIALS

[180] Following a case conference with counsel conducted prior to the argument of the motions, it was agreed that they would deliver their motion materials directly to me. The motion materials contain sensitive elements, some of which I have mentioned already. Directions must be given with respect to the filing of materials with the court office. Counsel have left those directions to the discretion of the court.

III. DISCUSSION

[181] Before delving into the issues raised by the parties, I want to briefly address the evidentiary record as it relates to the documents in issue.

[182] I have identified the documents in issue as being communications and documents generated by the planning and implementation of Project Maple Tree. These documents appear to fall into four broad categories: the Elwood Documents; the Tamara Global documents; the Black Cube documents; and the Psy Group documents.

[183] I have already particularized the Elwood Documents to some extent. They are more easily managed than the balance of the documents in issue for two principal reasons. First, there aren't very many of them; just 16 in total. Second, they have already been widely circulated amongst the parties. The upshot is that I have been able to review their contents. That ability certainly aids in the assessment of the privilege claims asserted over them.

[184] By contrast, I have very few of the other documents in issue. A modest selection of them was provided to me by Catalyst's counsel. My decisions about the privilege claims asserted over these documents must, for the most part, be made without access to their contents.

[185] Only a handful of the Tamara and Black Cube documents have been produced for my inspection, by way of a two-volume confidential Privileged Documents Brief. I intend to consider the assertions of privilege over these documents, one-by-one. These documents must otherwise serve as a proxy for the balance of any Tamara and Black Cube documents not produced for inspection.

[186] Said another way, I am proceeding from the premise that the onus is on Catalyst to provide a sufficient evidentiary record to establish the privilege claimed with respect to each document in issue. Catalyst has provided me with a select group of Tamara and Black Cube documents for consideration. I am proceeding on the basis that the documents provided to me are representative of the character of the Tamara and Black Cube documents in issue on the whole.

[187] Psy Group is an Isreali-based company. It is insolvent. It has not actively participated in this litigation. West Face has obtained a number of orders here in Ontario requesting the assistance of the Israeli courts in ordering the preservation and production of Psy Group documents. To date there has been no success in obtaining Psy Group's documents.

[188] I pause to comment on a submission by Catalyst's counsel. The orders made by the Commercial Court in Toronto seeking the assistance of the Israeli courts in West Face's pursuit of Psy Group documents, include a mechanism for determining any claims of privilege over any such documents. Catalyst's counsel suggested that the parties ought to be following the process established by those orders, rather than engaging in this free-standing privilege motion.

[189] I have three observations to make. First, in my view, if a mechanism was created for Psy Group to advance privilege claims over any of its documents whose disclosure was otherwise compelled by the assistance orders, that mechanism does not handcuff me in any way.

[190] Second, the appropriate time to raise arguments of this nature would have been when these motions were scheduled by the case management judge.

[191] Third, though Catalyst did not frame its argument this way, one might argue that it is not possible to assess any claim to privilege over documents that have not been identified and which Catalyst does not, apparently, have in its possession or control. It might be suggested that the mechanism contained in the assistance orders offers the best or fairest process to determine any privilege issues with respect to Psy Group documents.

[192] While I certainly see some attractiveness to such an argument, I reject it. I have sufficient evidence of Psy Group's role in Project Maple Tree and sufficient particulars of how and why any Psy Group documents may have been created, to render an informed decision about whether any may be protected by solicitor-client or litigation privilege.

[193] I will move on to an analysis of the live issues.

1. THE JURISDICTIONAL ISSUE

1.1 The Governing Principles

[194] For ease of reference, I will repeat the content of s. 137.1(5) of the *CJA*:

> Once a motion under this section is made, no further steps may be taken in the proceeding by any party until the motion, including any appeal of the motion, has been finally disposed of.

[195] The anti-SLAPP provisions are relatively new to Ontario and there is limited caselaw addressing the implications of the stay provision.

[196] Despite the paucity of caselaw interpreting s. 137.1(5), I think its purpose is clear. The prohibition on any further steps in a proceeding once an anti-SLAPP motion has been served prevents parties from engaging in extraneous litigation that may undermine the efficiency of the process established by s. 137.1 or otherwise compound the mischief the anti-SLAPP provisions are designed to prevent. See *United Soils Management Ltd. v. Mohammed*, 2017 ONSC 904, para. 16.

[197] The plain wording of the stay provision makes it apparent that it is non-discretionary. It permits no exceptions. *United Soils*, paras. 1 and 16. That said, it may be possible to draw a distinction between taking steps in the proceeding and taking steps in the motion. *United Soils*, para. 20. The parties appear to agree on this distinction and I take no issue with it. The jurisprudence has, however, yet to offer any guidance on what steps within the motion may be permissible.

[198] In assessing whether and to what extent interlocutory steps may be permitted within an anti-SLAPP motion, I believe consideration must be given to the design of the process established by s. 137.1. It is intended to be an efficient and economical means of identifying and stopping SLAPP proceedings in their tracks.

[199] The intention of anti-SLAPP legislation is to prevent deep-pocketed parties from misusing the court's processes to grind down litigants of lesser means, effectively preventing them from meaningfully participating in public discourse. The process established to identify and weed out SLAPPs has been designed in harmony with the legislative intention. For instance, anti-SLAPP motions require an evidentiary record, but one that is, by design, limited. The record is meant to reflect the nature of the process and the stage of the proceedings at which it occurs. As Coté J. observed in *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 at para. 52, a motion judge hearing an anti-SLAPP motion "is to engage in only a limited weighing of the evidence" and avoid a "deep dive" into the evidentiary record. The goal is to dispose of the motion as efficiently and economically as possible.

[200] It seems to me that any discretion to permit interlocutory motions within an anti-SLAPP motion must be exercised having regard to the aspirations of the legislation in terms of efficiency and economy. A multiplicity of interlocutory steps, or steps that fail to pass muster on a costs/benefits assessment ought to be avoided.

[201] The concept of proportionality is another means of expressing the essence of the costs/benefits analysis. It has taken on increasing prominence in the interpretation of the *Rules of Civil Procedure* over the past decade. It is a concept that, in my view, is of vital concern to the management of anti-SLAPP motions. Interlocutory steps that are disproportionate to the requirements of the anti-SLAPP motion(s) and the circumstances of the parties should be discouraged.

[202] To summarize, I accept Justice Penny's distinction, in *United Soils*, between steps in the proceeding and steps within the anti-SLAPP motion itself. The former are stayed. The latter are permissible, in the court's discretion. That discretion must be exercised having regard to the purposes and goals of the anti-SLAPP statutory regime – principally efficiency and economy. Accordingly, any proposed interlocutory steps must be subject to a costs/benefits analysis. Those steps found to be disproportionate to the needs of the anti-SLAPP motion or the circumstances of the parties should not be permitted.

[203] One further issue that arose during the course of argument was whether s. 137.1(5) has the effect of staying interlocutory proceedings already in process prior to the service of an anti-SLAPP motion. This issue arose largely as a result of the release by the Court of Appeal, on December 3, 2020, of its ruling in *Zoutman v. Graham*, 2020 ONCA 767.

[204] *Zoutman* was a defamation action commenced by a doctor against an individual who had made derogatory comments about him on a website known as RateMDs.com. The plaintiff moved for summary judgment once pleadings had closed. Two months after the summary judgment motion was served – and a month before it was scheduled to be heard – the defendant moved to strike the claim under s. 137.1 of the *CJA*. The two motions were ordered heard together. The judge hearing the motions dismissed the defendant's anti-SLAPP motion and granted the motion for summary judgment, awarding $50,000 in damages. The defendant appealed.

[205] One of the arguments raised on appeal was that the summary judgment motion ought not to have been heard until the anti-SLAPP motion was disposed of, in light of s. 137.1(5). The Court of Appeal rejected that argument, saying, at para. 17:

> …[T]he respondent brought and scheduled his summary judgment motion well before the appellant brought his motion under s. 137.1. Furthermore, the two motions were ordered to be heard at the same time, and the appellant did not seek to appeal that decision. In this context, the appellant did not take any further step within the meaning of s. 137.1(5).

[206] Counsel to West Face submit that the upshot of *Zoutman* is that any motion initiated prior to the service of an anti-SLAPP motion may continue, notwithstanding the operation of s. 137.1(5) of the *CJA*. They remind the court that their privilege motion was first launched in the fall of 2018.

[207] With respect to counsel, I do not read *Zoutman* as supportive of such a broad proposition. An interlocutory order had been made in *Zoutman* that provided for the combined hearing of the defendant's anti-SLAPP motion and the plaintiff's summary judgment motion. That order was not appealed from. Moreover, it does not appear that any further steps were taken with respect to the summary judgment motion between the time that the anti-SLAPP motion was served and when the

combined motions were argued. There was, in the result, arguably no breach of s. 137.1(5). Finally, on the facts of *Zoutman*, it would appear that combining the two outstanding motions did not run afoul of the legislative goals of efficiency and economy.

1.2 Analysis

[208] I am satisfied that the court has the jurisdiction to hear and determine the motions regarding Catalyst's assertions of privilege. There are a number of reasons supporting this conclusion.

[209] First, I am satisfied that these motions are not further steps in the proceeding at large, but are legitimate interlocutory steps within the anti-SLAPP motions.

[210] Second, the anti-SLAPP motions are being closely case managed by a judge of the Commercial List. These motions – and their parameters – have been case conferenced at length. Significant efforts, including the engagement of the Chief Justice's office, were taken to schedule the motions before an out-of-jurisdiction judge. At no time during that entire process did any party assert that the court lacked the jurisdiction to hear the motions as a result of the impact of s. 137.1(5) of the *CJA*, or otherwise. That argument was only raised during the hearing of the motions by Black Cube, a non-party to the anti-SLAPP motions.

[211] Third, while arguments were advanced before me to the effect that the documents in issue are not relevant or necessary to the determination of the anti-SLAPP motions, those assertions lacked conviction. I am satisfied that the parties actually engaged in the anti-SLAPP motions have always proceeded on the basis that the documents in issue are relevant to the determination of those motions. How significant they may be I am unable to say, but again, I defer to the fact that it was determined, through a case management process, that the motions should proceed.

[212] Fourth, I agree with Black Cube's submission that the court must manage interlocutory proceedings within an anti-SLAPP motion with regard to the goals of the legislated process in mind. Interlocutory steps within an anti-SLAPP motion may be permitted, but they must be proportionate and not undermine the goals of efficiency and economy.

[213] On this last point, I note that this is a $450 million lawsuit. This is not a David and Goliath battle. This is Goliath v. Goliath. The anti-SLAPP motions were initiated in November 2019. They will not be argued until at least early March 2021 – some 16 months in the making. There have been substantial materials filed in connection with the motions. There have been, or will be, cross-examinations on those materials. In terms of the privilege motions, I have received well in excess of 4,000 pages of materials. No party has shied away from supplementing the record.

[214] Proportionality takes on a different hue in a case like this. The main protagonists here have been litigating hard against each other for almost five years now. In the scheduling of these motions, no one appears to have raised any alarms about their cost, the time they would take, or the resources they would consume. Again, only Black Cube, a non-party to the anti-SLAPP motions, suggests that perhaps the costs associated with these privilege motions outweigh any benefits they might bring to the process. The parties actually litigating the anti-SLAPP motions do not appear to agree.

[215] In the circumstances, I conclude that:

(a) These privilege motions do not run afoul of the prohibition on further steps set out in s. 137.1(5) of the *CJA* because they are permissible steps within the anti-SLAPP motions; and,

(b) I am not satisfied, in the unique circumstances of this litigation, that the privilege motions undermine the goals of the anti-SLAPP process to such a degree that they should be prohibited. They are not disproportionate within the context of this litigation.

[216] In the result, I am satisfied that I have the jurisdiction to hear the motions and I will proceed to a consideration of the substantive issues.

2. THE ASSERTION OF SOLICITOR-CLIENT PRIVILEGE

2.1 The Governing Principles

The Basics

[217] Solicitor-client privilege is a class privilege. It protects the confidential relationship between a solicitor and his or her client. It has a constitutional dimension. Beginning as a rule of evidence, it has evolved into a principle of fundamental justice and a civil right of fundamental importance in Canadian law. See *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353; *Smith v. Jones*, [1999] 1 S.C.R. 455, and *R. v. Fink*, 2002 SCC 61.

[218] The basic rationale for solicitor-client privilege is well known and easily understood. Comprehensive and meaningful legal advice is realistically only possible where the client can be confident that what is said between her and her solicitor will not be disclosed. This rationale was explained as more than simply "utilitarian" by Justice Doherty, dissenting, but not on this point, in *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321, [1999] O.J. No. 3291 (C.A.) at para. 92. He described the privilege as "an expression of our commitment to both personal autonomy and access to justice."

[219] The onus is on the party asserting privilege to establish an evidentiary basis for it. See *Chrusz* at para. 95.

[220] The conditions necessary to establish the privilege are grounded in its rationale. They were identified in the seminal case of *Solosky v. The Queen*, as above. There are three. The communication over which privilege is asserted must:

(a) be a communication between lawyer and client;

(b) which entails the seeking or giving of legal advice; and,

(c) which is intended to be confidential by the parties.

> See also *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809 at para. 15.

[221] The privilege is assiduously protected, but it is not entirely impenetrable nor without exceptions. Its scope does not extend to communications where legal advice is not sought or offered or where the communications are not intended to be confidential. It is also not engaged where the communications themselves are criminal or where the client's purpose in obtaining legal advice is to facilitate the commission of a crime: see *Solosky*, as above, as well as *Descoteaux v. Mierzwinski*, [1982] 1 S.C.R. 860 and *Pritchard*, as above, at para. 16.

[222] The criminal purpose exception has arguably been extended to communications made with the intent of committing tortious conduct, or abuses of the court's processes. See *McDermott v. McDermott*, 2013 BCSC 534.

<u>The Limited Extension to Communications with Third Parties</u>

[223] Of particular interest to this case is the question of whether solicitor-client privilege can extend to communications between a solicitor and a third-party, notwithstanding the apparently clear pre-conditions described in *Solosky*. The short answer is yes it can, but only in limited circumstances.

[224] Prior to the Court of Appeal decision in *Chrusz*, as above, the jurisprudence appears to have recognized solicitor-client privilege over communications between a solicitor and a third party only in the following, very limited, circumstances:

> …where the third party serves as a channel of communication between the client and solicitor, communications to or from the third party by the client or solicitor will be protected by the privilege as long as those communications meet the criteria for the existence of the privilege.
>
> See *Chrusz*, as above, at para. 106.

[225] In *Chrusz*, Doherty J.A. expanded somewhat the protection of solicitor-client privilege over communications between a solicitor and a third party. Communications between a solicitor and a third party will continue to be recognized as subject to solicitor-client privilege where the third party acts as an agent or channel of communication between the client and the solicitor. They will also attract solicitor-client privilege where the third party's retainer "extends to a function which is essential to the existence or operation of the client-solicitor relationship". (*Chruz*, para. 120).

[226] An example of this latter situation is provided by the English case of *Susan Hosiery Ltd. v. M.N.R.*, [1969] 2 Ex. C.R. 27. In that case, the client's financial advisors met with the solicitor to convey information about its business affairs. They acted essentially as translators and as a "conduit of advice from the lawyer to the client and as a conduit of instructions from the client to the lawyer". (*Chrusz*, para. 111).

[227] Justice Doherty summarized the extension of solicitor-client privilege to communications between the solicitor and third parties as follows:

> Client-solicitor privilege is designed to facilitate the seeking and giving of legal advice. If a client authorizes a third party to direct a solicitor to act on behalf of the client, or if the client authorizes the third party to seek legal advice from the solicitor on behalf of the client, the third party is performing a function which is central to the client-solicitor relationship. In such circumstances, the third party should be seen as standing in the shoes of the client for the purpose of communications referable to those parts of the third party's retainer.
>
> If the third party is authorized only to gather information from outside sources and pass it on to the solicitor so that the solicitor might advise the client, or if the third party is retained to act on legal instructions from the solicitor (presumably given after the client has instructed the solicitor), the third party's function is not essential to the maintenance or operation of the client-solicitor relationship and should not be protected. (*Chrusz*, paras. 121-122).

[228] Generally, a third party investigator who gathers information to be used by counsel for the purpose of preparing for litigation or providing legal advice will not be considered essential to the maintenance or operation of the solicitor-client relationship. See *Ontario (Liquor Control Board v. Lifford Wine Agencies Ltd.*, [2005] O. J. No. 3042 (C.A.).

Waiver

[229] Solicitor-client privilege belongs to the client and can only be waived by the client or through his or her informed consent: *R. v. Fink*, as above, at para. 39 and *R. v. McClure*, 2001 SCC 14.

[230] Waiver may be express or, where fairness requires it, implied. The Court of Appeal explained the distinction in *R. v. Youvarajah*, 2011 ONCA 654 at paras. 146-147:

> An express waiver of privilege will occur where the holder of the privilege (1) knows of the existence of the privilege; and (2) voluntarily evinces an intention to waive it: S & K Processors Ltd. v. Campbell Ave. Herring Producers Ltd., [1983] B.C.J. No. 1499, [1983] 4 W.W.R. 762 (S.C.), per McLachlin J.
>
> Despite these requirements, an implied waiver of solicitor-client privilege may occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it…

[231] Implied waiver arises, in other words, where the holder of the privilege takes some action or position inconsistent with the maintenance of the privilege. See *Huang v. Silvercorp Metals Inc*., 2017 BCSC 795 at para. 92. One example of implied waiver, offered by the Court of Appeal in *Youvarajah*, is where a client alleges a breach of duty by his or her counsel. Another, offered by McLachlin J., as she then was, in *S & K Processors*, as above, is where a party relies on legal

advice to justify or explain its conduct. Moreover, disclosure of a portion of an otherwise privileged communication may sometimes, as a matter of fairness, require that the whole of the communication be disclosed. See for instance, *Howard v. London (City)*, 2015 ONSC 3698.

[232] The "shield and sword" analogy is sometimes invoked to explain the circumstances in which implied waiver will arise. A privilege holder may not at once attempt to use privileged documents to her benefit and at the same time shelter behind the privilege to prevent an opposing party from testing the evidence. See *Huang*, as above, at para. 143.

2.2 Analysis

2.2.1 The Elwood Documents

[233] The first prerequisite to a finding that solicitor-client privilege attaches to a communication is that the communication be between a solicitor and his or her client.

[234] For the purposes of the motions now before the court, I am interpreting the "client" as broadly including Catalyst and Callidus as well as their principals, Mr. Glassman, Mr. Riley and Mr. De Alba. Their solicitors have included, at varying times, the Greenspan firm, the Lax O'Sullivan firm, Moore Barristers and Gowling WLF (Canada) LLP.

[235] None of the Elwood Documents is a communication between a solicitor and client. They consist of email communications amongst Psy Group employees; email communications between Psy Group employees and Mr. Elwood; and emails between Virginia Jamieson and various parties. Privilege is also asserted over the contents of Mr. Elwood's affidavit, none of which has anything to do with communications between solicitor and client, save perhaps for the "Schedule 'C' Document" which I will come to in a moment.

[236] None of the Elwood Documents could even be said to be communications between a solicitor and a third party acting as a conduit for the client. Again, save for the Schedule "C" Document, none of the communications forming the Elwood Documents even involves a solicitor.

The Schedule "C" Document

[237] The only one of the Elwood Documents that involves a solicitor are the notes of Naomi Lutes, which were listed at Schedule "C" to West Face's Affidavit of Documents.

[238] Ms. Lutes is a lawyer at Greenspan Humphrey Weinstein. The notes in question were provided to me by counsel to Catalyst. None of the moving parties has seen the contents of the notes. Though a copy of them was provided to West Face's lawyers by Mr. Elwood, West Face's lawyers did not read them, out of respect for their apparent confidential nature.

[239] The notes reflect the content of a meeting on September 12, 2017 between Ms. Lutes, Mr. Riley, John Philips and Derrick Snowdy. I do not know who John Philips is. Mr. Snowdy is a private investigator and appears to have been providing evidence of the "short and distort" actions of what is referred to in the notes as a "cabal". I believe the so-called cabal is more or less the same group referred to throughout this litigation as the "Wolfpack".

[240] Ms. Lutes took handwritten notes of the meeting and then subsequently created a typed version of them. The typed version is in the form of a Memorandum from Ms. Lutes to Jim Riley. It is marked "Solicitor-Client Privileged".

[241] Ms. Lutes sent the notes by email to Yossi Tanuri of Tamara Global on September 14, 2017. They were subsequently shared with Royi Burstein at Psy Group, who emailed them to Emmanuel Rosen, Phil Elwood, Avi Eliyahou, Abraham Ronen and others on September 16, 2017.

[242] In my view, there can be no sustainable claim to solicitor-client privilege over Ms. Lutes' notes for at least three reasons:

(a) The handwritten notes are not a communication between solicitor and client. They are a record of discussions between the solicitor and a potential witness. The fact that Mr. Riley was present during the meeting with the witness does not alter the nature of the communication. The communicating was between Mr. Snowdy (a witness) and others, including Ms. Lutes;

(b) Typing up a copy of the handwritten notes does not alter their character, even when the reference to "Solicitor-Client Privileged" is added. One cannot make a nonprivileged document privileged just by writing "Privileged" on it. Having said that, the typed version of the notes contains a number of bracketed comments by Ms. Lutes, which I may have considered privileged, were it not for my next point;

(c) Whatever privilege may have attached to the notes was waived when the memorandum was delivered by Ms. Lutes to Yossi Tanuri and subsequently passed on to Psy Group and others, including Mr. Elwood.

[243] It is important to recall that privilege belongs to the client and it is the client's to waive. In this instance, the memorandum was sent to Mr. Tanuri with an email from Ms. Lutes that said, "Hi Yossi: Jim asked me to email you my notes of today's meeting. Please see attached."

[244] I understand "Jim" to be a reference to Jim Riley. I find that the memorandum of Ms. Lutes' notes was deliberately sent to Mr. Tanuri by counsel, on express instructions from the client. In the circumstances, if solicitor-client privilege at any time applied to the notes, it has been unequivocally waived.

[245] To close off this section, I will briefly address the possibility that solicitor-client privilege extended to communications between counsel (Ms. Lutes) and Tamara. In my view, it did not. Tamara did not act as a conduit between the client and counsel. Moreover, the communication of the memorandum to Tamara could not be described as essential to the maintenance or operation of the solicitor-client relationship.

[246] Tamara was hired as a security/investigations firm. They were to gather information and report it back to the client or counsel and they were to act on instructions from the client or counsel. They were not essential to the privileged relationship between counsel and client.

[247] In the result, I find that none of the Elwood Documents, including the Schedule "C" Document, is protected by solicitor-client privilege.

2.2.2 Communications Between Counsel and Tamara Global

[248] Recall that Tamara was retained by Catalyst, through Mr. Greenspan, on August 31, 2017. Tamara had the authority to retain third parties as subcontractors or consultants. Relying on that authority they retained Black Cube and Psy Group.

[249] Mr. Greenspan's letter engaging Tamara included the following paragraph**:**

> During the course of your retainer, we will provide you with information, data, and access to both principals and employees of the client/clients. The information provided to you or to consultants retained by you as subcontractors is to remain confidential and subject to solicitor-client privilege. Any results of your assessment and reports provided to us as counsel for the client/clients are to remain confidential and subject to solicitor-client privilege.

[250] With the greatest of respect to Mr. Greenspan, it simply cannot be that communications between counsel and Tamara are protected by solicitor-client privilege. At a very basic level they are simply not communications between a solicitor and client. And as I have found, Tamara is not the sort of third party to whom solicitor-client privilege might be extended. They were not essential to the solicitor-client relationship between Catalyst and any of its counsel.

2.2.3 The Black Cube and Psy Group Documents

[251] I reach the same conclusion with respect to any Black Cube and Psy Group documents. The assertion that they are protected by solicitor-client privilege is even less compelling than the assertion that communications between counsel and Tamara are protected by solicitor-client privilege.

[252] Black Cube and Psy Group are both independent contractors hired by Tamara to assist Tamara in carrying out its retainer with Catalyst. They were the subcontractors or consultants of Tamara. They are clearly not the "client" claiming privilege. They are third parties to the relationship between counsel and Catalyst, Callidus and their principals.

[253] As third parties there is only a narrow path to the protection of solicitor-client privilege over their communications and documents. And that narrow path is not present here. They did not act as a communications conduit between counsel and Catalyst. Nor did either play any role that one could characterize as essential to the solicitor-client relationship. Indeed, each of them appears to have had few, if any, direct communications with either the client or the solicitors.

[254] In my view, none of the documents of Tamara, Black Cube and Psy Group are subject to solicitor-client privilege. My conclusion includes any communications between Tamara, Black Cube or Psy Group whether internal, with counsel, with each other, or with third parties.

2.2.4 Other Documents

[255] Included in the 30-document brief of ostensibly privileged documents submitted by Catalyst's counsel were a number of communications clearly subject to solicitor-client privilege. They include:

(a) An email dated September 7, 2017 from Rocco DiPucchio – then counsel at Lax O'Sullivan – to Mr. Glassman regarding the prosecution of various actions on behalf of Catalyst;

(b) Two emails dated September 21, 2017 from David Moore to Brian Greenspan regarding the Moyse appeal and the possible use of fresh evidence; and,

(c) An email dated September 27, 2017 from David Moore to Brian Greenspan regarding a potential motion to adduce fresh evidence.

[256] None of the foregoing communications is subject to disclosure. As I understand the positions of the moving parties, none is seeking to get access to communications of this nature.

[257] I will turn now to a consideration of the assertion of litigation privilege.

3. THE ASSERTION OF LITIGATION PRIVILEGE

3.1 The Governing Principles

[258] Litigation privilege is another class privilege. Unlike solicitor-client privilege, it does not protect a relationship. Instead, it protects an area – a "zone of privacy" – necessary to foster the needs of our adversarial model of adjudication. See *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 at para. 34. It protects against the compulsory disclosure of communications and documents whose dominant purpose is preparation for litigation. See *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52 at para. 1.

[259] The purpose of the privilege, says the Supreme Court,

> …is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure. (*Blank*, para. 27).

[260] The parameters of litigation privilege strike a balance between the need for a protected area of privacy in which preparation for adversarial litigation takes place and the need for full disclosure to ensure trial fairness. As Carthy J.A. observed in *Chrusz*, "the modern trend is in the direction of complete discovery…[L]itigation privilege is the area of privacy left to a solicitor after the current demands of discovery have been met." (Para. 25).

[261] The Supreme Court described the ambit of litigation privilege succinctly in *Lizotte*, as above, at para. 19:

> Litigation privilege gives rise to an immunity from disclosure for documents and communications whose dominant purpose is preparation for litigation. The classic examples of items to which this privilege applies are the lawyer's file and oral or written communications between a lawyer and third parties, such as witnesses or experts.

[262] The privilege applies only to communications made at a time when litigation was commenced or contemplated and where the dominant purpose of the communication (and not just a substantial purpose) was for use in, or advice concerning that litigation. See *Blank*, as above, at para. 60 and *LCBO v. Lifford Wine Agencies*, as above, at para. 74.

[263] Again, the onus is on the party asserting the privilege to establish, with respect to each document in issue, that the dominant purpose for its creation was existing or contemplated litigation. See *Bartucci v. Lindsay*, 2010 ONSC 3942, at para. 11.

[264] The time at which the dominant purpose for a document's creation is to be assessed is the time when it was created. See *Nova Chemicals (Canada) Ltd. v. Ceda-Reactor Ltd*., 2014 ONSC 3995 at para. 35.

Expiration

[265] Litigation privilege, unlike solicitor-client privilege, is of temporary duration. Its purpose is to foster the litigation process and it makes sense, therefore, that it expires when the litigation it relates to comes to an end. *Blank*, para. 9. One must be cautious, however, in the determination of when litigation has come to an end. Sometimes parties remain engaged, over a number of legal proceedings, in what is fairly understood to be the same battle. Provided the ongoing proceedings are "closely related" to the litigation in which the privilege first arose, it will continue.

[266] "Closely related" litigation is that which involves the same or related parties and arises from the same or a related cause of action. *Blank*, para. 39.

Abrogation

[267] Over two paragraphs in *Blank*, the Supreme Court established an exception to the application of litigation privilege where disclosure would afford evidence of the misconduct or abuse of process of the party claiming privilege. Fish J. described the exception, at para. 45, as follows:

> Even where the materials sought would otherwise be subject to litigation privilege, the party seeking their disclosure may be granted access to them upon a *prima facie* showing of actionable misconduct by the other party in relation to the proceedings with respect to which litigation privilege is claimed. Whether privilege is claimed in the originating or in related litigation, the court may review the materials to determine whether their disclosure should be ordered on this ground.

[268] The "*Blank* exception" appears to have application beyond instances of strictly *actionable* misconduct. As Sharpe J.A. described the exception in *Moore v. Getahun*, 2015 ONCA 55, at para. 77, "the ends of justice do not permit litigation privilege to be used to shield *improper* conduct." (Emphasis mine).

[269] The issue in *Moore* was the propriety of communications between counsel and a medical expert hired by counsel to provide an opinion on standard of care and causation in a medical malpractice action. The Court of Appeal held that there is nothing inherently improper about counsel communicating with the expert during the preparation of a report. But those communications become improper if counsel communicates with the expert "in a manner likely to interfere with the expert witness's duties of independence and objectivity." The court concluded that where the opposing party can show reasonable grounds to suspect such improper communications have taken place, disclosure of those communications may be compelled, under the *Blank* exception.

[270] *Moore* is, in my view, significant for three reasons. First, it extends the *Blank* exception to improper conduct beyond that which is actionable. Second, it makes it evident that the misconduct in issue is not limited to the conduct of the client. Third, it permits compelled production where an opposing party establishes "reasonable grounds to suspect" improper conduct, which is arguably a lower threshold than a "*prima facie* showing".

Waiver

[271] Litigation privilege may be waived in the same manner as solicitor-client privilege, either expressly or implicitly.

3.2 Analysis

[272] Catalyst's claims to litigation privilege are significantly more difficult to assess than its claims to solicitor-client privilege. The difficulty can largely be explained by the fact that there are multiple lawsuits between Catalyst and West Face. Some of those lawsuits are now at an end, including the Moyse and VimpelCom actions. Others remain extant, including this Wolfpack action and the Veritas action.

[273] The first prerequisite to a valid claim of litigation privilege is that the communications in issue were made at a time when litigation was commenced or contemplated. The second prerequisite is that the dominant purpose of the communication was for use in, or advice concerning, that litigation.

[274] The Moyse and VimpelCom actions are both clearly at an end. They have each been finally disposed of at the trial court level, been unsuccessfully appealed to the Court of Appeal and denied a substantive hearing by the Supreme Court. Communications or documents that might otherwise have been clothed with litigation privilege in relation to the Moyse or VimpelCom actions will no longer be subject to that privilege, unless I conclude that this action is closely related to them.

[275] In my view, while this Wolfpack action shares some DNA with the earlier proceedings, they are not closely related.

[276] The Moyse and VimpelCom actions directly related to whether there was some impropriety with the way the WIND Mobile deal transpired. The Moyse action was about whether Mr. Moyse had given West Face confidential information belonging to Catalyst that somehow aided West Face in its pursuit of WIND. The VimpelCom action was about whether an exclusive negotiating agreement between VimpelCom and Catalyst had been breached and whether West Face had somehow induced that breach. The damages sought in each case were directly related to the profit West Face made on the WIND deal.

[277] The Wolfpack action has nothing to do with the WIND deal – at least not on paper. It may be born of the hard feelings generated by the prior litigation, but as a matter of law, the issues here are totally different than those engaged by the earlier proceedings. At the core of the Wolfpack action are allegations and counter-allegations of defamation and market manipulation.

[278] What all of this means is that communications made, and documents created, for use in or advice concerning the Moyse or VimpelCom actions are no longer protected by litigation privilege. Any such privilege, if it existed, has expired.

[279] In some instances, there isn't a bright line between communications/documents in relation to the prior litigation and those related to the current litigation. At the time Tamara, Black Cube and Psy Group were active, the Moyse and VimpelCom actions were ongoing and the Wolfpack claim was at least contemplated, if not ongoing.

[280] I will again, consider each broad group of documents in turn. In the last section, I began my analysis with the Elwood Documents, then moved on to the communications and documents of Tamara, Black Cube and Psy Group. In this section, I am going to begin with Tamara Global, simply for reasons of efficiency.

3.2.1 Communications with Tamara Global

[281] I have little to go on in terms of the communications Tamara has had with Catalyst or with its counsel, over which litigation privilege may be asserted. As I noted, I have been provided with specific documents to review by way of a Privileged Documents Brief submitted by Catalyst's counsel, but it contains relatively few documents.

[282] I am not privy to the rationale used to select the particular documents disclosed to me for review. I see no other reasonable way to approach these documents than to go through them individually, then to extend the reasoning I employ to the wider group of documents not otherwise produced for my review.

[283] The Privileged Documents Brief was filed in two volumes. The second volume, consisting of 8 tabs, reflects Black Cube documents. I will address these in a later section dedicated to Black Cube.

[284] The first volume contains a variety of documents, 22 in total, some of which involve communications between counsel and Tamara. My conclusions about these documents are as follows:

Tab 1:

[285] Tab 1 is copy of the Tamara Global retainer letter dated August 31, 2017. The retainer is expressly for the following reasons:

> The scope of the assignment authorized pursuant to this Retainer Agreement relates to a qualitative property, personnel and equipment assessment of the current needs and future requirements of our client/clients in order to more effectively and lawfully carry on their business objectives. The assignment may be expanded or modified by written or verbal instructions from authorized representatives of our office.

[286] What is immediately apparent from the language of the retainer agreement is that its dominant purpose – indeed any purpose – is not related to pending or contemplated litigation. It is not subject to litigation privilege.

Tabs 2 - 4

[287] Tabs 2 – 4 consist of three emails from Mr. Greenspan to Mr. Tanuri on September 1, 2017.

[288] The first email has a number of attachments including Veritas research alerts on a number of companies and a document/memo entitled, "Evidence that Veritas Investment Research has a long history of conspiring with short sellers". Most of the documents attached are public documents and as such are disclosable, assuming they're relevant. They do not attract privilege simply because they came to be filed in the solicitor's brief. The one-page memo on Veritas' history of conspiracy is puzzling. I have no idea who created it or for what purpose. In the absence of evidence to that effect, I am not prepared to make a finding that it was prepared for the dominant purpose of the Veritas lawsuit or other, ongoing or pending litigation.

[289] The second email encloses a string of other, rather cryptic, emails about a number of subjects. Again, I am not prepared to speculate about how litigation privilege may attach to these documents or communications.

[290] The third email attaches some handwritten charts of parties and how they may be connected. I am satisfied that this document was created for the dominant purpose of the Wolfpack litigation and is subject to litigation privilege.

Tab 5

[291] Tab 5 is an email between Mr. DiPucchio and Mr. Glassman dated September 7, 2017. I have addressed it above. It is subject to solicitor-client privilege.

Tabs 6 - 7

[292] Tabs 6 and 7 include a copy of the retainer agreement between Black Cube and Tamara for what they refer to as "Project Camouflage", as well as some email communications dated September 7-9, 2017 between Mr. Tanuri and Mr. Greenspan regarding the content of the retainer.

Arguably Tamara may have a viable assertion of solicitor-client privilege over the email communications, but no such claim has been asserted by them in this litigation.

[293] I will elaborate on this point a little later, but I am of the view that Black Cube's activities, ostensibly provided as "litigation support" are not properly characterized as having legitimate litigation as their dominant purpose. In my view, attempting to humiliate and denigrate a judge whose ruling one disapproves of, and lying and cheating one's way to extracting another party's private and confidential information, are not proper components of legitimate litigation. Moreover, I consider that a *prima facie* case of impropriety has easily been made out in relation to the conduct of Black Cube, such that any claim to litigation privilege over any of its relevant communications and documents has been vitiated.

Tabs 8 - 9

[294] Tabs 8 and 9 are copies of Ms. Lutes' handwritten and typed notes of the meeting with a witness on September 12, 2017. I will consider the claim to litigation privilege over these notes as part of my analysis of the Elwood Documents.

Tab 10

[295] Tab 10 is an email communication between Ms. Lutes and Mr. Tanuri dated September 14, 2017 which includes transcripts of "guarantors" requested by Mr. Tanuri. These appear to relate to an OSC investigation. The transcripts are not subject to litigation privilege in this action, but I am satisfied that the dominant purpose of Ms. Lutes' email was this litigation and that the email itself is subject to litigation privilege.

Tab 11

[296] Tab 11 consists of a series of emails between counsel and Mr. Tanuri. They clearly have to do with the Moyse litigation and are no longer subject to litigation privilege.

Tabs 12 and 13

[297] These tabs are transcripts of meetings between a Black Cube agent and Justice Newbould on September 18, 2017 as part of Project Camouflage. The sting on Justice Newbould related solely to the Moyse action. If these transcripts were ever subject to litigation privilege, that privilege has expired as a result of the termination of Moyse litigation. I also consider the entire sting on Justice Newbould to be an abuse of the court's processes and, pursuant to the *Blank* exception, I would not uphold litigation privilege over these transcripts even if it had not otherwise expired.

Tabs 14 and 15

[298] These documents are emails between Mr. Moore and Mr. Greenspan which I referred to earlier. They are clearly subject to solicitor-client privilege.

Tab 16

[299] Tab 16 consists of notes Ms. Lutes took of a meeting on September 25, 2017 with Black Cube agents. They reflect discussions about sting operations which I find to have been wholly related to the Moyse action. As such any litigation privilege that may have applied to them has expired. And again, in view of my finding that the stings conducted by Black Cube on Justice Newbould and others were improper, I would not otherwise have upheld any assertion of litigation privilege in any event.

Tab 17

[300] Tab 17 is another email from Mr. Moore to Mr. Greenspan which, as I have found, is subject to solicitor-client privilege.

Tab 18

[301] This document is a memo prepared by a junior counsel in Mr. Greenspan's firm regarding a potential fresh evidence application in the Moyse appeal. It undoubtedly was covered by litigation privilege at one point, but that privilege has expired.

Tabs 19 - 21

[302] Tabs 19-21 consist of communications between Mr. Greenspan and Mr. Tanuri and between Mr. Tanuri and Mr. Glassman. The emails concern the pretext investigations (stings) conducted by Black Cube and concerns about keeping a lid on the transcripts of those operations. These documents related only to the Moyse litigation in my view and any litigation privilege that may once have applied has expired. Again, I am also of the view that any such privilege has been abrogated by Black Cube's improper conduct.

Tab 22

[303] Tab 22 consists of a package of documents purportedly provided to former Justice Stephen Goudge, together with an opinion he rendered to West Face's counsel about whether solicitor-client privilege attaches to the notes of Ms. Lutes attached as Schedule "C" to the West Face Affidavit of Documents.

[304] None of the documents provided to Mr. Goudge are subject to privilege. I have by and large already dealt with each of them. His opinion may have been subject to a claim of litigation privilege by West Face, but they have released the opinion as an exhibit to Mr. Panet's affidavit. It is certainly not subject to privilege in the hands of Catalyst or any other party.

Conclusions

[305] Of the documents I have just reviewed, I have found that just two are covered by sustainable litigation privilege. They are both communications between counsel and Tamara regarding, and limited to, the Wolfpack litigation.

[306] I said earlier that I am treating the documents produced to me as a proxy for the thousands of documents that have not been produced. I accept that one might argue that Catalyst's failure to produce a document and prove that it is covered by privilege is a failure of Catalyst to meet its onus.

[307] Realistically, however, the court is not able, as a practical matter, to review thousands of individual documents and render one-off rulings with respect to each one. There was always going to have to be some means of dealing with documents as a group or groups. I do not fault the approach taken by Catalyst's counsel to deal with the documents in a practical way.

[308] I would hold, in the result, and using the documents produced as a proxy for the larger group of documents in issue, that any communications between counsel and Tamara dealing solely with the Wolfpack or Veritas litigation are subject to litigation privilege. If there are questions about any particular documents and whether they fall into this category, I may be spoken to. The balance of any Tamara Global documents related to the planning and implementation of Project Maple Tree are not privileged and must be disclosed.

[309] I will proceed to consider the Elwood Documents.

3.2.2 The Elwood Documents

[310] The Elwood Documents are not, in my view, subject to litigation privilege, save for the Schedule "C" Document. There are a number of factors that support this conclusion.

[311] Save for the Schedule "C" Document, none of them are the types of documents that one would classically associate as being subject to litigation privilege. None form part of the solicitor's brief and none are communications between counsel and a third party, such as a witness or expert.

[312] Having said, that, a document need not be one of the "classically" recognized types I have just described in order to attract litigation privilege. But it must be a document created at a time when litigation was pending and it must have been created for the dominant purpose of that litigation.

[313] I do not intend to go through the Elwood Documents individually. I do not believe it necessary to do so. I am not satisfied that any of them – save the Schedule "C" Document – were created for the dominant purpose of litigation.

[314] The Elwood Documents all relate, in one way or another, to Project Maple Tree and its implementation.

[315] Mr. Elwood described Project Maple Tree as having two prongs, white and black. The white prong involved a media campaign to, as Mr. Elwood deposed, "generate positive publicity in the mainstream media for Catalyst and Glassman, such as touting their business successes and charitable donations." The black prong also included an element of public relations. Specifically, generating negative media attention to West Face and Mr. Boland.

[316] In my view, the "black and white" public relations elements of Project Maple Tree (for instance, any communications involving Ms. Jamieson and her attempts, on behalf of Psy Group, to persuade Ms. Blatchford and others to publish articles about West Face, the Wolfpack conspirators, or Justice Newbould) had nothing to do with litigation.

[317] Even if I were to accept that the media aspects of Project Maple Tree were somehow part of an overall litigation strategy, I am *not* satisfied that documents or communications relating to public relations were created for the *dominant* purpose of litigation. Their dominant purpose was clearly related to the management of the public images of West Face and Catalyst.

[318] The black prong of Project Maple Tree also had some more nefarious elements, as I have set out above, including pretext stings on Justice Newbould as well as current and former employees of West Face. These elements had to do with undermining the integrity of the trial decision in the Moyse action. That action is over and any litigation privilege that applied to any such documents or communications has now expired.

[319] Determining the dominant purpose of some of the communications contained in the Elwood Documents is made more difficult by the fact that some of them refer to multiple topics. Mr. Burstein's emails of September 13 and 16, 2017 are good examples. They reference Project Maple Tree and its various aspirations. They include references to investigations surrounding the alleged Wolfpack conspirators.

[320] If reference to the Wolfpack was *all* these emails talked about, I would not hesitate to conclude that they are subject to litigation privilege. But none of them could be described that way. Each includes a variety of topics – some Wolfpack; some public relations; and some related to the improper planned activities of Black Cube agents.

[321] In the result, at best, I would say that the investigation into the Wolfpack conspirators was a *substantial* element of some of the communications. But a substantial element is not sufficient to attract litigation privilege.

The Schedule "C" Document

[322] The Schedule "C" Document is, again, distinguishable from the balance of the Elwood Documents. It reflects Ms. Lutes' notes of a meeting between counsel and a potential witness in the Wolpack action. The memorandum she prepared would most certainly be considered part of the solicitor's brief. Moreover, it directly relates to contemplated litigation which remains extant.

[323] The central question for determination, however, is whether Catalyst can sustain a claim to privilege over the document in Mr. Elwood's possession. I find that they cannot.

[324] The evidentiary record reflects the chain by which the document came into Mr. Elwood's possession. It was sent by Ms. Lutes to Mr Tanuri, on Mr. Riley's instructions. This was enough to waive any claim to solicitor-client privilege in the document, but I would not conclude that it was enough, on its own, to amount to a waiver of litigation privilege. To paraphrase Justice Carthy's reasoning in *Chrusz*, there is nothing inconsistent in giving a copy of the notes to Catalyst's investigator and maintaining privilege against its adversary. (*Chrusz*, para. 58).

[325] But Catalyst, and in turn their counsel, knew that Tamara had been retained to do more than just investigate the alleged Wolfpack conspirators. The aspirations of Project Maple Tree were well-known to Catalyst. Those aspirations included positive and negative media relations campaigns.

[326] There is no evidence in the record that would support a finding that the further distribution of Ms. Lutes' notes within the investigative group was inadvertent. I would, in fact, infer that Catalyst and its counsel would have been alive to the fact that Mr. Tanuri was likely to share the notes with other investigators.

[327] The notes came to be delivered to Mr. Elwood. Again, there is no evidence to suggest that the disclosure was inadvertent. Indeed, it appears entirely intentional. Mr. Elwood's role in Project Maple Tree had nothing to do with preparation for litigation. He was not engaged to investigate the allegations of a Wolfpack conspiring to harm the financial interests of Catalyst or Callidus. He was hired to find a way to get stories to print in the mainstream media.

[328] I conclude that Ms. Lutes' notes were provided to Mr. Elwood for the purpose of shoring up the credibility of the stories he was to promote to media outlets. There is no evidence I have seen that suggests Mr. Elwood's use of those notes was restricted in any way or that he was instructed to keep them confidential.

[329] In my view, the wide dissemination of the notes to various parties for various purposes is antithetical to a sustainable claim to privilege of any sort over them.

[330] In the result, I find that Catalyst has no sustainable claim to litigation privilege in the Elwood Documents, including the Schedule "C" Document.

3.2.3 The Black Cube Documents

[331] The Black Cube Documents are extensive. Only a small number have been produced to me for inspection. In my view, none of them are subject to sustainable claims of litigation privilege.

[332] As I noted, volume two of Catalyst's Privileged Documents Brief includes 8 tabs, all related to Black Cube. I will review them in turn.

Tab 1

[333] The document at Tab 1 is interesting because it is a signed copy of the Black Cube retainer agreement. It is dated September 11, 2017 and is significantly longer than the September 7, 2017 copy found at Tab 6 of volume one of the Brief of Privileged Documents. While the main body of the agreement remains vague as to the subject-matter of the engagement, there is a schedule attached to it that sets out a bonus payment structure. That schedule gives a much clearer idea of the contours of Black Cube's engagement.

[334] West Face took the position on these motions that there is no evidence that Black Cube was involved in any investigations having to do with any litigation other than the Moyse action. It

follows, in their submission, that any claim to litigation privilege over Black Cube documents has expired.

[335] Their counsel has not been privy to the document at Tab 1. It clearly demonstrates that part of Black Cube's retainer was the investigation into an alleged Wolfpack and its members.

[336] Again, if all Black Cube was doing was investigating the existence of a Wolfpack and its membership, I would be inclined to agree with Catalyst's position regarding the privileged nature of its communications and documents. But that is not the case.

[337] To be sure, one purpose of the Black Cube retainer, perhaps even a substantial purpose, was to conduct investigations relating to membership in the alleged Wolfpack. I accept that such an investigation was legitimate and appropriate. But an equally or more substantial purpose was the investigation of Justice Newbould, along with other targets, with the goal of undermining the integrity of the trial court ruling in the Moyse action.

[338] To suggest that conducting sting operations such as the ones carried out in this instance is properly construed as a legitimate "litigation purpose" is misguided in my view. I find that the Black Cube retainer agreement, with attachments, found at Tab 1 has a mix of purposes – some related to litigation, others related to more mischievous pursuits. I am not satisfied, in the circumstances, that the *dominant* purpose of the document is litigation.

[339] The trend in civil litigation is towards full disclosure, as a function of trial fairness and in service of the truth-seeking goal of the adjudicative process. The goal of litigation privilege is to promote the efficacy of the adversary process: *Blank*, para. 27. These goals tend to bump up against one another. Striking a balance between them can be difficult. I have to say, however, that activities that tend to undermine the integrity of the litigation process ought not to be recognized by the court as worthy of the court's protection. In my view the balance points clearly towards disclosure.

[340] In a moment I will address more generally the application of the *Blank* exception to the assertion of litigation privilege over Black Cube documents. At this stage, I am making the point that the September 11, 2017 retainer agreement was not created for the dominant purpose of litigation. It was created in part for a legitimate purpose of litigation support and at least equally for the purpose of engaging in mischief with the goal of undermining the integrity of the court's processes. On the "dominant purpose" test, the claim for litigation privilege fails.

Tabs 2 and 3

[341] Tabs 2 and 3 are spreadsheets that identify targets to be investigated by Black Cube. I reject the claim to litigation privilege for the exact same reason I rejected it in relation to the document at Tab 1. It fails to meet the dominant purpose test.

Tab 4

[342] The document at Tab 4 is an exchange of emails between a Black Cube agent and a Psy Group agent. Its contents unequivocally belie Dr. Yanus' evidence that "Black Cube did not

coordinate its efforts with those of Psy Group." The contents of this email exchange relate to the sting on former Justice Newbould. That sting cannot, in my view, fairly be described as serving a proper litigation purpose. Accordingly, I again find that this document fails to meet the prerequisite of being prepared for the dominant purpose of litigation.

[343] It also fails because it solely relates to the Moyse litigation, which is now complete. If litigation privilege applied at one time, it has expired.

Tab 5

[344] Tab 5 is a letter dated September 21, 2017 on the letterhead of K. Wruck & Associates, a licensed Ontario private investigation firm. They were apparently retained by Black Cube in an effort to comply with the provisions of the *Private Security and Investigative Services Act, 2005,* S.O. 2005, chapter 34.

[345] At any rate, the content of the letter relates to the sting on Justice Newbould. I would not clothe this document with litigation privilege for the same reasons as I expressed in relation to the documents at Tab 4.

Tab 6

[346] Tab 6 is an encrypted chat exchange between a Black Cube agent and a Psy Group agent. The email reveals a plan to exchange lists of objects between themselves. I have no other evidence about this document and will not speculate about its specific purpose. Catalyst has failed to establish why litigation privilege applies to it.

Tab 7

[347] Tab 7 is an email exchange between the same agents referenced in the document at Tab 6. The agents are divvying up targets. Some have to do with West Face and others with suspected Wolfpack members. I am not satisfied that litigation privilege should apply to these emails for the same reason I am not satisfied that it should apply to the document at Tab 1. Specifically, some of the investigations being undertaken may well have had a legitimate litigation purpose to them. Others, as I have found, did not. And for that reason, I am unable to say that the legitimate litigation purpose was anything more than a substantial reason for the document's creation.

Tab 8

[348] The document at Tab 8 consists of 200 plus pages of transcribed conversations in an encrypted chat room called "Hummus Abu-Gosh". The conversations appear to be amongst Black Cube members. I have no evidence about (1) who created the chat group; (2) why it was created; or (3) what all of the topics discussed mean.

[349] It is self-evident that it was intended to be a secure means by which agents of Black Cube could communicate with one another. It is not the case, however, that its content was restricted to one or another particular topic. I do not consider it my function to review over 200 pages of text messages to try to figure out, on my own, what was being discussed and how it might relate to a

legitimate litigation purpose. Catalyst has failed, in other words, to satisfy me that this document was created for the dominant purpose of (legitimate) litigation, and for that matter, litigation that remains extant. For that reason alone any claim to litigation privilege over it is rejected.

The *Blank* Exception

[350] I have a broader basis, however, to reject any claim to litigation privilege over Black Cube documents. Specifically, the *Blank* exception.

[351] I repeat a line from *Moore*, as above, at para. 77: "The ends of justice do not permit litigation privilege to be used to shield improper conduct".

[352] Conducting a pretext investigation on a former justice of this court may not be illegal or even actionable. Conducting pretext investigations on current or former employees of a business competitor may also not be illegal or an actionable wrong.

[353] But in my view luring a judge into a conversation based on a false pretext and attempting to bait him into making anti-Semitic remarks is remarkably improper. On September 18, 2017 "Arik" from Psy Group emailed "Guy" from Black Cube and made the goal of the operation clear: "Basically we're trying to prove that he's a racist, a depraved anti-Semite, and trying to find information that could paint him in as negative a light as possible."

[354] There was nothing in the judgment of Justice Newbould that would suggest he was biased, a racist or a depraved anti-Semite. The sting perpetrated on him was unvarnished random virtue testing or worse.

[355] Equally problematic were the stings on West Face employees. They too were lured in by lies. Efforts, sometimes quite significant, almost always adhering to the adage, *in vino veritas*, were made to persuade them to divulge West Face's confidential information.

[356] One of the factors that enabled Black Cube was the fact that the common law in Ontario lacks a robust framework for assessing the admissibility, in civil actions, of illegally, surreptitiously or otherwise improperly obtained evidence. A rule presumptively excluding from civil trials, evidence obtained by improper means would serve as a strong disincentive for parties to engage in the type of conduct Black Cube agents engaged in here. To date, no such rule exists in the civil context.

[357] By contrast, in the criminal law context there is a well-developed body of jurisprudence under s. 24(2) of the *Charter of Rights and Freedoms* which addresses the exclusion of evidence obtained in a manner infringing any of the *Charter's* provisions. There is also a growing body of law in the family law context which requires, as a condition of admissibility, a showing that the probative value of surreptitiously-obtained evidence exceeds any systemic or case-specific prejudice that may arise if the evidence is admitted. See *Sordi v. Sordi*, 2011 ONCA 665.

[358] Counsel to Catalyst and Black Cube submit that there is nothing inherently improper about pretext investigations. On some level, I agree with that. As an example, imagine a district manager of a chain of retail clothing stores who occasionally and randomly drops into one or another of the

stores under her management, posing as a shopper, just to see if the sales staff are adhering to company policies regarding customer service. This classic "undercover boss" scenario does not strike me as inherently improper, though it clearly has a pretext element to it.

[359] The undercover boss scenario is, by and large, harmless. It doesn't depend on active deceit and doesn't compromise the autonomy and privacy rights of employees. Countenancing it would not likely have any negative impact on the reputation of the administration of justice in the eyes of reasonably informed and objective members of the community.

[360] Perhaps a closer analogy to the pretext investigations conducted by Black Cube in this case are Mr. Big investigations conducted from time to time by Canadian law enforcement agencies.

[361] An invention of Canadian law enforcement, the Mr. Big technique is the ultimate pretext investigation. In short, it typically involves undercover police agents, posing as members of a criminal organization, luring a target into joining their organization on the promise of friendship and easy money. The goal is to have the target confess, to the head of the fictitious criminal organization, his involvement in a serious criminal offence. The confession is induced through lies and deception. Classically, the target is told that the organization is aware of his involvement in an offence (usually a homicide) and has a means of eliminating the risk of prosecution, provided they are made aware of all of the details. The target, wanting to remain a part of the organization and wanting to avoid prosecution, confesses to the boss (Mr. Big). See, for instance, *R. v. Hart*, 2014 SCC 52.

[362] It may be tempting to conclude that if Canadian courts are prepared to accept the validity of pretext investigations in the Mr. Big context, they should certainly be prepared to accept the validity of the pretext investigations conducted by Black Cube agents. But that would be an unsafe conclusion.

[363] First of all, Mr. Big operations are never about disclosure. They are about admissibility. The issue before the court in the case at bar is not about admissibility; it is about whether the details of the pretext investigations, otherwise relevant to a material issue in the litigation, ought to be disclosed. The legal principles engaged in disclosure (or privilege) issues are different than those engaged in admissibility issues.

[364] Second, it must be recognized that confessions generated through Mr. Big investigations are presumptively inadmissible. Though the Mr. Big technique is not illegal in Canada (as it is in many other jurisdictions including the United States) its use makes courts very uneasy. Confessions that arise in the context of lies, deception and inducements have to be looked at very carefully in terms of their reliability. Moreover, every Mr. Big investigation is subjected to close scrutiny for abusive conduct by state actors.

[365] In the context of Black Cube's pretext investigations, I would suggest that they too warrant close scrutiny, not because of concerns about the reliability or admissibility of any evidence they may have generated, but because of concerns about abusive conduct and their intrusion on the privacy and dignity interests of the targets. The court must be wary of protecting abusive conduct, even when not the actions of state agents, lest the administration of justice be brought into disrepute.

[366] Improper, even illegal, conduct may very well result in the creation of documents whose dominant purpose is litigation. But the court cannot sanction the suppression of such evidence because to do so would effectively make the court an accessory to the improper or illegal conduct. The court must distance itself from such conduct in order to maintain its integrity and repute. That is what the *Blank* exception is all about.

[367] Black Cube agents lied to former Justice Newbould. They took him to dinner, bought him drinks, pretended like they wanted to retain him as an arbitrator and then did their best to dupe him into making utterances that might embarrass him. They did so not because there was any credible evidence that he was biased against Jews or Catalyst or anyone else. They did so because they were being paid a very large amount of money to do so by someone who was very unhappy with a decision that he had rendered in his capacity as a Superior Court Justice.

[368] Black Cube agents also deceived a number of employees of West Face, both active and former. They pretended to offer lucrative and interesting employment opportunities. They acted like they thought the targets were unique, accomplished and special. At times they went to significant lengths. With Mr. Singh, for instance, they took him out for dinner and drinks and did their best to induce him to implicate Mr. Moyse in a breach of confidence. When their first effort failed, they flew him to London, England, took him out for dinner and more drinks and took another run at him.

[369] Black Cube's efforts were designed to, by hook or by crook, obtain confidential information about West Face. They were, in my view, corporate espionage.

[370] The conduct of Black Cube agents was an affront to justice. It is the type of conduct that the court must distance itself from.

[371] Again, this is not an admissibility ruling. I do not have to decide whether any evidence generated through the stings conducted by Black Cube might be admissible despite the manner in which it was obtained. This is a disclosure ruling. The sole question for determination is whether the court should recognize a claim to privilege over communications and documents generated by and in furtherance to a course of conduct deemed by the court to be improper.

[372] In view of the decisions in *Blank* and *Moore*, I think the answer is clearly no.

[373] The means by which the court distances itself from Black Cube's conduct is to refuse to shield evidence of their activities from the disinfecting light of day.

[374] I would add the following observation: the purpose underlying litigation privilege is the need to foster the needs of our adversarial model of litigation. Offering safe harbor to Black Cube's odious methods would not foster those needs. It would only serve to encourage the use of these types of investigative techniques; to dilute personal privacy and dignity; and to bring the administration of justice into disrepute.

[375] I am proceeding on the basis that Black Cube's documents are relevant to live issues in the anti-SLAPP motions and the litigation in general. Ordering production of those documents serves the truth-finding function of the adjudicate process. At the same time, in the circumstances of this

case, ordering production does not, in my view, impair the efficacy of the adversary process. The documents in issue overwhelmingly have to do with the Moyse litigation and Catalyst's unhappiness with the result. They have little, if anything, to do with the ability of counsel to properly prepare for the extant litigation – this Wolfpack action or the Veritas action, if it is seriously being pursued.

[376] I understand Catalyst's argument that the privilege in issue is theirs and not Black Cube's. Further that the principals of Catalyst did not know about the specific investigations Black Cube was planning to conduct and certainly did not approve of them.

[377] But as I observed earlier, misconduct that meets the *Blank* exception test need not be that of the party asserting privilege. In *Moore*, as above, it was the conduct of the party's solicitor that was in issue. Here it is the conduct of the party's agent.

[378] The purpose of the *Blank* exception is to avoid litigation privilege being used to shield improper conduct. That purpose would not be well-served if a party could simply disavow responsibility for the misconduct of its retained agent.

[379] I am also somewhat concerned about what inferences the specifics of Black Cube's retainer give rise to. Their base fee was $1.5 million U.S. A bonus structure – the particulars of which I will not elaborate on – provided for maximum fees up to $11 million U.S. Catalyst was the party ultimately paying Black Cube's fees. Even for Catalyst, $11 million is a big number. A natural inference is that the payor of such a significant sum will want to know what it is they are paying for. How else will they know if the fees are reasonable? The alternative is that they do not want to know. Actual knowledge and willful blindness are close cousins.

[380] As I said earlier, I am proceeding on the basis that the Black Cube documents provided to me are representative of the whole of the Black Cube documents over which privilege is asserted. In other words, the sample is a proxy for the whole. Unlike the case with respect to the Tamara documents, none of the Black Cube documents presented to me meets the criteria for a finding of litigation privilege. In the result, and by extension, I conclude that none of Black Cube's purportedly privileged communications and documents are protected by litigation privilege.

[381] At this point, I would move on to a consideration of the Psy Group documents. Almost none of those documents have been produced to me for inspection, save for those that are reflected in the Elwood Documents.

[382] I have rejected the claims to solicitor-client privilege and litigation privilege with respect to the Elwood Documents on the whole. I have no reason to believe that any of the Psy Group documents relating to Project Maple Tree is subject to solicitor-client privilege or litigation privilege based on the reasoning I applied to the balance of the Elwood Documents.

4. BLACK CUBE'S PUBLICATION BAN CLAIM

[383] Black Cube urges the court to permit them to redact any reference in any document that may tend to identify any of their agents. They depend on undercover, "pretext", investigations as a significant part of their business model.

[384] Black Cube has not, however, established the court's jurisdiction to permit such redactions. Assuming, for the sake of argument, that I have a discretion to permit the redaction of documents otherwise subject to disclosure, ought I to exercise that discretion in favour of Black Cube in the circumstances of this case? In my view, no.

[385] Presumably any discretion to permit redactions must be exercised in the interests of justice. I have no evidence that would establish why the interests of justice require the redactions sought. Nothing in Dr. Yanus' affidavit suggests, for instance, that the safety of Black Cube agents would be endangered if their identities were revealed. At best, it appears that Black Cube's business model might be impacted. This is the same business model that gave rise to Black Cube's improper conduct in this case.

[386] Undoubtedly privacy interests are in play, but no evidence was tendered about the privacy interests of the agents, nor was any specific argument made directed at those interests and how they might be balanced against other interests in play.

[387] It is also a little rich for a party to raise concerns about privacy interests when their business model involves lying to others in the hopes that they may inadvertently disclose otherwise private and confidential information. Black Cube appears to have been unconcerned about the privacy and dignity interests of former Justice Newbould or any of the West Face employees it conducted pretext interviews on. I have no doubt that Black Cube understands that if you live by the sword you die by the sword.

[388] At any rate, I am not prepared to grant the relief sought by Black Cube in the absence of a formal motion for that relief. The relief essentially amounts to a publication ban and there is a protocol in place that must be adhered to when such relief is requested. Specifically, a formal Notice of Motion must be served and notice of the motion must be provided to the media by completing and submitting the Notice of Request for Publication Ban described at Part V of the Superior Court's Consolidated Practice Direction.

[389] The redaction request is denied.

5. SUMMARY

[390] I have identified certain communications between Mr. Morris and Mr. Greenspan that are clearly subject to solicitor-client privilege. I am sure that there are other communications between the Catalyst parties and their various solicitors that are undoubtedly subject to solicitorclient privilege. I understand that the moving parties are not trying to get access to documents of that nature.

[391] With respect to the specific requests in the notices of motion, I find that:

(a) There is no sustainable claim to privilege, whether solicitor-client or litigation privilege, over any of the Elwood Documents, including the Schedule "C" document;

(b) There is no sustainable solicitor-client privilege or litigation privilege in any of the Tamara Global documents, Black Cube documents or Psy Group documents, save for:

(i) the third email from Brian Greenspan to Yossi Tanuri on September 1, 2017;

(ii) the email communication between Ms. Lutes and Mr. Tanuri dated September14, 2017 produced at Tab 10 of volume one of Catalyst's Privileged Documents Brief; and,

(iii) any other direct communications between counsel and Tamara relating solely to the Wolfpack or Veritas actions. Again, I may be spoken to if there is any question about whether a particular document falls under this umbrella.

[392] West Face refers to the documents in issue generally as documents relating to the "Defamation Campaign". I prefer to steer clear of that kind of language, given that it is at the core of the litigation. That said, I believe my ruling should be clear that of the documents in issue, only the ones listed in subparagraphs (b)(i), (ii) and (iii) are properly subject to a sustainable claim of privilege. Any other documents related to Project Maple Tree or Project Camouflage or to the retainers of Tamara Global, Black Cube or Psy Group more generally, are not subject to established and sustainable claims of privilege.

[393] Again, to be clear, only a small fraction of the documents were presented to me for review and consideration. I have proceeded on the basis that those documents are representative of, and serve as a proxy for, all of the documents in issue.

[394] Catalyst, Tamara Global, Black Cube and Psy Group are each ordered to produce revised Affidavits of Documents within 30 days, reflecting the substance of this ruling and shall produce, upon request and within a reasonable time, all Schedule "A" documents reflected in their revised Affidavits of Documents.

6. THE FILING OF MOTION MATERIALS

[395] There is a good deal of sensitive material filed in relation to these motions. I am directing that the parties file copies of their notices of motion with the court and that they pay the associated filing fees. In addition, the affidavits filed in support of the motions must be filed, along with any exhibits referred to in the affidavits. But those affidavits and exhibits, as well as the parties' factums, will be sealed, subject to further order of the court.

[396] I recognize that one or another party may seek leave to appeal this ruling. The ruling contains references to documents over which privilege has been asserted. For that reason, I order that the ruling not be disseminated or published in any way, beyond counsel and the principals of the parties hereto, for a period of 30 days. If any party moves for leave to appeal this ruling within that 30 day period, then this publication ban will continue until the motion for leave has been determined by the Divisional Court. This publication ban expires if no party moves for leave to appeal within 30 days.

7. COSTS

[397] The parties are encouraged to reach an agreement on the issue of costs.

[398] Absent an agreement, the parties are invited to make written submissions on the issue of costs on a 14-day turnaround. The moving parties should serve and file their submissions by January 25, 2021 and the responding parties by February 8, 2021. Submissions should not exceed 3 pages in length, not including Cost Outlines and caselaw.

Boswell J.

Released: January 11, 2021

2021 ONSC 2061
Ontario Superior Court of Justice (Divisional Court)

Catalyst Capital Group Inc. et al. v. West Face Capital Inc. et. al

2021 CarswellOnt 4049, 2021 ONSC 2061

THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION (Plaintiffs / Moving Parties) and WEST FACE CAPITAL INC., GREGORY BOLAND, M5V ADVISORS INC. C.O.B. ANSON GROUP CANADA, ADMIRALTY ADVISORS LLC, FRIGATE VENTURES LP, ANSON INVESTMENTS LP, ANSON CAPITAL LP, ANSON INVESTMENTS MASTER FUND LP, AIMF GP, ANSON CATALYST MASTER FUND LP, AIMF GP, ANSON CATALYST MASTER FUND LP, ACF GP,MOEZ KASSAM, ADAM SPEARS, SUNNY PURI, CLARITYSPRING INC., NATHAN ANDERSON, BRUCE LANGSTAFF, ROB COPELAND, KEVIN BAUMANN, JEFFREY MCFARLANE, DARRYL LEVITT, RICHARD MOLYNEUX and JOHN DOES #1-10 (Defendants / Responding Parties)

M. Edwards R.S.J., Penny J., and Doyle J.

Leave to appeal Justice Boswell's ruling refused

Heard: March 22, 2021
Judgment: March 22, 2021
Docket: 095/21

Proceedings: Leave to appeal refused *The Catalyst Capital Group Inc. v. West Face Capital Inc.* (2021), 2021 ONSC 125, 2021 CarswellOnt 4244 (Ont. S.C.J. [Commercial List])

Counsel: David C. Moore, Ken Jones, Matthew Karabus, for Moving Parties
M. Philip Tunley, Jennifer P. Saville, for Respondent, Rob Copeland
Kent E. Thomson, Mathhew Milne-Smith, Andrew Carlson, for Respondents, West Face Capital Inc. and Gregory Boland
Linda M. Plumpton, Leora Jackson, for Respondents, M5V Advisors Inc. C.O.B. Anson Group Canada, Admiralty Advisors LLC., Frigate Ventures LP, Anson Investments LP, Anson Capital LP, Anson Investments Master Fund LP, AIMF GP, Anson Catalyst Master Fund LP, ACF GP, Moez Kassam, Adam Spears and Sunny Puri
Lucas Lung, Rebecca Shoom, for Respondents, Clarity Spring Inc. and Nathan Anderson
Devin Jarcaig, for Respondent, Bruce Langstaff

Kevin Baumann, for himself

Subject: Civil Practice and Procedure
Headnote
Civil practice and procedure

Per curiam:

1 The motion for leave to appeal the January 11, 2021 decision of Boswell J. (2021 ONSC 125) is dismissed with costs in the amount of $4500 to the respondent West Face Capital Inc. and costs in the amount of $2500 to the respondent Rob Copeland.

CITATION: The Catalyst Capital Group Inc. and Callidus Corporation v. West Face Capital Inc. et al., 2021 ONSC 1140
COURT FILE NO.: CV-17-587463-00CL
DATE: 20210212

Leave to appeal refused by the Divisional Court

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION	)	*Richard Dearden, Marco Romeo, Matthew Karabus, David Moore* and *Ken Jones*, for the Plaintiffs
Plaintiffs	)	
– and –	)	
WEST FACE CAPITAL INC., GREGORY BOLAND, M5V ADVISORS INC., C.O.B ANSON GROUP CANADA, ADMIRALTY ADVISORS LLC, FRIGATE VENTURES LP, ANSON INVESTMENTS LP, AIMF GP, ANSON CATALYST MASTER FUND LP, ACF GP, MOEZ KASSAM, ADAM SPEARS, SUNNY PURI, CLARITYSPRING INC., NATHAN ANDERSON, BRUCE LANGSTAFF, ROB COPELAND, KEVIN BAUMANN, JEFFREY MCFARLANE, DARRYL LEVITT, RICHARD MOLYNEUX, GERALD DUHAMEL, GEORGE WESLEY VOORHEIS, BRUCE LIVESEY and JOHN DOES #4-10	)	*Matthew Milne-Smith, Andrew Carlson* and *Maura O'Sullivan*, for the Defendants West Face Capital Inc. and Gregory Boland
	)	*Lucas Lung* and *Rebecca Shoom*, for the Defendants ClaritySpring Inc. and Nathan Anderson
	)	*Devin Jarcaig*, for the Defendant Bruce Langstaff
	)	*Jennifer Saville*, for the Defendant Rob Copeland
	)	*A.J. Freedman*, for the Defendant Bruce Livesey
Defendants	)	*Darryl Levitt*, self-represented Defendant
	)	*Kevin Baumann*, self-represented Defendant
– and –	)	
CANACCORD GENUITY CORP.	)	
Third Party	)	

AND BETWEEN:	)	
	)	
WEST FACE CAPITAL INC., and GREGORY BOLAND	)	*Matthew Milne-Smith, Andrew Carlson* and *Maura O'Sullivan*, for the Plaintiffs by Counterclaim
Plaintiffs by Counterclaim	)	
	)	
– and –	)	
	)	
THE CATALYST CAPITAL GROUP INC., CALLIDUS CAPITAL CORPORATION, NEWTON GLASSMAN, GABRIEL DE ALBA, JAMES RILEY, VIRGINIA JAMIESON, EMMANUEL ROSE, B.C. STRATEGY LTD. D/B/A BLACK CUBE, B.C. STRATEGY UK LTD. D/B/A BLACK CUBE and INVOP LTD. D/B/A PSY GROUP	)	*Richard Dearden, Marco Romeo, David Moore* and *Ken Jones,* for the Defendants to the Counterclaim the Catalyst Capital Group Inc., Callidus Capital Corporation, Newton Glassman, Gabriel De Alba and James Riley
Defendants to the Counterclaim	)	
	)	
AND BETWEEN:	)	
	)	
BRUCE LANGSTAFF	)	*Devin Jarcaig*, for the Plaintiff by Counterclaim
Plaintiff by Counterclaim	)	
	)	
– and –	)	
	)	
THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION	)	*Richard Dearden, Marco Romeo, Matthew Karabus, David Moore* and *Ken Jones*, for the Defendants to the Counterclaim
	)	
Defendants to the Counterclaim	)	
	)	
	)	**HEARD:** January 18 and 22, 2021

ENDORSEMENT

[1] This is the first of a number of endorsements that I will be releasing concerning refusals motions brought in this matter.

[2] Specifically, this Endorsement deals with motions brought by West Face Capital Inc. ("West Face"), as well as Nathan Anderson ("Anderson") and his company ClaritySpring Inc. (collectively the "Anderson Defendants") seeking to require the Catalyst Capital Group Inc. and Callidus Capital Corporation (collectively the "Catalyst Parties") to answer questions that were refused or taken under advisement during the cross-examination of James Riley ("Riley") on behalf of the Catalyst Parties. Riley was cross-examined with respect to the upcoming anti-SLAPP motions that I am hearing in May 2021.

[3] The within motions dealt with three discrete categories:

- West Face and the Anderson Defendants seek production of the "Strategic Review and Remediation Plan" that was prepared by Callidus's interim CEO, Patrick Dalton, and provided to Callidus's Board of Directors in late February 2019 (the "Dalton Report").

- West Face seeks production of several communications between the Catalyst Parties and Vincent Hanna, Daniel Guy, John Kingman Phillips, and/or Derrick Snowdy (collectively the "Guy Documents").

- The Anderson Defendants also seek production of communications between the Catalyst Parties and the Ontario Securities Commission (the "OSC") and the U.S. Securities and Exchange Commission (the "SEC").

[4] For the reasons that follow, I order production of all of the aforementioned documents and that the Catalyst Parties re-attend to answer questions arising from the production of those documents.

OVERVIEW

[5] This Endorsement follows the lengthy decision of Boswell J.: see *The Catalyst Capital Group Inc. v. The West Face Capital Inc.*, 2021 ONSC 125. Boswell J. comprehensively set out the background of this enormous, fractious litigation. I commend those reasons to the reader of this Endorsement for a fulsome description of the circumstances surrounding this litigation.

[6] Briefly, for the purposes of this Endorsement, I would simply reiterate that the Catalyst Parties commenced this action (commonly referred to as the "Wolfpack Action") primarily accusing West Face and others, including the Anderson Defendants, of conspiring to "short and distort" the shares of Callidus. Anderson is the principal of ClaritySpring Inc. He is a business analyst, professional whistleblower and short seller. Anderson researched Catalyst and Callidus,

subsequently prepared Whistleblower Submissions (the "Whistleblower Submissions") for the OSC and engaged in the short selling of Callidus shares.[1]

[7] The defendants West Face, its principal Gregory Boland ("Boland") and the defendant Bruce Langstaff ("Langstaff") then commenced counterclaims against the Catalyst Parties and some of their principals including Newton Glassman ("Glassman"), the founding partner of Catalyst and Chief Executive Officer of Callidus, and Riley, an executive of Catalyst.

[8] All of this litigation follows earlier significant and, at times, nasty litigation between Catalyst and West Face, which is well set out in the reasons of Boswell J. The ill will in the earlier litigation has spilled over into these proceedings.

[9] Insofar as these motions are concerned, with respect to the pending anti-SLAPP motions, I begin by noting that none of the parties raised any issues with respect to whether I had jurisdiction to hear the motions. This issue was raised before Boswell J. He found that he had jurisdiction to hear similar motions: see paras. 194-216. Since it was not raised before me, I assume that this is now a dead issue but, in any event, I agree with Boswell J. that I have jurisdiction to hear the motions in advance of the anti-SLAPP motions.

[10] Further, the documents in question in these motions were provided to me on a confidential basis on the day of the motion by the Catalyst Parties for review. No other party objected to this method of proceeding, and it was supported by West Face and the Anderson Defendants.

[11] I will now turn to the three areas of dispute: first, the Dalton Report; second, the Guy Documents; and third, the OSC/SEC Documents.

THE DALTON REPORT

[12] I do not propose to deal with each and every argument raised by the parties, but rather those that I believe are most germane to the dispute.

[13] By way of background, Patrick Dalton ("Dalton") was employed by Callidus as a consultant and interim CEO from November 2018 until March 2019. While there, he prepared a detailed plan for completing the financial and business restructure of Callidus's business – the Dalton Report.

[14] It was presented to Callidus's Board of Directors at a February 2019 meeting. The meeting was also attended by Rocco DiPucchio ("DiPucchio"), a managing director of Catalyst who was also acting in a General Counsel role, and Jon Levin, a lawyer who performed legal work for Callidus.

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[1] For a full explanation of the basics of short selling, see the decision Boswell J., at para. 117, n 3.

[15] The Catalyst Parties claim that the Dalton Report is subject to solicitor-client privilege. The Catalyst Parties concede that the Dalton Report itself did not include legal advice but submit that Dalton was directed to prepare a report concerning restructuring options for Callidus which, given its affiliation with Catalyst, would have to be acceptable to Catalyst. Moreover, the Catalyst Parties submit that the Callidus Board knew that the Dalton Report would be provided to DiPucchio, Glassman and Riley for their review.

[16] In the above circumstances, the Catalyst Parties contend that the Callidus Board considered that the Dalton Report would be confidential and subject to solicitor-client privilege. They further submit that this intention was reflected by the notation on the first page that the Report was "Confidential Attorney-Client Privilege" and a disclaimer on the last page of the Dalton Report:

> The information contained in the document is intended for the Board of Directors of Callidus Capital and their respective Counsel. Circulation or reproduction of this document outside of Callidus Capital Corporation or its Affiliates is not permitted. The information contained in the [*sic*] this document is proprietary and confidential.[2]

[17] In this regard, the Catalyst Parties submit that the purpose and scope of the Dalton Report was to enable DiPucchio to provide legal and strategic advice to Catalyst.

[18] Indeed, DiPucchio did review the Dalton Report and certain information was added to it upon his recommendation. Ultimately, I accept that DiPucchio did use the Report to give legal advice to Catalyst and its principals concerning the proposed restructuring.

[19] In short, the Catalyst Parties submit that the purpose of the Dalton Report, its disclosure to DiPucchio, his work on the Report and his attendance at the board meeting enabled DiPucchio to provide legal advice to Catalyst with respect to possible restructuring proposals and, as such, is subject to solicitor-client privilege. I disagree.

[20] The Catalyst Parties also primarily rely upon three cases, each of which is distinguishable:

- In *Trillium Motor World Ltd. v. General Motors of Canada Ltd.*, 2014 ONSC 1338, aff'd 2014 ONSC 4894, the Court was not simply dealing with a report generated by a corporation but rather, the documents in question were specifically prepared by the corporation and its professional advisors, including legal counsel, with the goal of maximizing the success of the CCAA proceeding. Conversely, Dalton did not receive legal advice in the preparation of his Report, nor was it prepared for the purposes of litigation, although DiPucchio did provide advice with respect to restructuring. In my view, however, that is not enough.

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[2] I accept that Affiliates would include Catalyst and it also bears noting that the disclaimer also expressly stated that nothing in the Dalton Report constituted legal, tax or other advice.

- Similarly, in *Camp Development Corp. v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88, the documents over which privilege was asserted, and accepted by the Court, related to ongoing expropriation where the lawyer and consultant worked closely as a unified team to prepare a report for the Transportation Authority, which was carrying out the expropriation. Of note is the fact that the Court denied privilege over documents between the lawyer and the appraiser, which are more akin to the within case.

- In the third case, *Royal Bank v. Société Generalé (Canada)*, 2005 CanLII 36727 (Ont. S.C.), the Court dealt with a case in which general counsel struck a committee to deal with an issue of forged bank drafts, which is far different from the within case where Dalton prepared a report to deal with business advice.

[21] I prefer the arguments of West Face and the Anderson Defendants who submit that the Dalton Report is not subject to solicitor-client privilege for the following reasons:

- As noted, the Dalton Report was not prepared for the specific purpose of obtaining legal advice for Callidus.

- The Dalton Report was an analysis of the business of Callidus; it was intended to assess Callidus's business realities relating to the cause of its financial problems and to offer recommendations regarding its future activities.

- The Dalton Report was created as a briefing document for review by the Callidus Board and, therefore, does not attract solicitor-client privilege: *Nova Chemicals (Canada Ltd.) v. Ceda-Reactor Ltd.*, 2014 ONSC 3995, at paras. 34 and 37.

- The fact that DiPucchio and/or Levin were involved in the preparation of the document does not automatically result in the Dalton Report being subject to solicitor-client privilege. Solicitor-client privilege is not intended to protect all communications or materials deemed useful by a lawyer to properly advise their client: *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C. A.), at paras. 127-128; *R. v. Campbell*, [1999] 1 S.C.R. 565, at para. 50; *XCG Consultants Inc. v. ABB Inc.*, 2014 ONSC 1111, at para. 38.

- The fact that the Dalton Report was marked as being "Confidential Attorney-Client Privilege" does not make it so. In this regard, I echo the comments of Boswell J., at para. 242 of his decision, where he noted that "[o]ne cannot make a non-privileged document privileged by just writing 'Privileged' on it." The fact that DiPucchio and Levin attended at the board meeting does not necessarily render the Dalton Report privileged, nor does the fact that DiPucchio reviewed the draft version of the Dalton Report and proposed changes.

- DiPucchio, at the time, was not in the employ of Callidus, but rather the related company Catalyst. At the time, Catalyst was not a shareholder of Callidus, although Catalyst's related companies did hold shares in Callidus. DiPucchio, therefore, was not a lawyer for Callidus and, in my view, his participation cannot establish a solicitor and client relationship with Callidus such that the Dalton Report would have been considered to be privileged.

[22] The simple fact is that the Dalton Report was intended to and, in fact, did assess the business realities of Callidus. A plain reading of the document discloses this. While it may be that counsel ultimately used the Dalton Report to formulate legal advice, the Dalton Report, in and of itself, did not contain legal advice; it contained Dalton's business analysis for Callidus.

[23] In coming to this conclusion, I also reviewed and rely upon the decision of Boswell J. with respect to the law of solicitor-client privilege: see paras. 217-222.

[24] Although not raised in their factum, the Catalyst Parties also raised the issue as to whether the Dalton Report was relevant to the anti-SLAPP motions. In my view, it is. In this $450 million lawsuit, the Catalyst Parties claim that the defendants caused them significant damages due to the alleged "short attack" which drove down Callidus's share price, impaired their ability to raise funds and, overall, caused them significant damages. At the same time, the Catalyst Parties concede that they were experiencing significant financial difficulties. In my view, the Dalton Report is, therefore, relevant to the anti-SLAPP motions since it deals with Callidus's overall financial difficulties during the relevant timeframe.

[25] In all of the above circumstances, I am of the view that the Dalton Report is not subject to solicitor-client privilege and should be produced.

THE GUY DOCUMENTS

[26] Shortly after the Wall Street Journal published the article concerning the Catalyst Parties, which led to the Catalyst Parties commencing a separate action against Rob Copeland (the author of the article), Dow Jones (the owner of the Wall Street Journal) and others, Glassman received an email from a person purporting to be "Vincent Hanna" ("Hanna") which referred to a "cabal" of conspirators who, amongst other things, had a goal to "bring down" Callidus and Glassman. The cabal, according to Hanna, included West Face and Boland, amongst others.

[27] The Catalyst Parties, after receiving Hanna's email, consulted with counsel. Thereafter, twenty-six emails flowed between the Catalyst Parties and a number of others, including Hanna (which the Catalyst Parties now believe to be the alias of Daniel Guy ("Guy"), a claim which Guy denies), Guy himself, John Kingman Phillips ("Phillips") who was Guy's lawyer, Guy's private investigator Derrick Snowdy "(Snowdy"), Marc Cohodes ("Cohodes") who is a U.S. investor and short seller and Brian Greenspan ("Greenspan") who has acted as legal counsel for the Catalyst Parties. Various members of the Catalyst Parties were involved in the emails, including Glassman and Riley.

[28] The Catalyst Parties assert common interest privilege over these documents.

[29] In order to successfully assert common interest privilege, the Catalyst Parties must demonstrate that:

(i) the underlying information shared with the third party is privileged;

(ii) the third party shares a common interest with the sharing party at the time of disclosure; and

(iii) the privilege has not been abrogated through waiver, disclosure or otherwise at law: see *Milicevic v. T. Smith Engineering Inc.*, 2016 ONSC 2166, at paras. 136-137.

[30] In brief, common interest privilege ensures that a document or communication that is protected by solicitor-client privilege or litigation privilege does not lose that protection when it is shared between parties who share a common interest in either litigation or a transaction. Accordingly, in order to make out a claim for common interest privilege, there must also be an underlying privilege claim established.

[31] In my view, the Catalyst Parties have failed to establish an underlying claim of privilege or common interest. In any event, given the production of the first Vincent Hanna email, the Catalyst Parties have waived privilege with respect to the emails that followed.

[32] I begin my comments with my general concern about the murky nature of the Guy Documents. As noted, Guy disputes that he is Hanna. The Catalyst Parties believe he is. Further, Cohodes is also included in the emails, which would suggest that he has a common interest with the others. But other documentation in the Catalyst Parties' productions, including a decision of Perell J., *Harrington Global Opportunities Fund S.A.R.L. v. Investment Industry Regulatory Organization of Canada*, 2018 ONSC 7739, upon which they rely, notes that Harrington (Guy's company) was looking at pursuing litigation against Cohodes. This certainly does not speak of any common interest between them. All of this, of course, must be read in context with Boswell J.'s reasons wherein he was highly critical of some of the investigations carried out by entities hired by Catalyst.

[33] Insofar as an underlying claim of solicitor-client privilege is concerned, I once again agree with the statement of law set out by Boswell J., at paras. 217-221 of his decision. As is later stated in Boswell J.'s reasons, commencing at para. 233, solicitor-client privilege attaches to a communication that is between a solicitor and their client.

[34] None of the aforementioned Guy Documents amount to such a communication. Although Greenspan is included in some of the emails as one of a number of people being copied, he is not the author of any of the Guy Documents. Furthermore, the Guy Documents find their genesis in an unsolicited email sent by Hanna (whoever that might be) to Glassman, via a secure Norwegian server designed to provide maximum encryption. Thereafter, communications flew with respect to the allegations contained in Hanna's original email. I cannot see how the unsolicited email and those that followed can be subject to solicitor-client privilege.

[35] In addition, the emails on occasion included Cohodes and others, including Adam Spears who is a defendant in the Wolfpack Action. None of the emails refer to any communications between a solicitor and a client.

[36] Riley's assertions that the emails exchanged were "for the purpose of investigating the allegations that Callidus was subject to a short and distort attack, [and] obtaining legal advice" are vague and unparticularized and not supported by the contents of the email transmissions

themselves. As such, they cannot be subject to solicitor-client privilege: see *Chrusz*, *supra*, at para. 95.

[37] Similarly, I do not believe that litigation privilege can exist over the Guy Documents.

[38] It cannot be credibly said that the Guy Documents were created for the dominant purpose of assisting a solicitor in preparing for this litigation or any other contemplated litigation as required: see *Intact Insurance Co. v. 1367229 Ontario Inc.*, 2012 ONSC 5256, at paras. 26, 27, 30-32. To assert such a claim, the Catalyst Parties must establish "a dominant purpose" for each document. As noted, Riley's affidavit provides only generalized and largely unsubstantiated assertions of privilege. By way of example, he cannot possibly give such evidence with respect to the genesis behind the emails authored by Hanna – a pseudonym perhaps used by Guy. It is certainly not within Riley's purview to comment upon the genesis of those emails. Similarly, most of the Guy Documents involved emails being sent to the Catalyst Parties from others.

[39] Once again, my analysis above is consistent with the position taken by Boswell J. at the motion before him, commencing at para. 258 and the law he sets out therein.

[40] In any event, even if I am wrong with respect to the underlying claims of privilege, I do not find that the Catalyst Parties have established a "common interest" existing between the participants in the emails which constitute the Guy Documents.

[41] The Catalyst Parties, in this regard, rely upon notes prepared by Naomi Lutes ("Lutes") who is a lawyer in the Greenspan office. On a number of occasions, Lutes prepared notes (which are not the subject matter of this production motion) concerning meetings that she attended with Riley, Snowdy, Phillips and others concerning issues raised in the Guy Documents over which she notes that "joint interest privilege" is being asserted. Once again, just because a lawyer says notes are privileged does not mean this is so. Further, the Catalyst Parties did not provide any evidence on this motion from Lutes to explain these notations and, particularly, who exactly was involved in this assertion of joint interest privilege. Lutes's notes themselves provide very little context and are unpersuasive on this issue.

[42] Further, Lutes's notes do not refer to the Guy Documents themselves but rather to the minutes of the meetings that were held. Also, it is important to note that there is no evidence whatsoever directly from Hanna and/or Guy or any of the other non-parties referred to in the Guy Documents stating that they too believe that common interest privilege applies to this case. This is particularly important where the Guy Documents genesis is found in the unsolicited email from Hanna. In my view, the absence of evidence is fatal in this case: see *Chrusz*, *supra*, at paras. 58-60.

[43] Also, there is no evidence in the Guy Documents that the parties anticipated litigation against a common adversary, such as West Face or Dow Jones: see *Genier v. CGI Capital Ltd.*, 2008 CarswellOnt 209 (S.C.), at para. 18.

[44] Last, even if I am in error with respect to my aforementioned findings, it is my view that the Catalyst Parties waived privilege over the Guy Documents when they produced the initial

unsolicited Hanna email. They rely upon this email to support the theory of their case against the defendants in the Wolfpack Action and allege that the email justifies one of the publications that West Face takes issue with in its counterclaim against the Catalyst Parties.

[45] In my view, the Catalyst Parties cannot pick and choose what documents they rely upon and then claim some form of privilege over the others. This is manifestly unfair and runs counter to the existing case law, in which it has been held that selective disclosure will waive any privilege attaching over closely related materials: see *Ranger v. Penterman*, 2011 ONCA 412, 342 D.L.R. (4th) 690, at para. 16. Riley has denied any intent to waive such privilege, but this is not his call to make. Waiver has occurred.

[46] For all of the above-mentioned reasons, I order that the Catalyst Parties disclose the twenty-six emails in dispute.

THE OSC/SEC DOCUMENTS

[47] The Catalyst Parties assert that the OSC/SEC Documents are protected by case-by-case privilege. These documents consist of numerous correspondence passing between Callidus and Catalyst, their counsel and the OSC/SEC.

[48] The law concerning case-by-case privilege was well set out by Conway J. in the decision of *In the Matter of B*, 2020 ONSC 7563, at paras. 20-24, wherein she stated:

> The Applicant asserts that case-by-case privilege should extend to all of the Information as it is covered by the Confidentiality Clause. The Applicant acknowledges that the employer has not been served with this Application due to the confidential nature of the Investigation under s. 16 of the Act. The Applicant submits that as the custodian of the Information, it is up to the Applicant to defend it based on their unequivocal promise of confidentiality.
>
> Case-by-case privileges, unlike class privileges, do not carry a presumption of inadmissibility. Instead, the Court will consider, in any given case, whether a case-by-case privilege should be recognized, with reference to the four "Wigmore criteria", as adopted by the Supreme Court of Canada in *Slavutych v. Baker*, [1976] 1 S.C.R. 254, at p. 260:
>
> a. The communications must originate in a *confidence* that they will not be disclosed.
>
> b. This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
>
> c. The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.

> d. The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.
>
> [emphasis in original]
>
> These criteria are not "carved in stone". They are considerations, which provide a general framework within which policy considerations and the requirements of fact-finding can be weighed and balanced on the basis of their relative importance in the particular case before the court: *R. v. Gruenke*, [1991] 3 S.C.R. 263, at p. 290.
>
> Case-by-case privilege can apply in novel circumstances. The Supreme Court of Canada has recognized that the common law permits privilege in new situations where reason, experience and application of the principles that underlie the traditional privileges so dictate: *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157, at para. 20
>
> Case-by-case privilege need not be blanket or absolute. Courts have the power to impose partial privilege to the extent it is required to strike the proper balance between the interest in protecting the communication from disclosure and the interest in proper disposition of the litigation: *Ryan*, at paras. 18, 33.

[49] I will begin my comments with the OSC Documents and then turn to the SEC Documents. As I noted at the outset of this Endorsement, I find that both sets of documents ought to be produced.

The OSC Documents

[50] Generally speaking, these communications involved investigations being carried out by the OSC with respect to Callidus, which at that time was a public company, concerning its disclosure record and its responsibility to comply with the applicable securities legislation. Ultimately, the investigations led to Callidus amending its reporting concerning how it treated unrecognized yield enhancements. This issue is relevant to the issues in the anti-SLAPP motions surrounding Callidus's financial health and how it reported to the OSC.

[51] Insofar as the first Wigmore criterion is concerned, I do not believe that the OSC records could be considered communications originating in a confidence that they would not be disclosed. The OSC specifically stated in its correspondence that OSC staff would not place the information from documents that Callidus provided in the public file, but went on to note that the information would only be disclosed as permitted by the Ontario *Securities Act* or *as otherwise required by*

law. The Catalyst Parties concede that this statement provides this Court with the jurisdiction to order production. I agree.

[52] I am of the view that the confidentiality promised by the OSC wholly related to the fact that it would not publicly disclose Callidus's responses except as permitted by the Ontario *Securities Act*. There is, therefore, no evidence to support the Catalyst Parties' position that the communications originated in confidence vis-à-vis the world at large. This is consistent with the decision in *In the Matter of B, supra*.

[53] Further, I am of the view that the Catalyst Parties cannot reasonably expect that confidentiality would extend to circumstances where they have commenced significant litigation against the Wolfpack Defendants, seeking $450 million in damages and alleging a conspiracy. In such circumstances, given the allegations of conspiracy and the counter-allegations made by the defendants and plaintiffs by counterclaim, the OSC Documents are relevant, do not enjoy class privilege and ought to be produced.

[54] This is particularly so when Riley, in his examinations, has provided rather extensive oral evidence relating to the OSC's concerns and investigation and provided an explanation as to why, in his view, Callidus's reporting was satisfactory.

[55] Insofar as the second Wigmore criterion is concerned, I am also of the view that the Catalyst Parties have failed to establish, in the context of this case, that an element of confidentiality was essential to the full and satisfactory maintenance of the relation between Callidus and the OSC.

[56] I accept that confidence can be essential but only in the context of an ongoing enforcement investigation. There is no evidence that confidentiality was essential to the relation between Callidus and the OSC where a routine compliance review was taking place. While in the view of the Catalyst Parties, confidentiality would be desired in these circumstances, there is nothing in the record before me to suggest that the OSC or Callidus took the position that confidentiality was essential in a routine compliance review.

[57] With respect to the third Wigmore criterion, I accept that the relationship between the OSC and a reporting issuer, such as Callidus, is one that should be sedulously fostered since there is public interest in the proper regulation of capital markets. The Anderson Defendants agree.

[58] I also do not accept that the Catalyst Parties have satisfied the fourth Wigmore criterion – that the injury that would inure to the relation by the disclosure of the communications is greater than the benefit gained for the correct disposal of the litigation.

[59] In my view, the balancing of interests favours disclosure. The OSC investigation with respect to Callidus's use of unrecognized yield enhancements is long resolved. There are no ongoing investigations. Callidus is no longer a publicly traded company and, therefore, has no further disclosure obligations to the OSC. The Catalyst Parties have also not produced any evidence that they would suffer harm if their communications are disclosed. Instead, the Catalyst Parties submit that only relevant corporate documents should be produced, and that any

communications between Callidus and the OSC explaining or describing those documents are not evidence but, rather, opinions which hold no weight. I disagree. In my view, the Catalyst Parties are seeking to unduly restrict the breadth of the disclosure in a significant lawsuit. While ultimately such communications may not be given much weight, and this remains to be seen, they are relevant and producible.

[60] Furthermore, the Anderson Defendants' Whistleblower Submissions to the OSC relate to Callidus's use of the unrecognized yield enhancements in its public disclosure. The Catalyst Parties claim that the claims raised by the Anderson Defendants in the Whistleblower Submissions are false. I am, therefore, of the view that the communications between the OSC and Callidus, and its representations, are relevant to this issue and relate directly to the anti-SLAPP motions.

[61] Last, the Anderson Defendants submit that the Catalyst Parties have waived any privilege since Riley, as noted, has provided evidence about the substance of the plaintiffs' dealings and communications with the OSC. I have reviewed Riley's evidence. I do not agree that it is significant enough to establish waiver or indicate any intent to waive privilege. For the reasons above, however, the issue of waiver is immaterial.

The SEC Documents

[62] In my view, the reasoning above concerning the OSC Documents also applies to the SEC Documents.

[63] Insofar as the SEC Documents are concerned, however, the Catalyst Parties raise additional objections to production.

[64] The first objection is that none of the SEC communications were ever referred to in the Anderson Defendants' complaints and, therefore, production of the SEC Documents is not relevant. I disagree for the reasons above. It is my view that the SEC Documents are equally relevant as the OSC Documents in this regard and ought to be produced.

[65] The Catalyst Parties also rely upon "developing privilege" in the U.S. attaching to communications related to the SEC regulatory inquiries. They rely upon some articles, as well as a statement from Roel Campos ("Campos"), a former Commissioner of the SEC. The Catalyst Parties admittedly do not present Campos as an expert but, rather, as providing a statement of what he believes the applicable principles to be with respect to disclosure of SEC Documents. I frankly question why this does not fall into the area of expert evidence but, in any event, the Catalyst Parties agree that none of the aforementioned sources are binding upon me. I do not find sufficient authority in the statement of Campos, the articles or the case law to support a claim for privilege.

[66] Of significance, in this regard, the Anderson Defendants have provided case law and an article showing that U.S. Courts have specifically rejected the existence of privilege attaching to SEC communications: see *Kirkland v. Superior Court (Guess?, Inc.)* (2002), 95 Cal. App. 4th 93; *D'Addario v. Gellar* (2005), 129 Fed. App'x 1 (4th Cir.); Phillip M. Aidikoff et al. "Discovery of Regulatory Documents: Debunking the Myth of an 'SEC Privilege' in Securities Arbitration" (2011) 18:2 PIABA Bar J 187.

[67] Further, and in any event, the thrust of the submissions with respect to the U.S. authorities speaks to the obligations of the SEC to make disclosure and is not relevant to the parties in this lawsuit or the Wigmore factors.

[68] I also pause here to note that with respect to the OSC/SEC Documents (and indeed the Guy Documents and the Dalton Report), I agree with the sentiments of Boswell J., at para. 339 of his decision, that "the trend in civil litigation is towards full disclosure, as a function of trial fairness and in service of the truth-seeking goal of the adjudicative process." In my view, this statement rings true in this case which involves high-stakes litigation, allegations of conspiracy and defamation, amongst other significant allegations, and extensive litigation on a level seldom seen by our courts. In these circumstances, and considering that the parties have already exchanged hundreds of thousands of documents, it is fair to lean towards full disclosure. As Boswell J. noted, "[t]his is not a David and Goliath battle. This is Goliath v. Goliath."

ADDITIONAL COMMENTS

[69] It also bears noting that the parties filed thousands of pages of documents on this motion. This included the Catalyst Parties, as noted, providing me with the privileged documents on the day of the motion. These included not only the documents in dispute but also documents not in dispute involving communications between the Catalyst Parties and their solicitors, communications between Glassman and Guy using the WhatsApp platform, as well as handwritten notes, as referred to above, of Lutes.

[70] Counsel for West Face invited me to also make determinations of privilege with respect to these documents. I declined to do so since there was no motion record before me and, frankly, the volume of documents produced, including these documents (which were not provided to me in their entirety), made such an endeavour unworkable.

[71] Now that the parties have the benefit of these reasons, and the reasons of Boswell J., I would urge them to try to resolve their differences concerning the production of those documents.

[72] If they cannot, I can be spoken to and they can be added to the future motions that I am scheduled to hear.

[73] It is imperative that all production motions be determined well in advance of the May 17, 2021 hearing date for the anti-SLAPP motions.

DISPOSITION

[74] For the reasons above, I order that the Catalyst Parties produce the Dalton Report, the Guy Documents and the OSC/SEC Documents. I further order that Riley reattend to answer questions arising out of the production of the documents that were refused or taken under advisement at his previous cross-examination.

[75] In this regard, I note that the Anderson Defendants specifically provided questions to this Court appended to their notice of motion. These specific questions were not dealt with at the

motion. If any disputes arise between the parties I can be spoken to, although I would expect that the parties can resolve these differences between themselves.

[76] Like Boswell J., I recognize that one party or another may seek to appeal this ruling. I similarly order that this Endorsement not be disseminated or published in any way, beyond counsel and their clients for a period of thirty days. If any party moves for leave to appeal within the thirty day period, then this publication ban will continue until the motion for leave to appeal has been determined by the Divisional Court. The publication ban will expire if no party moves for leave to appeal within the thirty days.

[77] If the parties cannot agree on the issue of costs, I can be spoken to at a thirty minute case conference concerning further steps with respect to the delivery of written submissions.

McEwen, J.

Released: February 12, 2021

Refusing leave to appeal from privilege ruling of Justice McEwen

CITATION: Catalyst Capital Group Inc. et al. v. West Face Capital Inc. et. al, 2021 ONSC 2072
DIVISIONAL COURT FILE NO.: 157/21
DATE: 2021/03/22

SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

RE: THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION

Plaintiffs/Moving Parties

AND:

WEST FACE CAPITAL INC., GREGORY BOLAND, M5V ADVISORS INC. C.O.B. ANSON GROUP CANADA, ADMIRALTY ADVISORS LLC, FRIGATE VENTURES LP, ANSON INVESTMENTS LP, ANSON CAPITAL LP, ANSON INVESTMENTS MASTER FUND LP, AIMF GP, ANSON CATALYST MASTER FUND LP, AIMF GP, ANSON CATALYST MASTER FUND LP, ACF GP,MOEZ KASSAM, ADAM SPEARS, SUNNY PURI, CLARITYSPRING INC., NATHAN ANDERSON, BRUCE LANGSTAFF, ROB COPELAND, KEVIN BAUMANN, JEFFREY MCFARLANE, DARRYL LEVITT, RICHARD MOLYNEUX and JOHN DOES #1-10

Defendants/Responding Parties

BEFORE: M. Edwards R.S.J., Penny and Doyle JJ.

COUNSEL: *John E. Callaghan, Benjamin Na, Matthew Karabus David C. Moore* and *Kenneth G.G. Jones* for the Moving Parties

Kent Thomson, Matthew Milne-Smith and *Andrew Carlson for the Respondents West Face Capital Inc. and Gregory Boland*

Lucas Lung and Rebecca Shoom for the Respondents ClaritySpring Inc. and Nathan Anderson

Linda M. Plumpton, Andrew Bernstein and Stacey Reisman for the Respondents M5V Advisors Inc. c.o.b. Anson Group Canada, Admiralty Advisors LLC, Frigate Ventures LP, Anson Investments LP, Anson Capital LP, Anson Investments Master Fund LP, AIMP GP, Anson Catalyst Master Fund LP, ACF GP, Moez Kassam, Adam Spears and *Sunny Puri*

Devin Jarcaig for the Respondent Bruce Langstaff

Phil Tunley and *Alexi N. Wood, for the Respondent Rob Copeland*

A.J. Freedman, for the Respondent Bruce Livesey

Darryl Levitt, self represented Respondent

Kevin Baumann, self-represented Respondent

HEARD in writing: March 22, 2021

ENDORSEMENT

[1] The motion for leave to appeal the February 12, 2021 decision of McEwen J. (2021 ONSC 1140) is dismissed with costs to the respondents of $5000.

_____

M. Edwards R.S.J.

_____

Penny J.

_____

Doyle J.

Date: March 22, 2021

Please see paras. 56-61

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Creative Salmon Company Ltd. v. Staniford,*** 2009 BCCA 61

Date: 20090213
Docket: CA034801

Between:

Creative Salmon Company Ltd.

Respondent
(Plaintiff)

And

Don Staniford

Appellant
(Defendant)

Before: The Honourable Madam Justice Levine
The Honourable Mr. Justice Frankel
The Honourable Mr. Justice Tysoe

D.F. Sutherland and D.L. Kripp	Counsel for the Appellant
D.G. Sanderson, Q.C.	Counsel for the Respondent
Place and Date of Hearing:	Vancouver, British Columbia December 15, 2008
Place and Date of Judgment:	Vancouver, British Columbia February 13, 2009

Written Reasons by:
The Honourable Mr. Justice Tysoe

Concurred in by:
The Honourable Madam Justice Levine
The Honourable Mr. Justice Frankel

Reasons for Judgment of the Honourable Mr. Justice Tysoe:

Introduction

[1] The defendant, Don Staniford, appeals from the order dated January 15, 2007, awarding the plaintiff, Creative Salmon Company Ltd. ("Creative Salmon"), $10,000 general damages and $5,000 aggravated damages for defamatory comments made by Mr. Staniford about Creative Salmon in two press releases issued in June 2005.

[2] In her reasons for judgment, indexed as 2007 BCSC 62, the trial judge found that the press releases defamed Creative Salmon and the defence of fair comment was not available to Mr. Staniford. Since the release of the reasons for judgment, the Supreme Court of Canada has modified the test for the defence of fair comment in its decision in the case of *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, 293 D.L.R. (4th) 513 (*sub. nom*. *Simpson v. Mair*, 2006 BCCA 287, 55 B.C.L.R. (4th) 30).

[3] For the reasons that follow, I would allow the appeal and order a new trial.

Background

[4] Creative Salmon is in the business of fish farming in the Clayoquot Sound on the west coast of Vancouver Island. It is committed to farming salmon with minimal environmental impact. It is a member of the Pacific Organic Seafood Association, an organization that is seeking to become a certification body for organic seafood producers. If the organization is successful in becoming a certification body, then Creative Salmon intends to apply for organic certification.

[5] At the time of the press releases, Creative Salmon farmed only indigenous species of salmon, which, as I understand it, are more susceptible to disease than Atlantic salmon. It had not used antibiotics on the fish it sold for public consumption since 2001, and it had developed several means to reduce the stress that leads to disease, including keeping fewer fish in each pen, minimizing movement of fish between pens, and taking steps to ensure that all of the fish were adequately fed. Creative Salmon took pride in its non-use of antibiotics and claimed on its website to be antibiotic free.

[6] Creative Salmon did continue to use antibiotics on its brood stock as a protection against bacterial kidney disease. The brood stock was kept separate from the production fish sold to the public.

[7] Mr. Staniford is a committed environmentalist with a particular focus on fish farming. He has campaigned against open-net salmon farming since 1998 and worked in Scotland as the aquaculture campaigner for the Friends of the Earth and the Salmon Farm Protest Group. In November 2004, Mr. Staniford came to Canada to become employed as aquaculture campaigner for Friends of Clayoquot Sound, a non-profit society with a mission to protect the forest and ocean of Clayoquot Sound. The society is opposed to open-net salmon farming and to organic certification of farmed salmon. Mr. Staniford's role was to build government and public opposition to open-net salmon farming in the Clayoquot Sound, including opposition in the organic community to the concept of labelling any type of open-net salmon farming as being organic.

[8] Mr. Staniford learned two pieces of information that gave rise to the two press releases in question, which were issued on June 24, 2005 and June 27, 2005. The first piece of information was a report that the Canadian Food Inspection Agency had found trace amounts of an antifungal agent called malachite green in a Creative Salmon fish (0.33 parts per billion). Malachite green was historically used in hatcheries but, at the time of the first press release, it was not approved for use in fish intended for human consumption in Canada.

[9] Malachite green has also been used as an industrial dye by, among others, pulp and paper mills. To Mr. Staniford's knowledge, malachite green takes a long time to break down in water, and it is possible for a fish to become contaminated with malachite green from the waters of the Pacific Ocean.

[10] Creative Salmon did not use malachite green in its fish farming enterprise. It voluntarily suspended its fish sales upon being advised of the finding of malachite green so that it could investigate the matter. It was at this point that the Friends of Clayoquot Sound issued the first press release, which was authored by Mr. Staniford.

[11] The relevant portion of the first press release was as follows:

> Creative Salmon Goes Green
>
> - Clayoquot Sound factory closed due to chemical contamination?
>
> Tofino, BC – Has Creative Salmon suspended sales of farmed salmon after testing positive for the carcinogenic fungicide malachite green? …
>
> Don Staniford, Friends of Clayoquot Sound aquaculture campaigner, said:

> "If malachite green contamination is confirmed, this blows out of the water Creative's claims to be 'organic' and chemical-free. Creative Salmon must come clean on malachite green. Sea cage salmon farming in the Clayoquot Sound UNESCO Biosphere Reserve is a threat to both public safety and to the health of wild salmon and the pristine ocean forest."

[12] Creative Salmon's subsequent investigation confirmed that none of its feed suppliers or its contracted hatchery used malachite green. Samples of its fish were sent to be tested for the presence of malachite green, and the results received were negative. It resumed sales of its salmon on June 30, 2005, and it queried whether the finding of the Canadian Food Inspection Agency was an error.

[13] The second piece of information learned by Mr. Staniford came in the form of a response to a freedom of information request made to the Ministry of Environment. The response disclosed that Creative Salmon reported to the Ministry that it had used in the range of 230 to 250 kilograms of antibiotics at three farm sites in 2004.

[14] Mr. Staniford was confused when he received this information because it did not seem consistent with statements on Creative Salmon's website. He did not know whether or not the antibiotics had been given to Creative Salmon's brood stock or to its production fish because the response from the Ministry did not distinguish between the two types of fish.

[15] Despite his confusion and without making an inquiry of Creative Salmon, Mr. Staniford authored the second press release, the relevant portions of which read as follows:

Creative's 'Organic' Antibiotic Salmon Scam

- FOCS lodges 'Deceptive Marketing Practices' complaint with the Competition Bureau

Tofino, BC – Just a week after Creative Salmon closed its Clayoquot Sound-based factory due to malachite green contamination, Creative Salmon is exposed by information supplied by the Ministry of Environment (MoE) as a liar and a consumer fraud. Data on chemical use in Clayoquot Sound were obtained by Friends of Clayoquot Sound last week under Canada's Freedom of Information laws. The MoE documents, dated 20th June 2005, reveal that during 2004 nearly a quarter of a tonne of antibiotics (245.01 kg) were used by Creative Salmon in the Clayoquot Sound UNESCO Bioshphere Reserve: …

Despite this evidence, Creative Salmon (www.creativesalmon.com) still claims:
-"The fish that Creative Salmon sells [have] never been fed antibiotic"
-"Fish are grown to harvest size following our organic standards, in low density net pens without the use of antibiotics"
-"In fact Creative Salmon has been antibiotic free since Oct 17, 2001"
-"1349 days antibiotic free"

Don Staniford, Friends of Clayoquot Sound aquaculture campaigner, said:
"Japanese-funded Creative Salmon is being dangerously creative in its definition of 'organic' salmon farming. Last week, Creative's 'green' credentials were exposed when its Tofino-based factory closed because of malachite green contamination. And now its reputation has been well and truly shattered with the Ministry of the Environment's damning revelations of antibiotic use".

FOCS is lodging a formal complaint against Creative Salmon with the Competition Bureau under the Deceptive Marketing Practices part of the Competition Act.

"If Creative Salmon is telling such blatant lies, how is the public expected to believe the company's claims to be 'organic'?" Staniford said. "By discharging contaminated wastes, Creative is endangering the pristine marine environment of Clayoquot Sound. And by making spurious claims to be 'green', it is endangering the reputation of honest local business people who depend on the integrity of the UNESCO Biosphere Reserve. Consumers and locals alike have apparently been lied to and Creative must surely be held accountable."

[footnotes omitted]

[16] In its statement of claim, Creative Salmon alleged that Mr. Staniford had falsely and maliciously published defamatory statements about it in the two press releases. It claimed general, special, aggravated and punitive damages.

[17] In her reasons for judgment, the trial judge found that the two press releases were published by Mr. Staniford, were defamatory of Creative Salmon and were not justified in the sense of being true. None of these findings is challenged on appeal.

[18] The judge held that the defence of fair comment was not available in respect of either of the press releases. She ruled that the defence was not available in respect of the defamatory comments in the first press release because "Mr. Staniford's statements that Creative Salmon was dishonest were not warranted by the facts known to Mr. Staniford at the time he made the statements in the June 24th press release" (para. 44). She held that the defence was not available in respect of the defamatory comments in the second press release because "Mr. Staniford has not met the burden of establishing that the words complained of in the June 27th press release are fair comment based on facts that are true, and made honestly and fairly" (para. 67).

[19] In view of the holding that the defence of fair comment was not available, the trial judge concluded there was no need to address the issue of whether malice would have defeated such a defence. However, she did deal with the issue of malice in connection with the claim for aggravated damages, and she held that Mr. Staniford had been motivated by actual malice. The judge awarded aggravated

damages of $5,000, as well as general damages of $10,000. The award of general damages was relatively modest because there was no evidence at trial that Creative Salmon had been unable to sell any of its fish as a result of the press releases. A cross-appeal by Creative Salmon in respect of the amount of the damages has been abandoned.

Positions Of The Parties

[20] Mr. Staniford says the trial judge misstated part of the pre-*WIC Radio* test for the defence of fair comment and that, as a result, she did not properly analyze the defence. He also argues the judge failed to make findings as to what words in the press releases were statements of fact and what words were comment, with the consequence that she failed to make a ruling as to whether the sting of the imputations was fact or comment. Finally, Mr. Staniford submits the judge erred in finding that he was motivated by malice.

[21] Mr. Staniford asks this Court to allow the appeal and to dismiss Creative Salmon's action or, alternatively, to remit the matter back to the Supreme Court. He also requests that the funds posted by him as security for the trial judgment and costs of the appeal be returned.

[22] Creative Salmon concedes the trial judge misstated the test for the defence of fair comment, but says that the error is immaterial because the judge found that Mr. Staniford did not have an honest belief in the defamatory statements he made in the press releases. Creative Salmon says that the defence of fair comment is not available to Mr. Staniford under the test formulated in *WIC Radio* for three reasons:

(i) the trial judge found as a fact that Mr. Staniford was actuated by malice; (ii) no person could honestly have expressed the defamatory comments on the proven facts; and (iii) Mr. Staniford's comments were not based on facts truly stated.

Discussion

The *WIC Radio* Decision

[23] Before discussing the reasons of the trial judge, it is necessary to briefly describe the changes brought about by *WIC Radio*. The previous test for the defence of fair comment, as set out in the dissenting judgment of Mr. Justice Dickson in *Cherneskey v. Armadale Publishers Ltd.*, [1979] 1 S.C.R. 1067, 90 D.L.R. (3d) 321, and endorsed by Mr. Justice Binnie in *WIC Radio* at para. 28, together with an addition stipulated by the majority judgments in *Chernesky*, may be paraphrased as follows:

(a) the comment must be on a matter of public interest;

(b) the comment must be based on fact;

(c) the comment, though it can include inferences of fact, must be recognizable as comment;

(d) the comment must satisfy the following objective test: could any [fair-minded] person honestly express the opinion on the proved facts?;

(e) the comment must satisfy the following subjective test: was the comment an honest expression of the defendant's opinion?; and

(f) the defence can be defeated if the plaintiff proves that the defendant was [subjectively] actuated by express malice.

I have included the word “fair-minded” in item (d) in brackets because there was a debate in the authorities preceding *WIC Radio* whether the hypothetical person in the objective test should be required to be a fair-minded person. The word “subjectively” in item (f) is in brackets because, although it was not included as part of the test in *Chernesky*, it was added in brackets by Mr. Justice Binnie in *WIC Radio* when he was setting out the test from Mr. Justice Dickson’s dissenting reasons.

[24] The problem confronting the Supreme Court of Canada in *WIC Radio* was that the defendant had intended to convey one meaning in his comments but was objectively held to have conveyed a different meaning. He honestly believed the opinion he intended to convey but did not honestly believe the meaning he was taken to have conveyed. For this and other reasons, the Supreme Court of Canada decided that the “subjective honest belief” requirement should no longer be part of the test, except in the indirect sense that it is a consideration in determining whether the defendant was actuated by malice. The Court also decided that the objective element of the test should make reference to any person, no matter how obstinate or prejudiced, rather than a fair-minded person.

[25] Accordingly, the test for the defence of fair comment may now be stated as follows:

(a) the comment must be on a matter of public interest;

(b) the comment must be based on fact;

(c) the comment, though it can include inferences of fact, must be recognizable as comment;

(d) the comment must satisfy the following objective test: could any person honestly express the opinion on the proved facts?; and

(e) the defence can be defeated if the plaintiff proves that the defendant was subjectively actuated by express malice.

Errors by the Trial Judge

[26] Creative Salmon concedes the trial judge erred when she articulated the "subjective honest belief" requirement of the pre-*WIC Radio* test in stating at para. 39 that Mr. Staniford was required to satisfy the following:

> (i) subjective honesty of belief in the defamatory statement, that is, the comment is one which a fair minded person would honestly make on the facts proved.

The trial judge erred by interposing an objective element into the subjective test.

[27] Creative Salmon says the judge did not carry the error forward into her reasoning because she concluded that Mr. Staniford did not honestly believe the comments he made in the two press releases. I do not agree with this assertion. For example, the judge's reason for concluding that the defence was not available in respect of the first press release was that "Mr. Staniford's statements that Creative Salmon was dishonest were not warranted by the facts known to Mr. Staniford at the

time he made the statements in the June 24th press release." Her use of the word "warranted" indicates that she was applying an objective standard. It is also not entirely clear whether the judge repeated this error by injecting an objective element when she concluded that Mr. Staniford had not met the onus of establishing the defence of fair comment in respect of the second press release.

[28] However, the error of the trial judge in this regard has been overtaken by the evolution of the law brought about by *WIC Radio*. The judge has retroactively been placed in error by *WIC Radio* in the following two respects:

(a) she required Mr. Staniford to satisfy the "subjective honest belief" requirement when it is no longer part of the test for the defence of fair comment; and

(b) the hypothetical person she used in stating the objective test was a "fair minded" person, not any person (no matter how obstinate or prejudiced).

With respect to the second of these errors, the trial judge did correctly refer, at para. 39(ii), to "a person" in stating the objective test, but she made reference, at para. 41(iii), to a "fair minded person" when she was setting out the items Mr. Staniford was required to establish in respect of the first press release.

[29] In view of these errors, the issue becomes whether other findings of the trial judge sustain her decision (as argued by Creative Salmon) or whether these and other errors put this Court in a position to dismiss Creative Salmon's action (as argued by Mr. Staniford). A third option is that the decision cannot stand and a new

trial is required. I will begin by considering Creative Salmon's three grounds for sustaining the decision because, if it is correct on any of the three grounds, the appeal must be dismissed.

(i) Malice

[30] Creative Salmon submits that Mr. Staniford's reliance on the defence of fair comment is defeated by malice. One of Mr. Staniford's grounds of appeal is that the trial judge erred in finding that he was actuated by malice.

[31] The judge did not consider the topic of malice in connection with the defence of fair comment but, rather, she relied upon it in awarding aggravated damages against Mr. Staniford. It is conceded by Mr. Staniford that the meaning of the word "malice" is the same for each of these two purposes.

[32] Creative Salmon says that malice was proven because the trial judge concluded that Mr. Staniford made statements he knew to be untrue and failed to disclose information that resulted in a misleading statement. It relies on the following passage from Mr. Justice Cory's majority judgment in *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3, 126 D.L.R. (4th) 609:

> 79 ... [Qualified privilege] may be defeated in two ways. The first arises if the dominant motive for publishing is actual or express malice. Malice is commonly understood as ill will toward someone, but it also relates to any indirect motive which conflicts with the sense of duty created by the occasion. Malice may be established by showing that the defendant either knew that he was not telling the truth, or was reckless in that regard.

Malice for the purpose of defeating the defence of qualified privilege is the same as malice for the purpose of defeating the defence of fair comment.

[33] I do not interpret the above passage to equate lack of honest belief to malice. In my opinion, malice is a state of mind, and the passage stands only for the proposition that a trier of fact may draw an inference of malice if the defendant knew he or she was not telling the truth or was reckless as to the truth of the statement.

[34] A comment similar to the above passage was also made by Mr. Justice Dickson in *Cherneskey* (at 1099). However, in *WIC Radio*, Mr. Justice LeBel added the following qualification, after quoting the comment in *Cherneskey*:

> 102 I adopt this definition, although I wish to emphasize that while proof that the comment is not the honest expression of the publisher's real opinion may be evidence of malice, it is not determinative. Indeed, there may be non-malicious and valid reasons for publishing views one does not personally hold.

I agree with this qualification. It is open to the trier of fact to draw an inference of malice from a lack of honest belief, but there may be circumstances where malice is not the dominant motive of the defendant even though he or she does not have an honest belief in the comment they expressed. In *Gatley on Libel and Slander*, 10th ed. (London: Sweet & Maxwell, 2004) at para. 16.4, the authors express the view that "malice arises only where the defendant acts from an improper motive: knowledge of or recklessness as to falsity is not a separate head of malice, it is simply a way of establishing that the defendant was acting from an improper motive...".

[35] If Creative Salmon is correct in its position that the trial judge concluded that Mr. Staniford had been actuated by malice because she found he made statements he knew to be untrue, this Court could not interfere with the conclusion unless her finding of fact constituted a palpable and overriding error: see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

[36] As a result of the error made by the judge in her articulation of the "honest belief" requirement of the pre-*WIC Radio* test, I am not satisfied the judge did find that Mr. Staniford did not honestly believe the opinions he expressed in the two press releases. More importantly, however, it is clear the judge did not rely on a lack of honest belief in making her finding of malice. She stated her reason for making the finding in the following paragraph of her reasons:

> [93] In my view, Mr. Staniford was motivated by actual malice in that he was trying to build up opposition to Creative Salmon as a company that was attempting to obtain organic certification for its fish. In the circumstances an award of aggravated damages of $5,000 is appropriate.

In my view, this motivation does not constitute malice at law.

[37] In *Botiuk* at para. 79, malice was defined to include "ill will" and "any indirect motive which conflicts with the sense of duty created by the occasion [in the case of qualified privilege]". The definition of malice stated by Mr. Justice Dickson in *Cherneskey* at 1099, and adopted by Mr. Justice LeBel in *WIC Radio* at para. 102, includes "spite or ill will" and "any indirect motive or ulterior purpose".

[38] The trial judge did not make a finding that Mr. Staniford was motivated by ill will or spite. Thus, the finding of malice against Mr. Staniford can only stand if it involved a finding that he was motivated by an indirect motive or an ulterior purpose. In this regard, the indirect motive or ulterior purpose must be indirect or ulterior to the objective of the defence of fair comment.

[39] The objective of the defence is described as follows in *Gatley on Libel and Slander* at para. 12.1:

> There are matters on which the public has a legitimate interest or with which it is legitimately concerned and on such matters it is desirable that all should be able to comment freely …

In R.D. McConchie and D.A. Potts, *Canadian Libel and Slander Actions* (Toronto: Irwin Law, 2004) at 335, the authors begin the chapter on fair comment with the sentence: "The defence of fair comment is a cornerstone of free speech in Canada."

[40] In the present case, the trial judge held that Mr. Staniford was motivated by malice because he was trying to build up opposition to Creative Salmon obtaining organic certification for its fish. Mr. Staniford and his employer, Friends of Clayoquot Sound, were opposed to open-net salmon farming in the Clayoquot Sound. They did not believe that open-net salmon farming should be regarded as organic, and they were opposed to the possibility of Creative Salmon's fish products being given an organic certification. Mr. Staniford was endeavouring to build up opposition by attempting to influence public opinion on the topic of organic certification for the product of open-net salmon farming, a matter of legitimate public interest.

[41] The protection of a person's ability to exercise his or her right to freedom of expression in order to attempt to influence public opinion on legitimate public issues is the objective of the defence of fair comment. The defence cannot be defeated if Mr. Staniford was doing the very thing that the defence was designed to protect. What the trial judge found to be malice was not malice at law because her finding of Mr. Staniford's motivation did not represent an indirect motive or ulterior purpose.

[42] I would add that the trial judge did not make a finding that Mr. Staniford's motive of building up opposition against Creative Salmon's efforts to obtain organic certification was his only motivation. In order to defeat the defence of fair comment, malice must be the dominant or overriding motive: see *Botiuk* at para. 79, above, and *Ward v. Clark*, 2001 BCCA 724, [2002] 2 W.W.R. 238 at para. 53. The trial judge presumably did not make a finding in this regard because she was dealing with the topic of aggravated damages, and not the defence of fair comment, when she made the finding of malice.

[43] Creative Salmon points to evidence referred to by the trial judge (paras. 84, 86, 91, 92 and 93 of her reasons) and other evidence to support a finding of malice, implicitly urging us to make such a finding in the event we conclude that the reason given by the trial judge does not constitute malice. Mr. Staniford requests that Creative Salmon's claim be dismissed (provided that the other elements of the test for the defence of fair comment are satisfied).

[44] Malice is a state of mind. Only the trier of fact can determine Mr. Staniford's state of mind when he published the two press releases. This Court cannot look to the evidence and make its own finding in this regard.

[45] Although the reason given by the trial judge does not constitute malice at law, it is my view that on the basis of the evidence before the trial judge it would be open to a trier of fact to make a finding of malice against Mr. Staniford. Hence, it would not be appropriate for this Court to dismiss Creative Salmon's claim.

[46] As a result, neither of the courses of action advocated by the parties is open to this Court. Although it is regrettable in view of the added expense, I believe there must be a new trial unless Creative Salmon is successful on either of its other two grounds for sustaining the trial judge's decision.

(ii) The Objective Element of the Test

[47] Creative Salmon submits that although the trial judge did not expressly consider the objective element of the test for the defence of fair comment, the defence must fail because no person could honestly believe the comments Mr. Staniford made in the two press releases. It may be that the judge did effectively consider the objective element when she was dealing with the misstated subjective element of the pre-*WIC Radio* test but, in any event, she was viewing it from the perspective of a fair-minded person, not from the viewpoint of any person, as required by *WIC Radio*.

[48] The objective element of the test does not require a determination of the state of mind of a particular person. As a result, unlike the situation with respect to a finding of actual malice, this Court is in the same position as the trial judge with respect to assessing the objective element on the facts proven at trial.

[49] In discussing the objective element of the test in *WIC Radio*, Mr. Justice Binnie acknowledged that the threshold for satisfying it is not high:

> 50 Admittedly, the "objective" test is not a high threshold for the defendants to meet, but nor is it in the public interest to deny the defence to a piece of devil's advocacy that the writer may have doubts about (but is quite capable of honest belief) which contributes to the debate on a matter of public interest.
>
> 51 Of course, even the latitude allowed by the "objective" honest belief test may be exceeded. "Comment must be relevant to the facts to which it is addressed. It cannot be used as a cloak for mere invective"; *Reynolds* [*Reynolds v. Times Newspapers Ltd.*, [1999] 4 All E.R. 609 (H.L.)], at p. 615.

Mr. Justice Rothstein did not believe that a requirement for objective honest belief was even necessary as an element of the defence because "I cannot think of an example in which the test of objective honest belief could not be met once it is demonstrated that the comment has a basis in true facts" (para. 110).

[50] In the present case, the comments made by Mr. Staniford in the two press releases were relevant to the facts that he was addressing. The fact addressed in the first press release was expressed in the form of an answer to the question "[h]as Creative Salmon suspended sales of farmed salmon after testing positive for the carcinogenic fungicide malachite green?" The opinions were expressed on the basis of the contingency that malachite green contamination was confirmed. The opinions

related to the expressed fact, and it cannot be said that no person, irrespective of how obstinate or prejudiced they may be, could honestly hold those opinions.

[51] Similarly, the opinions or comments expressed in the second press release related to the facts that were being addressed. It was disclosed that Creative Salmon had reported to the Ministry of Environment that it had used a considerable quantity of antibiotics in 2004, while Creative Salmon claimed on its website that it had been antibiotic free since 2001. Although the trial judge objectively found that the statements on the website related only to production fish sold to the public, the website was open to an interpretation that Creative Salmon was claiming it did not use antibiotics in any aspect of its operations. The comments expressed in the press release related to this potential discrepancy, and it cannot be concluded that no person could have honestly expressed those comments.

[52] Hence, the objective element of the test for the defence has been satisfied with respect to both of the press releases.

(iii) Facts Truly Stated

[53] Creative Salmon submits the defence of fair comment is not available to Mr. Staniford because the requirement of the defence that the comment be based on fact includes an obligation to state the facts truly. The trial judge did not make any finding on this point.

[54] Creative Salmon begins the submission by quoting the following from Raymond E. Brown, *The Law of Defamation in Canada*, 2d ed., vol. 2 (Canada: Thomson Canada, 1999) at p. 15-2:

> In order to be fair, it must be shown that the facts upon which the comment is based are truly stated ...

Creative Salmon then cites the decisions in *Taylor-Wright v. CHBC-TV, a division of WIC Television Ltd.*, [1999] B.C.J. No. 334 (S.C.), aff'd 2000 BCCA 629; *Myers v. Canadian Broadcasting Corp.* (1999), 47 C.C.L.T. (2d) 272 (Ont. S.C.J.), rev'd in part on damages (2001), 54 O.R. (3d) 626, 6 C.C.L.T. (3d) 112 (C.A.), leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 433; and *Leenen v. Canadian Broadcasting Corp.* (2000), 48 O.R. (3d) 656, 50 C.C.L.T. (2d) 213 (S.C.J.), aff'd (2001), 54 O.R. (3d) 612, 6 C.C.L.T. (3d) 97 (C.A.), leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 432.

[55] The case of *Taylor-Wright* involved television broadcasts about court proceedings involving the control of the board of directors of a society. The broadcasts included allegations contained in affidavits of theft and fraud against the plaintiffs, who were endeavouring to have three directors of the society removed and replaced. Mr. Justice Drossos held the broadcasts were defamatory and no defences had been proven by the defendants. Creative Salmon relies on the following conclusion from *Taylor-Wright* (B.C.S.C.) regarding the omission of relevant information from the broadcasts:

> 143 I accordingly conclude that the complained of allegations arising from the February 13th broadcast, although substantially accurate as far as they went, such were not because of significant and relevant

> omissions substantially fair. The defendant is therefore not entitled to the defence of privilege or fair comment at common law or under section 3 of the statute. The defendant is therefore liable in damages to the plaintiffs for the libel that flows from the February 13th broadcasts.

Mr. Staniford maintains that *Taylor-Wright* was really a case dealing with privilege, in respect of which there is a requirement for fair and balanced coverage.

[56] The cases of *Myers* and *Leenen* involved the same episode of *the fifth estate* shown by the CBC about a controversial heart medication. Both Dr. Myers and Dr. Leenen were successful in their defamation claims. Creative Salmon quotes the following from *Myers*:

> 111 I conclude that no fair-minded person, nor indeed any reasonable person, could have come to hold the views about Dr. Myers which were conveyed in the program, given all the facts (reported and unreported) available to the defendants. From my review of the detailed transcripts and the tapes, including the parts which were not used in the program, I find that the CBC dramatically simplified a complex medical debate by seriously mischaracterizing Dr. Myers' position. The CBC set him up quite unfairly as a "bad guy" in the debate.

In *Leenen*, at para. 122, Mr. Justice Cunningham quoted the above passage and commented that the same applied to the CBC's treatment of Dr. Leenen.

[57] Creative Salmon also relies on the following statements of Mr. Justice Cunningham in *Leenen*:

> [126] One of the elements of fair comment, of course, is fairness. If it is found that the comment is unfair, the defence fails … Fairness would require that viewers be presented with both sides of the argument in a balanced way. In this case, by omitting key information, by deliberately failing to provide Dr. Leenen an opportunity to accurately present his views, and by deliberately failing to follow up with further interviews,

> the CBC cannot claim fair comment when it describes Dr. Leenen as an advocate of CCBs. The selectivity in the presentation of the material for this program in and of itself demonstrates an inherent unfairness towards those whose views did not mesh with Mr. Regush's. So much important information was kept away from the viewer, information that, had it been presented, probably would have destroyed the Regush thesis. … No comment can be fair if it is based upon facts which are invented or misstated: … Having raised the defence of fair comment, the defendants must satisfy the burden of establishing that the facts upon which it is based are true and that it is objectively fair….
>
> * * *
>
> [127a] Next I turn to the innuendo that Dr. Leenen, having co-authored the "Dear Colleague" letter in April 1995, was in a conflict of interest when he later chaired the *ad hoc* advisory committee meeting. Disbery J., in *Thomas v. Canadian Broadcasting Corp.*, [1981] 4 W.W.R. 289, 16 C.C.L.T. 113 (N.W.T.S.C.), writes at p. 338:
>
> > To only give the public a look at the side of the coin supportive of their comments and opinions and not show the facts to the contrary on the other side of the coin is to deal in half-truths, and comments made in this way are neither fair nor made in good faith.
> >
> > * * *
> >
> > [150] In the present case an inference of malice may be drawn from the fact that the defendants wilfully misrepresented the facts by omitting significant evidence contrary to their thesis.

[58] *The Law of Defamation in Canada* elaborates, at pp. 15-84 to 15-86, on the requirement that the facts be truly stated:

> [The facts] must be truly stated, or, at least, be substantially true. They must not be patently distorted or materially misstated, or so incomplete as to lead to a material alteration of the truth. A necessary foundation for the defence of fair comment is the truth of the facts commented upon. It is not sufficient to show some of the facts upon which the comment is made are true if some are also false, or if material facts are omitted which would fundamentally change the complexion of the facts which are stated. [footnotes omitted]

[59] *Gatley on Libel and Slander* makes the point in the following fashion at para. 12-17:

> Again, the defence of fair comment will fail if the defendant omits from the statement of facts on which the comment purports to be based some important fact which (had it been mentioned) would falsify or alter the complexion of the facts that are stated. For example, if A states that B was convicted by a jury of a serious crime and comments adversely on the fact, but omits to state that the conviction was quashed by the Court of Appeal, his words cannot be defended as fair comment. [footnote omitted]

[60] In my opinion, the requirement to state the facts truly does not obligate the commentator to set out all facts, both pro and con, relevant to the matter upon which he or she is commenting. Such an obligation would unduly hinder the commentator from forcefully expressing his or her opinion. Of course, the omission of relevant facts will be a factor to consider in determining whether or not malice was the primary motive of the commentator.

[61] I agree with the authors of *The Law of Defamation in Canada* and *Gatley on Libel and Slander* that the requirement to state the facts truly means in the present context that the commentator may not omit to state important or material facts that would falsify or alter the complexion of the facts stated in the commentary. It is not necessary to state all facts of a nature that may influence the opinion of the person hearing or reading the commentary. In order to defeat the defence, the omitted facts must be sufficiently fundamental that they undermine the accuracy of the facts expressed in the commentary to the extent the stated facts cannot be properly regarded as a true statement of the facts.

[62] The trial judge in the instant case found that Mr. Staniford omitted the following facts from the press releases:

(a) he omitted from the first press release the fact that it is possible for a fish to become contaminated by malachite green from the waters of the Pacific Ocean; and

(b) he omitted from the second press release the fact that he was confused when he received the information about antibiotic use from the Ministry of Environment and did not know if Creative Salmon had used the antibiotics on production fish sold to the public or on the brood stock.

[63] In my view, these omitted facts are not sufficiently fundamental that they undermine the accuracy of the facts that are stated in the press releases. The fact stated in the first press release was that Creative Salmon suspended sales of farmed salmon after testing positive for malachite green. The prospect of the fish becoming contaminated from the waters of the Pacific Ocean was one of several possibilities, and it was not known to be the most likely of the potential sources of contamination. Creative Salmon was sufficiently concerned that it was not an isolated event that it suspended its sales of fish. After it conducted its investigation, Creative Salmon queried whether the Canadian Food Inspection Agency had made an error, which suggests that Creative Salmon thought an error was a more likely explanation than contamination from the open waters.

[64] With respect to the second press release, I do not consider the omission from it to be an objective fact. The omission relates to the subjective state of Mr. Staniford's mind. In my opinion, the omission goes to the issue of malice, and it

does not undermine the accuracy of the stated fact that the information obtained from the Ministry of Environment disclosed the use of antibiotics by Creative Salmon in 2004, while it claimed on its website to have been antibiotic free since 2001.

[65] In the result, I would conclude that, on the evidence before the trial judge, Mr. Staniford did not fail to state the facts truly so as to deprive himself of reliance on the defence of fair comment.

Other Grounds of Appeal

[66] In addition to challenging the trial judge's finding of malice against him, Mr. Staniford asserts errors on the part of the trial judge in failing to determine which statements in the two press releases were fact and which statements were comment, and in failing to rule whether the sting of the imputations against Creative Salmon was comment. As I have concluded that a new trial is required, it is not necessary to deal with these grounds of appeal.

Conclusion

[67] I would allow the appeal and order a new trial. Although it was necessary to make determinations on some aspects of the defence of fair comment in order to decide this appeal, it would not be appropriate in the present circumstances for this Court to limit the issues in the new trial: see *Holsten v. Card*, 2002 BCCA 290, 100 B.C.L.R. (3d) 269. Unless there is an agreement to limit the issues, the judge in the new trial will have to rule on all of the issues on the basis of the findings of fact made

by him or her (which may be different from the findings of fact made by the judge in the trial that has already taken place).

[68] I would also order that the funds posted by Mr. Staniford as security for the trial judgment and costs of the appeal, together with any interest earned on the funds, be paid out of court to or at the direction of Mr. Staniford.

"The Honourable Mr. Justice Tysoe"

I agree:

"The Honourable Madam Justice Levine"

I agree:

"The Honourable Mr. Justice Frankel"

No. 33120

July 2, 2009

Coram: McLachlin C.J. and Abella and Rothstein JJ.

BETWEEN:

Creative Salmon Company Ltd.

Applicant

- and -

Don Staniford

Respondent

JUDGMENT

The application for leave to appeal from the judgment of the Court of Appeal for British Columbia (Vancouver), Number CA034801, 2009 BCCA 61, dated February 13, 2009, is dismissed with costs.

Le 2 juillet 2009

Coram : La juge en chef McLachlin et les juges Abella et Rothstein

ENTRE :

Creative Salmon Company Ltd.

Demanderesse

- et -

Don Staniford

Intimé

JUGEMENT

La demande d'autorisation d'appel de l'arrêt de la Cour d'appel de la Colombie-Britannique (Vancouver), numéro CA034801, 2009 BCCA 61, daté du 13 février 2009, est rejetée avec dépens.

C.J.C.
J.C.C.

Please see paras. 2, 3 & 49-78

CITATION: Dyce v. Lyons-Batstone, 2012 ONSC 490
BARRIE COURT FILE NO.: 11-0333 and 11-0512
DATE: 20120120

Affirmed by the ONCA

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N	)	
	)	
Wayne Dyce	)	Wayne Dyce, Self-represented
	)	
Plaintiff	)	
	)	
- and -	)	
	)	
Debora Lyons-Batstone, Linda Paterson-Kelly, Megan Hubbard, Irene Hubbard, Petronella Hubbard	)	Debora Lyons-Batstone, Self-repesented, and for Linda Paterson-Kelly, Megan Hubbard, Irene Hubbard and Petronella Hubbard
Defendants	)	Christopher Thompson, for Eberhard J.
	)	
	)	
AND BETWEEN	)	
	)	
Megan Hubbard	)	Debora Lyons-Batstone, for Megan Hubbard
	)	
	)	
Applicant	)	
	)	
- and -	)	
	)	
James Dyce and Wayne Dyce	)	James Dyce, Self-represented Wayne Dyce, Self-represented
	)	
Respondents	)	**HEARD:** August 2, September 6, 2011

TABLE OF CONTENTS

REASONS FOR DECISION

McEWEN J.

[1] This hearing dealt with a motion brought by the defendants in court file no. 11-0333 and an application brought by Megan Hubbard in court file no. 11-512. Megan Hubbard is also one of the defendants in action no. 11-0333.

I. ORDERS SOUGHT IN COURT FILE NO. 11-0333: DYCE v. LYONS-BATSTONE

[2] In this action, the defendants, Debora Lyons-Batstone, Linda Paterson-Kelly, Megan Hubbard, Irene Hubbard and Petronella Hubbard, bring a motion seeking the following orders:

1. For an order adding James Dyce as a full party to this proceeding.

2. For an order declaring Wayne Dyce and James Dyce frivolous and vexatious litigants and further an order that restricts their access to the civil Courts of Ontario, at all levels, without leave of the Superior Court of Justice at Barrie to proceed.

3. For an order dismissing the current proceeding on the basis that it is frivolous and vexatious, or alternatively, dismissing the current proceeding on the basis that it does not disclose a cause of action.

4. Alternative to the above requested relief, an order that sets aside noting of default against the defendants Megan Hubbard, Debora Lyons-Batstone and Irene Hubbard and further an order that permits the defendants to file a joint statement of defence, in accordance with paragraph 4 herein, and;

5. An order that permits the defendants to file a joint statement of defence within 20 days after all the defendants have properly been served, and;

6. An order that Wayne Dyce and James Dyce each post security for costs in the amount of $25,000.00 within 30 days after the statement of defence is filed and;

7. An order that Wayne Dyce and James Dyce are not to take any steps in the proceeding until the security is posted with the court.

8. Costs of this motion on a full recovery basis.

II. ORDERS SOUGHT IN COURT FILE NO. 11-0512: HUBBARD v. DYCE

[3] In this application, Megan Hubbard seeks the following orders:

(a) An order finding Wayne Dyce to be a frivolous and vexatious litigant and that he may not institute any legal proceedings in any court in Ontario except by leave of a judge of the Superior Court of Justice in Barrie, Ontario.

(b) An order finding James Dyce to be a frivolous and vexatious litigant and that he may not institute any legal proceedings in any court in Ontario except by leave of a judge of the Superior Court of Justice in Barrie, Ontario.

(c) An order that the proceeding commenced before the Court of Appeal for Ontario in court file no. M39650 not be continued.

(d) An order that the purported appeals before the Court of Appeal for Ontario of the decision of His Honour Justice O'Connell not be continued.

(e) An order that the civil proceedings commenced against Debora Lyons-Batstone, Linda Paterson-Kelly, Megan Hubbard, Petronella Hubbard and Irene Hubbard in court file no. 11-0333 not be continued.

(f) Costs of this proceeding on a full recovery basis in the amount of $10,000.00 to be paid prior to the respondents seeking any future leave to institute proceedings or continue proceedings.

III. BACKGROUND

[4] Wayne Dyce and Megan Hubbard met on the internet. They were involved in a tumultuous relationship between June 2007 and April 2008. They never married. Their child, Jaxon Hubbard ("Jaxon") was conceived during their relationship. He was born on December 9, 2008. Megan Hubbard has never been married. Wayne Dyce has been married on three previous occasions: see *Dyce v. Hubbard*, 2011 ONSC 29, at paras.1-2.

[5] Wayne Dyce commenced litigation, bearing court file no. FC-08-1084, against Megan Hubbard before Jaxon was born ("the family law litigation"). Since 2007 there has been a plethora of litigation between Wayne Dyce and Megan Hubbard. There has also been ongoing litigation between Wayne Dyce's father, James Dyce, and Megan Hubbard. James Dyce has sought to enforce his rights of access as Jaxon's grandfather. As will be outlined below he has also been closely involved in Wayne Dyce's litigation against Megan Hubbard.

[6] At the hearing of the motion, Megan Hubbard filed as Exhibit "A" to her affidavit a chronological history of most of the proceedings that have transpired to date. I have attached as Schedule "A" to my reasons for decision, a copy of the document which is entitled "History of Dyce Litigation."

[7] Unfortunately, although Schedule "A" is a somewhat useful guide, it is not entirely accurate and does not include copies of all of the endorsements with respect to the family law litigation that has been carried on between Wayne Dyce, James Dyce and Megan Hubbard. Some endorsements have inexplicably been left out by counsel for Megan Hubbard. At the same time, Wayne and James Dyce did not file any materials to assist the court. Accordingly, I was left with the difficult task of trying to recreate all of the litigation that has taken place, and I have attempted to do so below. It would have been of great benefit to the court if the parties, particularly the moving parties, had provided an accurate and comprehensive accounting of the previous litigation given the seriousness of the matters before the court.

IV. LITIGATION INVOLVING WAYNE DYCE

[8] Wayne Dyce has been involved in a significant amount of litigation.

1. *Dyce v. Dyce*

[9] Wayne Dyce has also been involved in litigation with one of his former spouses, Meryl Dyce. In September 2000, Wayne Dyce married Meryl Dyce. They have one child named Emily, born February 22, 2002. Wayne Dyce and Meryl Dyce separated in 2004. Litigation between Wayne Dyce and Meryl Dyce continued between 2004 and 2008. Wayne Dyce unsuccessfully appealed the judgment resulting from the litigation to the Court of Appeal. Costs of $20,000.00 were awarded against Wayne Dyce on the appeal. As of February 15, 2011, those costs remained outstanding: see *Dyce v. Hubbard*, at paras.2-3.

2. *Dyce v. Ontario*

[10] After Wayne Dyce's appeal of his family decision concerning Meryl Dyce was dismissed, he commenced two actions, which were heard together. The first action was against judges of the Ontario and Superior Courts, numerous staff in Sarnia, and Her Majesty the Queen in Right of Ontario (court file no.4603/07). He sought damages of $3,750,000.00 against these named parties. In the second action, Wayne Dyce named Aston J., a judge of the Superior Court, as a defendant and sought $1,000,000 in damages (court file no.4673/07). In *Dyce v. Hubbard*, at para.4, Gilmore J. commented on Wayne Dyce's motive in bringing these actions: "[H]is rationale was that all of the persons named in the claim had made wrong decisions related to his family law case."

[11] On May 27, 2007, Cunningham A.C.J.S.C.J. dismissed both actions. He found, amongst other things, that the statements of claim did not disclose a reasonable cause of action,

nor could actions be brought against judges of the Superior Court or Provincial Court or Her Majesty the Queen in Right of Ontario.

[12] Cunningham A.C.S.C.J. also found that Wayne Dyce's decision to make "serious and unsubstantiated allegations" against public officials, including a member of the judiciary, should attract costs on a substantial indemnity basis. He ordered that Wayne Dyce pay the defendants in that action $6,940 in costs and he further ordered that no other proceedings were to be commenced by Wayne Dyce until this costs order had been satisfied: see *Dyce v. Ontario*, 2007 CanLII 20098 (ON SC), at para.28. According to the uncontradicted affidavit evidence of Megan Hubbard those costs remain outstanding.

[13] Wayne Dyce appealed the decision of Cunningham A.C.J.S.C.J. to the Court of Appeal. That appeal was dismissed.

3. *Dyce v. Lyons-Batstone*

[14] In addition to the family law litigation that he commenced against Megan Hubbard, Wayne Dyce has also commenced this action, which has resulted in the defendants' motion. In this action he has sued not only Megan Hubbard, but also her mother, Petronella Hubbard, her aunt, Irene Hubbard, her previous counsel of record, Linda Paterson-Kelly, and her current counsel, Debora Lyons-Batstone. The statement of claim seeks damages of $5,000,000.00. The claim generally accuses all of the defendants of making false statements under oath, as well as to the Ontario Provincial Police and to the Crown Attorney.

4. Small Claims Action

[15] Wayne Dyce commenced a small claims court action against Megan Hubbard seeking compensation for child care he provided to Jaxon. This action was dismissed in January 2010.

5. Appeals

[16] In addition to the six actions commenced by Wayne Dyce there have been a number of appeals and motions for leave to appeal. As noted above, the incomplete record filed by the parties makes it difficult to determine exactly what appeals and motions for leave to appeal have been pursued by Wayne and James Dyce. My review of the record indicates that Wayne Dyce has pursued four matters in the Divisional Court, all of which have been unsuccessful.

[17] Additionally, as noted above, Wayne Dyce has pursued matters in the Court of Appeal, with respect to his litigation with Meryl Dyce in *Dyce v. Dyce*, and in his litigation against the various judges, court staff, and the Province of Ontario. Additionally, he has pursued matters to the Court of Appeal with respect to the family law litigation on five occasions, all of which have been unsuccessful. While in the Court of Appeal, Wayne Dyce has also attempted to, on at least on one occasion, appeal one judge's order to another without success.

[18] James Dyce joined with his son Wayne Dyce in at least one of the appeals before the Court of Appeal.

V. PRELIMINARY MOTIONS BROUGHT BY WAYNE DYCE AT THE HEARING OF THIS APPLICATION AND MOTION

[19] The motion and application was originally scheduled for one day, August 2, 2011. It became evident that argument could not be completed in one day and a second day was scheduled for September 6, 2011.

1. August 2, 2011 Attendance

[20] At the commencement of the hearing, Wayne Dyce, for the first time, provided the court with a notice of motion seeking the following orders: to examine Eberhard J., a justice of the Superior Court, to deem her to be an expert witness "on the rules of Ontario and the charter of rights and freedoms," to strike out the motion record and application record as not having been properly served, to examine Debora Lyons-Batstone, and, to cross-examine Megan Hubbard on her affidavits. No supporting materials were filed. After hearing argument, I dismissed the relief sought by Wayne Dyce with more detailed written reasons to follow, which I now give.

[21] First, Wayne Dyce delivered a summons to witness to Eberhard J. to attempt to compel her to attend at the motion to be examined by him, which I quashed. The parties had appeared before Eberhard J. concerning this motion and application on June 7 and June 28, 2011. Eberhard J. made a number of preliminary rulings, including setting a timetable, so that the matters could proceed before me. As I will describe in greater detail below, both attendances were acrimonious with Wayne Dyce engaging in extremely rude, profane and otherwise unacceptable behaviour.

[22] Wayne Dyce submitted that he had a right to cross-examine Eberhard J. since she had substantial information about the case, and could interpret the Canadian *Charter of Rights and Freedoms* and the *Rules of Civil Procedure*, R.R.O. 1990, Reg.194. He also argued that Eberhard J. should be called as a witness so that he could determine whether she was in fact a judge of the Superior Court. He claimed there was no evidence that she was a judge and he was not prepared to concede that fact. He further indicated that he had a right to examine her as to her public record, the time she spent as a lawyer, and her legal education. Amongst other things, he also submitted that I could not hear the motion since I was in a conflict of interest as I too am a judge of the Superior Court.

[23] Mr. Thompson, on behalf of the Attorney General of Ontario, brought a motion to quash the summons. He submitted, amongst other things, that Eberhard J. was not a compellable witness insofar as her judicial functions are concerned and that there was no evidence filed or reasonable argument made by Wayne Dyce that she had evidence that made her a compellable witness. I agreed and quashed the summons to witness against Eberhard J.:

see *R. v. Parente*, [2009] O.J. No.1639; *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796; and *Ontario Federation of Anglers & Hunters v. Ontario*, [2002] O.J. No. 1445.

[24] In my view, this motion was a bald attempt to falsely impugn the office and integrity of Eberhard J. It was intended to cause her personal angst and difficulty as a result of her clashes with Wayne Dyce during the June court attendances which will be discussed further below.

[25] Second, I also dismissed the motion to strike both the motion record and the application record. It is clear that both records were properly served as demonstrated by the affidavits of service. Furthermore, service of the materials has been a thorny issue for some time. Both Wayne and James Dyce complained of service issues to Eberhard J. in both of their attendances on June 7 and 28, 2011. Eberhard J. made a number of orders concerning service. She specifically ordered that, to ensure that Wayne and James Dyce obtained all documentation, they could attend at the SCJ secretary's office to obtain all relevant documentation on June 9 or 10, 2011. Service would then been deemed to have occurred by June 10, 2011 at 4:30 p.m. Neither of them saw fit to attend to obtain the documentation. In any event, it was obvious that Wayne and James Dyce had the materials at the hearing of the motion and the application.

[26] Third, I also dismissed the motion with respect to the examination of Debora Lyons-Batstone. Ms. Lyons-Batstone did not swear an affidavit in the proceedings. Furthermore, prior to August 2, 2011, no attempts had been made to examine her despite an in-depth timetable that was prepared by Eberhard J. on June 7, 2011. I also dismissed the motion to cross-examine Megan Hubbard on her affidavit. In order to do so an adjournment would have been necessary. Eberhard J. anticipated these types of issues when she implemented her timetable. Wayne Dyce did nothing at those attendances to attempt to schedule a cross-examination of Megan Hubbard.

[27] In my view, all of the relief sought in the notice of motion was an attempt by Wayne Dyce to disrupt the proper workings of the court. This is particularly so when one has regard to the endorsements of Eberhard J. which demonstrate she diligently worked to ensure that the matter could proceed on August 2, 2011.

2. September 6, 2011 Attendance

[28] Due to the multitude of issues before the court, a second hearing date was necessary on September 6, 2011. On that day, Wayne Dyce brought two further motions.

[29] In the first motion, Wayne Dyce sought to strike out all of the affidavit material filed by Megan Hubbard at the application and to dismiss the application on a summary basis. He argued that Megan Hubbard's affidavit had an illegible signature. He also claimed that Ms. Hubbard had previously brought a motion for the request sought in the application on April 22, 2011, and she could not bring an application seeking the same relief once again before the

court. I advised Mr. Dyce that I would continue to hear the motion and the application and rule on his motion in my written reasons which I do so now.

[30] This constitutes another spurious attempt by Wayne Dyce to try to disrupt the proper workings of the court. It is clear from the signature that Debora Lyons-Batstone commissioned the affidavit of Megan Hubbard. She confirmed this to me in open court. The affidavit was properly commissioned.

[31] In the first motion, as noted, Wayne Dyce also sought an order dismissing the application on the basis that the same relief was sought and refused on April 22, 2011, by O'Connell J. I reviewed the court filings with respect to that appearance. O'Connell J. dealt with a motion brought by Wayne and James Dyce, to change an existing order concerning access to Jaxon. O'Connell J. dismissed their application. In response to the motion for change, Megan Hubbard, perhaps ill advisedly, indicated in her response to motion to change that she sought an order that both Wayne Dyce and James Dyce be declared frivolous and vexatious litigants. This issue therefore was before O'Connell J. But when one reviews his decision, it is clear that the matter was not argued before him or considered by him. O'Connell J. simply dealt with the motion brought by Wayne and James Dyce, which he dismissed. A review of the record also discloses that Megan Hubbard sought this same type of relief when the matter was before Gunsolus J. on January 26, 2010. Once again, however, a review of the record discloses that Gunsolus J. did not deal with this issue.

[32] In the circumstances, therefore, I would dismiss the motion brought by Wayne Dyce to dismiss the application on the basis that the issue raised had been previously before the Court. Furthermore, I see no reason why the matter could not be revisited by the court from time to time as necessary.

[33] This brings us to the second notice of motion that was filed with the court by Wayne Dyce on September 6, 2011. This motion sought an order striking out the notices of intent to defend of Debora Lyons-Batstone and that of Irene Hubbard. It further sought an order that service of the statement of claim on Petronella Hubbard would be effective August 2, 2011, and that she be noted in default as of August 22, 2011. Once again, Mr. Dyce sought an order striking the affidavit material filed by the defendants even though this was previously dealt with on August 2, 2011. I dismissed it then, and I will not deal with it again in these reasons.

[34] With respect to the motion to strike the notices of intent to defend and the order of service on Petronella Hubbard effective August 2, 2011, I decline to do so. Mr. Dyce did not provide any evidence to support this motion. Furthermore, he provided me with no authority to allow me to do so in the circumstances of this case. As such, the relief sought in this notice of motion was dismissed.

[35] In conclusion, all motions brought by Wayne Dyce dealing with preliminary matters were dismissed.

VI. THE DEFENDANTS' MOTION IN COURT FILE NO. 11-0333

[36] I will now deal with the motion brought by the defendants in court file no. 11-0333. In this regard, I will first determine whether the matter ought to be dismissed on the basis that the statement of claim does not disclose a cause of action.

1. The Motion to Dismiss the Statement of Claim

a. The Statement of Claim

[37] In the statement of claim issued in court file no. 11-0333, Wayne Dyce seeks the following relief:

> Grounds
>
> 1. Megan Hubbard made false statements to the Ontario provincial police regarding the plaintiff causing the plaintiff to be charged with criminal harassment.
>
> 2. Megan Hubbard made false statements under oath regarding the plaintiff in an effort to have the plaintiff convicted of criminal harassment.
>
> 3. Megan Hubbard made false statements to the Crown Attorney regarding the plaintiff in an effort to have the plaintiff convicted of criminal harassment.
>
> 4. Megan Hubbard made false statements in affidavits causing the plaintiff to have restricted access to his child.
>
> 5. Megan Hubbard made false statements to the court causing the plaintiff to have restricted access to his child.
>
> 6. Megan Hubbard made false statements about the plaintiff causing the plaintiff to incur financial costs.
>
> 7. Petronella Hubbard made false statements to the Ontario provincial police regarding the plaintiff causing the plaintiff to be charged with criminal harassment.
>
> 8. Petronella Hubbard made false statements under oath regarding the plaintiff in an effort to have the plaintiff convicted of criminal harassment.

9. Petronella Hubbard made false statements to the Crown Attorney regarding the plaintiff in an effort to have the plaintiff convicted of criminal harassment.

10. Petronella Hubbard made false statements in affidavits causing the plaintiff to have restricted access to his child.

11. Petronella Hubbard made false statements about the plaintiff causing the plaintiff to incur financial costs.

12. Irene Hubbard made false statements to the Ontario provincial police regarding the plaintiff causing the plaintiff to be charged with criminal harassment.

13. Irene Hubbard made false statements under oath regarding the plaintiff in an effort to have the plaintiff convicted of criminal harassment.

14. Irene Hubbard made false statements about the plaintiff causing the plaintiff to incur financial costs.

15. Linda Paterson-Kelly made false statements to the Ontario provincial police regarding the plaintiff causing the plaintiff to be charged with criminal harassment.

16. Linda Paterson-Kelly made false statements under oath regarding the plaintiff in an effort to have the plaintiff convicted of criminal harassment.

17. Linda Paterson-Kelly made false statements to the Crown Attorney regarding the plaintiff in an effort to have the plaintiff convicted of criminal harassment.

18. Linda Paterson-Kelly made false statements to the court causing the plaintiff to have restricted access to his child.

19. Linda Paterson-Kelly made false statements about the plaintiff causing the plaintiff to incur financial costs.

20. Deborah Lyons-Batstone made false statements to the Ontario provincial police regarding the plaintiff causing the plaintiff to be charged with criminal harassment.

21. Deborah Lyons-Batstone made false statements which were the source of information to an affidavit.

22. Deborah Lyons-Batstone made false statements to the court causing the plaintiff to have restricted access to his child.

23. Deborah Lyons-Batstone made false statements about the plaintiff causing the plaintiff to incur financial costs.

b. The Law

[38] Cunningham A.C.J.S.C.J. in *Dyce v. Ontario*, where he dismissed two previous actions brought by Wayne Dyce, set out the law as to whether a statement of claim discloses a reasonable cause of action, or whether it is so bald as to be fatally defective. Cunningham A.C.J.S.C.J. stated as follows:

> [14] With respect to paragraphs 2 and 7 of action 4603/07, while it could be said that a cause of action known in law has been identified, no material facts to support what could only be described as vague allegations have been pleaded. It is not sufficient to plead bald allegations and this is especially so when allegations of intentional or malicious conduct are made. In this case, because the plaintiff has pleaded that the defendants violated his Charter rights and that the court staff have made false allegations against him, it is incumbent upon him to plead circumstances and full particulars or facts sufficient to enable the trier of fact to properly infer intentional or malicious conduct. See *Pispidikis v. Scroggie* [2002] O.J. No. 5081; *Wilson v. Toronto (Metropolitan) Police Service*, [2001] O.J. No. 2434.
>
> [15] The same would apply to paragraph 2 of the statement of claim in action 4673/07. This pleading is so bald as to be fatally defective. In that regard I refer to the decision of Epstein, J. in *Aristocrat Restaurant*, [2003] O.J. No. 5331, where she stated:
>
> > The importance of pleadings cannot be overemphasized. They define the issues in dispute. They give notice to the other side of the case to be met. They inform the court of the matters in issue. They provide a permanent record of the issues raised in deciding the action so as to prevent further litigation upon matters already judicially determined. They also play a key role in defining the scope of discovery.
> >
> > In order to survive the second type of rule 21.01(1)(b) motion, a plaintiff must, at minimum, plead the basic elements of a recognized cause of action pursuant to which an entitlement to damages is claimed. Vague allegations that make it impossible for an opposing party to reply should be struck. The court is permitted to strike out less than the entire pleading where the portion being struck is distinct.

> [16] The plaintiff argues that if I should find the pleadings to be insufficient, then he ought to have an opportunity to amend. The reality is that these allegations are so bare that no amendment could satisfy the requirement of the rules. The plaintiff frankly concedes that he has no other information because as he alleges he has been unable to obtain it. The fact is the plaintiff has no particulars to offer with respect to his various allegations. He simply has no facts to support the allegations he makes against various of the defendants. He is not entitled to begin a claim as a "fishing expedition" in order to obtain disclosure. The plaintiff must plead all materials facts on which he relies in order to establish a cause of action known in law. As Epstein, J. further stated in *Aristocrat Restaurant (supra)*,
>
> > A pleading that shows a complete absence of material facts is considered frivolous and vexatious. Bare allegations should be struck as scandalous. This is particularly so where allegations of intentional or malicious conduct are made.
>
> [17] With the exception of the paragraphs I have earlier referred to in the two statements of claim, the plaintiff's various allegations regarding conduct would not give rise to a cause of action even if they were true. The remainder of his claims relate to allegations of conduct and are in my view fatally defective. Even if I were to assume all of the facts pleaded in the two statements of claim could be proven, it is plain and obvious to me that these claims could not succeed. (*Hunt v. Carey*, [1990] S.C.J. No. 93.)

c. Analysis

[39] The allegations in this statement of claim are very similar in nature to the allegations Wayne Dyce made in the actions before Cunningham A.C.J.S.C.J. and therefore should be struck. Once again, Wayne Dyce has failed to plead circumstances and full particulars or facts sufficient to enable the trier of fact to properly determine whether false statements were made. Further, the allegations are so vague that it would be impossible for the defendants to reply and it would further be impossible to define the scope of discovery. Wayne Dyce did not make any submissions concerning any possible attempt to amend the statement of claim.

[40] Furthermore, as the pleading shows a complete absence of material facts, I find that it is frivolous and vexatious and should be struck as being scandalous: see *Aristocrat Restaurants Ltd. (c.o.b. Tony's East) v. Ontario,* [2003] O.J. No. 5331.

[41] Accordingly, pursuant to rules 21.01(1)(b), 21.01(3)(d) and 25.11 of the *Rules of Civil Procedure*, the claim is struck and the action dismissed.

2. Other Relief Sought by the Defendants

[42] In case I am incorrect with respect to the above, I will now deal with the alternative relief sought by the defendants at the motion concerning the setting aside of the noting in default, the filing of pleadings, and the motion for security for costs.

[43] The defendants, Megan Hubbard, Debora Lyons-Batstone and Irene Hubbard, were noted in default due to their failure to file a defence in response to the statement of claim issued by the plaintiff in court file no. 11-0333. They now seek to have this noting in default set aside. These defendants have not, however, explained why they failed to file a defence. Nowhere in the affidavit material filed with the court was this omission discussed. Even with that in mind, however, it is clear from a review of the on-going litigation involving these parties that these defendants are heavily involved in the action and have shown an intent to defend. While I would not set aside the noting in default, I would, if I were to entertain this alternative relief, grant these defendants leave to file further materials to deal with this issue.

[44] In addition, I agree with the defendants that this would be a case in which security for costs would be appropriate, pursuant to rule 56.01(1)(c) and (e), of the *Rules of Civil Procedure*. That rule states:

> 56.01 (1) The court, on motion by the defendant or respondent in a proceeding, may make such order for security for costs as is just where it appears that,
>
> ...
>
> (c) the defendant or respondent has an order against the plaintiff or applicant for costs in the same or another proceeding that remain unpaid in whole or in part;
>
> ...
>
> (e) there is good reason to believe that the action or application is frivolous and vexatious and that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent;

[45] In uncontradicted evidence set out in paragraphs 31 to 35 of Megan Hubbard's affidavit, which can be found in the Application Record of the defendants, the defendants explain how Wayne and James Dyce have arranged their affairs such that they are judgment proof. The defendants point to the numerous unpaid costs ordered against Wayne Dyce, as well as his failure to pay any of the monthly child support ordered by Gilmore J. They assert that Wayne Dyce is in receipt of monthly support under the Ontario Disability Support Program and that James Dyce has no discernable income. Moreover, Wayne Dyce lives in a house registered in James Dyce's name and James Dyce is in the process of building a house that is registered in the name of his eldest son. As a result of how Wayne and James Dyce have arranged their affairs, the defendants claim that there is little, if any, chance that costs against either Wayne or James Dyce could be recovered. It is for this reason that they seek security for costs.

[46] Additionally, as set out below, Wayne Dyce currently owes Megan Hubbard at least $25,675.00 in costs from proceedings and motions in the family law litigation.

[47] While I find this evidence demonstrates that an order for security for costs would be appropriate pursuant to rule 56.01(1)(c) or (e), I would be unable to grant such an order at this time since the defendants have not filed a statement of defence. Rule 56.03(1) requires that a statement of defence be filed prior to bringing a motion for security for costs. If this action was to proceed, and the defendants were to file a statement of defence, a request for an order for security costs could then be made. This would be in accordance with rule 56.03(1), which states:

> 56.03 (1) In an action, a motion for security for costs may be made only after the defendant has delivered a defence and shall be made on notice to the plaintiff and every other defendant who has delivered a defence or notice of intent to defend.

[48] I would not have granted the order sought to add James Dyce as a defendant to the action. I can see no sensible reason to force him into a lawsuit in which he has no interest.

[49] The only other order sought of significance was the order sought by the defendants to have Wayne Dyce and James Dyce declared frivolous and vexatious litigants. This is the same relief that has been sought by the applicant Megan Hubbard in her application. It can therefore be dealt with in the context of the application without requiring me to make two orders with respect to the same issue. It further makes sense to deal with this issue in the context of the application as opposed to the motion since the claim has been struck and the action dismissed. Lastly, I am concerned that I am without jurisdiction to make such an order in the context of a motion since section 140 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 requires that such relief be requested "on application:" see *Kallaba v. Bylykbashi*, [2006] O.J. No. 545 (C.A.).

VII. MEGAN HUBBARD'S APPLICATION IN COURT FILE NO. 11-0512

1. The Law

[50] Section 140 of the *Courts of Justice Act* provides the jurisdiction to a judge of the Superior Court to deem a person to be a vexatious litigant.

[51] Section 140 reads as follows:

> 140(1) Where a judge of the Superior Court of Justice is satisfied, on application, that a person has persistently and without reasonable grounds,
>
> (a) instituted vexatious proceedings in any court; or
>
> (b) conducted a proceeding in any court in a vexatious manner,
>
> the judge may order that,

> (c) no further proceeding be instituted by the person in any court; or
>
> (d) a proceeding previously instituted by the person in any court not be continued,
>
> except by leave of a judge of the Superior Court of Justice.

[52] In *Roskam v. Jacoby-Hawkins*, 2010 ONSC 4439, Boswell J. set out the rationale of section 140:

> [19] The rationale underlying s. 140 was discussed by Blair, J.A. in *Foy v. Foy* (1979), 26 O.R. (2d) 220. Though he was describing provisions of the Vexatious Proceedings Act, that legislation preceded the present s. 140 of the Courts of Justice Act and the rationale remains the same. Blair, J.A. described the object of the legislation as follows:
>
> > It is not difficult to perceive the object of the Vexatious Proceedings Act. The protection afforded honest litigants by the exercise of the Court's inherent jurisdiction to control abuse of process is subject to a serious limitation. It can only be exercised ex post facto. The vexatious litigant has the luxury of being able to initiate proceedings and to force the other party to the expense and inconvenience of responding. The severe financial burden which can be inflicted on a responding party is made obvious by this case. Moreover, the onus of proving that a proceeding is an abuse of process will always be on the responding party. Clearly the purpose of this legislation was to overcome the unfair advantage enjoyed by a vexatious litigant and, in cases where an order is made under the Act, to place upon him the onus of establishing that any proposed proceedings are not an abuse of the process of the Court. Significantly, the vexatious litigant is not deprived of the right to bring proceedings. Rather, the burden is shifted: the vexatious litigant must establish to the Court's satisfaction that there is a prima facie ground for the proposed proceedings.

[53] Further, Henry J., in *Re Lang Michener and Fabian*, (1987) 59 O.R. (2d) 353 at para.19, considered a number of judicial decisions referred to by counsel and stated as follows:

> From these decisions the following principles may be extracted:
>
> (a) the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction constitutes a vexatious proceeding;

(b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious;

(c) vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;

(d) it is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;

(e) in determining whether proceedings are vexatious, the court must look at the whole history of the matter and not just whether there was originally a good cause of action;

(f) the failure of the person instituting the proceedings to pay the costs of unsuccessful proceedings is one factor to be considered in determining whether proceedings are vexatious;

(g) the respondent's conduct in persistently taking unsuccessful appeals from judicial decisions can be considered vexatious conduct of legal proceedings.

[54] The case law has also evolved over the years so that courts may consider the behaviour of a litigant in determining whether restrictions should be imposed as per section 140 of the *Courts of Justice Act*. This is explained by Boswell J. in *Roskam v. Jacoby-Hawkins*:

> [25] The control of vexatious proceedings is necessary to protect the integrity of the judicial system. The purpose of the section is to prevent people from abusing the system for improper purposes such as harassment or oppression: *Dale Streiman & Kurz LLP v. De Teresi*, [2007] O.J. No. 255, at para. 7. Accordingly, a litigant's behaviour both inside and outside of the court is relevant: *Canada Post Corporation v. Varma*, [2000] F.C.J. No. 851. It is not unheard of for a litigant to utilize the court's processes as part of an overall strategy of harassment and abuse and the court must be vigilant to protect its process from being misused in that fashion.

[55] The behaviour of a litigant was also considered in the decision of Dawson J. in *Canada Post Corp. v. Varma*, [2000] F.C.J No. 851 at para. 23, where she stated:

> [23] A respondent's behaviour both in and out of the court has been held to be relevant. In *Canada v. Warriner* (1993), 70 F.T.R. 8 (T.D.), McGillis J. noted that frivolous and unsubstantiated allegations of impropriety had been levelled against lawyers who had acted for or against the respondent. In *Vojic, supra*, McGillis J. took into account the fact that the respondent had failed to appear on several occasions and had shown disregard for the Court. In *Yorke v. Canada* (1995), 102 F.T.R. 189 (T.D.), Rouleau J. considered a number of factors, including that the respondent's proceedings in the Federal Court were replete with extreme and unsubstantiated allegations.

[56] Finally, I note that the scope of the order that can be made when declaring a litigant to be vexatious is broad. The Court of Appeal for Ontario has made it clear that orders requiring a litigant to seek leave prior to continuing with "any such proceeding previously instituted...in any court" include appeals to their court. Only the order declaring the litigant to be vexatious is appealable as of right pursuant to section 6(1)(b) of the *Courts of Justice Act*: see *Kallaba v. Bylykbashi*. Furthermore, this order can include the staying of actions until outstanding costs orders are paid: see *Landmark Vehicle Leasing v. Marino*, 2011 ONSC 1671.

2. Analysis – Wayne Dyce

[57] As noted, Wayne Dyce has commenced a number of lawsuits as follows:

- Four years of protracted litigation against Meryl Dyce in *Dyce v. Dyce* in which he was ultimately unsuccessful and ordered to pay $20,000.00 in costs. These costs remained outstanding as of February 2011.

- *Dyce v. Ontario*, court file no. 4603/07, wherein Wayne Dyce commenced litigation against a number of judges, court staff and Her Majesty the Queen arising from his unsuccessful litigation with Meryl Dyce. This action was dismissed by Cunningham A.C.J.S.C.J for a number of reasons including the fact that the proceedings failed to disclose a cause of action and were frivolous and vexatious.

- *Dyce v. Ontario*, court file no. 4673/07, in which Wayne Dyce commenced an action against Aston J. which was similarly dismissed by Cunningham A.C.J.S.C.J. for the same reasons as those listed above, amongst others.

- *Dyce v. Lyons-Batstone*, court file no. 11-0333, which I have referred to above and dismissed. In this action, Wayne Dyce sued not only Megan Hubbard, once again, but also Megan Hubbard's mother, aunt, her former counsel and her current counsel.

- The unsuccessful Small Claims Court action against Megan Hubbard.
- The multiple proceedings in the family law litigation against Megan Hubbard concerning their son Jaxon.
- The numerous unsuccessful appeals to the Divisional Court and Court of Appeal.

[58] The family law litigation merits further discussion. During the course of this litigation (which is partially set out in Schedule "A") Mr. Dyce has been involved in a multiplicity of various types of actions and motions. It is difficult to quantify them all, but he has initiated approximately 30 proceedings against Megan Hubbard, not including the mandatory conferences. All of the litigation involves issues surrounding their son, Jaxon.

[59] While admittedly Wayne Dyce did enjoy some success in a few of the earlier proceedings, the fact is that overall he has continued to commence and recommence proceedings in which he has been repeatedly unsuccessful and required to pay costs as follows:

- Judgment of Gilmore J. in *Dyce v. Hubbard* dated February 15, 2011, following the 9 day trial in the family law proceeding - $20,000.00;
- Order of Mullins J. with respect to Wayne Dyce's motion for leave to appeal the decision of Gilmore J. dated January 13, 2011 - $4,000.00;
- Order of Quinlan J. with respect to a motion brought by Wayne Dyce - $175.00;
- Order by Rady J. concerning a motion brought by Wayne Dyce and James Dyce to transfer court file no. 11-0333 to London, Ontario - $1,500.00.

Wayne Dyce has not paid any of the costs orders. There is no reason to think that he will honour these outstanding costs orders or that he will honour future costs orders.

[60] Wayne Dyce has also persistently pursued unsuccessful appeals from the judicial decisions in the family law litigation.

[61] In addition to the unpaid costs orders, it should be noted that Megan Hubbard continues to miss a significant amount of time from work to attend at court proceedings initiated by Wayne Dyce. Furthermore, Wayne Dyce has not paid any child support for Jaxon, notwithstanding the many proceedings that he has been involved in and the judgment of Gilmore J.

[62] Wayne Dyce's behaviour has deteriorated both inside and outside the courtroom to the point where it is intolerable and completely unacceptable. Examples are as follows:

- As noted, he has commenced actions against a number of judges and court officials in *Dyce v. Ontario*.

- As noted, he has attempted to subpoena Eberhard J. to give evidence at the motion and refused to acknowledge that she was a judge at the Superior Court.

- He has also attempted to summons Quinlan J. of the Superior Court, to similarly provide viva voce evidence at an earlier hearing.

- According to Megan Hubbard's affidavit, which is uncontradicted, he attended with James Dyce at the Barrie Police Station in an attempt to have Ms. Lyons-Batstone charged with theft of an affidavit that was served on her in open court pursuant to an order of Wildman J.

- According to Megan Hubbard's affidavit, which is uncontradicted, Wayne Dyce advised her that he attempted to have Meryl Dyce's lawyer charged with assault, a claim which was a fabrication.

- At the trial before Gilmore J. in *Dyce v. Hubbard*, it was put to Wayne Dyce that he has displayed anger in the courtroom and has sworn at judges. As evidenced in paragraph 114 of Gilmore J.'s judgment, Wayne Dyce testified that he was in control at all times, but he had his opinions and had no difficulty expressing them. He did testify that one judge was "acting like a fucking idiot."

- Gilmore J. also made the following observations and findings at paragraph 258(o) of her judgment as follows:

> (o) Mr. Dyce insisted that he did not have an anger management problem, although his psychiatrist had recommended anger management counselling. I am concerned about Mr. Dyce's refusal to entertain the possibility that he has an anger management problem. Indeed, his past behaviour in the Barrie courthouse gives rise to concerns. His view that he will not be restrained in telling people his opinion of them even if that opinion means publicly calling that person a "bitch" or an "asshole" is concerning. I accept Ms. Hubbard's evidence that Mr. Dyce's anger towards her during this litigation has made her afraid and anxious. Ms. Hubbard's actions in having to hide her car, leasing a new car with an increased lease payment she could not really afford, and having support people with her at every court appearance and at every access exchange corroborate her fear of Mr. Dyce. While it is acceptable for Mr. Dyce to be angry, the real issue is how he expresses his anger. As such, I do not agree with Mr. Dyce that it is acceptable to announce one's unfiltered opinions of others indiscriminately. I share Ms. Hubbard's concern

> about how that behaviour model will affect Jaxon if Mr. Dyce became either a sole or joint custodial parent.

[63] Furthermore, while appearing in front of Eberhard J. on June 7, 2011 and June 28, 2011, Wayne Dyce's behaviour was shockingly disrespectful. He accused Eberhard J. and Ms. Lyons-Batstone of being liars. He accused Eberhard J. of bias. He also engaged in profane language, misogynistic slurs, and spoke and acted in a threatening manner. Eberhard J. was required to call security into the courtroom. The comments were of such a vile nature that I do not propose to repeat them. The filed transcripts speak for themselves. The June 28, 2011 hearing concluded with Wayne Dyce running towards Eberhard J., as she sat on the bench, and putting papers on the dias before he could be intercepted by court officials. Suffice it to say, Eberhard J. was the model of judicial humility and restraint in her dealings with Wayne Dyce.

[64] At the hearing of the motion before me, Wayne Dyce provided the following commentary:

- He believes that the mandatory settlement conferences in family law matters are a waste of time and that he plans to take this issue to the Supreme Court of Canada as "this needs to be brought to light."
- "Lawyers are liars." (a direct quote)
- He also made a number of derisive and derogatory comments about Gilmore J., Eberhard J. and judges of the Divisional Court with whom he has had dealings.

[65] In light of the above, it is clear that Wayne Dyce has persistently and without reasonable grounds, instituted vexatious proceedings in the Superior Court in court file nos. 4603/07, 4673/07 and 11-0333. He has engaged in what can only be described as scorched earth litigation against Megan Hubbard in the family law litigation in which he has brought repeated proceedings before the court, the vast majority of which have been unsuccessful. He has refused to pay the costs of those proceedings. He has attempted to relitigate and appeal matters unsuccessfully on multiple occasions. He has behaved badly both inside and outside the courtroom. Worse still, his behaviour is worsening over time. He is not content to litigate only against Meryl Dyce and Megan Hubbard. He has expanded the scope to include relatives of Megan Hubbard, court staff, judges, government institutions and opposing counsel.

[66] I can only conclude that for several years Wayne Dyce has done all of this to harass and oppress the other parties to the many actions, motions, applications and appeals he has commenced.

[67] For all of these reasons, it is appropriate to make an order declaring Wayne Dyce to be a vexatious litigant and impose terms upon him. In my view, given his egregious behaviour the terms, which will be outlined below, should extend not only to future litigation but also to all current matters including those before the Court of Appeal.

3. Analysis - James Dyce

[68] The record discloses that James Dyce has only been involved in the family law litigation involving his grandson, Jaxon, and not in any other litigation.

[69] In that litigation he has brought an application for access to Jaxon and it is fair to say that he has enjoyed some success. He currently enjoys supervised access with Jaxon. In fact, up until the time of the hearing of the motion and application, Ms. Lyons-Batstone, for the defendants, agreed that when one added up the costs owing in all of the litigation involving James Dyce and Megan Hubbard, she owed him $500.

[70] Notwithstanding this fact, he has acted with questionable motives. For example, he unsuccessfully attempted to have his application and motion to change proceedings dealt with on an uncontested basis, when he certainly knew that Megan Hubbard would want to have responded. That alone, however, does not constitute vexatious litigation.

[71] Of concern though, is the assertion by Megan Hubbard that Wayne and James Dyce institute proceedings in concert so that there are so many outstanding at a time that they gain an advantage over her as she cannot meaningfully respond.

[72] Although they deny this submission, it is my view that the evidence bears out her assertion for the following reasons:

- As noted by Gilmore J. in paragraph 131 of her judgment in *Dyce v. Hubbard*, James Dyce testified that he had been present at virtually all of the attendances concerning his son and Meryl Dyce. James Dyce in fact made the final submissions on behalf of his son at that trial. At paragraph 141, James Dyce further agreed, that with the exception of one or two occasions, he had been with Wayne Dyce for every court appearance in the litigation involving Megan Hubbard, both in the Superior Court and Small Claims Court as well as two motions for leave to appeal. At paragraph 148, James Dyce testified that he was interested in Wayne Dyce's litigation, had been in court with him on many occasions and it was better for them to conduct the litigation than to pay a lawyer. In the litigation against the province, multiple judges and court staff, James Dyce confirmed that his name did appear in the material as a contact person and that the mailing address on the material was his own. However, he denied being involved in that particular litigation.

- O'Connell J. in his endorsement of April 22, 2011, in which he dismissed James Dyce's motion to change his access to Jaxon, found that Wayne Dyce and James Dyce had been "tag teaming" Megan Hubbard in the family litigation. He denied any change to James' supervised access. O'Connell J. also expressed concern that James Dyce's motion to change could end up constituting an "end run" of the order of

Gilmore J. given the fact that Wayne Dyce had not fulfilled certain conditions precedent concerning his own access.

- O'Connell J., in his most recent endorsement concerning costs dated September 23, 2011,[1] noted that James Dyce did not act with "particularly clean hands" and he reiterated the fact that James and Wayne Dyce were engaged in "tag teaming." He commented that it was appropriate that the family law files of James Dyce and Wayne Dyce were consolidated to ensure the best interest of Jaxon and to avoid unnecessary court experiences. O'Connell J. further noted that he found various submissions made by James Dyce troubling. James Dyce described the dispute resolution office appearance of January 2011 as "a total waste of time as usual" and he stated that "Justice O'Connell felt that it was okay to lie" and that O'Connell J. had his "own agenda."

- Of great significance is the fact that O'Connell J., at paragraph 61 of the endorsement, made a finding that James Dyce was attempting, via his motion to change, to accomplish the primary benefit of increased access by Wayne Dyce to Jaxon. O'Connell J. found that the attempt was "calculated to visit an indirect benefit on Wayne Dyce; namely, increased unsupervised access." O'Connell J. went on to state that the tenacity of James Dyce in bringing a motion for summary judgment before Eberhard J. in January 2011, compounded by his "mischievous and calculated attempt" to get ex parte relief from Healey J., spoke to his "ulterior motive." O'Connell J. concluded that James Dyce's actions constituted an effort to "get what he wanted, on his terms, and without due regard to the best interests of Jaxon."

- Before awarding costs against James Dyce of $5,000 for the motion, O'Connell J. ultimately found "that Mr. James Dyce's unreasonableness in the conduct of his motion became underscored by bad faith," a finding he later repeated. He also reiterated that he considered James Dyce to have taken steps in his pursuit of access that were not in the best interests of Jaxon, describing them as "entirely unreasonable and counterproductive to the best interests of Jaxon."

[73] At the hearing before me, both Wayne and James Dyce made submissions to the court that they were not acting in concert but rather they had their own very separate proceedings. In light of the above, I do not accept this submission. It was also clear from my observations that they do act in tandem. I also agree with O'Connell J. and Gilmore J. that the proceedings already instituted by James and Wayne Dyce, and the proceedings that will likely be initiated in the future, involve their intertwined and strident desire to maximize Wayne Dyce's access to Jaxon, even if it has to be in the guise of expanded access to James Dyce. It is for this reason I agree with O'Connell J., and the submissions of counsel, that James and Wayne Dyce continue

[1] This decision was released after the hearing of the application and motion. Accordingly, I asked for written argument as to what, if any, import I should give to his decision. Ms. Lyons-Batstone delivered submissions. James Dyce, for whatever reason, delivered a blank page signed by him. Wayne Dyce did not respond.

to employ a highly co-ordinated strategy designed to wear down Megan Hubbard. They are attempting to make it as difficult and expensive as possible for her to respond to multiple proceedings, and maximize their, particularly Wayne's, access to Jaxon. In this regard, James Dyce has demonstrated his willingness to repeatedly act as means by which Wayne Dyce can pursue vexatious litigation.

[74] Additionally, as mentioned above, James Dyce attended with his son at the Barrie Police Station accusing Ms. Lyons-Batstone of theft.

[75] It is for these reasons that I conclude that James Dyce has engaged in detrimental, disingenuous and inappropriate behaviour both inside and outside of the courtroom that requires me to find him to be a vexatious litigant and impose restrictions upon him.

VIII. TERMS OF THE ORDER

1. Wayne Dyce

I. With respect to the outstanding family law litigation, no further action, originating process, proceeding, motion or appeal may be instituted or continued by Wayne Dyce against Megan Hubbard until both of the following conditions are met:

i. He has paid all outstanding costs ordered against him that are owing to Megan Hubbard, and;

ii. He has obtained leave of a judge of the Superior Court of Justice sitting in the Central East Region.

II. All other actions, originating processes, proceedings, motions or appeals brought by Wayne Dyce that are currently before any court in Ontario will be stayed until Wayne Dyce has paid all outstanding costs ordered against him. These actions may only be continued after Wayne Dyce has sought and obtained leave of a judge of the Superior Court of Justice.

III. No action, originating process, proceeding, motion or appeal of any kind may be instituted by Wayne Dyce, with respect to any other individual, corporation, or entity, in any court in Ontario without first obtaining leave of a judge of the Superior Court of Justice.

IV. This order will also affect Wayne Dyce's right to initiate or continue with any matters before the Court of Appeal for Ontario. Prior to doing so, he must first obtain leave of a judge of the Superior Court of Justice. The sole exception, of course, is his right to appeal my order.

2. James Dyce

I. With respect to the outstanding family law litigation, no further action, originating process, proceeding, motion or appeal may be instituted or continued by James Dyce against Megan Hubbard until he obtains leave of a judge of the Superior Court of Justice sitting in the Central East Region.

II. This order affects the right and ability of James Dyce to continue with or institute any appeals he has before the Court of Appeal in the family law litigation. Prior to continuing or instituting any such appeal, he must first obtain leave of a judge of the Superior Court of Justice.

III. No action, originating process, proceeding, motion or appeal of any kind may be instituted by James Dyce, with respect to any other individual, corporation, or entity, in any court in Ontario without first obtaining leave of a judge of the Superior Court of Justice.

[76] Since there are offsetting costs awards between Megan Hubbard, Ms. Lyons-Batstone and James Dyce, I am not prepared to make any orders concerning James Dyce satisfying the costs order of O'Connell J. dated September 23, 2011.

IX. CONCLUSION

[77] I am not prepared to limit the timing of these orders given the behaviour of Wayne and James Dyce.

[78] The parties may make written submissions on costs, not to exceed five pages in length. Ms. Lyons-Batstone shall deliver her submissions within four weeks time. Wayne and James Dyce shall deliver their submissions within two weeks of receiving Ms. Lyons-Batstone's submissions. Ms. Lyons-Batstone will have one week thereafter to reply.

_____

Justice T. McEwen

Released: January 20, 2012

COURT OF APPEAL FOR ONTARIO

CITATION: Dyce v. Hubbard, 2012 ONCA 553
DATE: 20120824
DOCKET: C54966

Goudge, Gillese and Armstrong JJ.A.

BETWEEN

Wayne Dyce

Affirming order of Justice McEwen

Respondent (Appellant)

and

Megan Hubbard

Applicant (Respondent)

and

James Dyce

Respondent (Respondent)

Wayne Dyce, appearing in person

Debora Batstone, for the respondents

Heard: August 22, 2012

On appeal from the order of Justice Thomas J. McEwen of the Superior Court of Justice, dated January20, 2012.

APPEAL BOOK ENDORSEMENT

[1] We see no error in the judgment appealed from, either on the preliminary challenges raised by the appellant or on the merits.

[2] Appeal dismissed. Costs to the respondent for counsel attending today fixed at $1000 inclusive of disbursements and taxes.

COURT OF APPEAL FOR ONTARIO

Further affirming order of Justice McEwen

CITATION: Dyce v. Hubbard, 2012 ONCA 626
DATE: 20120920
DOCKET: C55055

Goudge, Simmons and Gillese JJ.A.

BETWEEN

James E. Dyce

Respondent (Appellant)

and

Megan Hubbard

Applicant (Respondent)

and

Wayne Dyce

(Respondent)

James Dyce, appearing in person

Wayne Dyce, appearing in person

Debora Lyons, for the respondent

Heard: September 18, 2012

On appeal from the order of Justice Thomas J. McEwen of the Superior Court of Justice, dated January 20, 2012.

APPEAL BOOK ENDORSEMENT

[1] The appellant raises a number of peripheral arguments. The application below was fully argued and there is no merit to the appellant's want of service argument. Nor is there error in the application judge in his discretion hearing it with another motion. The appellant filed no motion seeking to cross examine Ms. Hubbard at the hearing and declined the invitation to make submissions following the hearing.

[2] On the merits of the appeal itself the appellant has demonstrated no basis for interfering with the conclusion reached by the application judge. The appeal is dismissed and there is therefore no need to deal with the respondent's motion.

[3] Costs to the respondent fixed at $1,000 in total.

Peter Grant and Grant Forest Products Inc. *Appellants/Respondents on cross-appeal*

v.

Torstar Corporation, Toronto Star Newspapers Limited, Bill Schiller, John Honderich and Mary Deanne Shears *Respondents/Appellants on cross-appeal*

and

Ottawa Citizen, Canadian Newspaper Association, Ad IDEM/Canadian Media Lawyers Association, RTNDA Canada/ Association of Electronic Journalists, Magazines Canada, Canadian Association of Journalists, Canadian Journalists for Free Expression, Writers' Union of Canada, Professional Writers Association of Canada, Book and Periodical Council, PEN Canada, Canadian Broadcasting Corporation, Canadian Civil Liberties Association and Danno Cusson *Interveners*

INDEXED AS: GRANT *v.* TORSTAR CORP.

Neutral citation: 2009 SCC 61.

File No.: 32932.

2009: April 23; 2009: December 22.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Torts — Defamation — Defences — Responsible communication on matters of public interest — Newspaper and reporter being sued for libel after article was published concerning proposed private golf course development — Whether traditional defences for defamatory statements of fact are inconsistent with values underlying freedom of expression — Whether law of defamation

Peter Grant et Grant Forest Products Inc. *Appelants/Intimés à l'appel incident*

c.

Torstar Corporation, Toronto Star Newspapers Limited, Bill Schiller, John Honderich et Mary Deanne Shears *Intimés/Appelants à l'appel incident*

et

Ottawa Citizen, Association canadienne des journaux, Ad IDEM/Canadian Media Lawyers Association, ACDIRT Canada/ Association des journalistes électroniques, Magazines Canada, Association canadienne des journalistes, Journalistes canadiens pour la liberté d'expression, Writers' Union of Canada, Professional Writers Association of Canada, Book and Periodical Council, PEN Canada, Société Radio-Canada, Association canadienne des libertés civiles et Danno Cusson *Intervenants*

RÉPERTORIÉ : GRANT *c.* TORSTAR CORP.

Référence neutre : 2009 CSC 61.

N° du greffe : 32932.

2009 : 23 avril; 2009 : 22 décembre.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Responsabilité délictuelle — Diffamation — Moyens de défense — Communication responsable concernant des questions d'intérêt public — Action en libelle diffamatoire intentée contre un journal et un journaliste ayant publié un article sur un projet de terrain de golf privé — Les moyens de défense classiques applicables à l'égard d'énoncés de fait discriminatoires sont-ils incompatibles

should be modified to recognize defence of responsible communication on matters of public interest.

Torts — Defamation — Defences — Responsible communication on matters of public interest — Elements of defence — Respective roles of judge and jury.

Torts — Defamation — Defences — Fair comment — Newspaper and reporter being sued for libel after article was published concerning proposed private golf course development — Whether trial judge erred in his charge to jury on fair comment.

G and his company brought a libel action against a newspaper and reporter after an article was published concerning a proposed private golf course development on G's lakefront estate. The story aired the views of local residents who were critical of the development's environmental impact and suspicious that G was exercising political influence behind the scenes to secure government approval for the new golf course. The article quoted a neighbour who said that "[e]veryone thinks it's a done deal" because of G's influence. The reporter, an experienced journalist, attempted to verify the allegations in the article, including asking G for comment, which G chose not to provide. At trial, without rejecting the possibility of an expanded qualified privilege defence based on a concept of public interest responsible journalism, the trial judge ruled that the defence would not apply in these circumstances and the case went to the jury essentially on the defences of truth and fair comment. The jury rejected these defences and awarded the plaintiffs general, aggravated and punitive damages. The Court of Appeal concluded that the trial judge had erred in failing to leave the new responsible journalism defence with the jury. It also concluded that the jury instructions were flawed, and ordered a new trial. G and his company appealed to reinstate the jury verdict. The newspaper defendants cross-appealed, asking the Court to apply the new defence in this case, and dismiss the action. In the alternative, they asked the Court to dismiss the action on the basis of fair comment.

Held: The appeal and the cross-appeal should be dismissed.

avec les valeurs qui sous-tendent la liberté d'expression? — Convient-il de modifier le droit en matière de diffamation pour y inclure la défense de communication responsable concernant des questions d'intérêt public?

Responsabilité délictuelle — Diffamation — Moyens de défense — Communication responsable concernant des questions d'intérêt public — Éléments de la défense — Rôles respectifs du juge et du jury.

Responsabilité délictuelle — Diffamation — Moyens de défense — Commentaire loyal — Action en libelle diffamatoire intentée contre un journal et un journaliste ayant publié un article sur un projet de terrain de golf privé — Le juge du procès a-t-il bien instruit le jury au sujet de la défense de commentaire loyal?

G et sa société ont intenté une action en diffamation contre un quotidien et un journaliste par suite de la parution d'un article traitant du projet d'aménagement d'un golf privé sur le terrain de G situé en bordure d'un lac. L'article présentait la position de résidents du secteur qui critiquaient les incidences environnementales du projet et qui soupçonnaient G d'avoir exercé des pressions politiques en coulisse pour obtenir l'approbation du gouvernement relativement au projet de construction du nouveau terrain de golf. L'article citait les propos d'une voisine qui avait dit : « Tout le monde pense que c'est un fait accompli » en raison de l'influence qu'exerce G. L'auteur de l'article, un journaliste expérimenté, a tenté de vérifier les allégations rapportées dans l'article et a notamment invité G à lui faire des commentaires, invitation qui a été déclinée. Au procès, sans écarter la possibilité d'appliquer une défense d'immunité relative élargie, fondée sur la notion de journalisme responsable concernant des questions d'intérêt public, le juge a déclaré que ce moyen de défense ne pourrait être retenu dans les circonstances, et les questions soumises au jury portaient essentiellement sur la défense de véracité et sur celle de commentaire loyal. Le jury les a toutes deux rejetées, et il a accordé aux demandeurs des dommages-intérêts généraux, majorés et punitifs. La Cour d'appel a conclu que le juge du procès avait omis à tort de présenter la nouvelle défense de journalisme responsable au jury. Estimant en outre que les directives données au jury étaient viciées, la Cour d'appel a ordonné la tenue d'un nouveau procès. G et sa société ont interjeté appel pour faire rétablir le verdict du jury. Les défendeurs ont formé un pourvoi incident, demandant à notre Cour d'appliquer le nouveau moyen de défense en l'espèce et de rejeter l'action. Subsidiairement, ils ont prié la Cour de rejeter l'action sur le fondement du commentaire loyal.

Arrêt : Le pourvoi et le pourvoi incident sont rejetés.

Per McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Charron, Rothstein and Cromwell JJ.: The law of defamation should be modified to provide greater protection for communications on matters of public interest. The current law with respect to statements that are reliable and important to public debate does not give adequate weight to the constitutional value of free expression. The first two rationales for the freedom of expression guarantee in s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* — the proper functioning of democratic governance and getting at the truth — squarely apply to communications on matters of public interest, even those which contain false imputations. Freewheeling debate on matters of public interest is to be encouraged and the vital role of the communications media in providing a vehicle for such debate is explicitly recognized in the text of s. 2(*b*) itself. While the law must protect reputation, the current level of protection — in effect a regime of strict liability — is not justifiable. The law of defamation accords no protection for statements on matters of public interest published to the world at large if they cannot be proven to be true. To insist on court-established certainty in reporting on matters of public interest may have the effect not only of preventing communication of facts which a reasonable person would accept as reliable and which are relevant and important to public debate, but also of inhibiting political discourse and debate on matters of public importance, and impeding the cut and thrust of discussion necessary to discovery of the truth. Although the right to free expression does not confer a licence to ruin reputation, when proper weight is given to the constitutional value of free expression on matters of public interest, the balance tips in favour of broadening the defences available to those who communicate facts it is in the public's interest to know. A consideration of the jurisprudence of other common law democracies also favours replacing the current Canadian law with a rule that gives greater scope to freedom of expression while offering adequate protection of reputation. A defence that would allow publishers to escape liability if they can establish that they acted responsibly in attempting to verify the information on a matter of public interest represents a reasonable and proportionate response to the need to protect reputation while sustaining the public exchange of information that is vital to modern Canadian society. The law of defamation should therefore be modified to recognize a defence of responsible communication on matters of public interest. [7] [52-54] [57-58] [65-66] [85-86]

La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Charron, Rothstein et Cromwell : Il convient de modifier les règles relatives à la diffamation de façon à accorder une plus grande protection aux communications concernant des questions d'intérêt public. Les règles de droit actuelles en ce qui a trait aux énoncés fiables et importants pour le débat public n'accordent pas un poids suffisant à la valeur constitutionnelle de la liberté d'expression. Les deux premières raisons d'être de la protection de la liberté d'expression prévue à l'al. 2*b*) de la *Charte canadienne des droits et libertés* — la saine gouvernance en démocratie et la recherche de la vérité — sont tout à fait pertinentes en matière de communication concernant des questions d'intérêt public, même si la communication est entachée de fausses imputations. Il y a lieu d'encourager un débat ouvert sur les questions d'intérêt public et le libellé de l'al. 2*b*) lui-même reconnaît l'importance cruciale des médias pour la tenue d'un tel débat. Bien que la réputation doive recevoir une protection juridique, celle dont elle jouit actuellement — qui constitue en fait un régime de responsabilité stricte — n'est pas justifiable. Le droit en matière de diffamation n'accorde aucune protection aux énoncés portant sur des questions d'intérêt public publiés sans destinataire précis s'il est impossible d'en prouver la véracité. Exiger que la couverture des questions d'intérêt public atteigne à une certitude judiciaire peut aboutir non seulement à empêcher la communication de faits qu'une personne raisonnable tiendrait pour fiables et qui sont pertinents et importants pour le débat public, mais aussi à entraver le discours et le débat politiques sur des questions importantes pour le public et à empêcher les attaques et ripostes inhérentes aux discussions nécessaires à la découverte de la vérité. Certes, la liberté d'expression n'autorise pas à ternir les réputations, mais l'attribution du poids qui lui revient à la valeur constitutionnelle de la liberté d'expression relativement à des questions d'intérêt public fait pencher la balance pour l'élargissement de la gamme des moyens de défense dont disposent ceux qui communiquent des faits que le public a intérêt à connaître. L'examen de la jurisprudence d'autres pays démocratiques de common law favorise également le remplacement des règles appliquées actuellement au Canada par une règle qui donne plus de portée à la liberté d'expression tout en protégeant adéquatement la réputation. Un moyen de défense qui permettrait aux diffuseurs de s'exonérer en établissant qu'ils ont agi de façon responsable en s'efforçant de vérifier l'information communiquée au sujet d'une question d'intérêt public constitue une réponse raisonnable et proportionnelle à la nécessité de protéger les réputations tout en permettant l'échange public d'information fondamental pour la société canadienne moderne. Il convient donc de modifier les règles relatives à la diffamation pour y inclure la défense de communication responsable concernant des questions d'intérêt public. [7] [52-54] [57-58] [65-66] [85-86]

The proposed change to the law should be viewed as a new defence, leaving the traditional defence of qualified privilege intact. To be protected by the defence of responsible communication, first, the publication must be on a matter of public interest. Second, the defendant must show that publication was responsible, in that he or she was diligent in trying to verify the allegation(s), having regard to all the relevant circumstances. [95] [98-99]

In determining whether a publication is on a matter of public interest, the judge must consider the subject matter of the publication as a whole. The defamatory statement should not be scrutinized in isolation. To be of public interest, the subject matter must be shown to be one inviting public attention, or about which the public, or a segment of the public, has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached. Public interest is not confined to publications on government and political matters, nor is it necessary that the plaintiff be a "public figure". [101] [105-106]

The judge determines whether the impugned statement relates to a matter of public interest. If public interest is shown, the jury decides whether on the evidence the defence of responsible communication is established. The following factors may aid in determining whether a defamatory communication on a matter of public interest was responsibly made: (a) the seriousness of the allegation; (b) the public importance of the matter; (c) the urgency of the matter; (d) the status and reliability of the source; (e) whether the plaintiff's side of the story was sought and accurately reported; (f) whether the inclusion of the defamatory statement was justifiable; (g) whether the defamatory statement's public interest lay in the fact that it was made rather than its truth ("reportage"); and (h) any other relevant circumstances. [110] [126] [128]

While the "repetition rule" holds that repeating a libel has the same legal consequences as originating it, under the reportage exception, the repetition rule does not apply to fairly reported statements whose public interest lies in the fact that they were made rather than in their truth or falsity. If a dispute is itself a matter of public interest and the allegations are fairly reported, the report will be found to be responsible even if some of the statements made may be defamatory and untrue, provided: (1) the report attributes the statement to a person, preferably identified, thereby avoiding total

Le changement proposé au droit crée un nouveau moyen de défense et laisse intacte celui classique d'immunité relative. Pour que la défense de communication responsable s'applique, premièrement, la communication doit concerner une question d'intérêt public; deuxièmement, le défendeur doit démontrer que la communication était responsable, en ce sens qu'il s'est efforcé avec diligence de vérifier les allégations, compte tenu de l'ensemble des circonstances pertinentes. [95] [98-99]

Pour décider si elle concerne une question d'intérêt public, le juge doit tenir compte de l'ensemble du contenu d'une communication. Il ne doit pas examiner l'énoncé diffamatoire isolément. Pour être d'intérêt public, une question doit être soit de celles qui éveillent l'attention publique de façon démontrable ou qui préoccupent sensiblement le public, ou une partie de la population, parce qu'elles concernent le bien-être de citoyens, soit de celles qui jouissent d'une notoriété publique considérable ou qui ont créé une controverse importante. L'intérêt public n'est pas confiné aux publications portant sur les questions gouvernementales et politiques; il n'est pas nécessaire non plus que le demandeur soit un « personnage public ». [101] [105-106]

Le juge décide si l'énoncé en cause concerne une question d'intérêt public. Si l'intérêt public est établi, le jury tranche la question de savoir si, compte tenu de la preuve, le moyen de défense de communication responsable est établi. Les facteurs suivants peuvent aider à déterminer si une communication diffamatoire concernant une question d'intérêt public a été faite de façon responsable : a) la gravité de l'allégation; b) l'importance de la question pour le public; c) l'urgence de la question; d) la nature et la fiabilité des sources; e) la question de savoir si l'on a demandé et rapporté fidèlement la version des faits du demandeur; f) la question de savoir si l'inclusion de l'énoncé diffamatoire était justifiable; g) la question de savoir si l'intérêt public de l'énoncé diffamatoire réside dans l'existence même de l'énoncé, et non dans sa véracité (« relation de propos »); et h) toute autre considération pertinente. [110] [126] [128]

Bien que, selon la « règle de la répétition », la réitération d'un libelle entraîne les mêmes conséquences juridiques que le libelle lui-même, suivant l'exception de la relation de propos, la règle de la répétition ne s'applique pas aux propos fidèlement rapportés, dont l'intérêt public réside dans le fait même qu'ils ont été tenus plutôt que dans leur fausseté ou leur véracité. Si un conflit est en soi une question d'intérêt public et que les allégations sont fidèlement rapportées, la relation de propos sera jugée responsable même si certaines des déclarations peuvent être diffamatoires et erronées,

unaccountability; (2) the report indicates, expressly or implicitly, that its truth has not been verified; (3) the report sets out both sides of the dispute fairly; and (4) the report provides the context in which the statements were made. [119-120]

The evidence in this case revealed a basis for three defences: justification, fair comment, and responsible communication on a matter of public interest. All three defences should have been left to the jury. It was open to the jury to consider the statement attributed to a neighbour that "[e]veryone thinks it's a done deal" as a comment, or statement of opinion. This would raise the defence of fair comment. While the defence was left to the jurors, the trial judge failed to instruct them that since the reporter was the conduit for the comment and not its maker, the fact that he did not honestly believe it could not be used as a foundation for finding malice unless in the context of the article, he had adopted the comment as his own. Additionally, the "fair-minded" component of the traditional test should not form part of a charge on fair comment. These problems in the trial judge's charge could have led the jury to wrongly conclude that the fair comment defence had been defeated by malice. It was also open to the jury to consider the critical "done deal" remark as a statement of fact. Read literally, this statement can be taken as an assertion that government approval for the development was actually already sealed, either formally behind closed doors or by tacit understanding. This raises the defence of responsible communication on a matter of public interest. The trial judge did not leave this defence or any similar defence to the jury. Taken together, the errors set out amount to a substantial wrong or miscarriage of justice and require a new trial pursuant to s. 134(6) of the Ontario *Courts of Justice Act*. [136-140]

Per Abella J.: The majority's reasons for adding the "responsible communication" defence to Canadian defamation law were agreed with, as was their view that determining the availability of this defence entails a two-step analysis. However, the jury should not decide the second step. Deciding whether the applicable standard of responsibility has been met in a given case is, like the public interest analysis in the first step, a matter for the judge to determine. The responsible communication

à condition que : (1) la relation de propos attribue les dires à quelqu'un, préférablement identifié, pour éviter que personne n'assume de responsabilité; (2) la relation de propos indique, expressément ou implicitement, que la véracité des dires n'a pas été vérifiée; (3) la relation de propos expose équitablement les deux versions des faits; et (4) la relation de propos situe les dires dans leur contexte. [119-120]

La preuve en l'espèce permettait de fonder trois moyens de défense : la justification, le commentaire loyal et la communication responsable concernant une question d'intérêt public. C'est le jury qui aurait dû se prononcer sur ces trois moyens. Le jury pouvait considérer la déclaration attribuée à une voisine selon laquelle « [t]out le monde pense que c'est un fait accompli » — comme un commentaire ou comme un énoncé d'opinion, ce qui permettait d'invoquer la défense de commentaire loyal. La défense de commentaire loyal a été soumise au jury. Or, le juge de première instance a omis d'indiquer aux jurés que le journaliste ayant rapporté et non formulé le commentaire, l'absence de croyance honnête ne pouvait servir de fondement à la conclusion qu'il y avait eu malveillance à moins que, dans le contexte de l'article, il ait fait sien le commentaire. En outre, l'exposé du juge concernant le commentaire loyal ne devrait pas aborder le volet relatif à l'« esprit juste » du test traditionnel. Il est possible que ces failles relevées dans l'exposé du juge au jury aient amené ce dernier à conclure à tort que la malveillance faisait échec à la défense de commentaire loyal. Les jurés pouvaient aussi considérer la remarque cruciale concernant le « fait accompli » comme un énoncé de fait. Prise littéralement, en effet, elle peut être perçue comme l'affirmation que l'approbation gouvernementale était déjà chose faite, soit officiellement derrière des portes closes soit par accord tacite. Cela permettait d'invoquer la défense de communication responsable concernant une question d'intérêt public, mais le juge du procès n'a soumis au jury ni ce moyen de défense ni aucun autre moyen apparenté. Considérées ensemble, les erreurs recensées constituent un préjudice grave ou une erreur judiciaire fondamentale et imposent la tenue d'un nouveau procès en vertu du par. 134(6) de la *Loi sur les tribunaux judiciaires* de l'Ontario. [136-140]

La juge Abella : Les motifs des juges majoritaires justifiant d'ajouter la défense de « communication responsable » au droit canadien en matière de diffamation, ainsi que leur opinion selon laquelle il faut, pour juger de l'applicabilité de ce moyen de défense, procéder à une analyse en deux volets ne sont pas contestés. Cependant, le deuxième volet ne devrait pas être tranché par le jury. La décision quant à l'atteinte de la norme prescrite de responsabilité dans un cas donné,

analysis requires that the defendant's interest in freely disseminating information and the public's interest in the free flow of information be weighed against the plaintiff's interest in protecting his or her reputation. This exercise involves balancing freedom of expression, freedom of the press, the protection of reputation, privacy concerns, and the public interest. Weighing these often competing interests is a legal determination, thereby taking the defence beyond the jury's jurisdiction except for disputed facts, and squarely into judicial territory. [142-143] [145]

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comme celui de l'analyse de l'intérêt public dans le premier volet, en fait une question qui doit être tranchée par le juge. L'analyse de la communication responsable exige que l'intérêt du défendeur de diffuser librement l'information et l'intérêt du public à ce que l'information circule librement soient mis en balance avec l'intérêt qu'a le demandeur à ce que sa réputation soit protégée. L'exercice suppose de mettre en balance la liberté d'expression, la liberté de la presse, la protection de la réputation, des préoccupations relatives à la protection de la vie privée et l'intérêt public. Mettre ces intérêts souvent opposés en balance consiste à tirer une conclusion de droit, ce qui fait du moyen de défense une question qui outrepasse la compétence du jury, confinée à celle de trancher les questions de fait, et qui la situe clairement dans le domaine qui relève du juge. [142-143] [145]

Jurisprudence

Citée par la juge en chef McLachlin

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APPEAL and CROSS-APPEAL from a judgment of the Ontario Court of Appeal (Rosenberg, Feldman and Simmons JJ.A.), 2008 ONCA 796, 92 O.R. (3d) 561, 301 D.L.R. (4th) 129, 243 O.A.C. 120, 61 C.C.L.T. (3d) 195, 71 C.P.R. (4th) 352, [2008] O.J. No. 4783 (QL), 2008 CarswellOnt 7155, setting aside a decision of Rivard J. and a jury award and ordering a new trial. Appeal and cross-appeal dismissed.

Peter A. Downard, *Catherine M. Wiley* and *Dawn K. Robertson*, for the appellants/respondents on cross-appeal.

Paul B. Schabas, *Erin Hoult* and *Iris Fischer*, for the respondents/appellants on cross-appeal.

Richard G. Dearden and *Wendy J. Wagner*, for the intervener the Ottawa Citizen.

Beattie, Kate. « New Life for the *Reynolds* "Public Interest Defence"? *Jameel v Wall Street Journal Europe* », [2007] *E.H.R.L.R.* 81.

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Weaver, Russell L., et al. « Defamation Law and Free Speech : *Reynolds v. Times Newspapers* and the English Media » (2004), 37 *Vand. J. Transnat'l L.* 1255.

POURVOI et POURVOI INCIDENT contre un arrêt de la Cour d'appel de l'Ontario (les juges Rosenberg, Feldman et Simmons), 2008 ONCA 796, 92 O.R. (3d) 561, 301 D.L.R. (4th) 129, 243 O.A.C. 120, 61 C.C.L.T. (3d) 195, 71 C.P.R. (4th) 352, [2008] O.J. No. 4783 (QL), 2008 CarswellOnt 7155, qui a annulé une décision du juge Rivard et l'octroi de dommages-intérêts par le jury et ordonné la tenue d'un nouveau procès. Pourvoi et pourvoi incident rejetés.

Peter A. Downard, *Catherine M. Wiley* et *Dawn K. Robertson*, pour les appelants/intimés à l'appel incident.

Paul B. Schabas, *Erin Hoult* et *Iris Fischer*, pour les intimés/appelants à l'appel incident.

Richard G. Dearden et *Wendy J. Wagner*, pour l'intervenant Ottawa Citizen.

Brian MacLeod Rogers and *Blair Mackenzie*, for the interveners the Canadian Newspaper Association, Ad IDEM/Canadian Media Lawyers Association, RTNDA Canada/Association of Electronic Journalists, Magazines Canada, the Canadian Association of Journalists, the Canadian Journalists for Free Expression, the Writers' Union of Canada, the Professional Writers Association of Canada, the Book and Periodical Council, and PEN Canada.

Daniel J. Henry, for the intervener the Canadian Broadcasting Corporation.

Patricia D. S. Jackson, *Andrew E. Bernstein* and *Jennifer A. Conroy*, for the intervener the Canadian Civil Liberties Association.

Ronald F. Caza and *Jeff G. Saikaley*, for the intervener Danno Cusson.

The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Charron, Rothstein and Cromwell JJ. was delivered by

THE CHIEF JUSTICE —

I. Introduction

[1] Freedom of expression is guaranteed by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*. It is essential to the functioning of our democracy, to seeking the truth in diverse fields of inquiry, and to our capacity for self-expression and individual realization.

[2] But freedom of expression is not absolute. One limitation on free expression is the law of defamation, which protects a person's reputation from unjustified assault. The law of defamation does not forbid people from expressing themselves. It merely provides that if a person defames another, that person may be required to pay damages to the other for the harm caused to the other's reputation. However, if the defences available to a publisher are too narrowly defined, the result may be "libel chill", undermining freedom of expression and of the press.

Brian MacLeod Rogers et *Blair Mackenzie*, pour les intervenants l'Association canadienne des journaux, Ad IDEM/Canadian Media Lawyers Association, ACDIRT Canada/Association des journalistes électroniques, Magazines Canada, l'Association canadienne des journalistes, les Journalistes canadiens pour la liberté d'expression, Writers' Union of Canada, Professional Writers Association of Canada, Book and Periodical Council et PEN Canada.

Daniel J. Henry, pour l'intervenante la Société Radio-Canada.

Patricia D. S. Jackson, *Andrew E. Bernstein* et *Jennifer A. Conroy*, pour l'intervenante l'Association canadienne des libertés civiles.

Ronald F. Caza et *Jeff G. Saikaley*, pour l'intervenant Danno Cusson.

Version française du jugement de la juge en chef McLachlin et des juges Binnie, LeBel, Deschamps, Fish, Charron, Rothstein et Cromwell rendu par

LA JUGE EN CHEF —

I. Introduction

[1] La liberté d'expression est garantie par l'al. 2*b*) de la *Charte canadienne des droits et libertés*. Elle est essentielle au fonctionnement de notre démocratie, à la recherche de la vérité dans divers domaines d'enquête et à la capacité de chacun de s'exprimer et de s'épanouir.

[2] La liberté d'expression n'est cependant pas absolue. Elle est limitée notamment par le droit en matière de diffamation, qui protège la réputation personnelle contre les attaques injustifiées. Les règles relatives à la diffamation n'interdisent pas aux gens de s'exprimer. Elles posent simplement que quiconque porte atteinte à la réputation d'autrui pourra être tenu de réparer le tort causé. Cependant, si les moyens de défense à la disposition des diffuseurs sont définis trop étroitement, une « crainte paralysante du libelle » préjudiciable à la liberté d'expression et à la liberté de la presse pourrait en résulter.

[3] Two conflicting values are at stake — on the one hand freedom of expression and on the other the protection of reputation. While freedom of expression is a fundamental freedom protected by s. 2(*b*) of the *Charter*, courts have long recognized that protection of reputation is also worthy of legal recognition. The challenge of courts has been to strike an appropriate balance between them in articulating the common law of defamation. In this case, we are asked to consider, once again, whether this balance requires further adjustment.

[4] Peter Grant and his company Grant Forest Products Inc. ("GFP") sued the *Toronto Star* in defamation for an article the newspaper published on June 23, 2001, concerning a proposed private golf course development on Grant's lakefront estate. The story aired the views of local residents who were critical of the development's environmental impact and suspicious that Grant was exercising political influence behind the scenes to secure government approval for the new golf course. The reporter, an experienced journalist named Bill Schiller, attempted to verify the allegations in the article, including asking Grant for comment, which Grant chose not to provide. The article was published, and Grant brought this libel action.

[5] The trial proceeded with judge and jury. The jury found the respondents (the "Star defendants") liable and awarded general, aggravated and punitive damages totalling $1.475 million.

[6] The Star defendants argue that what happened in this trial shows that something is wrong with the traditional law of libel: a journalist or publisher who diligently tries to verify a story on a matter of public interest before publishing it can still be held liable in defamation for massive damages, simply because the journalist cannot prove to the court that all of the story was true or bring it within one of the "privileged" categories exempted from the need to prove truth. This state of the law,

[3] Deux valeurs conflictuelles — la liberté d'expression et la protection de la réputation — sont en jeu. Bien que la liberté d'expression soit une liberté fondamentale protégée par l'al. 2*b*) de la *Charte*, les tribunaux ont reconnu depuis longtemps que la réputation mérite aussi d'être protégée par le droit. Pour eux, le défi a consisté à établir le juste équilibre entre ces deux valeurs lorsqu'il s'est agi de formuler les règles de common law relatives à la diffamation. En l'espèce, nous sommes de nouveau appelés à décider s'il y a lieu de rajuster cet équilibre.

[4] Peter Grant et sa société, Grant Forest Products Inc. (« GFP »), ont intenté une action en diffamation contre le *Toronto Star* par suite de la parution, le 23 juin 2001, d'un article traitant du projet d'aménagement d'un golf privé sur le terrain de M. Grant situé en bordure d'un lac. L'article présentait la position de résidents du secteur qui critiquaient les incidences environnementales du projet et qui soupçonnaient M. Grant d'avoir exercé des pressions politiques en coulisse pour obtenir l'approbation du gouvernement relativement au projet de construction du nouveau terrain de golf. L'auteur de l'article, M. Bill Schiller, un journaliste expérimenté, a tenté de vérifier les allégations rapportées dans l'article et a notamment invité M. Grant à lui faire des commentaires, invitation qui a été déclinée. L'article a été publié, et M. Grant a intenté la présente action en libelle diffamatoire.

[5] Le procès s'est tenu devant un juge et un jury. Le jury a conclu à la responsabilité des intimés (les « défendeurs Star ») et a accordé des dommages-intérêts généraux, majorés et punitifs totalisant 1 475 000 $.

[6] Selon les défendeurs Star, ce qui s'est produit en l'espèce met en évidence une lacune du droit relatif au libelle : un journaliste ou un diffuseur qui s'emploient avec diligence à vérifier la teneur d'un reportage sur une question d'intérêt public avant de le publier peuvent malgré tout engager leur responsabilité pour diffamation et avoir à payer d'énormes dommages-intérêts, simplement parce qu'ils ne peuvent pas prouver, en cour, que tous les éléments de l'article sont véridiques ou invoquer à son

they argue, unduly curbs free expression and chills reporting on matters of public interest, depriving the public of information it should have. The Star defendants ask this Court to revise the defences available to journalists to address these criticisms, following the lead of courts in the United States and England. Mr. Grant and his corporation, for their part, argue that the common law now strikes the proper balance and should not be changed.

[7] For the reasons that follow, I conclude that the common law should be modified to recognize a defence of responsible communication on matters of public interest. In view of this new defence, as well as errors in the jury instruction on fair comment, a new trial should be ordered.

II. Facts

[8] Peter Grant owns and operates a successful forestry business, GFP, in northern Ontario. GFP's executive offices and Grant's home are located on a lakefront estate on the Twin Lakes near New Liskeard, Ontario. In the mid-1990s, Grant decided to build a private three-hole golf course on the property, which he named Frog's Breath. In 1998, he began to host an annual charitable golf tournament and decided to expand the course to nine holes. For this he needed to purchase some adjacent Crown land and secure various government approvals.

[9] Neighbouring cottagers and local residents opposed the development, citing environmental impact on the lake and quality-of-life concerns. They sent letters of objection to the Ontario Ministry of Natural Resources ("MNR"), which had the ultimate say on approving Grant's plan, and retained an environmental consultant who evaluated the

égard l'une des catégories d'immunité dispensant de le prouver. Ils font valoir que l'état actuel du droit restreint indûment la liberté d'expression et paralyse la couverture de questions d'intérêt public, ce qui prive le public de l'information qu'il devrait recevoir. Pour corriger cette situation, les défendeurs Star demandent à notre Cour de réformer les moyens de défense dont disposent les journalistes en s'inspirant de la jurisprudence américaine et anglaise. Monsieur Grant et sa société soutiennent, quant à eux, que la common law établit actuellement le juste équilibre entre les droits en cause et qu'il n'y a pas lieu d'en changer les règles.

[7] Pour les motifs exposés ci-après, je suis d'avis qu'il convient de modifier la common law pour y inclure la défense de communication responsable concernant des questions d'intérêt public. En outre, compte tenu de la reconnaissance de ce nouveau moyen de défense et de l'existence d'erreurs entachant les directives données au jury au sujet de la défense de commentaire loyal, j'estime qu'il y a lieu d'ordonner la tenue d'un nouveau procès.

II. Les faits

[8] Monsieur Peter Grant possède et exploite, dans le Nord de l'Ontario, une entreprise forestière prospère, GFP. Il est propriétaire d'un domaine sur les rives des lacs Twin, près de New Liskeard, en Ontario, où il habite et où sont installés les bureaux administratifs de GFP. Au milieu des années 1990, M. Grant a décidé d'y aménager un parcours de golf privé de trois trous qu'il a baptisé Frog's Breath. En 1998, il a organisé le premier d'une série de tournois de golf de bienfaisance annuels, et il a décidé d'agrandir le parcours pour le porter à neuf trous. Il fallait pour cela qu'il acquière des terres publiques contiguës et obtienne diverses approbations gouvernementales.

[9] Les propriétaires de chalets voisins et les résidents de l'endroit se sont opposés au projet disant craindre ses incidences environnementales et ses effets sur leur qualité de vie. Ils ont communiqué leurs objections par lettre au ministère des Richesses naturelles de l'Ontario (« MRN ») à qui il revenait, en dernier ressort, d'approuver le projet

plan. The consultant substantiated their fears of a detrimental impact on the lake and its surroundings, disputing the positive claims made by Grant's own experts.

[10] On January 13, 2001, the Hudson Lakes Association ("HLA") held a public meeting at which Grant's representatives explained the proposal and tried to assuage local concerns. Suspicion about the integrity of the approval process was already widespread, however. Grant was a long-time supporter of the Ontario Progressive Conservative Party, and a personal friend of Mike Harris, who was then the premier of the province. While he endeavoured to maintain a low public profile, his wealth and close ties to the government attracted the notice of watchers of the Ontario business and political scene.

[11] Coincidentally, on the same day as the HLA's public meeting on the Grant development, the *Toronto Star* had published an article by veteran reporter Bill Schiller headlined "Slicing through the rules: Genesis of a land deal — How Harris friends overcame fish habitat controls to build their dream". The article told of how another of Harris's friends, Peter Minogue, had withstood MNR objections and secured approval for a golf course and resort development called Osprey Links after complaining at "political levels" about the delay. Though Peter Grant had nothing to do with the Osprey Links development, the reports of political interference in the approval of a comparable development also involving a Harris friend heightened local concerns and was the subject of much discussion at the HLA public meeting.

[12] A representative of the MNR was on hand at the meeting to assure the residents that the approval would go through normal bureaucratic channels

de M. Grant. Ils ont aussi chargé un consultant en environnement d'évaluer le projet. Le rapport de ce dernier a justifié les craintes des résidents au sujet des répercussions environnementales nuisibles pour le lac et son pourtour, et réfuté les arguments favorables formulés par les experts de M. Grant.

[10] Le 13 janvier 2001, la Hudson Lakes Association (« HLA ») a tenu une assemblée publique au cours de laquelle les représentants de M. Grant ont expliqué la proposition et essayé d'apaiser les craintes des résidents. L'intégrité du processus d'approbation était cependant déjà largement mise en doute. Monsieur Grant soutenait depuis longtemps le Parti progressiste-conservateur de l'Ontario. En outre, il était un ami personnel de Mike Harris, alors premier ministre de la province. Bien qu'il s'efforçait de ne pas attirer l'attention publique, sa fortune et les liens étroits qu'il entretenait avec le gouvernement n'avaient pas manqué d'attirer l'attention des observateurs de la scène politique et du monde des affaires de l'Ontario.

[11] Par pure coïncidence, le jour même où se tenait l'assemblée publique de la HLA concernant le projet Grant, le *Toronto Star* a publié un article du journaliste chevronné Bill Schiller intitulé [TRADUCTION] « Court-circuiter les règles : Genèse d'une opération foncière — Comment les amis de Mike Harris prennent le pas sur le contrôle de l'habitat des poissons pour construire leur rêve ». L'article décrivait comment Peter Minogue, un autre ami du premier ministre Harris, avait prévalu sur les objections du MRN et obtenu l'autorisation de construire un terrain de golf et un centre de villégiature appelé Osprey Links après s'être plaint aux « instances politiques » des retards subis par le projet. Même si Peter Grant n'avait rien à voir avec le projet Osprey Links, la nouvelle d'une ingérence politique dans l'approbation d'un projet d'aménagement analogue piloté par un autre ami du premier ministre Harris a avivé les préoccupations des résidents et suscité de longues discussions lors de l'assemblée de la HLA.

[12] Un représentant du MRN a participé à l'assemblée pour assurer aux résidents que le processus d'approbation suivrait la filière administrative

and that no final decision had yet been made. But given the appearance of the Osprey Links article that very day, this assurance was not well received by the assembled group. One resident, holding up the newspaper, demanded to know "whether, given today's article in the *Toronto Star*, the final answer will come from North Bay or Queen's Park". In other words, whether the decision would be made by Ministry bureaucrats themselves or by their political masters in Toronto. Another resident expressed the concern that approval might already be a "done deal".

[13] Dr. Lorrie Clark, a professor of English at Trent University in Peterborough who has a cottage on the Twin Lakes, attended the meeting. Following the meeting, Clark sent Bill Schiller an e-mail advising him that the Osprey Links story had "hit New Liskeard like a bombshell" and that the similarities between Osprey Links and the events surrounding Grant's golf course development were "extraordinary". She explained the situation giving rise to the public meeting and described the sentiments of local cottagers in the following manner:

> Basically, the situation is this: Peter Grant, multimillionaire owner of Grant Forest Products in Englehart and Mike Harris supporter and crony, is trying to buy 40 acres of Crown Land behind his "cottage" on Twin Lakes, just west of New Liskeard, for a private golf course. . . . Everyone thinks it's a done deal, because of Grant's influence (he employs 10,000 people in Northern Ontario) but most of all his Mike Harris ties. . . .
>
> There has been a constant sense from the beginning that this is, as one cottager put it last night, "a done deal," and that nothing we can do to stop a development that is NOT in the public interest — but obviously only a very private one — will make any difference. Everyone suspects — although I do grant that this is perhaps all unfounded — that there may be political pressure on the MNR people to give Mr. Grant what he wants. [A.R., vol. X, at p. 78]

habituelle et qu'aucune décision n'était encore rendue. Or, l'article concernant Osprey Links étant paru le jour même, ces propos n'ont pas été bien reçus. Un résident, brandissant le journal, a exigé de savoir [TRADUCTION] « compte tenu de l'article du *Toronto Star* d'aujourd'hui, si la réponse finale viendra de North Bay ou de Queen's Park ». Autrement dit, il demandait si la décision serait prise par les fonctionnaires du ministère eux-mêmes ou par leurs patrons politiques à Toronto. Un autre résident a dit craindre que l'approbation soit déjà un [TRADUCTION] « fait accompli ».

[13] Madame Lorrie Clark, une professeure d'anglais de l'Université Trent à Peterborough et propriétaire d'un chalet sur les bords des lacs Twin était présente à l'assemblée. À la suite de cette rencontre, elle a communiqué par courriel avec M. Bill Schiller, lui signalant que son article sur Osprey Links avait [TRADUCTION] « fait l'effet d'une bombe à New Liskeard » et que la ressemblance entre les faits entourant le projet de M. Grant d'aménagement d'un terrain de golf et ceux relatifs au projet d'Osprey Links était [TRADUCTION] « extraordinaire ». Elle lui a décrit ainsi la situation ayant mené à la tenue de l'assemblée publique et l'état d'esprit des propriétaires de chalets :

> [TRADUCTION] Voici en gros la situation : M. Peter Grant, propriétaire multimillionnaire de l'entreprise Grant Forest Products d'Englehart, mais aussi ami et partisan de longue date de Mike Harris, essaie d'acquérir 40 acres de terres publiques contiguës à son « chalet » des lacs Twin, à l'ouest de New Liskeard, pour y aménager un golf privé. [. . .] Tout le monde pense que c'est un fait accompli en raison de l'influence qu'exerce M. Grant (il emploie 10 000 personnes dans le Nord de l'Ontario), mais plus encore en raison de ses liens avec Mike Harris. . .
>
> Depuis le début, on sent que c'est « un fait accompli », comme l'a dit l'un des propriétaires de chalets hier soir, et qu'il n'y a rien à faire pour empêcher la réalisation d'un projet qui ne sert PAS l'intérêt public, mais, de toute évidence, uniquement un intérêt très privé. Tout le monde soupçonne que des pressions politiques sont peut-être exercées sur les fonctionnaires du MRN pour que M. Grant obtienne ce qu'il désire, bien qu'il puisse s'agir, je le concède, d'une rumeur non fondée. [d.a., vol. X, p. 78]

Schiller received other communications from cottagers critical of Grant's proposal and suspicious of his influence. The story captured his attention — in his words, it was a "classic public interest story" — and he decided to investigate.

[14] Schiller began by examining records from Elections Ontario, which confirmed a history of large political contributions by Grant and GFP to the provincial PC Party and Mike Harris. He then went to New Liskeard and met with several local residents. He received information about the proposed development, listened to the residents' concerns, and learned more about Peter Grant and his prominence in the community. He spoke with MNR representatives and collected an array of documents dealing with the project. Schiller also attempted on several occasions to interview Grant in order to "get both sides" of the story, but was repeatedly rebuffed. When, in June, Schiller again wrote to Grant, putting to him some of the cottagers' objections and asking for a response, Grant's lawyer responded by threatening a libel suit.

[15] In early June, the Star sent a photographer named Mike Slaughter to take photos of Grant's property for the newspaper article. Slaughter photographed Grant's property from a canoe in the lake. He also took photos of the golf course, parking by the side of a public road and walking a few steps on to the course in the process. Noticing the photographer and suspecting that he was from the Star, Grant instructed an employee, Ted Webster, to go and find out who the photographer was and try to detain him. Apparently, Grant wanted Webster to keep Slaughter there until the police responded to his trespass complaint. In any event, Webster parked his truck on the road in front of Slaughter's car in an attempt to block him in. Slaughter nonetheless drove around him, narrowly missing driving into a ditch. Webster followed him in his truck, with another Grant employee joining in the chase,

D'autres propriétaires de chalets, en désaccord avec le projet de M. Grant et suspectant que ce dernier usait de son influence, ont communiqué avec M. Schiller. L'affaire a éveillé son intérêt. Pour reprendre ses mots, il s'agissait d'un [TRADUCTION] « sujet classique d'intérêt public » — et il a décidé de faire enquête.

[14] Monsieur Schiller a commencé par examiner les dossiers d'Élections Ontario qui ont confirmé que M. Grant et GFP contribuaient généreusement aux caisses du PC ontarien et de Mike Harris. Il s'est ensuite rendu à New Liskeard et a rencontré plusieurs résidents de l'endroit. Il a recueilli des renseignements au sujet de l'aménagement proposé, a pris note des inquiétudes des résidents et en a appris davantage sur Peter Grant et sur la place importante qu'il occupe dans la collectivité. Il a parlé avec des représentants du MRN et rassemblé une série de documents se rapportant au projet. Il a également tenté à plusieurs reprises de rencontrer M. Grant pour connaître [TRADUCTION] « les deux côtés de la médaille ». Il s'est cependant constamment heurté à un refus. En outre, lorsqu'il a écrit de nouveau à M. Grant, au mois de juin, pour lui exposer certaines objections des propriétaires de chalets et lui demander une réponse, l'avocat de ce dernier lui a répondu en menaçant de le poursuivre pour libelle diffamatoire.

[15] Au début du mois de juin, le Star a dépêché un photographe du nom de Mike Slaughter pour rapporter des photos de la propriété de M. Grant afin d'illustrer l'article. Monsieur Slaughter a photographié la propriété vue du lac, à partir d'un canot. Il a également pris des photos du golf après avoir garé son véhicule sur le côté de la voie publique et avoir fait quelques pas sur le terrain. Monsieur Grant, qui avait remarqué la présence du photographe et qui se doutait qu'il était envoyé par le Star, a donné instruction à un employé, M. Ted Webster, d'aller voir de qui il s'agissait et d'essayer de l'empêcher de partir. Il semble que M. Grant voulait que le photographe reste où il était jusqu'à ce que la police réponde à sa plainte pour intrusion. Quoi qu'il en soit, M. Webster a garé son camion sur la voie, devant la voiture de M. Slaughter, pour tenter de lui bloquer le passage. Monsieur Slaughter a

but Slaughter escaped. Accounts of this event vary widely between the parties and became a significant issue at trial. According to Grant, the event constituted an egregious trespass by the Star; according to the Star, it demonstrated Grant's ruthless desire to suppress all scrutiny, and his aggressive posture toward the press.

quand même réussi à le contourner, manquant de peu de tomber dans un fossé. Monsieur Webster l'a suivi dans son camion. Un autre employé de M. Grant s'est joint à la poursuite, mais M. Slaughter a réussi à s'échapper. Les parties ont des versions très différentes de cet incident — qui a pris une grande importance au procès. Selon M. Grant, il s'agissait d'une intrusion manifeste du Star sur une propriété privée. Pour le Star, l'incident a plutôt fait la preuve de la volonté impitoyable de M. Grant d'empêcher toute enquête et de son attitude agressive envers la presse.

[16] The article, headlined "Cottagers teed off over golf course — Long-time Harris backer awaits Tory nod on plan", was finally published on June 23, 2001. Its full text is reproduced in full in the Appendix to these reasons. (Two follow-up articles were also published, but they are not the subject of this action.) The June 23 article detailed Grant's ties to Harris and the PC Party, explained the background to the controversy and gave voice to the cottagers' concerns over the development itself and the possibility of political interference. It noted that Grant had refused to comment and mentioned that one of Grant's employees had "tried to drive the photographer's vehicle off a public road". The article included the following paragraph, which became the centerpiece of this litigation:

[16] L'article, intitulé [TRADUCTION] « Résidents verts de rage à propos d'un terrain de golf — un partisan de longue date de Mike Harris attend l'aval des conservateurs quant à son projet », a paru le 23 juin 2001. Il est reproduit en entier en annexe. (Deux autres articles lui ont fait suite, mais ils ne sont pas visés par la présente action.) L'article du 23 juin décrivait les liens de M. Grant avec Mike Harris et le parti conservateur, situait la controverse et exposait les préoccupations que l'aménagement lui-même et la possibilité d'une ingérence politique suscitaient chez les propriétaires de chalets. Il faisait état du refus de commenter opposé par M. Grant et de la tentative d'un des employés de ce dernier [TRADUCTION] « de faire quitter la voie publique au véhicule du photographe ». L'article comportait le paragraphe suivant, qui est au cœur du présent litige :

"Everyone thinks it's a done deal because of Grant's influence — but most of all his Mike Harris ties," says Lorrie Clark, who owns a cottage on Twin Lakes.

[TRADUCTION] « Tout le monde pense que c'est un fait accompli en raison de l'influence qu'exerce M. Grant, mais plus encore en raison de ses liens avec Mike Harris », affirme Lorrie Clark, propriétaire d'un chalet sur les bords des lacs Twin.

All in all, the article gave greater credence and prominence to the cottagers' side of the story than to Grant's. It did not paint Grant in a flattering light. However, its constituent facts were largely true, depending on whether the quote from Dr. Clark that "[e]veryone thinks it's a done deal" is seen as a statement of fact or opinion — a matter to which I will return.

Somme toute, l'article accordait plus de crédit et d'importance à la position des propriétaires de chalets qu'à celle de M. Grant. Il ne peignait pas ce dernier sous un jour flatteur. Toutefois, les faits rapportés étaient en grande partie véridiques, selon que l'on considère la citation de M^me^ Clark — « [t]out le monde pense que c'est un fait accompli » comme un énoncé de fait ou comme un énoncé d'opinion, une question sur laquelle je reviendrai.

[17] As promised, Grant and GFP sued Schiller, the Star and affiliates of the paper, and Lorrie Clark. Dr. Clark settled before trial.

III. Judicial History

A. *Ontario Superior Court of Justice (Rivard J. sitting with a jury)*

[18] At trial, the principal focus was on the "done deal" statement attributed to Dr. Clark, which the plaintiffs said contained the core of the article's defamatory import. The plaintiffs contended that the article effectively accused Grant of improperly using his influence to obtain government favours. The defendants countered that the article simply aired the real and legitimate concerns of local residents without actually levelling any allegation of impropriety against Grant.

[19] In the alternative, the defendants, relying on recent English jurisprudence, argued that an expanded qualified privilege defence based on a concept of public interest responsible journalism should apply. Without rejecting the possibility of such expansion, the trial judge ruled that the defence would not apply in these circumstances because the story was primarily one of local import and had a "very negative tone".

[20] Accordingly, the case went to the jury essentially on the defences of truth and fair comment. The jury rejected these defences and awarded the plaintiffs general, aggravated and punitive damages totalling $1.475 million. Punitive damages alone were assessed at $1 million.

B. *Ontario Court of Appeal (Rosenberg, Feldman and Simmons JJ.A.) (2008 ONCA 796, 92 O.R. (3d) 561)*

[21] Fortified by the intervening decision of the Ontario Court of Appeal in *Cusson v. Quan*, 2007 ONCA 771, 231 O.A.C. 277 (reasons on appeal in

[17] Les menaces de poursuite ont été mises à exécution. Monsieur Grant et GFP ont poursuivi M. Schiller, le Star et d'autres parties liées au journal ainsi que M^me^ Lorrie Clark. Madame Clark a réglé avant le procès.

III. Historique judiciaire

A. *Cour supérieure de justice de l'Ontario (le juge Rivard, siégeant avec jury)*

[18] Au procès, l'accent a été mis sur la déclaration attribuée à M^me^ Clark qu'il y avait « fait accompli » qui, pour les demandeurs, constituait le nœud de la diffamation. Ils ont soutenu que l'article accusait en fait M. Grant d'avoir abusé de son influence pour obtenir des faveurs du gouvernement, ce à quoi les défendeurs ont opposé que l'article se faisait simplement l'écho des préoccupations réelles et légitimes des résidents locaux, sans accuser M. Grant de s'être mal conduit.

[19] Puis, invoquant la jurisprudence anglaise récente, les défendeurs ont soutenu subsidiairement qu'il y aurait lieu d'appliquer une défense d'immunité relative élargie, fondée sur la notion de journalisme responsable concernant des questions d'intérêt public. Sans écarter la possibilité d'une telle extension, le juge du procès a déclaré que ce moyen de défense ne pourrait être retenu dans les circonstances en raison de la portée essentiellement locale de l'article et de son [TRADUCTION] « ton très négatif ».

[20] Par conséquent, les questions soumises au jury portaient essentiellement sur la défense de véracité et sur celle de commentaire loyal. Le jury les a toutes deux rejetées, et il a accordé aux demandeurs des dommages-intérêts généraux, majorés et punitifs totalisant 1 475 000 $. Les dommages-intérêts punitifs à eux seuls se chiffraient à 1 000 000 $.

B. *Cour d'appel de l'Ontario (les juges Rosenberg, Feldman et Simmons) (2008 ONCA 796, 92 O.R. (3d) 561)*

[21] Forts de la décision que la Cour d'appel de l'Ontario avait rendue entre-temps dans l'affaire *Cusson c. Quan*, 2007 ONCA 771, 231 O.A.C.

this Court released concurrently: *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712), which recognized a new defence of responsible journalism, the Star defendants appealed the jury verdict on both liability and quantum of damages.

[22] Writing for the Court of Appeal, Feldman J.A. affirmed the new responsible journalism defence elaborated in *Quan*, and concluded that the trial judge had erred in failing to leave this defence with the jury. Feldman J.A. held that the trial judge had applied an inappropriately narrow conception of the public interest: he should have found as a matter of law that the subject of the article was in the public interest and gone on to assess responsibility on that basis. On the issue of responsibility, Feldman J.A. took the view that the trial judge had inaccurately downplayed the extent to which Schiller actually attempted to verify the allegations. She also held that the jury should have been required to answer a preliminary question as to the meaning of the statement, since it could be interpreted in different ways.

[23] On the defence of fair comment, Feldman J.A. identified additional problems with the trial judge's charge to the jury. Because the trial took place prior to this Court's decision in *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420, the trial judge understandably instructed the jury that a fair comment must be one that a "fair-minded" person could hold — a proviso that was rejected in *WIC Radio*. Further, on the issue of malice which defeats fair comment, the trial judge instructed the jury that the key question was Schiller's honest belief in the defamatory statements, the "done deal" remark chief among them. But, as Feldman J.A. noted, this comment was attributed to Dr. Clark. Schiller's honest belief in it could only be relevant if he had adopted it as his own. This confusion meant that the jury may have found malice on improper grounds.

277 — et dont l'appel est tranché par les motifs de la Cour rendus concurremment : *Quan c. Cusson*, 2009 CSC 62, [2009] 3 R.C.S. 712 —, laquelle reconnaissait la nouvelle défense de journalisme responsable, les défendeurs Star ont interjeté appel du verdict du jury tant à l'égard de la question de la responsabilité que de celle du montant des dommages-intérêts.

[22] Rendant jugement pour la cour, la juge Feldman a confirmé la reconnaissance de la nouvelle défense de journalisme responsable élaborée dans *Quan*, et elle a conclu que le juge du procès avait omis à tort de la présenter au jury. Selon elle, le juge du procès a indûment rétréci la notion d'intérêt public : il aurait dû tirer la conclusion de droit que le sujet de l'article était d'intérêt public, puis en évaluer en conséquence le caractère responsable. Relativement à cette dernière question, la juge Feldman a estimé que le juge du procès avait réduit à tort l'importance des efforts effectivement déployés par M. Schiller pour vérifier les allégations. Elle a aussi statué que le juge aurait dû soumettre au jury la question préliminaire du sens de l'énoncé en cause, puisque celui-ci pouvait être interprété de diverses façons.

[23] La juge Feldman a aussi relevé des erreurs dans l'exposé au jury concernant la défense de commentaire loyal. Parce que le procès s'est tenu avant que notre Cour rende l'arrêt *WIC Radio Ltd. c. Simpson*, 2008 CSC 40, [2008] 2 R.C.S. 420, le juge du procès a naturellement indiqué au jury que le commentaire loyal devait pouvoir émaner d'un « esprit juste », condition qui a été rejetée dans *WIC Radio*. En outre, dans ses directives au jury sur la question de la malveillance qui fait échec à la défense de commentaire loyal, le juge Rivard a expliqué que la question fondamentale était de savoir si M. Schiller croyait honnêtement les énoncés diffamatoires, en particulier la remarque portant sur le « fait accompli ». Or, comme la juge Feldman l'a signalé, ce commentaire ayant été attribué à M^me^ Clark, la croyance honnête de M. Schiller à son égard ne pouvait être pertinente que s'il l'avait fait sien. La confusion à cet égard peut avoir induit le jury à conclure, sur la foi de fondements erronés, qu'il y avait eu malveillance.

[24] Concluding that the jury instructions were flawed, the Court of Appeal ordered a new trial.

[25] Mr. Grant and his corporation appeal to this Court to reinstate the jury verdict. The Star defendants cross-appeal, asking the Court to apply the new defence in this case and dismiss the action. In the alternative, they ask the Court to dismiss the action on the basis of fair comment.

IV. Issues

[26] While both fair comment and public interest responsible communication remain live issues on appeal, the principal legal question before us is whether the protection accorded to factual statements published in the public interest should be strengthened and, if so, how. This suggests the following analytical framework:

1. Should the common law provide a defence based on responsible communication in the public interest?

2. If so, what are the elements of the new defence?

3. If so, what procedures should apply? In particular, what are the respective roles of the judge and jury?

4. Application to the case at bar

   (a) Fair comment

   (b) Responsible communication

V. Analysis

A. *Should the Common Law Provide a Defence Based on Responsible Communication in the Public Interest?*

[27] I will first examine the current law, and then consider the arguments for and against change.

[24] Estimant que les directives données au jury étaient viciées, la Cour d'appel a ordonné la tenue d'un nouveau procès.

[25] Monsieur Grant et sa société se sont pourvus devant la Cour pour faire rétablir le verdict du jury. Les défendeurs Star ont formé un pourvoi incident, demandant à notre Cour d'appliquer le nouveau moyen de défense en l'espèce et de rejeter l'action. Subsidiairement, ils ont prié la Cour de rejeter l'action sur le fondement du commentaire loyal.

IV. Les questions en litige

[26] Bien que les défenses de commentaire loyal et de communication responsable faite dans l'intérêt public restent des questions en litige, la principale question juridique posée en l'espèce concerne l'opportunité de renforcer la protection accordée aux énoncés de fait diffusés dans l'intérêt public et, le cas échéant, la façon de le faire. Ces questions invitent à adopter le cadre analytique suivant :

1. La common law devrait-elle prévoir une défense fondée sur la communication responsable faite dans l'intérêt public?

2. Si oui, quels seraient les éléments du nouveau moyen de défense?

3. Si oui, quelle serait la procédure applicable? Plus particulièrement, quels seraient les rôles respectifs du juge et du jury?

4. Application à la présente espèce

   a) le commentaire loyal

   b) la communication responsable

V. Analyse

A. *La common law devrait-elle prévoir une défense fondée sur la communication responsable faite dans l'intérêt public?*

[27] J'analyserai d'abord le droit actuel. Ensuite, j'examinerai les arguments invoqués en faveur ou à l'encontre du changement.

(1) The Current Law

[28] A plaintiff in a defamation action is required to prove three things to obtain judgment and an award of damages: (1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff. If these elements are established on a balance of probabilities, falsity and damage are presumed, though this rule has been subject to strong criticism: see, e.g., R. A. Smolla, "Balancing Freedom of Expression and Protection of Reputation Under Canada's *Charter of Rights and Freedoms*", in D. Schneiderman, ed., *Freedom of Expression and the Charter* (1991), 272, at p. 282. (The only exception is that slander requires proof of special damages, unless the impugned words were slanderous *per se*: R. E. Brown, *The Law of Defamation in Canada* (2nd ed. (loose-leaf)), vol. 3, at pp. 25-2 and 25-3.) The plaintiff is not required to show that the defendant intended to do harm, or even that the defendant was careless. The tort is thus one of strict liability.

[29] If the plaintiff proves the required elements, the onus then shifts to the defendant to advance a defence in order to escape liability.

[30] Both statements of opinion and statements of fact may attract the defence of privilege, depending on the occasion on which they were made. Some "occasions", like Parliamentary and legal proceedings, are absolutely privileged. Others, like reference letters or credit reports, enjoy "qualified" privilege, meaning that the privilege can be defeated by proof that the defendant acted with malice: see *Horrocks v. Lowe*, [1975] A.C. 135 (H.L.). The defences of absolute and qualified privilege reflect the fact that "common convenience and welfare of society" sometimes requires untrammelled communications: *Toogood v. Spyring* (1834), 1 C.M. & R. 181, 149 E.R. 1044, at p. 1050, *per* Parke B.

(1) Le droit actuel

[28] Celui qui intente une action en diffamation doit prouver trois éléments pour avoir gain de cause et obtenir des dommages-intérêts : (1) que les mots en cause sont diffamatoires au sens où ils tendent à entacher sa réputation aux yeux d'une personne raisonnable, (2) que ces mots visent bel et bien le demandeur et (3) qu'ils ont été diffusés, c'est-à-dire qu'ils ont été communiqués à au moins une personne autre que le demandeur. Si ces éléments sont établis suivant la prépondérance des probabilités, la fausseté et le préjudice sont présumés, en dépit du fait que cette règle a été vertement critiquée : voir, p. ex., R. A. Smolla, « Balancing Freedom of Expression and Protection of Reputation Under Canada's *Charter of Rights and Freedoms* » dans D. Schneiderman, dir., *Freedom of Expression and the Charter* (1991), 272, p. 282. (Cette règle ne connaît qu'une exception, qui exige la preuve d'un dommage spécial pour les cas de diffamation verbale, à moins que les mots en cause ne soient intrinsèquement diffamatoires : R. E. Brown, *The Law of Defamation in Canada* (2e éd. (feuilles mobiles)), vol. 3, p. 25-2 et 25-3). Le demandeur n'a pas à prouver que le défendeur avait l'intention de causer un préjudice ni même qu'il a été négligent. Il s'agit donc d'un délit de responsabilité stricte.

[29] Si le demandeur a établi les éléments nécessaires, le fardeau de la preuve est inversé et le défendeur doit invoquer un moyen de défense pour éviter d'être jugé responsable.

[30] Le défendeur peut invoquer la défense d'immunité tant à l'égard des énoncés d'opinion qu'à l'égard des énoncés de fait, selon les circonstances dans lesquelles ils ont été faits. Certaines « circonstances », comme les débats parlementaires ou les instances judiciaires, donnent lieu à une immunité absolue. D'autres, comme les lettres de recommandation ou les rapports de solvabilité, ne confèrent qu'une immunité « relative », au sens où elle peut être levée s'il est démontré que le défendeur a agi avec malveillance : voir *Horrocks c. Lowe*, [1975] A.C. 135 (H.L.). L'existence des défenses d'immunités absolue et relative témoigne du fait que [TRADUCTION] « l'intérêt et le bien-être communs

The law acknowledges through recognition of privileged occasions that false and defamatory expression may sometimes contribute to desirable social ends.

de la société » exigent parfois que la communication puisse se faire sans entrave : *Toogood c. Spyring* (1834), 1 C.M. & R. 181, 149 E.R. 1044, p. 1050, le baron Parke. En formulant le principe de l'immunité circonstancielle, le droit reconnaît que des propos faux et diffamatoires peuvent parfois contribuer à l'atteinte de fins sociales souhaitables.

[31] In addition to privilege, statements of opinion, a category which includes any "deduction, inference, conclusion, criticism, judgment, remark or observation which is generally incapable of proof" (*Ross v. New Brunswick Teachers' Assn.*, 2001 NBCA 62, 201 D.L.R. (4th) 75, at para. 56, cited in *WIC Radio*, at para. 26), may attract the defence of fair comment. As reformulated in *WIC Radio*, at para. 28, a defendant claiming fair comment must satisfy the following test: (a) the comment must be on a matter of public interest; (b) the comment must be based on fact; (c) the comment, though it can include inferences of fact, must be recognisable as comment; (d) the comment must satisfy the following objective test: could any person honestly express that opinion on the proved facts?; and (e) even though the comment satisfies the objective test the defence can be defeated if the plaintiff proves that the defendant was actuated by express malice. *WIC Radio* expanded the fair comment defence by changing the traditional requirement that the opinion be one that a "fair-minded" person could honestly hold, to a requirement that it be one that "anyone could honestly have expressed" (paras. 49-51), which allows for robust debate. As Binnie J. put it, "[w]e live in a free country where people have as much right to express outrageous and ridiculous opinions as moderate ones" (para. 4).

[31] À l'égard des énoncés d'opinion, comprenant [TRADUCTION] « les déductions, inférences, conclusions, critiques, jugements, remarques et observations, dont il est généralement impossible de faire la preuve » (*Ross c. New Brunswick Teachers' Assn.*, 2001 NBCA 62, 201 D.L.R. (4th) 75, par. 56, cité dans *WIC Radio* au par. 26), un défendeur peut invoquer non seulement l'immunité, mais aussi la défense de commentaire loyal. Suivant la reformulation qui en a été faite dans *WIC Radio*, au par. 28, le défendeur qui invoque ce moyen doit satisfaire aux éléments suivants de la défense : a) le commentaire doit porter sur une question d'intérêt public; b) le commentaire doit être fondé sur des faits; c) le commentaire peut comprendre des conclusions de fait, mais doit être reconnaissable en tant que commentaire; d) le commentaire doit répondre au critère objectif suivant : est-ce que n'importe qui pourrait honnêtement exprimer cette opinion vu les faits prouvés?; e) même si le commentaire répond au critère objectif, la défense peut échouer si le demandeur prouve que le défendeur était animé par la malice. *WIC Radio* a élargi la défense de commentaire loyal en modifiant l'exigence classique de l'opinion qui puisse honnêtement être exprimée par un « esprit juste » en exigence voulant que l'opinion soit de celles qu'« on pouvait honnêtement exprimer » (par. 49-51) et qui permette les débats vigoureux. Pour reprendre les mots du juge Binnie : « [n]ous vivons dans un pays libre, où il est permis d'énoncer des opinions outrancières et ridicules tout autant que des vues modérées » (par. 4).

[32] Where statements of fact are at issue, usually only two defences are available: the defence that the statement was substantially true (justification); and the defence that the statement was made in a protected context (privilege). The issue in this case is whether the defences to actions for defamatory

[32] Lorsque des énoncés de fait sont en cause, le défendeur n'a habituellement que deux moyens de défense à sa disposition : il peut faire valoir que l'énoncé est substantiellement vrai (justification) ou qu'il a été fait dans un contexte protégé (immunité). En l'espèce, il faut déterminer s'il convient

statements of fact should be expanded, as has been done for statements of opinion, in recognition of the importance of freedom of expression in a free society.

[33] To succeed on the defence of justification, a defendant must adduce evidence showing that the statement was substantially true. This may be difficult to do. A journalist who has checked sources and is satisfied that a statement is substantially true may nevertheless have difficulty proving this in court, perhaps years after the event. The practical result of the gap between responsible verification and the ability to prove truth in a court of law on some date far in the future, is that the defence of justification is often of little utility to journalists and those who publish their stories.

[34] If the defence of justification fails, generally the only way a publisher can escape liability for an untrue defamatory statement of fact is by establishing that the statement was made on a privileged occasion. However, the defence of qualified privilege has seldom assisted media organizations. One reason is that qualified privilege has traditionally been grounded in special relationships characterized by a "duty" to communicate the information and a reciprocal "interest" in receiving it. The press communicates information not to identified individuals with whom it has a personal relationship, but to the public at large. Another reason is the conservative stance of early decisions, which struck a balance that preferred reputation over freedom of expression. In a series of judgments written by Cartwright J. (as he then was), this Court refused to grant the communications media any special status that might have afforded them greater access to the privilege: *Douglas v. Tucker*, [1952] 1 S.C.R. 275; *Globe and Mail Ltd. v. Boland*, [1960] S.C.R. 203; *Banks v. Globe and Mail Ltd.*, [1961] S.C.R. 474; *Jones v. Bennett*, [1969] S.C.R. 277.

d'élargir la gamme des moyens de défense applicables en cas de poursuite pour énoncés de fait diffamatoires — comme cela a été fait pour les énoncés d'opinion — en raison de l'importance de la liberté d'expression dans une société libre.

[33] Pour que sa défense de justification soit reçue, le défendeur doit démontrer que l'énoncé était substantiellement vrai. Une telle preuve peut être difficile à faire. Un journaliste pourrait avoir vérifié ses sources et être convaincu qu'un énoncé est substantiellement vrai, mais avoir néanmoins de la difficulté à le démontrer en cour, peut-être des années après les faits. L'absence d'adéquation entre la vérification responsable et la capacité de prouver la véracité en cour beaucoup plus tard fait en sorte que, d'un point de vue pratique, la défense de justification s'avère souvent très peu utile aux journalistes et à ceux qui diffusent leurs reportages.

[34] Si la défense de justification est rejetée, le diffuseur ne pourra généralement échapper à la responsabilité résultant d'un énoncé de fait diffamatoire faux qu'en établissant que cet énoncé a été fait dans des circonstances conférant une « immunité ». La défense d'immunité relative n'a toutefois que rarement été utile aux médias. Cela tient notamment à ce que ce moyen est traditionnellement associé à l'existence de relations particulières caractérisées par un « devoir » de communiquer l'information et un « intérêt » correspondant à en recevoir communication. Or, la presse ne communique pas de renseignements à des personnes déterminées avec lesquelles elle entretient des rapports personnels, elle s'adresse plutôt au public en général. L'utilité restreinte de ce moyen de défense s'explique aussi par le conservatisme des premières décisions, qui ont résolu le conflit entre protection de la réputation et liberté d'expression en privilégiant la réputation. Dans une série de jugements rédigés par le juge Cartwright (plus tard Juge en chef), notre Cour a refusé de reconnaître aux médias un statut particulier qui aurait pu leur rendre la défense d'immunité plus accessible : *Douglas c. Tucker*, [1952] 1 R.C.S. 275; *Globe and Mail Ltd. c. Boland*, [1960] R.C.S. 203; *Banks c. Globe and Mail Ltd.*, [1961] R.C.S. 474; *Jones c. Bennett*, [1969] R.C.S. 277.

[35] In recent decades, courts have begun to moderate the strictures of qualified privilege, albeit in an *ad hoc* and incremental way. When a strong duty and interest seemed to warrant it, they have on occasion applied the privilege to publications to the world at large. For example, in suits against politicians expressing concerns to the electorate about the conduct of other public figures, courts have sometimes recognized that a politician's "duty to ventilate" matters of concern to the public could give rise to qualified privilege: *Parlett v. Robinson* (1986), 5 B.C.L.R. (2d) 26 (C.A.), at p. 39.

[35] Au cours des dernières décennies, les tribunaux ont assoupli les règles régissant l'immunité relative, quoique de façon graduelle et ponctuelle. Il est arrivé aux tribunaux de reconnaître une telle immunité à des publications sans destinataire précis, lorsqu'un devoir et un intérêt impérieux semblaient le justifier. Par exemple, à l'occasion de poursuites visant des politiciens ayant fait part à l'électorat de préoccupations suscitées par la conduite d'autres personnages publics, les tribunaux ont parfois reconnu que le [TRADUCTION] « devoir qui incombe aux politiciens de faire circuler l'information » sur des sujets d'intérêt pour le public pouvait conférer une immunité relative : *Parlett c. Robinson* (1986), 5 B.C.L.R. (2d) 26 (C.A.), p. 39.

[36] In the last decade, this recognition has sometimes been extended to media defendants. For example, in *Grenier v. Southam Inc.*, [1997] O.J. No. 2193 (QL), the Ontario Court of Appeal (in a brief endorsement) upheld a trial judge's finding that the defendant media corporation had a "social and moral duty" to publish the article in question. Other cases have adopted the view that qualified privilege is available to media defendants, provided that they can show a social or moral duty to publish the information and a corresponding public interest in receiving it: *Leenen v. Canadian Broadcasting Corp.* (2000), 48 O.R. (3d) 656 (S.C.J.), at p. 695, aff'd (2001), 54 O.R. (3d) 612 (C.A.), and *Young v. Toronto Star Newspapers Ltd.* (2003), 66 O.R. (3d) 170 (S.C.J.), aff'd (2005), 77 O.R. (3d) 680 (C.A.).

[36] Au cours de la dernière décennie, cette reconnaissance a quelquefois été étendue à des médias défendeurs. Dans *Grenier c. Southam Inc.*, [1997] O.J. No. 2193 (QL), par exemple, la Cour d'appel de l'Ontario (dans une brève inscription) a confirmé la conclusion du juge de première instance selon laquelle l'entreprise de presse défenderesse avait le [TRADUCTION] « devoir social et moral » de publier l'article en question. L'opinion voulant que les médias puissent invoquer l'immunité relative à la condition qu'ils démontrent l'existence d'un devoir social ou moral de diffusion et d'un intérêt correspondant à recevoir l'information a été adoptée dans d'autres décisions : *Leenen c. Canadian Broadcasting Corp.* (2000), 48 O.R. (3d) 656 (C.S.J.), p. 695, conf. par (2001), 54 O.R. (3d) 612 (C.A.), et *Young c. Toronto Star Newspapers Ltd.* (2003), 66 O.R. (3d) 170 (C.S.J.), conf. par (2005), 77 O.R. (3d) 680 (C.A.).

[37] Despite these tentative forays, the threshold for privilege remains high and the criteria for reciprocal duty and interest required to establish it unclear. It remains uncertain when, if ever, a media outlet can avail itself of the defence of qualified privilege.

[37] En dépit de ces incursions limitées, les exigences relatives à l'immunité demeurent rigoureuses et les critères applicables au devoir et à l'intérêt correspondant nécessaires à son établissement demeurent nébuleux. On ne sait toujours pas avec certitude quand une entreprise médiatique peut se prévaloir de la défense d'immunité relative, si tant est qu'elle le puisse.

(2) The Case for Changing the Law

[38] Two related arguments are presented in support of broadening the defences available to public communicators, such as the press, in reporting matters of fact.

[39] The first argument is grounded in principle. It asserts that the existing law is inconsistent with the principle of freedom of expression as guaranteed by s. 2(*b*) of the *Charter*. In the modern context, it is argued, the traditional rule has a chilling effect that unjustifiably limits reporting facts, and strikes a balance too heavily weighted in favour of protection of reputation. While the law should provide redress for baseless attacks on reputation, defamation lawsuits, real or threatened, should not be a weapon by which the wealthy and privileged stifle the information and debate essential to a free society.

[40] The second argument is grounded in jurisprudence. This argument points out that many foreign common law jurisdictions have modified the law of defamation to give more protection to the press, in recognition of the fact that the traditional rules inappropriately chill free speech. While different countries have taken different approaches, the trend is clear. Recent Canadian cases, most notably the decision of the Ontario Court of Appeal in *Quan*, have affirmed this trend. The time has arrived, it is argued, for this Court to follow suit.

(a) *The Argument From Principle*

[41] The fundamental question of principle is whether the traditional defences for defamatory statements of fact curtail freedom of expression in a way that is inconsistent with Canadian constitutional values. Does the existing law strike an appropriate balance between two values vital to Canadian society — freedom of expression on the one hand, and the protection of individuals' reputations on

(2) Les arguments militant en faveur d'une modification du droit

[38] La thèse préconisant d'élargir la gamme des moyens de défense dont peuvent se prévaloir les diffuseurs publics — telle la presse — relativement à la communication de faits repose sur deux arguments connexes.

[39] Le premier argument, fondé sur des considérations de principe, pose que le droit actuel n'est pas compatible avec la liberté d'expression garantie par l'al. 2*b*) de la *Charte*. Selon cet argument, les règles classiques, appliquées à l'ère moderne, produisent un effet paralysant qui limite indûment la couverture de faits et qui fait trop pencher la balance au profit de la protection de la réputation. Bien que le droit doive pourvoir à la réparation d'atteintes non fondées à la réputation, il faut éviter que les poursuites ou menaces de poursuite en diffamation servent d'arme permettant aux riches et aux puissants d'entraver la diffusion de l'information et le débat essentiels à une société libre.

[40] Le second argument, fondé sur la jurisprudence, renvoie aux modifications que plusieurs ressorts étrangers de common law ont apportées aux règles classiques applicables en matière de diffamation pour étendre la protection conférée aux médias, après avoir reconnu que ces règles restreignaient indûment la liberté d'expression. Toujours selon cet argument, en dépit de la diversité des approches retenues, la tendance est claire et elle a été confirmée par des décisions canadiennes récentes, plus particulièrement par l'arrêt de la Cour d'appel de l'Ontario *Quan*, si bien que le temps est venu pour notre Cour d'emboîter le pas.

a) *L'argument de principe*

[41] La question de principe fondamentale qui se pose est celle de savoir si les moyens de défense classiques applicables à l'égard d'énoncés de fait discriminatoires imposent à la liberté d'expression des limites incompatibles avec les valeurs constitutionnelles canadiennes. Le droit existant établit-il un juste équilibre entre deux valeurs essentielles pour la société canadienne — la liberté

the other? As Binnie J. stated in *WIC Radio*, "[a]n individual's reputation is not to be treated as regrettable but unavoidable road kill on the highway of public controversy, but nor should an overly solicitous regard for personal reputation be permitted to 'chill' freewheeling debate on matters of public interest" (para. 2).

[42] Freedom of expression and respect for vigorous debate on matters of public interest have long been seen as fundamental to Canadian democracy. Many years before the *Charter* this Court, in the *Reference re Alberta Statutes*, [1938] S.C.R. 100, *per* Duff C.J., suggested that the Canadian Constitution contained an implied right of free expression on political matters. That principle, affirmed in cases like *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299, and *Switzman v. Elbling*, [1957] S.C.R. 285, has stood the test of time.

[43] In 1982, the *Charter*, through s. 2(*b*), confirmed and expanded constitutional protection for free expression, specifically extending it to the press: "Everyone has . . . freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication".

[44] The constitutional status of freedom of expression under the *Charter* means that all Canadian laws must conform to it. The common law, though not directly subject to *Charter* scrutiny where disputes between private parties are concerned, may be modified to bring it into harmony with the *Charter*. As Cory J. put it in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 97, "*Charter* values, framed in general terms, should be weighed against the principles which underlie the common law. The *Charter* values will then provide the guidelines for any modification to the common law which the court feels is necessary."

d'expression d'une part et la protection de la réputation personnelle d'autre part? Comme le juge Binnie l'a indiqué dans *WIC Radio*, « [i]l n'est pas question de considérer l'atteinte à la réputation de l'individu comme une conséquence regrettable, mais inévitable, des controverses publiques, mais il ne faut pas non plus vouer à la réputation personnelle une déférence exagérée propre à "paralyser" un débat ouvert sur des questions d'intérêt public » (par. 2).

[42] Il y a longtemps que la liberté d'expression et le respect des débats vigoureux sur les questions d'intérêt public sont considérés comme essentiels à la démocratie canadienne. Bien avant l'avènement de la *Charte*, notre Cour a indiqué, dans *Reference re Alberta Statutes*, [1938] R.C.S. 100 (le juge en chef Duff), que la Constitution canadienne comportait le droit implicite de s'exprimer librement sur des questions politiques. Ce principe, confirmé par des arrêts tels *Saumur c. City of Quebec*, [1953] 2 R.C.S. 299, et *Switzman c. Elbling*, [1957] R.C.S. 285, a résisté à l'épreuve du temps.

[43] En 1982, la *Charte* a confirmé et élargi la protection conférée à la liberté d'expression, à l'al. 2*b*), en l'étendant expressément à la presse : « [c]hacun a [la] [. . .] liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication ».

[44] Vu le statut de règle constitutionnelle conféré à la liberté d'expression par la *Charte*, il s'agit d'une norme à laquelle doivent se conformer toutes les règles de droit canadiennes. Même si la common law n'est pas directement sujette à un examen au regard de la *Charte* dans le cadre de litiges opposant des parties privées, des modifications peuvent y être apportées pour la rendre conforme à la *Charte*. Comme l'a déclaré le juge Cory dans *Hill c. Église de scientologie de Toronto*, [1995] 2 R.C.S. 1130, par. 97, « [f]ormulées en termes généraux, les valeurs de la *Charte* devraient être pondérées en regard des principes qui inspirent la common law. Les valeurs de la *Charte* offriront alors des lignes directrices quant à toute modification de la common law que la cour estime nécessaire. »

[45] The argument that the *Charter* requires modification of Canadian defamation law was considered in *Hill*. Writing for a unanimous Court on this point, Cory J. declined to adopt the American "actual malice" rule from *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), which provides immunity for defamation of public officials except where malice is shown. Cory J. did, however, undertake a modest expansion of the recognized qualified privilege for reports on judicial proceedings.

[46] While *Hill* stands for a rejection of the *Sullivan* approach and an affirmation of the common law of defamation's general conformity with the *Charter*, it does not close the door to further changes in specific rules and doctrines. As Iacobucci J. observed in *R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 670, "[j]udges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country." It is implicit in this duty that the courts will, from time to time, take a fresh look at the common law and re-evaluate its consistency with evolving societal expectations through the lens of *Charter* values.

[47] The guarantee of free expression in s. 2(*b*) of the *Charter* has three core rationales, or purposes: (1) democratic discourse; (2) truth-finding; and (3) self-fulfillment: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 976. These purposes inform the content of s. 2(*b*) and assist in determining what limits on free expression can be justified under s. 1.

[48] First and foremost, free expression is essential to the proper functioning of democratic governance. As Rand J. put it, "government by the free public opinion of an open society . . . demands the

[45] Dans *Hill*, la Cour s'est penchée sur l'argument voulant que, vu l'existence de la *Charte*, il y ait lieu de modifier le droit canadien en matière de diffamation. Exprimant l'opinion unanime de la Cour sur ce point, le juge Cory a refusé d'adopter la norme de la « malveillance véritable » formulée dans la décision américaine *New York Times Co. c. Sullivan*, 376 U.S. 254 (1964) qui reconnaît l'existence d'une immunité à l'égard des propos diffamatoires visant des titulaires d'une charge publique, à moins que la malveillance ne soit établie. Le juge Cory a cependant élargi quelque peu le principe reconnu de l'immunité relative à l'égard des comptes rendus de procédures judiciaires.

[46] Bien que l'arrêt *Hill* ait écarté la solution retenue dans *Sullivan* et confirmé la conformité générale avec la *Charte* des règles de common law relatives à la diffamation, il n'a pas pour autant fermé la porte à tout changement visant des règles ou des principes particuliers. Comme l'a signalé le juge Iacobucci dans *R. c. Salituro*, [1991] 3 R.C.S. 654, p. 670, « [l]es juges peuvent et doivent adapter la common law aux changements qui se produisent dans le tissu social, moral et économique du pays. » Cette obligation suppose que les tribunaux poseront à l'occasion un regard neuf sur la common law et réévalueront sa compatibilité avec les attentes sociales en mutation, à la lumière des valeurs affirmées dans la *Charte*.

[47] Les raisons d'être fondamentales ou objectifs de la garantie relative à la liberté d'expression prévue à l'al. 2*b*) de la *Charte* sont triples : (1) le débat démocratique, (2) la recherche de la vérité et (3) l'épanouissement personnel : *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927, p. 976; elles en déterminent le contenu et aident à définir les limites à la liberté d'expression qui peuvent se justifier au sens où il faut l'entendre pour l'application de l'article premier.

[48] Premièrement et avant tout, la liberté d'expression est essentielle à la saine gouvernance en démocratie. Comme le juge Rand l'a affirmé, [TRADUCTION] « un gouvernement, par le libre jeu

condition of a virtually unobstructed access to and diffusion of ideas": *Switzman*, at p. 306.

[49] Second, the free exchange of ideas is an "essential precondition of the search for truth": *R. v. Keegstra*, [1990] 3 S.C.R. 697, at p. 803, *per* McLachlin J. This rationale, sometimes known as the "marketplace of ideas", extends beyond the political domain to any area of debate where truth is sought through the exchange of information and ideas. Information is disseminated and propositions debated. In the course of debate, misconceptions and errors are exposed. What withstands testing emerges as truth.

[50] Third, free expression has intrinsic value as an aspect of self-realization for both speakers and listeners. As the majority observed in *Irwin Toy*, at p. 976, "the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed".

[51] Of the three rationales for the constitutional protection of free expression, only the third, self-fulfillment, is of dubious relevance to defamatory communications on matters of public interest. This is because the plaintiff's interest in reputation may be just as worthy of protection as the defendant's interest in self-realization through unfettered expression. We are not talking here about a direct *prohibition* of expression by the state, in which the self-fulfillment potential of even malicious and deceptive expression can be relevant (*R. v. Zundel*, [1992] 2 S.C.R. 731), but rather a means by which individuals can hold one another civilly accountable for what they say. *Charter* principles do not provide a licence to damage another person's reputation simply to fulfill one's atavistic desire to express oneself.

de l'opinion publique dans une société libre, [. . .] exige comme conditions un accès à peu près libre aux idées et leur diffusion sans entraves » : *Switzman*, p. 306.

[49] Deuxièmement, la libre circulation des idées est « un préalable essentiel de la recherche de la vérité » : *R. c. Keegstra*, [1990] 3 R.C.S. 697, p. 803, la juge McLachlin. Cette raison d'être, quelquefois appelée le « marché des idées », dépasse la sphère politique pour englober tout débat axé sur la recherche de la vérité par l'échange d'information et d'idées. De l'information est propagée et des propositions sont débattues. Dans le cadre du débat, des idées fausses et des erreurs sont exposées. Ce qui subsiste au terme de cette épreuve a valeur de vérité.

[50] Troisièmement, la liberté d'expression est intrinsèquement précieuse en tant que facteur d'épanouissement personnel tant de ceux qui s'expriment que des membres de leur auditoire. Comme la majorité de notre Cour l'a fait remarquer dans *Irwin Toy*, p. 976, « la diversité des formes d'enrichissement et d'épanouissement personnels doit être encouragée dans une société qui est essentiellement tolérante, même accueillante, non seulement à l'égard de ceux qui transmettent un message, mais aussi à l'égard de ceux à qui il est destiné ».

[51] Des trois raisons d'être de la protection constitutionnelle de la liberté d'expression, seule la troisième, l'épanouissement personnel, a plus ou moins de pertinence en matière de communication diffamatoire concernant une question d'intérêt public. Cela tient à ce que la réputation du demandeur peut mériter d'être protégée tout autant que l'épanouissement personnel passant par l'expression exempte d'entraves. Il n'est pas question ici d'une *interdiction* de s'exprimer décrétée par l'État, où même l'épanouissement personnel par l'expression malveillante ou trompeuse peut entrer en ligne de compte (*R. c. Zundel*, [1992] 2 R.C.S. 731), mais d'un moyen par lequel une personne peut en rechercher une autre en responsabilité civile en raison des propos que cette dernière a tenus. Les principes de la *Charte* n'autorisent personne à ternir la réputation d'autrui pour le simple assouvissement du désir atavique de s'exprimer.

[52] By contrast, the first two rationales for free expression squarely apply to communications on matters of public interest, even those which contain false imputations. The first rationale, the proper functioning of democratic governance, has profound resonance in this context. As held in *WIC Radio*, freewheeling debate on matters of public interest is to be encouraged, and must not be thwarted by "overly solicitous regard for personal reputation" (para. 2). Productive debate is dependent on the free flow of information. The vital role of the communications media in providing a vehicle for such debate is explicitly recognized in the text of s. 2(*b*) itself: "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication".

[52] Les deux premières raisons d'être de la protection de la liberté d'expression, en revanche, sont tout à fait pertinentes en matière de communication concernant des questions d'intérêt public, même si la communication est entachée de fausses imputations. La première, la saine gouvernance en démocratie, a une profonde résonnance dans ce contexte. Comme la Cour l'a indiqué dans *WIC Radio*, il y a lieu d'encourager un débat ouvert sur les questions d'intérêt public, et il ne faut pas « vouer à la réputation personnelle une déférence exagérée » propre à le freiner (par. 2). Or, la libre circulation de l'information est nécessaire à un débat productif, et le libellé de l'al. 2*b*) lui-même reconnaît l'importance cruciale des médias pour la tenue d'un tel débat : « liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication ».

[53] Freedom does not negate responsibility. It is vital that the media act responsibly in reporting facts on matters of public concern, holding themselves to the highest journalistic standards. But to insist on court-established certainty in reporting on matters of public interest may have the effect of preventing communication of facts which a reasonable person would accept as reliable and which are relevant and important to public debate. The existing common law rules mean, in effect, that the publisher must be certain before publication that it can prove the statement to be true in a court of law, should a suit be filed. Verification of the facts and reliability of the sources may lead a publisher to a reasonable certainty of their truth, but that is different from knowing that one will be able to prove their truth in a court of law, perhaps years later. This, in turn, may have a chilling effect on what is published. Information that is reliable and in the public's interest to know may never see the light of day.

[53] La liberté n'évacue pas la responsabilité. Il est capital que les médias se conduisent de façon responsable lorsqu'ils couvrent des faits concernant des questions d'intérêt public et qu'ils se conforment aux normes les plus exigeantes du journalisme. Toutefois, exiger que la couverture des questions d'intérêt public atteigne à une certitude judiciaire peut aboutir à empêcher la communication de faits qu'une personne raisonnable tiendrait pour fiables et qui sont pertinents et importants pour le débat public. Dans leur état actuel, les règles de common law font en sorte qu'une information ne peut être communiquée que si le diffuseur est certain de pouvoir en prouver la véracité devant le tribunal en cas de poursuite. Le diffuseur qui vérifie les faits et la fiabilité des sources peut parvenir à une certitude raisonnable quant à leur véracité, sans pour autant être assuré de pouvoir, peut-être des années plus tard, établir cette véracité en cour. Cette situation peut avoir un effet paralysant sur ce qui sera communiqué, et il est possible que des renseignements fiables et d'intérêt public ne soient ainsi jamais révélés.

[54] The second rationale — getting at the truth — is also engaged by the debate before us. Fear of being sued for libel may prevent the publication of information about matters of public

[54] La question dont nous sommes saisis intéresse aussi la deuxième raison d'être de la garantie relative à la liberté d'expression : la recherche de la vérité. La crainte des poursuites en diffamation

interest. The public may never learn the full truth on the matter at hand.

[55] Against this, it is argued that false statements cannot advance the purposes of s. 2(*b*). This contention, however, is belied by the fact the existing defence of privilege concedes: sometimes the public interest requires that untrue statements should be granted immunity, because of the importance of robust debate on matters of public interest (e.g. Parliamentary privilege), or the importance of discussion and disclosure as a means of getting at the truth (e.g. police reports, employment recommendations).

[56] The argument also overlooks the fact that the *Charter*'s s. 2(*b*) protection is not confined to statements that a person can ultimately prove are true. As Professor Boivin puts it:

> Those who argue that false and defamatory publications have a weak claim to *Charter* protection omit to mention that it is only at trial, usually several years after publication, that a trier of fact determines whether a defence of justification is well founded. Moreover, it is only then that the defamatory nature of the publication is assessed. Surely freedom of expression encompasses more than statements which, after the fact, are either proven factually accurate or do not injure someone's reputation. [Emphasis added.]

(D. W. Boivin, "Accommodating Freedom of Expression and Reputation in the Common Law of Defamation" (1997), 22 *Queen's L.J.* 229, at p. 270)

[57] I conclude that media reporting on matters of public interest engages the first and second rationales of the freedom of expression guarantee in the *Charter.* The statement in *Hill* (at para. 106) that "defamatory statements are very tenuously related to the core values which underlie s. 2(*b*)" must be read in the context of that case. It is simply beyond debate that the limited defences available to press-related defendants may have the effect of inhibiting political discourse and debate on matters of public

peut empêcher la diffusion d'information concernant des questions d'intérêt public. Il se peut donc que le public ne sache jamais toute la vérité sur une question donnée.

[55] D'aucuns opposent que la fausseté ne saurait servir les fins de l'al. 2*b*). La défense d'immunité existante réfute toutefois cet argument puisqu'elle reconnaît que l'intérêt public exige parfois d'accorder une immunité à l'égard d'énoncés faux, en raison de l'importance de tenir des débats vigoureux sur les questions d'intérêt public (p. ex. l'immunité parlementaire) ou de l'importance de la discussion et de la divulgation en tant que moyens de parvenir à la vérité (p. ex. les rapports de police, les recommandations d'emploi).

[56] Cet argument fait également fi du fait que la protection conférée par l'al. 2*b*) de la *Charte* ne vise pas exclusivement les énoncés dont la véracité peut, à terme, être démontrée. Comme l'explique le professeur Boivin :

> [TRADUCTION] Les tenants de l'opinion voulant que la protection conférée par la *Charte* aux publications fausses et diffamatoires est difficilement justifiable omettent de dire que ce n'est qu'au procès, habituellement plusieurs années après la diffusion, qu'un juge des faits statue sur le bien-fondé de la défense de justification. Qui plus est, ce n'est qu'à ce moment que la nature diffamatoire de l'énoncé est examinée. La liberté d'expression englobe assurément plus que les déclarations dont l'exactitude factuelle est démontrée plus tard ou qui ne portent atteinte à la réputation de personne. [Je souligne.]

(D. W. Boivin, « Accommodating Freedom of Expression and Reputation in the Common Law of Defamation » (1997), 22 *Queen's L.J.* 229, p. 270)

[57] Je conclus que la couverture de questions d'intérêt public par les médias relève des deux premières raisons d'être de la liberté d'expression garantie par la *Charte*. L'affirmation selon laquelle « les déclarations diffamatoires ont un lien très ténu avec les valeurs profondes qui sous-tendent l'al. 2*b*) » faite au par. 106 de l'arrêt *Hill* doit être replacée dans le contexte de cette affaire. Il ne fait pas l'ombre d'un doute que les moyens de défense limités dont dispose la presse peuvent entraver le

importance, and impeding the cut and thrust of discussion necessary to discovery of the truth.

[58] This brings me to the competing value: protection of reputation. Canadian law recognizes that the right to free expression does not confer a licence to ruin reputations. In assessing the constitutionality of the *Criminal Code*'s defamatory libel provisions, for example, the Court has affirmed that "[t]he protection of an individual's reputation from wilful and false attack recognizes both the innate dignity of the individual and the integral link between reputation and the fruitful participation of an individual in Canadian society": *R. v. Lucas*, [1998] 1 S.C.R. 439, at para. 48, *per* Cory J. This applies both to private citizens and to people in public life. People who enter public life cannot reasonably expect to be immune from criticism, some of it harsh and undeserved. But nor does participation in public life amount to open season on reputation.

[59] Related to the protection of reputation is a concern for personal privacy. This Court has recognized that protection of personal privacy is "intimately related" to the protection of reputation: *Hill*, at para. 121. While in other contexts privacy protection has been recognized as "essential for the well-being of the individual" (*R. v. Dyment*, [1988] 2 S.C.R. 417, at p. 427, *per* La Forest J.) and "an essential component of what it means to be 'free'" (*R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 113, *per* L'Heureux-Dubé J.), it does not figure prominently in defamation jurisprudence. One reason for this is that defamation law is concerned with providing recourse against *false* injurious statements, while the protection of privacy typically focusses on keeping *true* information from the public gaze. Legislation in several provinces provides a separate cause of action for the violation of privacy: see *Privacy Act*, R.S.B.C. 1996, c. 373, s. 1(1); *The Privacy Act*, R.S.S. 1978, c. P-24, s. 2; *The Privacy Act*, R.S.M. 1987, c. P125, s. 2(1); *Privacy Act*, R.S.N.L. 1990, c. P-22, s. 3. This said, protection

discours et le débat politiques sur des questions importantes pour le public et empêcher les attaques et ripostes inhérentes aux discussions nécessaires à la découverte de la vérité.

[58] Cela m'amène à la valeur opposée : la protection de la réputation. Le droit canadien reconnaît que la liberté d'expression n'autorise pas à ternir les réputations. Examinant, par exemple, la constitutionnalité des dispositions du *Code criminel* relatives au libelle diffamatoire, la Cour a affirmé que « [l]a protection de la réputation d'une personne contre les attaques mensongères délibérées reconnaît à la fois la dignité innée de la personne et le rapport intégral qui existe entre la réputation d'une personne et sa participation utile à la société canadienne » : *R. c. Lucas*, [1998] 1 R.C.S. 439, par. 48, le juge Cory. Cette affirmation s'applique tant aux citoyens privés qu'aux personnalités publiques. Ceux qui entrent dans la sphère publique ne peuvent raisonnablement s'attendre à échapper aux critiques, dont certaines pourront être acerbes ou imméritées. La participation à la vie publique ne signifie pas pour autant que la chasse à la réputation est ouverte.

[59] Autre sujet de préoccupation, lié à la protection de la réputation : la vie privée. La Cour a reconnu que la protection de la vie privée est « étroitement liée » à la protection de la réputation : *Hill*, par. 121. Bien qu'il ait été reconnu, dans d'autres contextes, que la protection de la vie privée « est essentielle [au] bien-être [de la personne] » (*R. c. Dyment*, [1988] 2 R.C.S. 417, p. 427, le juge La Forest) et constitue « un élément essentiel de ce que signifie être "libre" » (*R. c. O'Connor*, [1995] 4 R.C.S. 411, par. 113, la juge L'Heureux-Dubé), elle n'occupe pas une place prédominante dans la jurisprudence relative à la diffamation. Il en est notamment ainsi parce que le droit en cette matière vise à offrir des recours contre les énoncés diffamatoires *erronés* tandis que la protection de la vie privée vise généralement à soustraire des renseignements *exacts* aux regards du public. La législation de plusieurs provinces prévoit une cause d'action distincte en cas de violation du droit à la vie privée : voir, *Privacy Act*, R.S.B.C. 1996, ch. 373, par. 1(1); *The Privacy Act*, R.S.S. 1978, ch. P-24, art. 2; *Loi sur la*

of privacy may be a factor complementing the protection of reputation in the development of defamation law (see paras. 102 and 111 below).

[60] The Grant appellants argue that a defence based on the conduct of the defendant devalues the plaintiff's ability to vindicate reputation. A plaintiff's concern, it is said, is with the falsity of the libel, not the responsibility of the journalistic practices that led to its publication. To the extent that a revised defence shifts the focus of the litigation from the truth or falsity of the defamatory statements to the diligence of the defendant in verifying them, the plaintiff's very reason for bringing the suit is obscured.

[61] The answer to this argument lies in the fact that a balanced approach to libel law properly reflects both the interests of the plaintiff and the defendant. The law must take due account of the damage to the plaintiff's reputation. But this does not preclude consideration of whether the defendant acted responsibly, nor of the social value to a free society of debate on matters of public interest. I agree with Sharpe J.A. that the partial shift of focus involved in considering the responsibility of the publisher's conduct is an "acceptable price to pay for free and open discussion" (*Quan*, at para. 142).

[62] The protection offered by a new defence based on conduct is meaningful for both the publisher and those whose reputations are at stake. If the publisher fails to take appropriate steps having regard to all the circumstances, it will be liable. The press and others engaged in public communication on matters of public interest, like bloggers, must act carefully, having regard to the injury to reputation that a false statement can cause. A defence based on responsible conduct reflects the social concern that the media should be held accountable through the law of defamation. As Kirby P. stated in *Ballina*

protection de la vie privée, L.R.M. 1987, ch. P125, par. 2(1); *Privacy Act*, R.S.N.L. 1990, ch. P-22, art. 3. Cela étant dit, la protection de la vie privée peut servir de complément à la protection de la réputation pour l'élaboration du droit en matière de diffamation (voir par. 102 et 111 des présents motifs).

[60] Les appelants Grant soutiennent qu'un moyen de défense reposant sur la conduite du défendeur affaiblit la capacité du demandeur de laver sa réputation. Ce qui est en cause, du point de vue d'un demandeur, c'est la fausseté du libelle, non le caractère responsable des pratiques journalistiques ayant mené à sa diffusion. Un moyen de défense modifié qui donnerait davantage de poids à la diligence mise par le défendeur à vérifier les faits au détriment de l'examen de la véracité ou de la fausseté des énoncés diffamatoires obscurcirait la raison d'être même de l'action en diffamation.

[61] La réponse à cet argument réside dans le fait qu'une approche mesurée du droit relatif à la diffamation rend correctement compte tant des intérêts du demandeur que de ceux du défendeur. Le droit doit tenir compte du préjudice causé à la réputation du demandeur. Cela n'empêche toutefois pas l'examen du caractère responsable des actes du défendeur ni la prise en considération de la valeur sociale du débat sur des questions d'intérêt public pour une société libre. Je conviens avec le juge Sharpe que le changement d'orientation partiel que suppose l'examen du caractère responsable de la conduite du diffuseur est « un prix acceptable à payer en retour d'une discussion libre et ouverte » (*Quan*, par. 142).

[62] La protection offerte par un moyen de défense élargi reposant sur la conduite du défendeur est digne d'intérêt tant pour les diffuseurs que pour ceux dont la réputation est en jeu. Si le diffuseur ne prend pas les mesures qui s'imposent compte tenu de l'ensemble des circonstances, il engagera sa responsabilité. Étant donné les atteintes à la réputation qu'une fausse déclaration peut causer, la presse et ceux qui œuvrent dans la communication sur des questions d'intérêt public, comme les blogueurs, doivent faire preuve de prudence. Un moyen de défense fondé sur la conduite

Shire Council v. Ringland (1994), 33 N.S.W.L.R. 680 (C.A.), at p. 700: "The law of defamation is one of the comparatively few checks upon [the media's] great power." The requirement that the publisher of defamatory material act responsibly provides accountability and comports with the reasonable expectations of those whose conduct brings them within the sphere of public interest. People in public life are entitled to expect that the media and other reporters will act responsibly in protecting them from false accusations and innuendo. They are not, however, entitled to demand perfection and the inevitable silencing of critical comment that a standard of perfection would impose.

[63] It is also argued that a defence based on the conduct of the defendant may lead to costly and lengthy litigation over questions of journalistic practice about which claimants can have no advance knowledge: see A. T. Kenyon, "*Lange* and *Reynolds* Qualified Privilege: Australian and English Defamation Law and Practice" (2004), 28 *Melb. U.L. Rev.* 406, at p. 425. Of the relevant factors (see discussion of *Reynolds* below, at paras. 69-71) only the opportunity to respond to the allegation prior to publication is likely to lie within the plaintiff's knowledge, making it hard for a potential plaintiff to judge the strength of her case, it is said.

[64] Again, the objection goes not so much to principle as to the particular test and procedures adopted. Whatever defence is accepted, it must be workable and fair to both plaintiff and defendant, as discussed in greater detail below. Procedural objections, however, do not negate the conclusion that the traditional test fails to protect reliable statements that are connected to the democratic discourse and truth-finding rationales for freedom of expression.

responsable est le reflet de la préoccupation sociale voulant que les médias devraient être tenus responsables grâce au droit en matière de diffamation. Comme l'a affirmé le président Kirby dans *Ballina Shire Council c. Ringland* (1994), 33 N.S.W.L.R. 680 (C.A.), [TRADUCTION] « [l]e droit en matière de diffamation est une des relativement rares mesures de contrôle du pouvoir considérable dont jouissent [les médias] » (p. 700). Exiger du diffuseur de propos diffamatoires qu'il agisse de façon responsable concorde avec les attentes raisonnables de ceux qui, par leurs actes, entrent dans la sphère de l'intérêt public et le responsabilise. En effet, les personnages publics ont le droit de s'attendre à ce que les médias et les autres diffuseurs agissent de façon responsable en les protégeant contre les fausses accusations et insinuations. En revanche, ils ne peuvent exiger ni la perfection ni la réduction au silence des commentaires critiques qui découlerait inévitablement de l'application d'une norme de perfection.

[63] On a aussi fait valoir qu'un moyen de défense fondé sur la conduite du défendeur peut mener à des litiges longs et coûteux sur des questions de pratique journalistique dont les demandeurs ne peuvent avoir aucune connaissance préalable : voir A. T. Kenyon, « *Lange* and *Reynolds* Qualified Privilege : Australian and English Defamation Law and Practice » (2004), 28 *Melb. U.L. Rev.* 406, p. 425. Le seul des facteurs applicables (voir l'analyse de la décision *Reynolds*, ci-après, aux par. 69-71) dont le demandeur est susceptible d'avoir connaissance est celui de la possibilité qui lui a ou non été offerte de répondre aux allégations avant leur diffusion, de sorte qu'il peut être difficile pour un demandeur potentiel d'évaluer la solidité de sa cause.

[64] Encore une fois, cette objection concerne moins les principes que les critères et la procédure retenus. Comme nous le verrons plus en détail ultérieurement, quel que soit le moyen de défense accepté, il doit être fonctionnel et équitable tant pour le demandeur que pour le défendeur. Les objections procédurales, toutefois, ne réfutent pas la conclusion que le test classique ne protège pas les énoncés fiables liés au débat démocratique et la recherche de la vérité, éléments fondateurs de la liberté d'expression.

[65] Having considered the arguments on both sides of the debate from the perspective of principle, I conclude that the current law with respect to statements that are reliable and important to public debate does not give adequate weight to the constitutional value of free expression. While the law must protect reputation, the level of protection currently accorded by the law — in effect a regime of strict liability — is not justifiable. The law of defamation currently accords no protection for statements on matters of public interest published to the world at large if they cannot, for whatever reason, be proven to be true. But such communications advance both free expression rationales mentioned above — democratic discourse and truth-finding — and therefore require some protection within the law of defamation. When proper weight is given to the constitutional value of free expression on matters of public interest, the balance tips in favour of broadening the defences available to those who communicate facts it is in the public's interest to know.

(b) *The Argument on the Jurisprudence*

[66] A consideration of the jurisprudence of other common law democracies favours replacing the current Canadian law governing redress for defamatory statements of fact on matters of public interest, with a rule that gives greater scope to freedom of expression while offering adequate protection of reputation. Different countries canvassed have taken different approaches. Most, however, give more weight to the value of freedom of expression and robust public debate than does the traditional Canadian approach.

[67] In *Sullivan*, the United States Supreme Court applied the First Amendment's free speech guarantee to hold that a "public official" cannot recover in defamation absent proof that the defendant was motivated by "actual malice", meaning knowledge

[65] Ayant examiné les arguments fondés sur des considérations de principe invoqués de part et d'autre, je conclus que les règles de droit actuelles en ce qui a trait aux énoncés fiables et importants pour le débat public n'accordent pas un poids suffisant à la valeur constitutionnelle de la liberté d'expression. Bien que la réputation doive recevoir une protection juridique, celle dont elle jouit actuellement — qui constitue en fait un régime de responsabilité stricte — n'est pas justifiable. Le droit en matière de diffamation n'accorde actuellement aucune protection aux énoncés portant sur des questions d'intérêt public publiés sans destinataire précis s'il est impossible, pour une raison ou pour une autre, d'en prouver la véracité. Or, ce type d'énoncés favorisent les deux raisons d'être de la liberté d'expression dont il a été question précédemment — le débat démocratique et la recherche de la vérité — et il est donc nécessaire que le droit en matière de diffamation leur accorde une certaine protection. L'attribution du poids qui lui revient à la valeur constitutionnelle de la liberté d'expression relativement à des questions d'intérêt public fait pencher la balance pour l'élargissement de la gamme des moyens de défense dont disposent ceux qui communiquent des faits que le public a intérêt à connaître.

b) *Les arguments tirés de la jurisprudence*

[66] L'examen de la jurisprudence d'autres pays démocratiques de common law favorise le remplacement des règles appliquées actuellement au Canada en matière de réparation pour énoncés de faits diffamatoires concernant des questions d'intérêt public par une règle qui donne plus de portée à la liberté d'expression tout en protégeant adéquatement la réputation. Les approches varient selon les pays dont la jurisprudence a été examinée, mais la plupart d'entre elles accordent plus de poids à la liberté d'expression et à la vigueur du débat public que ne le fait l'approche canadienne classique.

[67] Dans *Sullivan*, la Cour suprême des États-Unis a donné effet à la liberté d'expression garantie par le Premier amendement et statué qu'un [TRADUCTION] « titulaire d'une charge publique » ne peut obtenir de dommages-intérêts pour

of falsity or reckless indifference to truth. In subsequent cases, the "actual malice" rule was extended to apply to all "public figures", not only people formally involved in government or politics: *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). *Sullivan* and its progeny have made it extremely difficult for anyone in the public eye to sue successfully for defamation. In the contest between free expression and reputation protection, free expression decisively won the day.

[68] Commonwealth courts have rejected the precise balance struck in *Sullivan* between free expression and protection of reputation. However, the law has begun to shift in favour of broader defences for press defendants, most prominently in England, but also in Australia (*Lange v. Australian Broadcasting Corp.* (1997), 145 A.L.R. 96 (H.C.)), New Zealand (*Lange v. Atkinson*, [1998] 3 N.Z.L.R. 424 (C.A.) ("*Lange v. Atkinson No. 1*"); *Lange v. Atkinson*, [2000] 1 N.Z.L.R. 257 (P.C.) ("*Lange v. Atkinson No. 2*"); *Lange v. Atkinson*, [2000] 3 N.Z.L.R. 385 (C.A.) ("*Lange v. Atkinson No. 3*")), and South Africa (*Du Plessis v. De Klerk*, 1996 (3) SA 850 (CC); *National Media Ltd. v. Bogoshi*, 1998 (4) SA 1196 (SCA)).

(i) United Kingdom

[69] *Reynolds v. Times Newspapers Ltd.*, [1999] 4 All E.R. 609, marked a decisive departure from the traditional pro-reputation orientation of defamation law in England. The case involved allegations of improper dealing by an Irish politician. The House of Lords, for the first time, recognized that "freedom to disseminate and receive information on political matters is essential to the proper functioning of the system of parliamentary democracy", (p. 621) and that the news media plays a vital role in furthering that interest. It followed that the law of defamation should provide greater protection to

diffamation sans la preuve que le défendeur était animé d'une [TRADUCTION] « malveillance véritable », c'est-à-dire qu'il avait connaissance de la fausseté ou qu'il manifestait une insouciance téméraire à l'égard de la vérité. Dans des arrêts subséquents, la règle de la « malveillance véritable » a été élargie et appliquée à tous les personnages publics et non aux seuls membres du gouvernement ou politiciens : *Curtis Publishing Co. c. Butts*, 388 U.S. 130 (1967). Depuis l'arrêt *Sullivan* et ceux qui l'ont suivi, les poursuites en diffamation intentées par des personnes en vue sont très rarement accueillies. La liberté d'expression a ainsi remporté une victoire décisive dans la lutte qui l'oppose à la protection de la réputation.

[68] Les tribunaux du Commonwealth ont rejeté l'équilibre précis entre la liberté d'expression et la protection de la réputation établi dans *Sullivan*. Toutefois, le droit a commencé à favoriser l'élargissement de la gamme des moyens de défense dont disposent les médias. Le phénomène est plus perceptible en Angleterre, mais il s'observe aussi en Australie (*Lange c. Australian Broadcasting Corp.* (1997), 145 A.L.R. 96 (H.C.)), en Nouvelle-Zélande (*Lange c. Atkinson*, [1998] 3 N.Z.L.R. 424 (C.A.) (« *Lange c. Atkinson n^o 1* »); *Lange c. Atkinson*, [2000] 1 N.Z.L.R. 257 (C.P.) (« *Lange c. Atkinson n^o 2* »); *Lange c. Atkinson*, [2000] 3 N.Z.L.R. 385 (C.A.) (« *Lange c. Atkinson n^o 3* »)), et en Afrique du Sud (*Du Plessis c. De Klerk*, 1996 (3) SA 850 (CC); *National Media Ltd. c. Bogoshi*, 1998 (4) SA 1196 (CSA)).

(i) Le Royaume-Uni

[69] L'arrêt *Reynolds c. Times Newspapers Ltd.*, [1999] 4 All E.R. 609, a marqué une rupture décisive du droit anglais relatif à la diffamation avec l'orientation traditionnelle, favorable à la réputation. Dans cette affaire portant sur des allégations de malversation reprochée à un politicien irlandais, la Chambre des lords a reconnu pour la première fois que [TRADUCTION] « la liberté de diffuser et de recevoir de l'information sur des questions politiques est essentielle au bon fonctionnement de la démocratie parlementaire » (p. 621) et que les médias jouent un rôle crucial dans la poursuite

publications made on matters of public interest. A new standard was pronounced — responsible journalism. Effectively, the House of Lords recognized a compelling duty on the press to publish such reports and a corresponding interest on the part of the public in receiving them.

[70] In order to determine whether a publication should be covered by responsible journalism, Lord Nicholls provided a list of considerations which have come to be known as the "*Reynolds* factors" (at p. 626):

(1) The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. (2) The nature of the information, and the extent to which the subject matter is a matter of public concern. (3) The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories. (4) The steps taken to verify the information. (5) The status of the information. The allegation may have already been the subject of an investigation which commands respect. (6) The urgency of the matter. News is often a perishable commodity. (7) Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary. (8) Whether the article contained the gist of the plaintiff's side of the story. (9) The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. (10) The circumstances of the publication, including the timing.

Lord Nicholls made clear that the ultimate determination of responsibility would be a legal question for the judge, though he allowed that any dispute of "primary fact" would be decided by the jury (p. 626).

[71] *Reynolds* was quickly recognized as a "media-friendly" development. In practical terms, however, *Reynolds* only partially succeeded in changing the landscape. The ten *Reynolds* factors

de cet intérêt. La Chambre des lords a conclu en conséquence que les règles de droit applicables à la diffamation devaient protéger davantage les communications concernant des questions d'intérêt public et elle a formulé une nouvelle norme, celle du journalisme responsable. En fait, la Chambre des lords a reconnu l'existence d'un devoir impérieux qui incombe à la presse de publier de telles communications et d'un intérêt correspondant du public à recevoir l'information.

[70] Lord Nicholls a dressé une liste de points à prendre en compte pour déterminer si le journalisme responsable est applicable à la diffusion. Ces points ont par la suite été désignés sous le nom de « facteurs *Reynolds* » (p. 626) :

[TRADUCTION] (1) La gravité de l'allégation. Plus grave est l'accusation, plus le public est trompé et plus grand est le préjudice de la personne, si l'allégation est fausse. (2) La nature de l'information et la mesure dans laquelle le contenu est une affaire d'intérêt public. (3) La source de l'information. Certains informateurs n'ont pas une connaissance directe des événements. Certains travaillent pour leur intérêt personnel ou sont payés pour raconter l'affaire. (4) Les étapes à suivre pour vérifier l'information. (5) Le statut de l'information. L'allégation a déjà pu faire l'objet d'une enquête qui impose le respect. (6) L'urgence de l'affaire. Les nouvelles sont souvent des produits périssables. (7) Si l'on s'est renseigné auprès du requérant. Il peut disposer d'information que d'autres ne possèdent pas ou n'ont pas divulguées. Il n'est pas toujours nécessaire de se renseigner auprès du requérant. (8) Si l'article contenait l'essentiel de la version du requérant. (9) Le ton de l'article. Un journal peut soulever des questions ou demander une enquête. Il n'a pas besoin d'adopter les allégations comme des énoncés des faits. (10) Les circonstances de la publication, notamment le moment où elle paraît.

Lord Nicholls a clairement indiqué que, ultimement, l'appréciation du caractère responsable constituait une question juridique relevant du juge, et reconnu malgré tout que les différends relatifs aux [TRADUCTION] « faits principaux » seraient tranchés par le jury (p. 626).

[71] On a rapidement qualifié *Reynolds* de précédent « favorable aux médias ». En pratique toutefois, l'arrêt n'a pas entièrement réussi à changer le paysage. Les dix facteurs *Reynolds* se sont révélés

proved difficult to apply. Some courts saw them as merely an illustrative list of possible considerations, while others viewed them as a complete code for what constitutes responsible journalism. Journalists and publishers, for their part, found it difficult to anticipate what kind of conduct would satisfy the *Reynolds* criteria, applied with the benefit of judicial hindsight. (See, e.g., R. L. Weaver et al., "Defamation Law and Free Speech: *Reynolds v. Times Newspapers* and the English Media" (2004), 37 *Vand. J. Transnat'l L.* 1255, at pp. 1303-7.) As one commentator has observed:

> . . . the *Reynolds* defence virtually never succeeded because the 10 pointers of responsible journalism were treated by the judges as hurdles to be surmounted. The judges applied a dollop of hindsight, finding something which *they*, as a responsible editor or journalist, would have done differently. The *Reynolds* defence spawned satellite litigation where, often for understandable reasons, the underlying facts could not be proved and much time and money had to be spent on analysing how the story was constructed. Anonymous sources tended to be viewed with suspicion and juries were given a complex list of factual issues to decide, sometimes with confusing directions as to the presumption of falsity which served to push them in the direction of disbelieving what the journalists said. [Emphasis in original.]

(D. Hooper, "The Importance of the Jameel Case", [2007] *Ent. L.R.* 62, at p. 62. See also A. J. Bonnington, "Reynolds Rides Again" (2006), 11 *Comms. L.* 147.)

[72] The House of Lords addressed this uncertainty in *Jameel v. Wall Street Journal Europe SPRL*, [2006] UKHL 44, [2007] 1 A.C. 359. The defendant Wall Street Journal Europe had published an article, shortly after September 11, 2001, revealing that the bank accounts of certain prominent Saudi Arabian businessmen, including the plaintiff, were being monitored for possible terrorist connections by Saudi authorities at the behest of the U.S. government, citing anonymous sources. The tone of the article was neutral and unsensational, and the article bore the indicia of responsible journalism. Nonetheless, the trial judge denied

difficiles à appliquer. Certains tribunaux n'y ont vu qu'une liste d'exemples pouvant être pris en considération, tandis que d'autres les ont perçus comme un code complet définissant le journalisme responsable. Les journalistes et diffuseurs, de leur côté, ont trouvé difficile de prévoir la conduite qui satisferait à la norme *Reynolds*, appliquée *a posteriori* par les tribunaux. (Voir, p. ex., R. L. Weaver et autres, « Defamation Law and Free Speech : *Reynolds v. Times Newspapers* and the English Media » (2004), 37 *Vand. J. Transnat'l L.* 1255, p. 1303-1307.) Comme l'a fait remarquer un commentateur :

> [TRADUCTION] . . . la défense *Reynolds* n'a presque jamais été reçue parce que les juges ont traité les dix indicateurs du journalisme responsable comme des obstacles à surmonter. Avec le recul dont ils bénéficiaient, ils ont relevé des choses qu'*ils* auraient faites différemment en tant que diffuseur ou journaliste responsable. La défense *Reynolds* a suscité des litiges satellites où, pour des raisons souvent faciles à comprendre, les faits sous-jacents ne pouvaient être prouvés et où il fallait consacrer beaucoup de temps et d'argent à l'examen de la genèse du reportage. Les sources anonymes ont été considérées avec suspicion, et les jurys se sont vu remettre des listes complexes de questions factuelles à trancher après avoir parfois reçu, concernant la présomption de fausseté, des directives embrouillées qui les poussaient à mettre en doute les dires des journalistes. [En italique dans l'original.]

(D. Hooper, « The Importance of the Jameel Case » [2007] *Ent. L.R.* 62, p. 62. Voir aussi A. J. Bonnington, « Reynolds Rides Again » (2006), 11 *Comms. L.* 147.)

[72] La Chambre des lords a levé cette incertitude dans *Jameel c. Wall Street Journal Europe SPRL*, [2006] UKHL 44, [2007] 1 A.C. 359, affaire qui portait sur un article publié peu après le 11 septembre 2001, par le journal défendeur, le Wall Street Journal Europe. Citant des sources anonymes, l'article révélait que, à la demande du gouvernement des États-Unis, les autorités saoudiennes surveillaient les comptes de banque d'hommes d'affaires saoudiens en vue (dont le demandeur), pour y déceler de possibles liens terroristes. L'article avait un ton mesuré et dénué de sensationnalisme et portait l'empreinte du journalisme responsable.

the defendants access to the *Reynolds* privilege, and the Court of Appeal upheld that denial on the sole ground that the paper had not waited long enough to hear back from the plaintiff before running the story.

[73] The House of Lords reversed the judgment of the Court of Appeal and held that the responsible journalism defence applied. It criticized the lower courts for applying the *Reynolds* factors restrictively as "a series of hurdles to be negotiated by a publisher" (para. 33, *per* Lord Bingham), rather than as an illustrative guide to what might constitute responsible journalism on the facts of a given case. Given that the defence was meant to foster free expression and a free press, its requirements should not be pitched so high as to make its availability all but illusory. The House of Lords also emphasized that the assessment of responsible journalism is not an invitation for courts to micro-manage the editorial practices of media organizations. Rather, a degree of deference should be shown to the editorial judgment of the players, particularly professional editors and journalists. For instance, a court should be slow to conclude that the inclusion of a particular defamatory statement was "unnecessary" and therefore outside the scope of the defence. As Lord Hoffmann put it:

> The fact that the judge, with the advantage of leisure and hindsight, might have made a different editorial decision should not destroy the defence. That would make the publication of articles which are, ex hypothesi, in the public interest, too risky and would discourage investigative reporting. [para. 51]

The House of Lords also made clear that the defence is available to "anyone who publishes material of public interest in any medium", not just journalists or media companies: *Jameel*, at para. 54, *per* Lord Hoffmann; *Seaga v. Harper*, [2008] UKPC 9, [2008] 1 All E.R. 965.

Le juge du procès a néanmoins refusé que les défendeurs se prévalent de l'immunité définie dans *Reynolds*, et la Cour d'appel a confirmé cette décision pour le seul motif que le journal n'avait pas attendu assez longtemps la réponse du demandeur avant de publier l'article.

[73] La Chambre des lords a infirmé le jugement de la Cour d'appel et statué que la défense de journalisme responsable était applicable. Elle a reproché aux tribunaux d'instances inférieures d'avoir appliqué les facteurs *Reynolds* de façon restrictive comme s'il s'agissait d'une [TRADUCTION] « série d'obstacles que le diffuseur devait franchir » (par. 33, lord Bingham) plutôt que d'un guide illustrant ce qui pouvait constituer du journalisme responsable compte tenu de faits donnés. En outre, elle a déclaré que, le moyen de défense visant à protéger la liberté d'expression et la liberté de la presse, il ne fallait pas l'assortir d'exigences rigoureuses au point d'en rendre l'application illusoire. La Chambre des lords a également souligné que les tribunaux ne devaient pas prendre prétexte de l'appréciation du caractère responsable du journalisme pour gérer de façon interventionniste les pratiques éditoriales des médias, mais qu'ils devaient plutôt en déférer au jugement des personnes en cause, en particulier des diffuseurs et des journalistes professionnels. Il faudrait, par exemple, qu'un tribunal fasse preuve de circonspection avant de conclure qu'un énoncé diffamatoire est [TRADUCTION] « inutile » et que, par suite, il n'est pas couvert par le moyen de défense. Comme l'a expliqué lord Hoffmann :

> [TRADUCTION] Le fait qu'un juge, avec le temps de réflexion et le recul dont il jouit, puisse faire un choix éditorial différent ne devrait pas rendre la défense irrecevable. Cela ferait en effet de la publication d'articles qui sont, par hypothèse, d'intérêt public une entreprise trop risquée et découragerait le journalisme d'enquête. [par. 51]

La Chambre des lords a aussi clairement établi que [TRADUCTION] « quiconque diffuse du matériel d'intérêt public, quel que soit le média », peut invoquer le moyen de défense, pas seulement les journalistes ou les entreprises médiatiques : *Jameel*, par. 54, lord Hoffmann; *Seaga c. Harper*, [2008] UKPC 9, [2008] 1 All E.R. 965.

[74] *Jameel* has been welcomed as re-affirming the liberalizing tone of *Reynolds* and providing much-needed guidance for its application: see, e.g., K. Beattie, "New Life for the *Reynolds* 'Public Interest Defence'? *Jameel v Wall Street Journal Europe*", [2007] *E.H.R.L.R.* 81. But questions remain.

[75] One unresolved issue is whether the new defence is a species of privilege or a distinct defence. If the former, a further issue arises of whether it could be defeated by malice. The judges in *Jameel* discussed these issues but reached no consensus.

[76] Another unresolved issue is the status of so-called "reportage". "Reportage" refers to defamatory statements clearly attributed to someone other than, and not adopted by, the defendant. On one view, reportage is simply the accurate reporting of facts — the fact of what someone said. Such reportage is essential, the media argue, to comprehensive coverage of public debate. Charges flung back and forth between contending factions in a dispute are themselves, it is argued, an essential part of the story, and will be understood by the public as such. However, the reporting of defamatory statements is barred by the "repetition rule" of defamation law, which holds that someone who repeats a defamatory statement is no less liable than the person who originated it. Recent cases suggest that this rule has been attenuated in the context of actions brought against media outlets, although whether as a distinct defence or as one of the factors to consider in applying the responsible journalism standard remains unclear: *Charman v. Orion Publishing Group Ltd.*, [2007] EWCA Civ 972, [2008] 1 All E.R. 750. I will return to this question below.

(ii) Australia

[77] Despite the absence of a constitutional bill of rights guaranteeing freedom of expression, the

[74] *Jameel* a été reçu comme une réaffirmation de la portée libérale de *Reynolds* apportant un éclairage fort utile quant à son application : voir, p. ex., K. Beattie, « New Life for the *Reynolds* "Public Interest Defence"? *Jameel v Wall Street Journal Europe* », [2007] *E.H.R.L.R.* 81. Il reste néanmoins des questions à trancher.

[75] Parmi elles figure celle de savoir si ce nouveau moyen de défense constitue un type d'immunité — auquel cas il faut ensuite se demander si la malveillance interdit de s'en prévaloir — ou un moyen de défense distinct. Ces questions ont été examinées dans *Jameel*, sans qu'il s'en dégage un consensus.

[76] Le statut de la « relation de propos » fait elle aussi partie des questions non résolues. La « relation de propos » vise des propos diffamatoires clairement attribués à un tiers et que le défendeur n'a pas faits siens. Certains considèrent la relation de propos comme un simple compte rendu exact de faits — soit le fait qu'une personne a tenu certains propos. Les médias font valoir pour leur part que la relation de propos est essentielle à la couverture exhaustive du débat public. Selon eux, les accusations que se lancent des factions opposées constituent en elles-mêmes un aspect essentiel des faits relatés, et le public les prendra pour ce qu'elles sont. Toutefois, la règle du droit de la diffamation dite de la « répétition » — suivant laquelle celui qui répète des propos diffamatoires n'est pas moins responsable que celui qui en est à l'origine — interdit de rapporter les déclarations diffamatoires. Il appert de décisions récentes que cette règle aurait été assouplie à l'égard des médias, mais sans qu'on sache clairement si la relation de propos constitue un moyen de défense distinct ou un des facteurs à prendre en considération dans l'examen de la défense de journalisme responsable : *Charman c. Orion Publishing Group Ltd.*, [2007] EWCA Civ 972, [2008] 1 All E.R. 750. Je me pencherai à nouveau sur cette question ultérieurement.

(ii) Australie

[77] En dépit de l'inexistence, en Australie, d'une charte des droits et libertés constitutionnelle

High Court of Australia has increased the protection afforded to the media on factual reports. In *Lange v. Australian Broadcasting Corp.*, a case involving a former prime minister of New Zealand, the High Court confirmed the existence of a qualified privilege for publications on "government and political matters", established earlier in *Theophanous v. Herald & Weekly Times Ltd.* (1994), 124 A.L.R. 1. The High Court held that "each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia [a category that, while broad, does not extend to all matters of public interest]. The duty to disseminate such information is simply the correlative of the interest in receiving it" (p. 115). *Lange* defined "government and political matters" relatively narrowly to cover matters within the sphere of electoral politics, whether at a local, state, or federal level, adding that "discussion of matters concerning the United Nations or other countries may be protected by the extended defence of qualified privilege" (p. 115).

garantissant la liberté d'expression, la Haute Cour de ce pays a accru la protection accordée aux médias relativement aux comptes rendus factuels. Dans *Lange c. Australian Broadcasting Corp.*, une affaire mettant en cause l'ancien premier ministre de la Nouvelle-Zélande, la Haute Cour a confirmé l'existence d'une immunité relative quant aux publications portant sur les « questions gouvernementales et politiques » établie auparavant par *Theophanous c. Herald & Weekly Times Ltd.* (1994), 124 A.L.R. 1. La Haute Cour a statué que [TRADUCTION] « chaque membre de la communauté australienne a intérêt à ce que l'information, les opinions et les points de vue concernant les questions gouvernementales et politiques qui affectent les Australiens [une catégorie qui, quoique large, n'englobe pas toutes les questions d'intérêt public] soient diffusés et reçus. Le devoir de diffuser cette information n'est que le corrélatif de l'intérêt à la recevoir » (p. 115). L'arrêt *Lange* a défini les « questions gouvernementales et politiques » relativement étroitement, de façon à ce qu'elles englobent les sujets qui appartiennent à la sphère de la politique électorale, aux échelons tant local, qu'étatique ou fédéral, ajoutant que [TRADUCTION] « les propos relatifs à des questions concernant les Nations Unies ou d'autres pays peuvent être protégés par le moyen de défense élargi d'immunité relative » (p. 115).

[78] The burden rests on the defendant to show that publishing the information was reasonable in the circumstances. The defendant's conduct "will not be reasonable unless the defendant had reasonable grounds for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue" (*Lange*, at p. 118). "Reasonableness" may also require the publisher to seek a response from the person being defamed.

[78] Selon ce régime, il incombe au défendeur de démontrer que la diffusion de l'information était raisonnable dans les circonstances. Sa conduite [TRADUCTION] « ne sera pas jugée raisonnable à moins qu'il ait eu des motifs raisonnables de croire que l'allégation était véridique, qu'il ait pris les mesures nécessaires, si tant est qu'elles puissent raisonnablement être prises, pour vérifier l'exactitude de l'information et qu'il n'ait pas cru que les allégations étaient fausses » (*Lange*, p. 118). Pour qu'il soit possible de conclure à la « raisonnabilité », il est possible qu'il faille exiger du diffuseur qu'il ait sollicité le point de vue de la personne diffamée.

[79] In its focus on reasonableness, *Lange* resembles *Reynolds* and *Jameel*. There are indications, however, that *Lange*'s reasonableness requirement has been applied more stringently than the

[79] Du fait qu'il met l'accent sur la raisonnabilité, l'arrêt *Lange* ressemble aux décisions *Reynolds* et *Jameel*. Il appert toutefois de certains indices que la norme du caractère raisonnable établie dans

responsibility test under its English counterparts: see Kenyon, at p. 432.

(iii) New Zealand

[80] New Zealand's courts have modified the common law defence of qualified privilege in a manner broadly similar to the Australian approach. Coincidentally, the leading New Zealand cases also involved former prime minister David Lange as plaintiff: see *Lange v. Atkinson Nos. 1*, *2* and *3*. In *Lange v. Atkinson No. 1*, the Court of Appeal announced a qualified privilege for "generally-published statements which directly concern the functioning of representative and responsible government, including statements about the performance or possible future performance of specific individuals in elected public office" (p. 468), basing their decision largely on New Zealand's democratic traditions and the specific dictates of the *Bill of Rights Act 1990*. Contrary to the Australian position, however, the court imposed no reasonableness requirement on the *prima facie* availability of the defence. Rather, evidence of irresponsibility can be adduced by the plaintiff to show that the privilege has been misused.

[81] In *Lange v. Atkinson No. 3*, on remand from the Privy Council, the Court of Appeal re-affirmed its earlier decision, rejecting *Reynolds* as ill-suited to New Zealand's needs and realities. Among the court's criticisms of *Reynolds* was the view that it devalued the traditionally central role of the jury in libel trials by placing the key determination in the hands of the judge, a concern that also arises in the case at bar. More fundamentally, the court opined that "the *Reynolds* decision appears to alter the structure of the law of qualified privilege in a way which adds to the uncertainty and chilling effect almost inevitably present in this area of law" (para. 38). The Court of Appeal's solution was to reject

Lange a été appliquée plus rigoureusement que le critère de la raisonnabilité ne l'a été par les tribunaux anglais : voir Kenyon, p. 432.

(iii) Nouvelle-Zélande

[80] Les tribunaux néo-zélandais ont apporté, au moyen de la défense d'immunité relative reconnu par la common law, des modifications très similaires à celles adoptées par les tribunaux australiens. Par pure coïncidence, les arrêts de principe néo-zélandais concernaient aussi l'ancien premier ministre David Lange, à titre de demandeur : voir *Lange c. Atkinson n^{os} 1*, *2* et *3*. Dans *Lange c. Atkinson n^{o} 1*, la Cour d'appel a annoncé la création d'une immunité relative pour [TRADUCTION] « les déclarations publiées à l'intention du public en général qui portent directement sur le fonctionnement des gouvernements représentatifs et responsables, y compris les déclarations relatives aux réalisations ou possibles réalisations futures d'individus titulaires de charges publiques électives » (p. 468). Cette décision était fondée en grande partie sur les traditions démocratiques de la Nouvelle-Zélande et sur les exigences du *Bill of Rights Act 1990*. Contrairement à la position adoptée par les tribunaux australiens, celle préconisée par la Cour d'appel n'a toutefois pas subordonné le recours au moyen de défense à la preuve de la raisonnabilité. Au contraire, elle prévoit que le demandeur peut présenter des éléments de preuve d'irresponsabilité pour démontrer que l'immunité a été utilisée à mauvais escient.

[81] Dans *Lange c. Atkinson n^{o} 3*, après que la cause lui eût été renvoyée par le Conseil privé, la Cour d'appel a confirmé sa décision antérieure rejetant *Reynolds*, jugeant cette décision mal adaptée aux besoins et aux réalités de la Nouvelle-Zélande. La Cour d'appel a critiqué *Reynolds*, notamment parce qu'elle était d'avis que cette décision dévaluait le rôle central traditionnel du jury dans les procès pour libelle en conférant au juge le pouvoir de trancher le sujet-clé, une question qui se pose également dans le présent pourvoi. Plus fondamentalement, la Cour d'appel a émis l'opinion que [TRADUCTION] « la décision *Reynolds* semble modifier la structure du droit à l'immunité relative

any requirement of reasonableness or diligence in determining the scope of the privilege itself. In the result, the scope of privileged subject matter in New Zealand is narrower than in the United Kingdom, but within that domain New Zealand law may offer stronger protection.

(iv) South Africa

[82] Developments in South Africa have generally parallelled those in the other jurisdictions just discussed, the U.K. most particularly. In *Du Plessis*, the Constitutional Court of South Africa considered and rejected an argument that the common law of defamation should be liberalized and constitutionalized along the lines of *Sullivan*. The court held that s. 15 of the Constitution — the free expression guarantee — did "not mandate any particular rule of common law" (p. 885) because the guarantee does not apply directly to disputes between private litigants. However, echoing the Canadian "*Charter* values" approach, it held that the common law ought to be developed by courts in a manner consistent with constitutional values.

[83] The Supreme Court of Appeal subsequently adopted a responsible journalism defence in *Bogoshi*. Writing for the court, Hefer J.A. held that "the publication in the press of false defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time" (p. 1212). Approving of this approach in the Constitutional Court, Sachs J. recently commented that "[i]n *Bogoshi* the SCA developed in a way that was sensitive to contemporary concerns and realities, a well-weighted

de telle sorte qu'elle ajoute à l'incertitude et à l'effet paralysant presque inévitablement présent dans ce domaine du droit » (par. 38). La Cour d'appel a choisi de rejeter toute exigence de raisonnabilité ou de diligence pour délimiter la portée de l'immunité en tant que telle. Par conséquent, l'étendue des sujets couverts par l'immunité est plus restreinte en Nouvelle-Zélande qu'au Royaume-Uni, mais ceux qui le sont peuvent jouir d'une plus grande protection en Nouvelle-Zélande.

(iv) Afrique du Sud

[82] Le courant jurisprudentiel en Afrique du Sud a suivi, pour l'essentiel, celui des autres juridictions dont je viens de traiter, et plus particulièrement celui du Royaume-Uni. Dans *Du Plessis*, la Cour constitutionnelle de l'Afrique du Sud a examiné, puis rejeté, un argument voulant que les règles de la common law relatives à la diffamation devraient être libéralisées et inscrites dans la Constitution conformément aux principes énoncés dans *Sullivan*. La Cour constitutionnelle a conclu que l'art. 15 de la Constitution — qui garantit la liberté d'expression — [TRADUCTION] « ne commandait pas l'énoncé d'une règle particulière de common law » (p. 885) parce que la garantie qui y figure ne s'applique pas directement aux litiges qui opposent des particuliers. En revanche, faisant écho à l'approche canadienne fondée sur les « valeurs consacrées par la *Charte* », la Cour constitutionnelle a conclu que les tribunaux devaient pouvoir faire évoluer la common law dans le respect des valeurs constitutionnelles.

[83] Ultérieurement, la Cour suprême d'appel a consacré l'existence d'une défense de journalisme responsable dans *Bogoshi*. S'exprimant au nom de la cour, le juge Hefer a conclu que [TRADUCTION] « la publication dans les médias d'allégations de fait diffamatoires erronées ne sera pas jugée illégale si, compte tenu de l'ensemble des circonstances de l'affaire, il est estimé qu'il a été raisonnable de diffuser les faits particuliers en cause, de la manière particulière et au moment particulier choisis pour le faire » (p. 1212). Souscrivant à cette approche pour la Cour constitutionnelle, le juge Sachs a affirmé récemment que [TRADUCTION] « [d]ans *Bogoshi*, la

means of balancing respect for individual personality rights with concern for freedom of the press": *N.M. v. Smith*, [2007] ZACC 6, 2007 (5) SA 250, at para. 203. See also *Khumalo v. Holomisa*, [2002] ZACC 12, 2002 (5) SA 401; *Mthembi-Mahanyele v. Mail & Guardian Ltd.*, [2004] ZASCA 67, 2004 (6) SA 329.

[84] The effect of *Bogoshi* has been to establish in South African law a reasonableness defence resembling *Reynolds* in most respects, but naturally with its own distinctive features elaborated in the jurisprudence.

(c) *Conclusion*

[85] A number of countries with common law traditions comparable to those of Canada have moved in recent years to modify the law of defamation to provide greater protection for communications on matters of public interest. These developments confront us with a range of possibilities. The traditional common law defence of qualified privilege, which offered no protection in respect of publications to the world at large, situates itself at one end of the spectrum of possible alternatives. At the other end is the American approach of protecting all statements about public figures, unless the plaintiff can show malice. Between these two extremes lies the option of a defence that would allow publishers to escape liability if they can establish that they acted responsibly in attempting to verify the information on a matter of public interest. This middle road is the path chosen by courts in Australia, New Zealand, South Africa and the United Kingdom.

[86] In my view, the third option, buttressed by the argument from *Charter* principles advanced earlier, represents a reasonable and proportionate response to the need to protect reputation while sustaining the public exchange of information that is vital to modern Canadian society.

CSA a élaboré, en se souciant des préoccupations et des réalités contemporaines, une approche bien équilibrée pour mettre en balance le respect des droits individuels d'une part et les préoccupations relatives à la liberté de la presse d'autre part » : *N.M. c. Smith*, [2007] ZACC 6, 2007 (5) SA 250, par. 203. Voir aussi *Khumalo c. Holomisa*, [2002] ZACC 12, 2002 (5) SA 401; *Mthembi-Mahanyele c. Mail & Guardian Ltd.*, [2004] ZASCA 67, 2004 (6) SA 329.

[84] *Bogoshi* a eu pour effet de créer, dans le droit sud africain, une défense de raisonnabilité semblable pour l'essentiel à celle établie par *Reynolds*, mais, bien entendu dotée de caractéristiques distinctes élaborées par la jurisprudence.

c) *Conclusion*

[85] Au cours des dernières années, des pays appliquant un régime de common law semblable au nôtre ont modifié les règles relatives à la diffamation applicables chez eux de façon à accorder une plus grande protection aux communications concernant des questions d'intérêt public. Ces initiatives nous placent devant un éventail de possibilités. La défense classique d'immunité relative reconnue par la common law, qui ne confère aucune protection en ce qui a trait aux publications qui n'ont pas de destinataire précis, se situe à une extrémité de l'éventail des possibilités. À l'autre extrémité de l'éventail, on retrouve l'approche américaine qui protège toute déclaration visant un personnage public sauf si le demandeur peut prouver qu'il y a eu malveillance. Entre ces deux extrêmes se situe un moyen de défense qui permettrait aux diffuseurs de s'exonérer en établissant qu'ils ont agi de façon responsable en tentant de vérifier l'information communiquée au sujet d'une question d'intérêt public. Cette voie mitoyenne est celle qu'ont choisie les tribunaux d'Australie, de Nouvelle-Zélande, d'Afrique du Sud et du Royaume-Uni.

[86] À mon avis, cette troisième option, étayée par l'argument fondé sur la *Charte* exposé précédemment, constitue une réponse raisonnable et proportionnelle à la nécessité de protéger les réputations tout en permettant l'échange public d'information fondamental pour la société canadienne moderne.

[87] What remains to be decided is how, consistent with *Charter* values, the new defence should be formulated.

B. *The Elements of the Defence of Responsible Communication*

(1) Preliminary Issues

[88] The first preliminary issue is whether the defence should be considered a new defence or an extension of the traditional defence of qualified privilege.

[89] In *Reynolds*, the House of Lords saw itself as extending the traditional law of qualified privilege in a manner appropriate to the realities of contemporary media and the imperative of free expression. Effectively, the Law Lords decided that the media has a "duty" to report on a matter of public interest and the public has a corresponding "interest" in receiving such a report. Whether the duty and interest had crystallized into a privilege in the particular case depended on whether the defendant had acted responsibly, having regard to Lord Nicholls' non-exhaustive list of factors.

[90] The introduction of the *Reynolds* factors into the analysis, amounting in effect to a due diligence test, produced an uneasy fit with the traditional model of qualified privilege, which looked only to the occasion on which the communication was made. The conduct of the defendant was only relevant after the privilege had already been established, to show whether it was defeated by malice. By contrast, under *Reynolds*, the defendant's conduct became the dominant focus of the inquiry.

[91] This led some courts and commentators to argue that *Reynolds* had introduced a substantially new defence into the law of defamation. For instance, in *Loutchansky v. Times Newspapers Ltd.*, [2001] EWCA Civ 1805, [2002] 1 All E.R. 652, at para. 35, Lord Phillips, M.R. (as he then

[87] Il nous reste à présent à définir, en nous fondant sur les valeurs énoncées dans la *Charte*, le contenu de ce nouveau moyen de défense.

B. *Les éléments de la défense de communication responsable concernant des questions d'intérêt public*

(1) Les questions préliminaires

[88] Il nous faut premièrement déterminer si la défense doit être considérée comme un nouveau moyen de défense ou comme l'extension de l'immunité relative classique.

[89] Dans *Reynolds*, la Chambre des lords a estimé qu'elle élargissait les règles classiques de l'immunité relative pour les adapter à la réalité contemporaine des médias et aux impératifs de la liberté d'expression. De fait, les lords juges ont statué que les médias avaient, relativement aux questions d'intérêt public, un « devoir » de rendre compte auquel correspondait un « intérêt » du public à être ainsi renseigné. L'applicabilité, dans un cas donné, d'une immunité résultant de ce devoir et de cet intérêt dépendait du caractère responsable de la conduite du défendeur, compte tenu de la liste non exhaustive de facteurs dressée par lord Nicholls.

[90] Les facteurs *Reynolds* — équivalant en fait à un test de diligence raisonnable — ne se sont pas intégrés harmonieusement au modèle classique de l'immunité relative axé uniquement sur les circonstances de la communication. En effet, selon ce modèle, la conduite du défendeur ne devenait pertinente qu'une fois l'applicabilité de l'immunité établie, pour déterminer si la malveillance y faisait échec. Or, suivant *Reynolds*, la conduite du défendeur devenait plutôt le point central de l'examen.

[91] C'est pourquoi des tribunaux et des commentateurs en sont venus à considérer que *Reynolds* avait introduit un moyen de défense sensiblement nouveau en matière de diffamation. Par exemple, dans *Loutchansky c. Times Newspapers Ltd.*, [2001] EWCA Civ 1805, [2002] 1 All E.R. 652,

was), opined that the *Reynolds* privilege is "a different jurisprudential creature from the traditional form of privilege from which it sprang".

[92] The majority of the Law Lords in *Jameel* maintained the view that "*Reynolds* privilege" or "responsible journalism" rests at least notionally on the duty/interest analysis associated with qualified privilege. However, Lord Hoffmann, with the concurrence of Baroness Hale, insisted that responsible journalism could not be assimilated to traditional qualified privilege, adopting Lord Phillips' view that it is "a different jurisprudential creature". It is not the occasion which is protected by the new defence, but the published material itself. (See also Brown, vol. 4, at pp. 27-45 and 27-46, fn. 116.) Furthermore, it makes little sense to speak of an assertion of responsible journalism being defeated by proof of malice, because the absence of malice is effectively built into the definition of responsible journalism itself.

[93] Characterizing the change to the law as introducing a new defence is also supported by the fact that many forms of qualified privilege would not be well served by opening up the privilege to media publications. The duties and interests of people communicating and receiving job references or police reports are definable with some precision and involve a genuine reciprocity. The reciprocal duty and interest involved in a journalistic publication to the world at large, by contrast, is largely notional.

[94] The traditional duty/interest framework works well in its established settings of qualified privilege. These familiar categories should not be compromised or obscured by the addition of a broad new privilege based on public interest.

par. 35, lord Phillips, maître des rôles (maintenant président de la Cour suprême du Royaume-Uni), a exprimé l'opinion que l'immunité reconnue dans *Reynolds* est [TRADUCTION] « une créature jurisprudentielle différente de la forme traditionnelle d'immunité dont elle est issue ».

[92] La majorité des lords juges, dans *Jameel*, a réitéré l'opinion que « l'immunité *Reynolds* » ou le « journalisme responsable » reposaient à tout le moins théoriquement sur la correspondance devoir/intérêt associée à l'immunité relative. Cependant, lord Hoffmann, à l'opinion duquel a souscrit la baronne Hale, a affirmé avec force qu'il n'était pas possible d'assimiler le journalisme responsable à l'immunité relative classique et a fait sienne l'opinion de lord Phillips selon laquelle il s'agissait d'une [TRADUCTION] « créature jurisprudentielle différente ». Ce ne sont pas les circonstances que protège le nouveau moyen de défense, mais ce qui est communiqué. (Voir également Brown, vol. 4, p. 27-45 et 27-46, note 116.) Au surplus, il ne serait pas très logique d'affirmer que l'établissement de la malveillance fait échec à la défense de journalisme responsable, parce que l'absence de malveillance est inhérente à la définition même du journalisme responsable.

[93] Appliquer l'immunité aux communications médiatiques nuirait à plusieurs formes d'immunité relative. Voilà une raison de plus pour qualifier la modification apportée au droit d'introduction d'un nouveau moyen de défense. Les devoirs et les intérêts de ceux qui fournissent ou reçoivent des références professionnelles ou des rapports de police peuvent être définis avec une certaine précision et comportent une véritable réciprocité. En comparaison, la réciprocité entre les devoirs et les intérêts en jeu dans une communication journalistique sans destinataire précis est essentiellement théorique.

[94] Le cadre classique devoir/intérêt s'applique bien dans son contexte reconnu qu'est l'immunité relative. Ces catégories familières ne devraient pas être altérées ou embrouillées par l'ajout d'une nouvelle immunité importante fondée sur l'intérêt

Further, qualified privilege as developed in the cases is grounded not in free expression values but in the social utility of protecting particular communicative occasions from civil liability.

[95] I therefore conclude that the proposed change to the law should be viewed as a new defence, leaving the traditional defence of qualified privilege intact.

[96] A second preliminary question is what the new defence should be called. In arguments before us, the defence was referred to as the responsible journalism test. This has the value of capturing the essence of the defence in succinct style. However, the traditional media are rapidly being complemented by new ways of communicating on matters of public interest, many of them online, which do not involve journalists. These new disseminators of news and information should, absent good reasons for exclusion, be subject to the same laws as established media outlets. I agree with Lord Hoffmann that the new defence is "available to anyone who publishes material of public interest in any medium": *Jameel*, at para. 54.

[97] A review of recent defamation case law suggests that many actions now concern blog postings and other online media which are potentially both more ephemeral and more ubiquitous than traditional print media. While established journalistic standards provide a useful guide by which to evaluate the conduct of journalists and non-journalists alike, the applicable standards will necessarily evolve to keep pace with the norms of new communications media. For this reason, it is more accurate to refer to the new defence as responsible communication on matters of public interest.

public. De plus, le concept d'immunité relative élaborée par la jurisprudence ne procède pas de valeurs liées à la liberté d'expression, mais de l'utilité sociale de ne pas tenir civilement responsables les auteurs de communications faites dans des circonstances particulières.

[95] Je conclus donc qu'il convient de considérer que le changement proposé crée un nouveau moyen de défense et laisse intacte celui classique d'immunité relative.

[96] La deuxième question préliminaire porte sur le nom à donner à ce nouveau moyen de défense. Dans les observations qui nous ont été soumises, on l'appelle le critère du journalisme responsable. Ce nom a le mérite d'exprimer succinctement l'essence du moyen de défense. Cependant, de nouveaux modes de communication (beaucoup d'entre eux en ligne) permettant de traiter de questions d'intérêt public et ne faisant pas appel à des journalistes se greffent rapidement aux médias traditionnels. À moins qu'il n'existe des motifs valables de les exclure, ces nouveaux propagateurs de nouvelles et d'information devraient être soumis aux mêmes règles juridiques que celles auxquelles sont soumis les médias établis. Je partage l'opinion de lord Hoffmann que le moyen de défense peut être [TRADUCTION] « invoqué par quiconque diffuse du matériel d'intérêt public, quel que soit le média » : *Jameel*, par. 54.

[97] Un examen de la jurisprudence récente relative à la diffamation permet de constater que de nombreux recours concernent désormais des articles de blogue ainsi que d'autres médias en ligne dont la portée est susceptible d'être à la fois plus éphémère et plus répandue que celle de la presse écrite. Même si les normes journalistiques établies constituent un guide utile pour évaluer la conduite tant des journalistes que des non-journalistes, les normes applicables évolueront forcément pour suivre l'évolution des nouveaux médias. Il est donc plus juste de désigner ce nouveau moyen sous le nom de défense de communication responsable concernant des questions d'intérêt public.

(2) Formulating the Defence of Responsible Communication on Matters of Public Interest

[98] This brings us to the substance of the test for responsible communication. In *Quan*, Sharpe J.A. held that the defence has two essential elements: public interest and responsibility. I agree, and would formulate the test as follows. First, the publication must be on a matter of public interest. Second, the defendant must show that publication was responsible, in that he or she was diligent in trying to verify the allegation(s), having regard to all the relevant circumstances.

(a) *Was the Publication on a Matter of Public Interest?*

[99] To be protected by the defence of responsible communication, the publication must be on a matter of public interest.

[100] This is a matter for the judge to decide. To be sure, whether a statement's publication is in the public interest involves factual issues. But it is primarily a question of law; the judge is asked to determine whether the nature of the statement is such that protection may be warranted in the public interest. The judge acts as a gatekeeper analogous to the traditional function of the judge in determining whether an "occasion" is subject to privilege. Unlike privilege, however, the determination of whether a statement relates to a matter of public interest focusses on the substance of the publication itself and not the "occasion". Where the question is whether a particular communication fits within a recognized subject matter of public interest, it is a mixed question of fact and law, and will therefore attract more deference on appeal than will a pure determination of public interest. But it properly remains a question for the trial judge as opposed to the jury.

(2) Définition de la défense de communication responsable concernant des questions d'intérêt public

[98] Cela nous amène à traiter des éléments du test applicable lorsqu'est invoquée la défense de communication responsable. Dans *Quan*, le juge Sharpe a conclu que la défense comporte deux éléments essentiels : l'intérêt public et le caractère responsable. Je partage son point de vue et je définirais ainsi le test applicable. Premièrement, la communication doit concerner une question d'intérêt public. Deuxièmement, le défendeur doit démontrer que la communication était responsable, en ce sens qu'il s'est efforcé avec diligence de vérifier les allégations, compte tenu de l'ensemble des circonstances pertinentes.

a) *La communication concerne-t-elle une question d'intérêt public?*

[99] Pour que la défense de communication responsable s'applique, l'énoncé diffusé doit porter sur une question d'intérêt public.

[100] Il appartient au juge de trancher à cet égard. Naturellement, des considérations factuelles entrent en ligne de compte lorsqu'il s'agit de déterminer si la diffusion d'un énoncé est d'intérêt public, mais la question est principalement juridique. Ainsi, le juge est appelé à déterminer si, de par sa nature, l'énoncé peut justifier l'application d'une protection dans l'intérêt public. Le juge exerce à cet égard une fonction de gardien analogue à celle qu'il remplit lorsqu'il détermine si des « circonstances » donnent lieu à une immunité dans le modèle classique. Toutefois, l'examen visant à déterminer si l'énoncé porte sur une question d'intérêt public, contrairement à celui visant à juger de l'opportunité d'appliquer l'immunité, est axé sur la substance de la communication elle-même, et non sur les « circonstances » dans lesquelles elle s'inscrit. Déterminer si un énoncé en particulier porte sur un sujet reconnu comme étant d'intérêt public, consiste à trancher une question mixte de fait et de droit. En appel, il conviendra donc de faire preuve de davantage de déférence à l'égard de la réponse à une telle question qu'à l'égard du fruit du pur examen de l'intérêt public. Il n'en demeure pas moins que c'est une question qui continue à bon droit à relever du juge et non du jury.

[101] In determining whether a publication is on a matter of public interest, the judge must consider the subject matter of the publication as a whole. The defamatory statement should not be scrutinized in isolation. The judge's role at this point is to determine whether the subject matter of the communication as a whole is one of public interest. If it is, and if the evidence is legally capable of supporting the defence, as I will explain below, the judge should put the case to the jury for the ultimate determination of responsibility.

[102] How is "public interest" in the subject matter established? First, and most fundamentally, the public interest is not synonymous with what interests the public. The public's appetite for information on a given subject — say, the private lives of well-known people — is not on its own sufficient to render an essentially private matter public for the purposes of defamation law. An individual's reasonable expectation of privacy must be respected in this determination. Conversely, the fact that much of the public would be less than riveted by a given subject matter does not remove the subject from the public interest. It is enough that some segment of the community would have a genuine interest in receiving information on the subject.

[103] The authorities offer no single "test" for public interest, nor a static list of topics falling within the public interest (see, e.g., *Gatley on Libel and Slander* (11th ed. 2008), at p. 530). Guidance, however, may be found in the cases on fair comment and s. 2(*b*) of the *Charter*.

[104] In *London Artists, Ltd. v. Littler*, [1969] 2 All E.R. 193 (C.A.), speaking of the defence of fair comment, Lord Denning, M.R., described public interest broadly in terms of matters that may legitimately concern or interest people:

> There is no definition in the books as to what is a matter of public interest. All we are given is a list of examples, coupled with the statement that it is for the judge and not for the jury. I would not myself confine it within narrow limits. Whenever a matter is such as to affect

[101] Pour décider si elle concerne une question d'intérêt public, le juge doit tenir compte de l'ensemble du contenu d'une communication. Il ne doit pas examiner l'énoncé diffamatoire isolément. À ce stade, le rôle du juge consiste à déterminer si le contenu de la communication, dans son ensemble, est d'intérêt public. S'il estime que c'est le cas et que la preuve permet de fonder juridiquement la défense, comme je l'expliquerai ultérieurement, le juge demande alors au jury de se prononcer en dernière analyse sur le caractère responsable.

[102] Comment établit-on qu'une question est d'« intérêt public »? Disons premièrement et fondamentalement que l'intérêt public n'est pas synonyme d'intérêt du public. La soif d'information du public sur un sujet donné — la vie privée de gens célèbres, par exemple — ne suffit pas en soi pour conférer un caractère public, au sens des règles régissant la diffamation, à ce qui est essentiellement privé. Pour trancher cette question, il faut respecter l'attente raisonnable d'une personne en matière de vie privée. À l'inverse, le fait qu'un sujet donné soit loin d'intéresser une majorité de gens ne l'exclut pas de l'intérêt public; il suffit qu'un segment de la population ait un intérêt véritable à recevoir l'information s'y rapportant.

[103] La jurisprudence et la doctrine n'énoncent pas de « test » unique permettant de conclure à l'existence ou non d'un intérêt public, pas plus qu'elles ne dressent une liste établie de sujets relevant de l'intérêt public (voir, p. ex., *Gatley on Libel and Slander* (11e éd. 2008), p. 530). La jurisprudence relative au commentaire loyal ainsi qu'à l'al. 2*b*) de la *Charte* peut toutefois nous éclairer.

[104] Dans *London Artists, Ltd. c. Littler*, [1969] 2 All E.R. 193 (C.A.), lord Denning, maître des rôles, qui traitait de la défense de commentaire loyal, a décrit l'intérêt public de façon large, en parlant de sujets qui peuvent légitimement intéresser ou préoccuper les gens :

> [TRADUCTION] Les ouvrages ne définissent pas ce qui est d'intérêt public. On n'y trouve qu'une liste d'exemples, et la mention que la question relève du juge et non du jury. Je pense, pour ma part, qu'il ne faut pas enfermer la notion dans des limites étroites. Dès qu'une

people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or to others; then it is a matter of public interest on which everyone is entitled to make fair comment. [p. 198]

[105] To be of public interest, the subject matter "must be shown to be one inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached": Brown, vol. 2, at pp. 15-137 and 15-138. The case law on fair comment "is replete with successful fair comment defences on matters ranging from politics to restaurant and book reviews": *Simpson v. Mair*, 2004 BCSC 754, 31 B.C.L.R. (4th) 285, at para. 63, *per* Koenigsberg J. Public interest may be a function of the prominence of the person referred to in the communication, but mere curiosity or prurient interest is not enough. Some segment of the public must have a genuine stake in knowing about the matter published.

[106] Public interest is not confined to publications on government and political matters, as it is in Australia and New Zealand. Nor is it necessary that the plaintiff be a "public figure", as in the American jurisprudence since *Sullivan*. Both qualifications cast the public interest too narrowly. The public has a genuine stake in knowing about many matters, ranging from science and the arts to the environment, religion and morality. The democratic interest in such wide-ranging public debate must be reflected in the jurisprudence.

[107] Care must be taken by the judge making this determination to characterize the subject matter accurately. Overly narrow characterization may inappropriately defeat the defence at the outset. For example, characterizing the subject matter in

question touche les gens en général, à tel point qu'ils peuvent légitimement s'intéresser à ce qui se passe ou à ce qui peut leur arriver à eux ou à ce qui peut arriver à d'autres personnes, ou s'en préoccuper, cette question en est une d'intérêt public sur laquelle tout le monde a le droit de faire un commentaire loyal. [p. 198]

[105] Pour être d'intérêt public, une question [TRADUCTION] « doit être soit de celles qui éveillent l'attention publique de façon démontrable ou qui préoccupent sensiblement le public parce qu'elles concernent le bien-être de citoyens, soit de celles qui jouissent d'une notoriété publique considérable ou qui ont créé une controverse importante » : Brown, vol. 2, p. 15-137 et 15-138. La jurisprudence relative au commentaire loyal [TRADUCTION] « fourmille d'exemples où le moyen de défense fondé sur le commentaire loyal a été accueilli à l'égard de sujets allant de la politique aux critiques de restaurants ou de livres » : *Simpson c. Mair*, 2004 BCSC 754, 31 B.C.L.R. (4th) 285, par. 63, la juge Koenigsberg. L'intérêt public peut découler de la notoriété de la personne mentionnée, mais la simple curiosité ou l'intérêt malsain sont insuffisants. Il faut que certains segments de la population aient un intérêt véritable à être au courant du sujet du matériel diffusé.

[106] L'intérêt public n'est pas confiné aux publications portant sur les questions gouvernementales et politiques, comme c'est le cas en Australie et en Nouvelle-Zélande. Il n'est pas nécessaire non plus que le demandeur soit un « personnage public » comme l'exige la jurisprudence américaine depuis *Sullivan*. Dans ces deux cas, l'intérêt public est défini de façon trop étroite. Le public a véritablement intérêt à être au courant d'un grand éventail de sujets concernant tout autant la science et les arts que l'environnement, la religion et la moralité. L'intérêt démocratique pour que se tiennent des débats publics sur une gamme de sujets de cette ampleur doit se traduire dans la jurisprudence.

[107] Le juge appelé à statuer sur cette question doit s'efforcer de définir le sujet avec justesse. Une définition trop étroite peut vouer d'emblée le moyen de défense à l'échec. Par exemple, définir le sujet en l'espèce comme les « relations d'affaires de Peter

this case simply as "Peter Grant's business dealings" would obscure the significant public interest engaged by the article and thus restrict the legitimate scope of public interest. Similarly, characterizing the subject matter too broadly as "Ontario politics" might render the test a mere rubber stamp and bring unworthy material within the protection of the defence.

[108] The question then arises whether the judge or the jury should decide whether the inclusion of a particular defamatory statement in a publication was necessary to communicating on the matter of public interest. Is this question merely a subset of determining generally whether the publication is in the public interest? Or is it better treated as a factor in the jury's assessment of responsibility? Lord Hoffmann in *Jameel* took the view that determining whether a defamatory statement was necessary to communicating on a matter of public interest is a question of law for the judge, conceding, however, that this may require the judge to second-guess editorial judgment, and must be approached in a deferential way (para. 51).

[109] In my view, if the publication, read broadly and as a whole, relates to a matter of public interest, the judge should leave the defence to the jury on the publication as a whole, and not editorially excise particular statements from the defence on the ground that they were not necessary to communicating on the matter of public interest. Deciding whether the inclusion of the impugned statement was justifiable involves a highly fact-based assessment of the context and details of the publication itself. Whereas a given subject matter either is or is not in law a matter of public interest, the justifiability of including a defamatory statement may admit of many shades of gray. It is intimately bound up in the overall determination of responsibility and should be left to the jury. It is for the jury to consider the need to include particular defamatory statements in determining whether the defendant acted responsibly in publishing what it did.

Grant » obscurcirait l'importante question d'intérêt public posée par l'article et réduirait ainsi la portée légitime de l'intérêt public. De même, une définition trop large, telle la « politique ontarienne », pourrait transformer l'application du moyen de défense en une simple formalité et aboutir à protéger ce qui n'est pas digne de l'être.

[108] Il faut ensuite se demander qui du juge ou du jury détermine si l'inclusion dans un reportage d'un énoncé diffamatoire était nécessaire à la communication concernant la question d'intérêt public. S'agit-il d'une simple sous-question intervenant dans l'appréciation générale de l'intérêt public de la communication ou d'un facteur dont le jury doit tenir compte en évaluant le caractère responsable? Dans *Jameel*, lord Hoffmann a considéré qu'il s'agissait d'une question de droit qui relevait du juge tout en concédant que son examen pouvait obliger le juge à se substituer après coup au diffuseur et qu'il fallait en conséquence faire preuve de déférence à l'égard du jugement éditorial (par. 51).

[109] À mon avis, si la communication, prise dans son ensemble et analysée de façon large, se rapporte à une question d'intérêt public, le juge doit soumettre le moyen de défense au jury à l'égard de la totalité de la communication et s'abstenir de soustraire par suite d'un choix éditorial certains passages à l'application de la défense pour cause de non-nécessité à la communication d'intérêt public. Pour décider s'il était justifié d'inclure l'énoncé en cause, il faut procéder à une évaluation largement factuelle du contexte et des détails de ce qui a été communiqué. Si, juridiquement, un sujet donné est d'intérêt public ou ne l'est pas, la question de la nécessité de l'inclusion d'un énoncé diffamatoire, elle, n'est pas aussi tranchée. Elle est intimement liée à l'appréciation globale du caractère responsable, et elle devrait être laissée à l'appréciation du jury. Ainsi, c'est au jury qu'il appartient d'examiner la nécessité de l'inclusion d'énoncés diffamatoires donnés pour déterminer si le défendeur a agi de façon responsable en diffusant la communication.

(b) *Was Publication of the Defamatory Communication Responsible?*

[110] Against this background, I turn to some relevant factors that may aid in determining whether a defamatory communication on a matter of public interest was responsibly made.

(i) The Seriousness of the Allegation

[111] The logic of proportionality dictates that the degree of diligence required in verifying the allegation should increase in proportion to the seriousness of its potential effects on the person defamed. This factor recognizes that not all defamatory imputations carry equal weight. The defamatory "sting" of a statement can range from a passing irritant to a blow that devastates the target's reputation and career. The apprehended harm to the plaintiff's dignity and reputation increases in relation to the seriousness of the defamatory sting. The degree to which the defamatory communication intrudes upon the plaintiff's privacy is one way in which the seriousness of the sting may be measured. Publication of the kinds of allegations traditionally considered the most serious — for example, corruption or other criminality on the part of a public official — demand more thorough efforts at verification than will suggestions of lesser mischief. So too will those which impinge substantially on the plaintiff's reasonable expectation of privacy.

(ii) The Public Importance of the Matter

[112] Inherent in the logic of proportionality is the degree of the public importance of the communication's subject matter. The subject matter will, however, already have been deemed by the trial judge to be a matter of public interest. However, not all matters of public interest are of equal importance. Communications on grave matters of national security, for example, invoke different concerns from those on the prosaic business of everyday politics.

b) *La communication des propos diffamatoires a-t-elle été faite de façon responsable?*

[110] Ce contexte étant défini, je me tourne vers certains des facteurs pouvant nous aider à déterminer si une communication diffamatoire concernant une question d'intérêt public a été faite de façon responsable.

(i) La gravité de l'allégation

[111] Suivant la logique de la proportionnalité, le degré de diligence mis à vérifier l'allégation devrait croître en proportion de la gravité des effets que celle-ci risque d'avoir sur la personne diffamée. Ce facteur reconnaît que toutes les imputations diffamatoires n'ont pas le même poids. En effet, l'élément d'« affront » d'un énoncé diffamatoire peut aller de l'irritation passagère au coup dévastateur pour la réputation et la carrière de la personne visée. Le tort susceptible d'être causé à la dignité et à la réputation du demandeur augmente en fonction de la gravité de l'affront diffamatoire. La gravité de l'atteinte au droit à la vie privée du demandeur est l'un des moyens qui peuvent permettre de mesurer la gravité de l'affront. Les allégations habituellement considérées comme les plus graves — par exemple, des allégations de corruption ou de perpétration d'une autre infraction par le titulaire d'une charge publique — commandent des vérifications plus approfondies que des insinuations moins graves. Il en va de même des allégations qui portent atteinte de façon importante aux attentes raisonnables du demandeur en matière de vie privée.

(ii) L'importance de la question pour le public

[112] Le degré d'importance du sujet de la communication pour le public est un facteur inhérent à la logique du principe de proportionnalité. Le juge du procès aura toutefois déjà jugé que le sujet est d'intérêt public. Cependant, tous les sujets d'intérêt public ne sont pas d'importance égale. Les communications sur les questions graves de sécurité nationale, par exemple, suscitent des préoccupations différentes de celles soulevées par des questions

What constitutes reasonable diligence with respect to one may fall short with respect to the other. Where the public importance in a subject matter is especially high, the jury may conclude that this factor tends to show that publication was responsible in the circumstances. In many cases, the public importance of the matter may be inseparable from its urgency.

(iii) The Urgency of the Matter

[113] As Lord Nicholls observed in *Reynolds*, news is often a perishable commodity. The legal requirement to verify accuracy should not unduly hamstring the timely reporting of important news. But nor should a journalist's (or blogger's) desire to get a "scoop" provide an excuse for irresponsible reporting of defamatory allegations. The question is whether the public's need to know required the defendant to publish when it did. As with the other factors, this is considered in light of what the defendant knew or ought to have known at the time of publication. If a reasonable delay could have assisted the defendant in finding out the truth and correcting any defamatory falsity without compromising the story's timeliness, this factor will weigh in the plaintiff's favour.

(iv) The Status and Reliability of the Source

[114] Some sources of information are more worthy of belief than others. The less trustworthy the source, the greater the need to use other sources to verify the allegations. This applies as much to documentary sources as to people; for example, an "interim progress report" of an internal inquiry has been found to be an insufficiently authoritative source in the circumstances: *Miller v. Associated Newspapers Ltd.*, [2005] EWHC 557 (QB) (BAILII). Consistent with the logic of the repetition rule, the fact that someone has already published a defamatory statement does not give another person licence to repeat it. As already explained, this principle is especially vital when defamatory

prosaïques qui constituent le quotidien de la vie politique. Ainsi, il se pourrait que ce qui constitue de la diligence raisonnable à l'égard d'une question ne suffise pas quant à une autre. Lorsqu'un sujet revêt une importance particulièrement élevée pour le public, le jury peut conclure que ce facteur tend à démontrer que la communication a été faite de façon responsable dans les circonstances. Souvent, l'importance de la question pour le public sera indissociable de son urgence.

(iii) L'urgence de la question

[113] Comme lord Nicholls l'a indiqué dans *Reynolds*, les nouvelles sont souvent des produits périssables. Ainsi, il ne faut pas que l'exigence légale de la vérification de l'exactitude empêche la diffusion en temps utile de nouvelles importantes. Il ne faut pas non plus que la course au « scoop » à laquelle prendrait part un journaliste (ou un blogueur) serve d'excuse à la diffusion irresponsable d'allégations diffamatoires. Il s'agit de décider si la nécessité d'informer le public commandait que le défendeur procède à la communication au moment où il l'a fait. Ce facteur, comme d'autres, s'examine à la lumière de ce que le défendeur savait ou devait savoir au moment de la diffusion. Si un délai raisonnable lui avait permis de découvrir la vérité et de corriger les erreurs diffamatoires sans nuire à l'actualité de la nouvelle, le facteur favoriserait le demandeur.

(iv) La nature et la fiabilité des sources

[114] Il existe des sources d'information plus dignes de foi que d'autres. Moins une source est fiable, plus il faudra se tourner vers d'autres sources pour vérifier les allégations. Cela vaut pour toutes les sources qu'il s'agisse de documents ou de personnes. Dans *Miller c. Associated Newspapers Ltd.*, [2005] EWHC 557 (QB) (BAILII), par exemple, la cour a jugé que le [TRADUCTION] « rapport d'étape provisoire » d'une enquête interne n'était pas suffisamment fiable dans les circonstances. Conformément à la logique de la règle de la répétition, le fait que quelqu'un ait déjà diffusé un énoncé diffamatoire n'autorise pas quelqu'un d'autre à le répéter. Comme je l'ai déjà expliqué, ce principe

statements can be reproduced electronically with the speed of a few keystrokes. At the same time, the fact that the defendant's source had an axe to grind does not necessarily deprive the defendant of protection, provided other reasonable steps were taken.

[115] It may be responsible to rely on confidential sources, depending on the circumstances; a defendant may properly be unwilling or unable to reveal a source in order to advance the defence. On the other hand, it is not difficult to see how publishing slurs from unidentified "sources" could, depending on the circumstances, be irresponsible.

(v) Whether the Plaintiff's Side of the Story Was Sought and Accurately Reported

[116] It has been said that this is "perhaps the core *Reynolds* factor" (*Gatley*, at p. 535) because it speaks to the essential sense of fairness the defence is intended to promote, as well as thoroughness. In most cases, it is inherently unfair to publish defamatory allegations of fact without giving the target an opportunity to respond: see, e.g., *Galloway v. Telegraph Group Ltd.*, [2004] EWHC 2786 (QB) (BAILII), at paras. 166-67, *per* Eady J. Failure to do so also heightens the risk of inaccuracy, since the target of the allegations may well be able to offer relevant information beyond a bare denial.

[117] The importance of this factor varies with the degree to which fulfilling its dictates would actually have bolstered the fairness and accuracy of the report. For example, if the target of the allegations could have no special knowledge of them, this factor will be of little importance: see *Jameel*, at paras. 35, and 83-85, where the House of Lords held that the plaintiff (whose group of companies had been put on a terrorism monitoring list) could not realistically have added anything material to

est d'autant plus vital lorsque les énoncés diffamatoires peuvent être reproduits électroniquement en aussi peu de temps qu'il ne le faut pour taper sur quelques touches du clavier. Cela étant dit, le fait que la source du défendeur ait agi dans son intérêt personnel ne prive pas nécessairement ce dernier de protection, à la condition qu'il ait pris d'autres mesures raisonnables.

[115] Se fier à des sources confidentielles peut, selon les circonstances, constituer une conduite responsable; un défendeur peut légitimement refuser de révéler l'identité d'une source pour se prévaloir de la défense ou en être incapable. Par contre, il n'est pas difficile de percevoir l'irresponsabilité qu'il pourrait y avoir, selon les circonstances, à diffuser des insultes proférées par des « sources » non identifiées.

(v) A-t-on demandé et rapporté fidèlement la version des faits du demandeur?

[116] On a dit qu'il s'agissait [TRADUCTION] « peut-être du facteur *Reynolds* fondamental » (*Gatley*, p. 535) parce qu'il se rapporte à la fois à l'esprit essentiel de justice que le moyen de défense vise à protéger et à l'exhaustivité. Dans la plupart des cas, il est intrinsèquement injuste de diffuser des allégations de fait diffamatoires sans donner à la personne visée la possibilité de répondre : voir, p. ex., *Galloway c. Telegraph Group Ltd.*, [2004] EWHC 2786 (QB) (BAILII), par. 166-167, le juge Eady. Lorsqu'on ne fournit pas cette occasion, on accroît en outre les risques d'inexactitude, car la personne visée peut fort bien être en mesure de fournir des renseignements pertinents et non une simple dénégation.

[117] L'importance de ce facteur varie en fonction du degré de justice et d'exactitude que son application aurait permis d'atteindre. Par exemple, si la cible des allégations ne pouvait rien savoir de particulier à leur sujet, ce facteur aurait peu d'importance : voir *Jameel*, par. 35 et 83-85, où la Chambre des lords a estimé peu réaliste de penser que le demandeur (dont le groupe de sociétés avait été inscrit sur une liste de surveillance pour terrorisme) aurait pu ajouter quoi que ce soit d'important parce

the story because the relevant actions of the Saudi and U.S. governments were secret and entirely beyond his control.

(vi) Whether Inclusion of the Defamatory Statement Was Justifiable

[118] As discussed earlier (paras. 108-9), it is for the jury to determine whether inclusion of a defamatory statement was necessary to communicating on a matter of public interest. Its view of the need to include a particular statement may be taken into account in deciding whether the communicator acted responsibly. In applying this factor, the jury should take into account that the decision to include a particular statement may involve a variety of considerations and engage editorial choice, which should be granted generous scope.

(vii) Whether the Defamatory Statement's Public Interest Lay in the Fact That It Was Made Rather Than Its Truth ("Reportage")

[119] The "repetition rule" holds that repeating a libel has the same legal consequences as originating it. This rule reflects the law's concern that one should not be able to freely publish a scurrilous libel simply by purporting to attribute the allegation to someone else. The law will not protect a defendant who is "willing to wound, and yet afraid to strike": *"Truth" (N.Z.) Ltd. v. Holloway*, [1960] 1 W.L.R. 997 (P.C.), at p. 1001, *per* Lord Denning. In sum, the repetition rule preserves the accountability of media and other reporting on matters of public interest. The "bald retailing of libels" is not in the public interest: *Charman*, at para. 91, *per* Sedley L.J. Maintaining the repetition rule is particularly important in the age of the Internet, when defamatory material can spread from one website to another at great speed.

[120] However, the repetition rule does not apply to fairly reported statements whose public interest

que les gestes pertinents des gouvernements saoudien et américain étaient secrets et échappaient totalement à son contrôle.

(vi) L'inclusion de l'énoncé diffamatoire se justifiait-elle?

[118] Comme on l'a vu (par. 108-109), il appartient au jury de déterminer si l'inclusion d'un énoncé diffamatoire était nécessaire à la communication concernant une question d'intérêt public. L'opinion du communicateur sur la nécessité d'inclure un énoncé particulier peut entrer en ligne de compte pour établir si ce dernier a agi de façon responsable. En appliquant ce facteur, le jury doit prendre en considération que la décision d'inclure un énoncé donné peut faire intervenir de nombreuses variables et relève de choix éditoriaux auxquels il convient d'accorder une grande portée.

(vii) L'intérêt public de l'énoncé diffamatoire réside-t-il dans son existence même, et non dans sa véracité? (« relation de propos »)

[119] Selon la « règle de la répétition », la réitération d'un libelle entraîne les mêmes conséquences juridiques que le libelle lui-même. Cette règle traduit le souci du droit d'empêcher qu'on puisse se livrer impunément à la diffamation simplement en attribuant les allégations calomnieuses à autrui. Le droit ne viendra pas en aide au défendeur [TRADUCTION] « cherchant à blesser, mais d'une main timide » : *« Truth » (N.Z.) Ltd. c. Holloway*, [1960] 1 W.L.R. 997 (C.P.), p. 1001, lord Denning. En somme, la règle de la répétition assure le maintien de la responsabilité des organes de presse et autres qui diffusent des renseignements sur des questions d'intérêt public. Le [TRADUCTION] « simple colportage de libelles » n'est pas d'intérêt public : *Charman*, par. 91, lord juge Sedley. En outre, il est particulièrement important de maintenir la règle de la répétition à l'époque d'Internet, où des propos diffamatoires peuvent se propager d'un site Web à un autre en un rien de temps.

[120] Toutefois, la règle de la répétition ne s'applique pas aux propos fidèlement rapportés, dont

lies in the fact that they were made rather than in their truth or falsity. This exception to the repetition rule is known as reportage. If a dispute is itself a matter of public interest and the allegations are fairly reported, the publisher should incur no liability even if some of the statements made may be defamatory and untrue, provided: (1) the report attributes the statement to a person, preferably identified, thereby avoiding total unaccountability; (2) the report indicates, expressly or implicitly, that its truth has not been verified; (3) the report sets out both sides of the dispute fairly; and (4) the report provides the context in which the statements were made. See *Al-Fagih v. H.H. Saudi Research & Marketing (U.K.) Ltd.*, [2001] EWCA Civ 1634 (BAILII), at para. 52; *Charman*; *Prince Radu of Hohenzollern v. Houston*, [2007] EWHC 2735 (QB) (BAILII); *Roberts v. Gable*, [2007] EWCA Civ 721, [2008] 2 W.L.R. 129.

[121] Where the defendant claims that the impugned publication (in whole or in part) constitutes reportage, i.e. that the dominant public interest lies in reporting what was said in the context of a dispute, the judge should instruct the jury on the repetition rule and the reportage exception to the rule. If the jury is satisfied that the statements in question are reportage, it may conclude that publication was responsible, having regard to the four criteria set out above. As always, the ultimate question is whether publication was responsible in the circumstances.

(viii) Other Considerations

[122] As noted, the factors serve as non-exhaustive but illustrative guides. Ultimately, all matters relevant to whether the defendant communicated responsibly can be considered.

l'intérêt public réside dans le fait même qu'ils ont été tenus plutôt que dans leur fausseté ou leur véracité. Cette exception à la règle de la répétition est connue sous le nom de doctrine de la relation de propos. Si un conflit est en soi une question d'intérêt public et que les allégations sont fidèlement rapportées, le diffuseur ne devrait pas encourir de responsabilité même si certaines des déclarations peuvent être diffamatoires et erronées, à condition que : (1) la relation de propos attribue les dires à quelqu'un, préférablement identifié, pour éviter que personne n'assume de responsabilité; (2) la relation de propos indique, expressément ou implicitement, que la véracité des dires n'a pas été vérifiée; (3) la relation de propos expose équitablement les deux versions des faits; et (4) la relation de propos situe les dires dans leur contexte. Voir *Al-Fagih c. H.H. Saudi Research & Marketing (U.K.) Ltd.*, [2001] EWCA Civ 1634 (BAILII), par. 52; *Charman*; *Prince Radu of Hohenzollern c. Houston*, [2007] EWHC 2735 (QB) (BAILII); *Roberts c. Gable*, [2007] EWCA Civ 721, [2008] 2 W.L.R. 129.

[121] Lorsque le défendeur soutient que la communication qu'on lui reproche constitue (en tout ou en partie) une relation de propos, c.-à-d. que l'intérêt public dominant réside dans le fait de relater ce qui a été dit dans le contexte d'un débat, le juge devrait donner au jury des directives sur la règle de la répétition et sur l'exception à cette règle qui entre en jeu dans le cas d'une relation de propos. Si le jury est convaincu que les énoncés en cause constituent une relation de propos, vu les quatre critères énoncés précédemment, il peut conclure que leur communication a été faite de façon responsable. Comme dans tous les cas, la question déterminante est celle de savoir si la communication a été faite de façon responsable dans les circonstances.

(viii) Autres considérations

[122] Je le répète, ces facteurs constituent un guide non exhaustif. En définitive, tous les éléments pertinents pour juger du caractère responsable de la communication peuvent être pris en considération.

[123] Not all factors are of equal value in assessing responsibility in a given case. For example, the "tone" of the article (mentioned in *Reynolds*) may not always be relevant to responsibility. While distortion or sensationalism in the manner of presentation will undercut the extent to which a defendant can plausibly claim to have been communicating responsibly in the public interest, the defence of responsible communication ought not to hold writers to a standard of stylistic blandness: see *Roberts*, at para. 74, *per* Sedley L.J. Neither should the law encourage the fiction that fairness and responsibility lie in disavowing or concealing one's point of view. The best investigative reporting often takes a trenchant or adversarial position on pressing issues of the day. An otherwise responsible article should not be denied the protection of the defence simply because of its critical tone.

[123] Tous les facteurs n'ont cependant pas le même poids pour l'appréciation du caractère responsable d'une communication donnée. Il est possible, par exemple, que le « ton » de l'article (mentionné dans *Reynolds*) ne soit pas toujours pertinent. Bien que la déformation de faits ou le sensationnalisme puissent affaiblir la vraisemblance de l'affirmation d'un défendeur qu'il a communiqué les faits de façon responsable dans l'intérêt public, on ne doit pas faire de la platitude stylistique une condition d'application du moyen de défense : voir *Roberts*, par. 74, lord juge Sedley. Le droit ne doit pas non plus encourager la fiction selon laquelle on ne communique de façon juste et responsable qu'en reniant les points de vue ou en les dissimulant. Le journalisme d'enquête à son meilleur prend souvent une position incisive ou critique sur des questions d'actualité pressantes. Il ne faudrait pas que ce seul ton d'un article, responsable par ailleurs, empêche d'invoquer la défense de communication responsable.

[124] If the defamatory statement is capable of conveying more than one meaning, the jury should take into account the defendant's intended meaning, if reasonable, in determining whether the defence of responsible communication has been established. This follows from the focus of the inquiry on the conduct of the defendant. The weight to be placed on the defendant's intended meaning is a matter of degree: "The more obvious the defamatory meaning, and the more serious the defamation, the less weight will a court attach to other possible meanings when considering the conduct to be expected of a responsible journalist in the circumstances" (*Bonnick v. Morris*, [2002] UKPC 31, [2003] 1 A.C. 300 (P.C.), at para. 25, *per* Lord Nicholls). Under the defence of responsible communication, it is no longer necessary that the jury settle on a single meaning as a preliminary matter. Rather, it assesses the responsibility of the communication with a view to the range of meanings the words are reasonably capable of bearing.

[124] Si l'énoncé diffamatoire peut avoir plus d'un sens, le jury doit, pour décider si la défense de communication responsable a été établie, prendre en compte, s'il est raisonnable, le sens que le défendeur voulait exprimer. Cela découle de ce que l'examen est axé sur la conduite du défendeur. Le poids à attribuer au sens recherché par le défendeur est une question de degré : [TRADUCTION] « [p]lus la signification diffamatoire est évidente et plus la diffamation est grave, moins le tribunal attachera de poids aux autres sens possibles dans son examen de la conduite à attendre d'un journaliste responsable dans les circonstances » (*Bonnick c. Morris*, [2002] UKPC 31, [2003] 1 A.C. 300, par. 25, lord Nicholls). Il n'est plus nécessaire, pour l'application de la défense de communication responsable, que le jury se prononce de façon préliminaire sur un sens unique. Il évalue plutôt le caractère responsable de la communication en considérant l'éventail des sens que les mots peuvent raisonnablement exprimer.

[125] Similarly, the defence of responsible communication obviates the need for a separate inquiry into malice. (Malice may still be relevant where other defences are raised.) A defendant who has

[125] De la même façon, la défense de communication responsable rend inutile l'examen distinct de la question de la malveillance — qui peut cependant demeurer pertinente si d'autres moyens de défense

acted with malice in publishing defamatory allegations has by definition not acted responsibly.

(3) Summary of the Required Elements

[126] The defence of public interest responsible communication is assessed with reference to the broad thrust of the publication in question. It will apply where:

A. The publication is on a matter of public interest, and

B. The publisher was diligent in trying to verify the allegation, having regard to:

(a) the seriousness of the allegation;

(b) the public importance of the matter;

(c) the urgency of the matter;

(d) the status and reliability of the source;

(e) whether the plaintiff's side of the story was sought and accurately reported;

(f) whether the inclusion of the defamatory statement was justifiable;

(g) whether the defamatory statement's public interest lay in the fact that it was made rather than its truth ("reportage"); and

(h) any other relevant circumstances.

C. *Procedural Issues: Judge and Jury*

[127] As a general rule, the judge decides questions of law, while the jury decides questions of fact and applies the law to the facts. As is the case in other actions, for example negligence trials, issues of fact and law cannot be entirely disentangled. Nevertheless, it is possible to arrive at the following allocation of responsibility on the defence of responsible communication, having regard to

sont invoqués. En effet, par définition, un défendeur qui a publié par malveillance des allégations diffamatoires n'a pas agi de façon responsable.

(3) Résumé des exigences

[126] La défense de communication responsable concernant des questions d'intérêt public s'évalue en fonction de l'ensemble de la communication en question. Elle s'applique aux conditions suivantes :

A. La communication concerne une question d'intérêt public, et

B. Le diffuseur s'est efforcé avec diligence de vérifier les allégations, compte tenu des facteurs suivants :

a) la gravité de l'allégation;

b) l'importance de la question pour le public;

c) l'urgence de la question;

d) la nature et la fiabilité des sources;

e) la question de savoir si l'on a demandé et rapporté fidèlement la version des faits du demandeur;

f) la question de savoir si l'inclusion de l'énoncé diffamatoire était justifiable;

g) la question de savoir si l'intérêt public de l'énoncé diffamatoire réside dans l'existence même de l'énoncé, et non dans sa véracité (« relation de propos »);

h) toute autre considération pertinente.

C. *Questions procédurales : juge et jury*

[127] En règle générale, le juge statue sur les questions de droit tandis que le jury tranche les questions de fait et applique les règles de droit aux faits. Or, dans le type d'action dont nous sommes saisis en l'espèce, comme dans d'autres types d'actions — telles celles pour négligence —, les questions de fait et de droit ne peuvent pas être complètement départagées. Il n'en demeure pas moins

whether the issue is predominantly legal or factual, to the traditional allocations of responsibility in defamation trials, and to relevant legislation.

[128] The judge decides whether the statement relates to a matter of public interest. If public interest is shown, the jury decides whether on the evidence the defence is established, having regard to all the relevant factors, including the justification for including defamatory statements in the article.

[129] As in any trial by judge and jury, the judge may, upon motion, rule out the defence on the basis that the facts as proved are incapable of supporting the inference of responsible communication. This is consistent with the power of the judge in existing jurisprudence to withdraw the issue of malice from the jury where there is no basis for an inference of malice on the evidence.

[130] The defence of responsible communication does not require preliminary rulings from the jury on primary meaning, since it does not depend on the supposition of a single meaning. The jury should be instructed to assess the responsibility of the communication in light of the range of meanings the words are reasonably capable of bearing, including evidence as to the defendant's intended meaning.

[131] The division of responsibility proposed here accords with the general rule that matters of law are for the judge, and matters of fact are for the jury. In preserving a central role for the jury, it is consistent with Canadian tradition and statutory enactments. Traditionally, defamation actions have usually been tried by judge and jury, and many Canadian jurisdictions continue to have special rules for jury trials in defamation cases even as juries in most other kinds of civil actions have become less common: see, e.g., British Columbia *Supreme Court Rules*, B.C. Reg. 221/90, r. 39(27);

qu'il est possible de répartir les tâches de chacun de la façon décrite ci-après en ce qui a trait à la défense de communication responsable, compte tenu de la nature principalement juridique ou factuelle de la question, de la répartition classique des tâches dans les instances en diffamation et des dispositions législatives applicables.

[128] Le juge décide si l'énoncé concerne une question d'intérêt public. Si l'intérêt public est établi, le jury tranche la question de savoir si le moyen de défense est établi, compte tenu de tous les facteurs pertinents, y compris la justification de l'inclusion de l'énoncé diffamatoire.

[129] Comme dans tout procès devant juge et jury, le juge peut, sur requête, écarter le moyen de défense s'il estime que les faits, tels qu'ils ont été prouvés, ne sauraient fonder la conclusion de communication responsable. Cela correspond au pouvoir que la jurisprudence reconnaît au juge de soustraire la question de la malveillance à l'examen du jury lorsque la preuve ne permet pas d'en étayer la présence.

[130] La défense de communication responsable ne requiert pas que le jury se prononce de façon préliminaire sur le sens principal de l'énoncé, car elle ne repose pas sur l'hypothèse d'une signification unique. Il faut cependant indiquer au jury qu'il doit évaluer le caractère responsable de la communication en tenant compte de l'éventail des sens que les mots peuvent raisonnablement exprimer ainsi que de la preuve du sens que voulait exprimer le défendeur.

[131] Le partage des tâches proposé en l'espèce obéit à la règle générale voulant que les questions de droit relèvent du juge et les questions de fait du jury. En préservant le rôle capital du jury, ce partage s'inscrit dans la tradition canadienne et respecte les dispositions législatives. Les procès pour diffamation se sont habituellement déroulés devant juge et jury. En outre, dans plusieurs ressorts canadiens, des règles particulières continuent à régir les procès par jury en matière de diffamation, même si la participation des jurys est désormais moins répandue dans la plupart des autres types d'actions

Alberta *Jury Act*, R.S.A. 2000, c. J-3, s. 17(1). In Ontario, where the case at bar arose, there is no longer any special right to a jury trial in defamation cases. However, s. 14 of the Ontario *Libel and Slander Act*, R.S.O. 1990, c. L.12, guarantees the right of a jury in a defamation action to render a general verdict (see also *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 108(5)). Courts have interpreted s. 14 to mean that the jury cannot be *required* to answer specific questions, and if they are asked to do so they must also be informed of their right to render a general verdict: *Pizza Pizza Ltd. v. Toronto Star Newspapers Ltd.* (1998), 42 O.R. (3d) 36 (Div. Ct.), at pp. 43-44, *per* Sharpe J. Finally, s. 108 of the Ontario *Courts of Justice Act* provides that in a defamation action tried by judge and jury, it is for the jury to decide questions of fact and to assess the quantum of damages.

civiles : voir, p. ex., les *Supreme Court Rules* de la Colombie-Britannique, B.C. Reg. 221/90, r. 39(27), et la *Jury Act*, R.S.A. 2000, ch. J-3, par. 17(1) de l'Alberta. En Ontario, d'où provient la présente cause, il n'existe plus de droit particulier à un procès avec jury dans les instances en diffamation. Toutefois, l'art. 14 de la *Loi sur la diffamation*, L.R.O. 1990, ch. L.12, de l'Ontario garantit le droit du jury de rendre un verdict général dans une action en diffamation (voir également la *Loi sur les tribunaux judiciaires*, L.R.O. 1990, ch. C.43, par. 108(5)). Suivant l'interprétation jurisprudentielle de l'art. 14, les jurys ne peuvent être *obligés* de répondre à des questions particulières, et s'il leur est demandé de le faire, ils doivent être informés de leur droit de prononcer un verdict général : *Pizza Pizza Ltd. c. Toronto Star Newspapers Ltd.* (1998), 42 O.R. (3d) 36 (C. div.), p. 43 et 44, le juge Sharpe. Enfin, l'art. 108 de la *Loi sur les tribunaux judiciaires* de l'Ontario dispose que, dans une action en diffamation instruite devant juge et jury, il appartient au jury de trancher les questions de fait et d'évaluer le montant des dommages-intérêts.

[132] The plaintiffs argue against a central role for the jury. In their view, if a conduct-based defence is recognized, it should be for the judge alone to determine whether it lies and whether it is established on the facts. This, they contend, is the only way to safeguard the nuanced constitutional balance between free expression and the protection of reputation.

[132] Les demandeurs contestent ce rôle primordial du jury. Selon eux, si l'existence d'un moyen de défense axé sur la conduite est reconnue, c'est le juge seul qui devrait statuer sur son applicabilité et déterminer s'il a été prouvé au vu des faits. Ce serait, pour eux, la seule façon de maintenir l'équilibre constitutionnel délicat entre la liberté d'expression et la protection de la réputation.

[133] This argument cannot be sustained. First, restricting the role of the jury in this manner may run afoul of the statutory rights accorded by s. 108 of the Ontario *Courts of Justice Act* (it is for the jury to decide questions of fact), and most certainly would violate s. 14 of the Ontario *Libel and Slander Act* (the jury cannot be required to decide preliminary questions, and must be permitted to render a general verdict). The argument is essentially a plea to the Court to amend the provisions of these Acts. This the Court cannot do.

[133] On ne peut retenir cet argument. Premièrement, restreindre de la sorte le rôle du jury pourrait déroger aux droits qui lui sont conférés par l'art. 108 de la *Loi sur les tribunaux judiciaires* de l'Ontario (qui prévoit qu'il revient à ce dernier de se prononcer sur les questions de fait) et contreviendrait assurément à l'art. 14 de la *Loi sur la diffamation* de l'Ontario (selon lequel le jury ne peut être tenu de statuer sur des questions préliminaires et doit être libre de rendre un verdict général). Cet argument ne constitue ni plus ni moins qu'un plaidoyer pour que la Cour modifie les dispositions de ces lois, ce qu'elle ne peut pas faire.

[134] Second, permitting the jury to have the ultimate say on whether or not the new defence applies, is consistent with the jury's role with respect to the defence of fair comment. The *Reynolds* model, where "primary facts" are determined by the jury but the decision on responsible journalism is made by the judge, entails a complex back and forth between judge and jury and may lead to interlocutory rulings, and in due course appeals from those interlocutory decisions. Moreover, confining the jury's role to preliminary fact-finding would entail seeking jury responses to numerous detailed questions, which may in turn "thwart many of the benefits sought through the doctrinal changes": Kenyon, at p. 433; see also Lord Phillips, M.R., in *Jameel v. Wall Street Journal Europe SPRL*, [2005] EWCA Civ 74, [2005] 4 All E.R. 356, at para. 70, lamenting the division of roles that has taken shape in English courts under *Reynolds*.

[135] Third, it is not unusual for juries to render verdicts where constitutionally protected interests are at stake. They do so every day in criminal trials across the country. Sufficient safeguards exist in the proposed division of responsibility to ensure the appropriate constitutional balance is struck. The judge exercises a gatekeeper function in determining the legal issues and evidentiary sufficiency, and instructs the jury on all relevant factors, including the nature and importance of the *Charter* values of free expression and protection of reputation. The judge's decisions can be appealed for legal error.

VI. Application to the Facts of This Case

[136] The evidence revealed a basis for three defences: (1) justification; (2) fair comment; and (3) responsible communication on a matter of public interest. All three defences should have been left to the jury. It is unnecessary to deal further with the

[134] Deuxièmement, compte tenu du rôle du jury lorsque la défense de commentaire loyal est invoquée, il serait logique de lui permettre de décider de l'application du nouveau moyen de défense. Le modèle *Reynolds*, qui postule que le jury se prononce sur les « faits principaux », mais que le juge statue sur la défense de journalisme responsable, entraîne un va-et-vient complexe entre le juge et le jury susceptible de donner lieu à des décisions interlocutoires et peut, éventuellement, entraîner des appels des décisions interlocutoires en question. En outre, si le rôle des jurés se limitait à trancher des questions de fait préliminaires, il s'ensuivrait qu'il faudrait solliciter leurs points de vue sur un grand nombre de questions détaillées, points de vue qui, à leur tour, pourraient [TRADUCTION] « contrecarrer un grand nombre des avantages recherchés par les modifications doctrinales » Kenyon, p. 433; voir également lord Phillips, maître des rôles, dans *Jameel c. Wall Street Journal Europe SPRL*, [2005] EWCA Civ 74, [2005] 4 All E.R. 356, par. 70, qui déplore le partage des rôles mis en place par les tribunaux anglais en application de l'arrêt *Reynolds*.

[135] Troisièmement, il n'est pas rare que des jurys rendent des verdicts lorsque des droits jouissant d'une protection constitutionnelle sont en jeu. Cela se produit tous les jours, partout au Canada, dans des procès criminels. Le partage des tâches proposé comporte suffisamment de garanties pour assurer le maintien de l'équilibre constitutionnel requis. Le juge assume des fonctions de gardien en statuant sur les questions juridiques et sur la suffisance de la preuve, et il donne des directives au jury sur tous les facteurs pertinents, notamment sur la nature et l'importance des valeurs de la *Charte* que sont la liberté d'expression et la protection de la réputation. En outre, les décisions du juge peuvent être portées en appel pour erreur de droit.

VI. Application aux faits de la présente espèce

[136] La preuve permettait de fonder trois moyens de défense : (1) la justification, (2) le commentaire loyal, et (3) la communication responsable concernant une question d'intérêt public. C'est le jury qui aurait dû se prononcer sur ces trois moyens. Il n'est

defence of justification; no error is alleged in the trial judge's directions on this defence.

[137] Where the judge retains genuine doubt as to whether a given statement should be characterized as fact or opinion, the question should be left to the jury to decide: *Scott v. Fulton*, 2000 BCCA 124, 73 B.C.L.R. (3d) 392. In this case, it was open to the jury to consider the statement attributed to Dr. Clark that "[e]veryone thinks it's a done deal" as a comment, or statement of opinion. The statement could be read as an idiomatic expression of an opinion about the *likelihood* of something, namely government approval, that had not yet come to pass. This would raise the defence of fair comment.

[138] The defence of fair comment was left to the jury at trial. However, I agree with the Court of Appeal, *per* Feldman J.A., that the trial judge erred in his charge to the jury on fair comment. He failed to instruct the jury that "since Mr. Schiller was the conduit for the comment and not its maker, the fact that he did not honestly believe it could not be used as a foundation for finding malice unless in the context of the article, he had adopted the comment as his own" (Feldman J.A., at para. 93). This recalls Binnie J.'s observation in *WIC Radio* that "defamation proceedings will have reached a troubling level of technicality if the protection afforded by the defence of fair comment to freedom of expression ('the very lifeblood of our freedom') is made to depend on whether or not the speaker is prepared to swear to an honest belief in something he does not believe he ever said" (para. 35). Additionally, as also held in *WIC Radio*, the "fair-minded" component of the traditional test should not form part of a charge on fair comment. For the reasons given by Feldman J.A., at paras. 83-94 of her reasons, these problems in the trial judge's charge could have led the jury to wrongly conclude that the fair comment defence had been defeated by malice.

pas nécessaire d'ajouter quoi que ce soit au sujet de la défense de justification puisqu'aucune erreur dans les directives du juge à son sujet n'a été alléguée.

[137] Si le juge entretient un doute véritable quant à la question de savoir si l'objet de la communication devrait être caractérisé comme un énoncé de fait ou comme un énoncé d'opinion, la question devrait être laissée à l'appréciation du jury : *Scott c. Fulton*, 2000 BCCA 124, 73 B.C.L.R. (3d) 392. En l'espèce, le jury pouvait considérer la déclaration attribuée à M^me^ Clark — « [t]out le monde pense que c'est un fait accompli » — comme un commentaire ou comme un énoncé d'opinion. L'énoncé pouvait être perçu comme la formulation, en termes courants, d'une opinion sur une *probabilité* — soit celle que le gouvernement donne son approbation — qui ne s'était pas encore réalisée, ce qui permettait d'invoquer la défense de commentaire loyal.

[138] Au procès, la défense de commentaire loyal a été soumise au jury. Je partage toutefois l'opinion de la Cour d'appel, exprimée par la juge Feldman, selon laquelle le juge du procès n'a pas bien instruit le jury au sujet de ce moyen de défense. Il a omis d'indiquer que [TRADUCTION] « M. Schiller ayant rapporté et non formulé le commentaire, l'absence de croyance honnête ne pouvait servir de fondement à la conclusion qu'il y avait eu malveillance à moins que, dans le contexte de l'article, il ait fait sien le commentaire » (la juge Feldman, par. 93). Ce passage rappelle l'observation du juge Binnie, dans *WIC Radio*, selon laquelle « les instances en diffamation auront atteint un degré de formalisme inquiétant si la protection de la liberté d'expression ("l'élément vital de notre liberté") par la défense de commentaire loyal doit dépendre du fait que l'auteur des propos doit être disposé à affirmer sous serment qu'il croit honnêtement une chose qu'il estime n'avoir jamais dite » (par. 35). En outre, comme la Cour l'a aussi indiqué dans *WIC Radio*, l'exposé du juge concernant le commentaire loyal ne devrait pas aborder le volet relatif à l'« esprit juste » du test traditionnel. Pour les motifs exposés par la juge Feldman aux par. 83 à 94 de ses motifs, il est possible que ces failles relevées dans l'exposé du juge au jury aient amené ce dernier à conclure à tort que la malveillance faisait échec à la défense de commentaire loyal.

[139] It was also open to the jury to consider the critical "done deal" remark as a statement of fact. Read literally, it can be taken as an assertion that government approval for the development was actually already sealed, either formally behind closed doors or by tacit understanding. This raises the defence of responsible communication on a matter of public interest. The trial judge did not leave this or any similar defence to the jury.

[139] Les jurés pouvaient aussi considérer la remarque cruciale concernant le « fait accompli » comme un énoncé de fait. Prise littéralement, en effet, elle peut être perçue comme l'affirmation que l'approbation gouvernementale était déjà chose faite, soit officiellement derrière des portes closes soit par accord tacite. Cela permettait d'invoquer la défense de communication responsable concernant une question d'intérêt public, mais le juge du procès n'a soumis au jury ni ce moyen de défense ni aucun autre moyen apparenté.

[140] In Ontario, an appellate court cannot order a new trial in a civil matter "unless some substantial wrong or miscarriage of justice has occurred": *Courts of Justice Act*, s. 134(6). Taken together, in my view, the errors I have described rise to this level and require a new trial. Since the facts and submissions on the new trial may differ from those on the first trial, detailed discussion of how the new trial should proceed would be inappropriate. However, on the assumption the evidence will mirror the evidence on the first trial, the following observations may be helpful.

[140] En Ontario, une cour d'appel ne peut pas ordonner la tenue d'un nouveau procès dans une cause civile « en l'absence d'un préjudice grave ou d'une erreur judiciaire fondamentale » : *Loi sur les tribunaux judiciaires*, par. 134(6). Considérées ensemble, j'estime que les erreurs que j'ai décrites sont de ce type et imposent d'ordonner la tenue d'un nouveau procès. Il ne convient pas de préciser comment la nouvelle instruction devrait se dérouler, puisque les faits et les arguments en jeu dans la nouvelle instance pourront différer de ceux présentés dans le cadre de la première instance. Toutefois, en supposant que la preuve soumise lors du deuxième procès ressemble à celle présentée lors du premier procès, les observations qui suivent pourraient être utiles.

1. The jury should be told that three defences may arise on the facts: (1) justification (truth); (2) fair comment, with respect to any statements of opinion; and (3) responsible communication on a matter of public interest, with respect to any statements of fact.

1. Il faudrait dire au jury que le défendeur peut invoquer trois moyens de défense selon les faits en cause : (1) la justification (véracité); (2) le commentaire loyal, à l'égard des énoncés d'opinion; et (3) la communication responsable concernant une question d'intérêt public, à l'égard des énoncés de fait.

2. Since the statement most at issue (the "done deal" remark) can be viewed as opinion, the trial judge should instruct the jury on the defence of fair comment in accordance with this Court's decision in *WIC Radio.*

2. Puisque la principale déclaration en cause (la remarque sur le « fait accompli ») peut être considérée comme l'énoncé d'une opinion, les directives au jury concernant la défense de commentaire loyal devraient être conformes aux règles établies par la Cour dans *WIC Radio.*

3. Since the statement can also be viewed as a statement of fact, raising the defence of

3. Puisque cette affirmation peut également être considérée comme un énoncé de fait, ce qui

responsible communication on a matter of public interest, the trial judge should rule on whether communication of the statement was in the public interest. On the evidence in the first trial, the answer to this question is affirmative. The communication related to issues of government conduct is clearly in the public interest.

4. The jury should be instructed to determine whether publication of the defamatory material was responsible, having regard to the factors enumerated above.

VII. Conclusion

[141] I would dismiss the appeal and the cross-appeal, and affirm the order for a new trial. The respondents should have their costs of the main appeal in this Court.

The following are the reasons delivered by

[142] ABELLA J. — I am in complete agreement with the Chief Justice's reasons for adding the "responsible communication" defence to Canadian defamation law. I also share her view that determining the availability of this defence entails a two-step analysis: the first to determine whether a publication is on a matter of public interest; and the second to determine whether the standard of responsibility is met. Yet while I agree that the first question is a matter of law for the judge to decide, I do not, with great respect, share her view that the jury should decide the second step. I see very little conceptual difference between deciding whether a communication is in the public interest and whether it is responsibly made. While both inquiries engage questions of fact and law, both are nonetheless predominantly legal issues. As a result, in my view the legal character of deciding whether the applicable standard of responsibility has been met in a given case is,

permet d'invoquer la défense de communication responsable concernant une question d'intérêt public, le juge du procès devrait déterminer si la communication de l'énoncé était dans l'intérêt public. Suivant la preuve présentée lors du premier procès, la réponse à cette question est affirmative. La communication qui concernait des questions relatives à la conduite du gouvernement était manifestement d'intérêt public.

4. Le jury devrait recevoir comme directive de déterminer si la communication des propos diffamatoires a été faite de façon responsable, en tenant compte des facteurs que j'ai énumérés plus tôt.

VII. Conclusion

[141] Je suis d'avis de rejeter le pourvoi ainsi que le pourvoi incident et de confirmer l'ordonnance relative à la tenue d'un nouveau procès. Les intimés ont droit aux dépens relativement au pourvoi principal devant notre Cour.

Version française des motifs rendus par

[142] LA JUGE ABELLA — Je souscris entièrement aux motifs de la Juge en chef justifiant d'ajouter la défense de « communication responsable » au droit canadien en matière de diffamation. Je partage également son opinion selon laquelle il faut, pour juger de l'applicabilité de ce moyen de défense, procéder à une analyse en deux volets : le premier pour déterminer si la communication concerne une question d'intérêt public; et le deuxième pour déterminer s'il a été satisfait à la norme de la responsabilité. Cela étant dit, bien que je sois d'accord pour dire que la première question en est une de droit qui relève du juge, je ne partage pas, soit dit en tout respect, son opinion selon laquelle le deuxième volet devrait être tranché par le jury. J'estime qu'il n'existe qu'une infime différence conceptuelle entre le fait de décider si une communication est d'intérêt public et celui de déterminer si elle a été faite de façon responsable. Bien que les deux examens supposent de répondre à des questions de fait et de droit, il s'agit

like the public interest analysis, a matter for the judge.

[143] The responsible communication analysis requires that the defendant's interest in freely disseminating information and the public's interest in the free flow of information be weighed against the plaintiff's interest in protecting his or her reputation. This is true no less of the second and determinative step as of the first. The exercise as a whole involves balancing freedom of expression, freedom of the press, the protection of reputation, privacy concerns, and the public interest. Each of these is a complex value protected either directly or indirectly by the *Canadian Charter of Rights and Freedoms* (*Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at p. 1336; *Canadian Broadcasting Corporation v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 459, at p. 475; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 107; and *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420, at para. 2). Weighing these often competing constitutional interests is a legal determination. It is, therefore, a determination that the judge should undertake.

[144] I accept that the jury's participation in defamation cases is firmly entrenched in the psyche of defamation law and that authorizing judges to decide both steps of the responsible communication analysis leaves juries with a limited role. But I am unpersuaded that it is inconsistent with the statutory scheme to leave the legal issues at stake here with the judge and any disputed facts with the jury. It is worth remembering that such a potentially determinative role for the judge already exists when the defence of absolute or qualified privilege is engaged (Raymond E. Brown, *The Law of Defamation in Canada* (2nd ed. (looseleaf)), vol. 2, at pp. 12-289, 13-405 and 16-136). It is also useful to bear in mind the historical basis

principalement de questions juridiques. En conséquence, je suis d'avis que le caractère juridique de la décision quant à l'atteinte de la norme prescrite de responsabilité dans un cas donné, comme celui de l'analyse de l'intérêt public, en fait une question qui doit être tranchée par le juge.

[143] L'analyse de la communication responsable exige que l'intérêt du défendeur de diffuser librement l'information et l'intérêt du public à ce que l'information circule librement soient mis en balance avec l'intérêt qu'a le demandeur à ce que sa réputation soit protégée. Cela n'est pas moins vrai relativement au deuxième volet déterminant du test qu'en ce qui a trait au premier volet. L'exercice, dans son ensemble, suppose de mettre en balance la liberté d'expression, la liberté de la presse, la protection de la réputation, des préoccupations relatives à la protection de la vie privée et l'intérêt public. Il s'agit dans tous les cas de valeurs complexes protégées directement ou indirectement par la *Charte canadienne des droits et libertés* (*Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326, p. 1336; *Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [1991] 3 R.C.S. 459, p. 475; *Hill c. Église de scientologie de Toronto*, [1995] 2 R.C.S. 1130, par. 107; et *WIC Radio Ltd. c. Simpson*, 2008 CSC 40, [2008] 2 R.C.S. 420, par. 2). Mettre ces intérêts constitutionnels souvent opposés en balance consiste à tirer une conclusion de droit. Il s'agit donc d'une question qu'il appartient au juge de trancher.

[144] J'admets que la participation du jury dans les causes de diffamation est fermement ancrée dans l'esprit du droit en matière de diffamation et que d'autoriser les juges à trancher les deux volets de l'analyse de la communication responsable ne laisse qu'un rôle limité au jury. Je ne suis toutefois pas convaincue que cette approche est incompatible avec le régime législatif qui confie au juge la tâche de décider des questions juridiques et au jury celle de trancher les questions de fait. Il convient de se rappeler que les juges assument déjà un tel rôle potentiellement déterminant lorsque la défense d'immunité absolue ou d'immunité relative est invoquée (Raymond E. Brown, *The Law of Defamation in Canada* (2e éd. (feuilles mobiles)), vol. 2, p. 12-289,

for the jury's preeminent role in defamation cases. It was an outgrowth of Britain's *Libel Act* of 1792 when juries were seen to be necessary as "watchdogs of democratic rights against unrepresentative governments" (New South Wales Law Reform Commission, Report 75, *Defamation* (1995), at para. 3.2, cited in *Australian Broadcasting Corp. v. Reading*, [2004] NSWCA 411 (AustLII), at para. 143). More than two centuries later, this rationale is difficult to sustain, as is the primacy of the jury's role (Brown, vol. 3, at p. 17-115; *Jameel v. Wall Street Journal Europe SPRL*, [2005] EWCA Civ 74, [2005] 4 All E.R. 356, at para. 70, *per* Lord Phillips, M.R.; *Gatley on Libel and Slander* (11th ed. 2008), at p. 1241; and David A. Anderson, "Is Libel Law Worth Reforming?" (1991-1992), 140 *U. Pa. L. Rev.* 487, at p. 540).

[145] By adopting the responsible communication defence, we are recognizing the sophistication and constitutional complexity of defamation cases involving communications on matters of public interest. What is most important is protecting the integrity of the interests and values at stake in such cases. This defence is a highly complex legal determination with constitutional dimensions. That takes it beyond the jury's jurisdiction and squarely into judicial territory.

[146] Other than this concern over the proper division of labour between judge and jury, I agree with the Chief Justice's reasons and with her decision to order a new trial.

APPENDIX

Cottagers teed off over golf course

Long-time Harris backer awaits Tory nod on plan

13-405 et 16-136). Il est également utile de garder à l'esprit le fondement historique du rôle prépondérant du jury dans les causes en matière de diffamation. Il découle de la *Libel Act* de 1792 britannique selon laquelle les jurys étaient perçus comme les nécessaires [TRADUCTION] « chiens de garde des droits démocratiques face aux gouvernements non représentatifs » (New South Wales Law Reform Commission, Rapport 75, *Defamation* (1995), par. 3.2, cité dans *Australian Broadcasting Corp. c. Reading*, [2004] NSWCA 411 (AustLII), par. 143). Plus de deux siècles plus tard, ce raisonnement est difficilement soutenable, tout comme la primauté du rôle du jury (Brown, vol. 3, p. 17-115; *Jameel c. Wall Street Journal Europe SPRL*, [2005] EWCA Civ 74, [2005] 4 All E.R. 356, par. 70, lord Phillips, maître des rôles; *Gatley on Libel and Slander* (11e éd. 2008), p. 1241; et David A. Anderson, « Is Libel Law Worth Reforming? » (1991-1992), 140 *U. Pa. L. Rev.* 487, p. 540).

[145] En adoptant la défense de communication responsable, nous reconnaissons la subtilité et la complexité constitutionnelle des causes en matière de diffamation relatives à des communications concernant des questions d'intérêt public. Il importe avant tout de protéger l'intégrité des intérêts et des valeurs en cause dans de tels litiges. L'application du moyen de défense dont il est question en l'espèce suppose de trancher une question de droit très complexe ayant des dimensions constitutionnelles. C'est ce qui en fait une question qui outrepasse la compétence du jury et qui la situe clairement dans le domaine qui relève du juge.

[146] Mis à part cette préoccupation quant au partage approprié des tâches entre le juge et le jury, je souscris aux motifs de la Juge en chef et à sa décision d'ordonner la tenue d'un nouveau procès.

ANNEXE

[TRADUCTION]

Résidents verts de rage à propos d'un terrain de golf

Un partisan de longue date de Mike Harris attend l'aval des conservateurs quant à son projet

Bill Schiller

FEATURE WRITER

Saturday Special

NEW LISKEARD — During the past decade, millionaire lumber magnate Peter Grant — one of the most powerful business people in northern Ontario — has been generous with Mike Harris and the Conservatives.

In 1990, Grant, through his companies, gave Harris more than $14,000 to help him win the Conservative leadership.

In 1999, Grant poured $45,000 into Conservative pockets to speed their re-election, — followed by another $21,000 last year.

Of this $80,000, at least $5,000 went to Natural Resources Minister John Snobelen and his Mississauga riding association.

But Peter Grant also wants something from the government.

Here, on a tiny peninsula on a cottage-speckled lake, where families have come for generations, Grant wants to take three small golf holes on his property and expand them into a 3,290-yard, nine-hole course.

To do so, he needs the Harris government — with the support of Snobelen's ministry — to sell him 10.5 hectares of crown land and approve the project.

The planned course will be private, so private in fact, it will be for Grant's own "personal use and enjoyment."

But in the minds of many who own cottages here on Twin Lakes, about 500 kilometres north of Toronto, Grant's dream of carving a course out of the northern wilderness for his own pleasure, is a nightmare.

"Herbicides, pesticides, fertilizers, will all wash into our lake," insists Bonnie Taylor, who might be forgiven for sounding a little proprietary. Her pioneering family first built on this spring-fed lake nearly 60 years ago.

Last winter, she wrote the province to say she's worried about the impact the course could have on lake and

Bill Schiller

JOURNALISTE D'ENQUÊTE

Reportage spécial

NEW LISKEARD — Au cours des dix dernières années, M. Peter Grant, richissime magnat de l'industrie du bois d'œuvre — un des plus puissants hommes d'affaires du Nord de l'Ontario — s'est montré généreux envers Mike Harris et les conservateurs.

En 1990, par l'intermédiaire de ses entreprises, M. Grant a donné plus de 14 000 $ à M. Harris pour l'aider à devenir le chef du Parti progressiste-conservateur de l'Ontario.

En 1999, M. Grant a versé 45 000 $ dans les coffres des conservateurs pour contribuer à leur réélection et, l'an dernier, il leur a donné 21 000 $.

De ce total de 80 000 $, au moins 5 000 $ sont allés au ministre des Richesses naturelles, M. John Snobelen, et à son association de circonscription de Mississauga.

Mais M. Peter Grant attend aussi quelque chose en retour du gouvernement.

Ici, sur une petite presqu'île qui s'avance dans un lac aux rives parsemées de chalets, où des familles viennent depuis plusieurs générations, M. Grant veut agrandir le petit parcours de golf de trois trous situé sur sa propriété et en faire un parcours de neuf trous de 3 290 verges.

Toutefois, pour y arriver, il a besoin que le gouvernement Harris — avec l'appui du ministère de M. Snobelen — lui vende 10,5 hectares de terres publiques et approuve son projet.

Le parcours projeté sera privé, si privé en fait qu'il sera réservé « à l'usage et à l'agrément personnels » de M. Grant.

Cependant, pour de nombreuses personnes possédant des chalets sur les rives des lacs Twin, à quelque 500 kilomètres au nord de Toronto, le rêve de M. Grant d'aménager pour son propre agrément un terrain de golf dans les régions sauvages du Nord constitue plutôt un cauchemar.

« Les herbicides, les pesticides et les fertilisants ruisselleront dans notre lac », insiste M^me^ Bonnie Taylor, dont on peut sans doute excuser les élans de possessivité. En effet, sa famille a été la première, il y a près de 60 ans, à s'établir sur les rives de ce lac alimenté par des sources.

L'hiver dernier, elle a écrit au gouvernement provincial pour faire part de son inquiétude à l'égard des

well water — especially, she said, "with Walkerton still fresh on everyone's mind."

For his part, Grant refuses to be interviewed.

"Our client . . . does not intend to discuss his personal affairs with you," his lawyers informed The Star by letter.

When a Star photographer went to take pictures at the site this month, men the OPP believe were Grant employees, accused the photographer of trespassing. They then tried to drive the photographer's vehicle off a public road, and finally followed the photographer out of town for almost 20 kilometres.

But for concerned cottagers back at lakeside — the issue is water.

Grant already has provincial permission to draw as much as 300,000 litres per day from the lake to water his three golf holes.

According to environment ministry guidelines, the same amount of treated water could support a community of 750 to 1,500 people.

And ratepayers worry that if Grant's plan goes ahead, his need for water will grow.

It's a worry not without foundation: some 18-hole golf courses in the north have provincial permits to take as much as 2.2 million litres of water per day.

Grant's expanded course would also clear trees from almost 23.5 hectares in total: 10.5 hectares of crown land, and another 13 hectares of privately held land he also intends to buy for the project.

Perhaps most worrisome from the cottagers' perspective, planning documents show the course will use $20,000 worth of pesticides annually, including small amounts of Daconil, a highly effective pesticide that is also highly toxic to fish and invertebrates.

But locals aren't the only ones concerned about Grant's plans. Officials from the Ministry of Natural Resources are too. Currently conducting a limited environmental assessment, they've informed Grant of at least a dozen

répercussions que pourrait avoir le terrain de golf sur l'eau du lac et des puits, particulièrement, a-t-elle dit, « en raison du fait que les événements de Walkerton sont encore frais dans notre mémoire ».

Quant à M. Grant, il a refusé d'être interviewé.

« Notre client [. . .] n'a pas l'intention de discuter ses affaires personnelles avec vous », ont fait savoir les avocats de M. Grant dans une lettre adressée au Star.

Lorsqu'un photographe du Star s'est rendu aux lacs Twin ce mois-ci pour prendre des photos de l'endroit, il s'est fait accuser d'intrusion dans une propriété privée par des hommes que la Police provinciale de l'Ontario croit être des employés de M. Grant. Ces derniers ont alors essayé de faire quitter la voie publique au véhicule du photographe, après quoi ils ont suivi ce dernier à l'extérieur de la ville pendant près de 20 kilomètres.

Mais c'est la question de l'eau qui préoccupe les propriétaires des chalets bordant le lac.

En effet, M. Grant est déjà autorisé par le ministère provincial à puiser quotidiennement jusqu'à 300 000 litres d'eau dans le lac pour arroser son terrain de trois trous.

Selon les normes du ministère de l'Environnement, la même quantité d'eau traitée pourrait répondre aux besoins d'une collectivité de 750 à 1 500 personnes.

En outre, les contribuables craignent que, si le projet de M. Grant se concrétise, ses besoins en eau augmentent.

Cette inquiétude n'est pas sans fondement : certains terrains de golf dans le Nord de la province sont autorisés à puiser jusqu'à 2,2 millions de litres d'eau par jour.

Pour agrandir le terrain de golf de M. Grant, il faudrait également abattre des arbres sur une superficie totale de près de 23,5 hectares : 10,5 hectares de terres publiques, ainsi que 13 hectares de terres privées que M. Grant entend également acheter pour mener à bien son projet.

Mais ce qui inquiète peut-être encore davantage les propriétaires de chalet, c'est le fait que, selon les documents de planification, on prévoit utiliser annuellement 20 000 $ en pesticides pour le terrain de golf, y compris de faibles quantités de Daconil, un pesticide très efficace, mais également hautement toxique pour les poissons et les invertébrés.

Les gens de l'endroit ne sont toutefois pas les seuls à être inquiets des projets de M. Grant. Les fonctionnaires du ministère des Richesses naturelles le sont eux aussi. Dans le cadre de l'évaluation environnementale

concerns they have about the project, from potential effects on water quality, to the impact on lake levels.

Grant's consultants are preparing a response.

But the ministry's concerns are small comfort to cottagers.

They know the expressed concerns of government officials don't always mean much when it comes to development projects led by supporters of the Premier.

"Everyone thinks it's a done deal because of Grant's influence — but most of all his Mike Harris ties," says Lorrie Clark, who owns a cottage on Twin Lakes.

Earlier this year, the local cottagers' association invited Grant's consultants, as well as ministry officials to a meeting to discuss Grant's proposal. A number of cottagers brought copies of a Toronto Star article detailing how the Premier's best friend Peter Minogue complained "at political levels" to try to get his North Bay golf course and subdivision approved in the face of opposition from the Ministry of Natural Resources.

Minogue's partners in that venture, known as Osprey Links, included the president of Harris' riding association and a veritable Who's Who of Harris' North Bay friends. Ministry objections were overruled just 12 days after a senior bureaucrat warned by memo that Minogue had begun complaining.

With that experience in mind, lawyer Peter Ramsay, a ratepayer and cottager rose at the public meeting here and put his concerns bluntly.

"Is this (Grant) project going to be decided by the Ministry of Natural Resources?" he asked officials present. "Or is it going to be decided by Queen's Park?"

A ministry official at the meeting, Greg Gillespie, said he couldn't speak for what happens at Queen's Park.

restreinte à laquelle ils procèdent actuellement, ces derniers ont signalé à M. Grant au moins une douzaine d'inquiétudes que suscite selon eux le projet, inquiétudes allant de ses possibles répercussions sur la qualité de l'eau du lac jusqu'à son impact sur le niveau de celui-ci.

Les experts-conseils de M. Grant préparent leur réponse.

Mais les inquiétudes soulevées par le ministère sont loin d'apaiser celles des propriétaires de chalet.

Ces derniers savent que les inquiétudes exprimées par des fonctionnaires ne pèsent parfois pas bien lourd lorsqu'il est question de projets de développement menés par des partisans du premier ministre.

« Tout le monde pense que c'est un fait accompli en raison de l'influence qu'exerce M. Grant, mais plus encore en raison de ses liens avec Mike Harris », affirme Lorrie Clark, propriétaire d'un chalet sur les bords des lacs Twin.

Plus tôt cette année, l'association des propriétaires de chalet de l'endroit a invité à une réunion les experts-conseils de M. Grant, ainsi que des fonctionnaires du ministère, pour discuter du projet de M. Grant. Un certain nombre de propriétaires de chalet ont apporté des copies d'un article du Toronto Star relatant que le meilleur ami du premier ministre, M. Peter Minogue, s'était adressé « aux instances politiques » afin de tenter de faire approuver son projet de terrain de golf et de lotissement à North Bay devant l'opposition du ministère des Richesses naturelles.

Au nombre des partenaires de M. Minogue dans ce projet, appelé Osprey Links, figuraient le président de l'association de la circonscription de Mike Harris et le gratin des relations de ce dernier à North Bay. Les objections du ministère ont été écartées seulement 12 jours après qu'un haut fonctionnaire eût souligné dans une note de service que M. Minogue avait commencé à se plaindre.

Ayant sans doute cette situation à l'esprit, M^e^ Peter Ramsay, contribuable et propriétaire d'un chalet dans la localité, n'a pas mâché ses mots lorsqu'il a fait part de ses inquiétudes lors de la réunion publique.

« Est-ce que ce sera le ministère des Richesses naturelles qui prendra la décision à propos de ce projet [de M. Grant]? » a-t-il demandé aux fonctionnaires présents, « Ou bien Queen's Park? »

Un fonctionnaire du ministère présent à la réunion, Greg Gillespie, a dit qu'il ne pouvait pas se prononcer sur ce qui se passe à Queen's Park.

"But we did our job," he said of the Osprey experience.

« Mais nous avons fait notre travail », a-t-il affirmé au sujet d'Osprey Links.

Such suspicions and anxiety over the approval process have set the stage for a classic confrontation, which — in the cottagers' view — pits the public good of ordinary Ontarians, many of whom are senior citizens, against a single, powerful, private interest: Peter Grant.

La méfiance et l'anxiété que suscite le processus d'approbation ont ouvert la voie à une confrontation typique, qui — de l'avis des propriétaires de chalet — oppose le bien-être d'Ontariens ordinaires, dont de nombreuses personnes âgées, aux intérêts privés d'une seule personne influente, Peter Grant.

"This is a development that is not in the public interest," cottage owner Clark emphasizes, "but only a very private one."

« Ce projet de développement ne sert pas l'intérêt public », a insisté M^me^ Clark, propriétaire de chalet, « mais seulement des intérêts essentiellement privés. »

For an outsider, however, looking at the history of the lake, one might think Grant is fighting an uphill battle.

Toutefois, quelqu'un de l'extérieur pourrait considérer, vu l'histoire du lac, que le succès de la démarche de M. Grant est loin d'être acquis.

After all, in 1985 the Ontario Municipal Board shut down a proposal to build a small subdivision on Twin Lakes out of concerns about potential environmental damage.

Après tout, en 1985, la Commission des affaires municipales de l'Ontario a rejeté un projet de petit lotissement aux lacs Twin, par crainte de possibles dommages environnementaux.

The board — a kind of court of appeal for developers and citizens who disagree on a development — sided with a consultant who argued that the lake was too sensitive, teetering on overdevelopment with 200 cottages, and any additional building might constitute an environmental hazard.

La Commission — sorte de tribunal d'appel à l'intention des promoteurs et citoyens qui s'opposent à l'égard d'un projet de développement — a retenu les arguments d'un expert-conseil qui affirmait que le lac était trop fragile, que la présence de 200 chalets frôlait déjà la surexploitation immobilière et que toute construction additionnelle pourrait constituer un risque pour l'environnement.

Those arguments won the day.

Ces arguments l'ont emporté.

But Grant is undaunted.

Mais il en faut plus pour décourager M. Grant.

Today, the same consultant who convinced the board to block that development more than 15 years ago, now consults for Grant.

Aujourd'hui, le même expert-conseil qui a convaincu la Commission d'empêcher le lotissement il y a plus de quinze ans a maintenant été retenu par M. Grant.

Michael Michalski argues that Grant's development can be built with minimum impact and that "everything feasible" will be done to keep contaminants on site.

En effet, Michael Michalski affirme que le projet de M. Grant peut être réalisé tout en réduisant au minimum ses répercussions et que « tous les moyens possibles » seront pris pour que les contaminants ne s'échappent pas du site.

Not to be outdone, local citizens have hired their own consultants, Gartner Lee. They say neither Michalski nor anyone else can guarantee the lake's safety.

Pour ne pas être en reste, les citoyens de la localité ont eux aussi retenu leurs propres experts-conseils, la société Gartner Lee, selon qui ni M. Michalski ni personne d'autre ne saurait garantir que le lac ne sera pas touché.

And so the scientific lines have been drawn in the sand.

Les positions scientifiques respectives des parties sont donc bien arrêtées.

But if politics and power were to have any bearing on the matter, some feel Grant would have the upper hand.

Mais certains estiment que, si les relations politiques et le pouvoir devaient jouer un rôle dans le dossier, c'est M. Grant qui aurait gain de cause.

In this rough and rugged stretch of northern Ontario, where local economies depend largely on timber and tourism, Grant is a powerful presence.

His company, Grant Forest Products, is an important local employer. The company's radio ads, which continually remind locals that Grant is "using our forests wisely," are part of public consciousness. And every autumn, a charity golf tournament Grant holds using two public courses — the tournament culminates at his mini-course — heralds the high point of this area's social season. It always makes front-page news.

So did the Premier's visit here last fall, when he attended a post-tournament reception for more than 600 at Grant's palatial home.

Grant, who has been running the event since 1998, proudly presented a cheque that day for $300,000 to help build a local senior's home.

Press accounts note that he's raised about $1 million for local causes, including area golf courses, over three years.

Up north, the charity event has distinguished him.

So has his selection of lobbyists down south at Queen's Park.

When it comes to looking after business interests there, Grant depends on North Bay lobbyist Peter Birnie. Records at Elections Ontario show Birnie is vice-president of Harris' riding association.

Meanwhile, on the personal front, Grant maintains a reputation for living large.

His home and corporate compound in the bush dwarfs the dozens of cottages that surround it.

His 14,500 square-foot house on 4.5 hectares of lavishly landscaped property, was once appraised at $1.9 million. Neighbours note the occasional helicopter coming and going through the bush.

The seven-bedroom main house has an indoor squash court with viewing gallery, a fully equipped gymnasium, and a Jacuzzi that can accommodate 15 people.

Dans cette région sauvage du Nord de l'Ontario, où les économies régionales sont largement tributaires du bois d'œuvre et du tourisme, M. Grant est un homme puissant.

Son entreprise, Grant Forest Products, est un important employeur de la localité. Les publicités radiophoniques de la compagnie, qui rappellent sans cesse aux gens du coin que M. Grant « exploite sagement les ressources forestières », font partie de la conscience collective. En outre, chaque automne, le tournoi de golf de bienfaisance qu'organise M. Grant sur deux terrains de golf publics — et qui se termine sur son mini-parcours — constitue le point culminant des activités mondaines de la région. Cet événement fait immanquablement la manchette.

La visite du premier ministre a également fait la une l'automne dernier, lorsque celui-ci a assisté à la réception donnée après le tournoi pour plus de 600 personnes à la somptueuse propriété de M. Grant.

Ce dernier, qui organise le tournoi depuis 1998, a fièrement remis ce jour-là un chèque de 300 000 $ en vue d'aider à la construction d'une résidence pour personnes âgées dans la région.

Selon les médias, il a recueilli environ un million de dollars en trois ans pour appuyer certaines causes dans la région, notamment au profit de terrains de golf.

Dans le Nord de la province, c'est par cet événement caritatif qu'il se distingue.

Dans le Sud, à Queen's Park, c'est par son choix de lobbyistes.

En effet, pour y défendre ses intérêts commerciaux, M. Grant s'en remet au lobbyiste de North Bay, Peter Birnie. Selon les dossiers d'Élections Ontario, M. Birnie est vice-président de l'association de circonscription de M. Harris.

Par ailleurs, sur le plan personnel, M. Grant a la réputation de mener grand train.

Sa demeure et ses bureaux administratifs, construits en pleine nature, donnent un air lilliputien aux dizaines de chalets avoisinants.

Sa maison de 14 500 pieds carrés, bâtie sur un terrain de 4,5 hectares luxueusement aménagé, a déjà été évaluée à 1,9 million de dollars. De temps à autre, les voisins voient des hélicoptères s'y poser.

La résidence principale compte sept chambres, ainsi qu'un court de squash intérieur avec gradins, un gymnase tout équipé et un jacuzzi pouvant accueillir 15 personnes.

Outside, tennis courts are equipped with banks of lights that illuminate the night sky. And down on the water, there's a 1,500-square-foot boat house.

There is also his three-hole mini-course — that Grant calls Frog's Breath — which can be configured to play as a tiny five.

Records show these holes were built on almost three hectares of crown land, which the province sold to Grant in April, 1998 for $20,000.

But records also show that two months earlier, in February, 1998, Grant had also applied to buy the 10.5 hectares he's still pursuing today.

These developments have residents up in arms.

"It's difficult living here and watching all this go on," says Nancy Kramp, a mother of four who, like Grant, lives permanently on Twin Lakes.

"It used to be dead silence out here. There was nothing but the sounds of wildlife. Now, there are always (golf course) machines running."

Kramp can't comprehend how the provincial government can think of selling 10.5 hectares of land so that one man may build a golf course for his own enjoyment.

She remembers a run-in she had with the Ministry of Natural Resources not so long ago over a sandbox.

"Around 1994, the ministry told us to move a sandbox we'd erected for our son," Kramp recalls, "four planks with sand in the middle, because it was on crown land. This sandbox seemed to be interfering with the natural habitat of the area. And now a nine-hole golf course is okay?"

It's not okay yet.

The Harris government has not sold the property to him.

Still, local politicians are preparing the way.

Today, five politicians who represent the people of Hudson Township here (population: 501), are scheduled to meet to discuss a motion to amend local zoning

À l'extérieur, les projecteurs des courts de tennis illuminent le ciel le soir tombé. Et, plus bas, sur les rives du lac, on trouve une remise à bateaux de 1 500 pieds carrés.

Le domaine compte également un parcours de golf de trois trous — appelé « Frog's Breath » par M. Grant – qui peut être aménagé en un petit parcours de cinq trous.

Il ressort de certains documents que ce parcours a été aménagé sur près de trois hectares de terres publiques, que la province a vendues à M. Grant en avril 1998 pour la somme de 20 000 $.

Ces documents révèlent également que deux mois plus tôt, en février 1998, M. Grant avait aussi présenté une demande pour acheter les 10,5 hectares qu'ils cherchent toujours à acquérir aujourd'hui.

Ce sont ces démarches qui soulèvent l'ire des résidents.

« Ce n'est pas facile de vivre ici et d'être témoin de tout ça », affirme M^me^ Nancy Kramp, qui est mère de quatre enfants et qui, tout comme M. Grant, vit toute l'année sur les rives des lacs Twin.

« Avant, c'était la tranquillité totale ici. On n'entendait que les sons de la nature. Maintenant, il y a toujours des bruits de machines (venant du terrain de golf). »

Madame Kramp n'arrive pas à comprendre comment le gouvernement provincial peut envisager de vendre 10,5 hectares de terrain à un particulier pour qu'il y construise un terrain de golf pour son usage personnel.

Elle se rappelle la prise de bec qu'elle a eu assez récemment avec un fonctionnaire du ministère des Richesses naturelles à propos d'un « carré de sable ».

« Aux alentours de 1994, se remémore M^me^ Kramp, le ministère nous a demandé de déplacer un carré de sable — quatre planches et du sable — que nous avions construit pour notre fils, et ce, parce qu'il se trouvait sur des terres publiques. Ce carré de sable nuisait, semble-t-il, à l'habitat naturel dans la région. Mais aujourd'hui, un terrain de golf de neuf trous serait acceptable? »

Le projet n'a pas encore été jugé acceptable.

Le gouvernement Harris n'a pas vendu le terrain à M. Grant.

Toutefois, des politiciens de la région sont en train de frayer la voie.

Cinq politiciens représentant la population du canton de Hudson (501 habitants) doivent se rencontrer aujourd'hui pour discuter d'une motion visant à modifier

bylaws and, according to a published notice, "permit the construction of a personal golf course — for the personal use of the property owner."

Local councillor Clinton Edwards says he doesn't really want to say whether he'll support it.

"I'm in a bit of a bind here," he says, somewhat haltingly. "My wife works for him (Grant). Employment is very hard to get up here," he adds.

News of impending zoning changes even before the government has sold Grant the land makes some cottagers distrustful about what might happen next.

"The people on this lake aren't mega-millionaires," says Alexandra Skindra, mother, grandmother and property owner.

"They're just regular people. Hard-working people. This shouldn't be happening."

Skindra and her husband Arkadis, 68, a retired nuclear plant designer, were planning on spending their retirement on the lake.

"I grew up here," explains Alexandra. "My kids grew up here. And I was hoping our five grandchildren could come here every summer."

"We don't have anything against Peter," Arkadis offers, hammer in hand as he renovates the front room of their cottage overlooking the water.

"But I can't see how this can go ahead and not damage the lake and the environment."

Down the way, Ira and Marion Murphy have spent 56 years on a tiny stretch of land that joins Twin Lakes with neighbouring Frere Lake.

Looking trim at 75, Ira, a retired Hydro supervisor, can point to the shore where he built a two-storey tree house for his granddaughters 18 summers ago.

For him, lake life is a precious thing, something interwoven with family.

"You know, we've known Peter since he was 3 years old," says Murphy, a handsome, gray-haired man with a taste for the outdoors.

le règlement de zonage local et, selon un avis public, « à permettre la construction d'un terrain de golf personnel — pour l'usage personnel du propriétaire ».

Le conseiller municipal Clinton Edwards dit qu'il ne tient pas vraiment à dire s'il appuiera ou non la motion.

« Je me sens un peu entre l'arbre et l'écorce sur cette question », dit-il avec une certaine hésitation. Puis il ajoute : « Mon épouse travaille pour lui [M. Grant]. Il est très difficile de se trouver un emploi dans la région. »

L'information selon laquelle on s'apprêterait à modifier de façon imminente le règlement de zonage, avant même que le gouvernement n'ait vendu le terrain à M. Grant, rend certains propriétaires de chalet méfiants au sujet de la suite des événements.

« Les gens qui habitent autour du lac ne sont pas des multimillionnaires », affirme M^me^ Alexandra Skindra, mère, grand-mère et propriétaire de chalet.

« Ce sont juste des gens ordinaires. Des gens qui travaillent fort. Ce genre de situation ne devrait pas se produire. »

Madame Skindra et son mari, M. Arkadis, concepteur de centrale nucléaire, âgé de 68 ans et maintenant à la retraite, avaient prévu couler paisiblement leur retraite au lac.

« J'ai grandi ici, explique M^me^ Skindra. Mes enfants ont grandi ici. Et j'espérais que mes cinq petits-enfants pourraient venir ici tous les étés. »

« Nous n'avons rien contre Peter », fait remarquer M. Arkadis, marteau à la main, pendant qu'il rénove la pièce qui donne sur le lac à l'avant de son chalet.

« Mais je ne vois pas comment ce projet peut être réalisé sans causer de dommages au lac et à l'environnement. »

Au bout du chemin, Ira et Marion Murphy ont passé 56 ans sur un lopin de terre qui relie les lacs Twin au lac voisin, le lac Frère.

Encore svelte à 75 ans, M. Murphy, ancien superviseur à Hydro Ontario, maintenant à la retraite, peut indiquer du doigt l'endroit sur la rive où il a construit dans un arbre, 18 étés plus tôt, une cabane de deux étages pour ses petites-filles.

Pour lui, la vie au lac est une chose précieuse, intimement liée à la vie familiale.

« Vous savez, nous connaissons Peter depuis qu'il a trois ans », affirme M. Murphy, un bel homme aux cheveux gris affectionnant la vie au grand air.

"We've got nothing against him. We're just concerned about the lake, that's all."

Rudi Ptok, 71, says he's worried about run-off, and not just with pesticides, he says, but with the 400 kilograms of fertilizers per year that will be needed to keep Grant's course green too.

"They're probably going to have to blast out rock to build too," he says.

Ptok says Grant's consultants have confirmed they may well have to dynamite.

Looking worriedly out at the lake, Ptok says, "I don't even want to think about it."

(A.R., vol. XI, at pp. 4-12)

Appeal and cross-appeal dismissed, with costs of the appeal in this Court to the respondents.

Solicitors for the appellants/respondents on cross-appeal: Fasken Martineau DuMoulin, Toronto.

Solicitors for the respondents/appellants on cross-appeal: Blake, Cassels & Graydon, Toronto.

Solicitors for the intervener the Ottawa Citizen: Gowling Lafleur Henderson, Ottawa.

Solicitors for the interveners the Canadian Newspaper Association, Ad IDEM/Canadian Media Lawyers Association, RTNDA Canada/ Association of Electronic Journalists, Magazines Canada, the Canadian Association of Journalists, the Canadian Journalists for Free Expression, the Writers' Union of Canada, the Professional Writers Association of Canada, the Book and Periodical Council, and PEN Canada: Brian MacLeod Rogers, Toronto.

Solicitor for the intervener the Canadian Broadcasting Corporation: Canadian Broadcasting Corporation, Toronto.

Solicitors for the intervener the Canadian Civil Liberties Association: Torys, Toronto.

« Nous n'avons rien contre lui. C'est uniquement le sort du lac qui nous préoccupe, c'est tout. »

Monsieur Rudi Ptok, 71 ans, dit s'inquiéter des effets du ruissellement, et ce, non seulement des pesticides, mais également des 400 kilogrammes de fertilisants qui seront nécessaires chaque année pour maintenir vert le gazon du parcours de golf de M. Grant.

« De plus, ils devront probablement dynamiter du roc pour aménager le terrain », dit-il.

Monsieur Ptok affirme que les experts-conseils de M. Grant ont confirmé qu'il pourrait fort bien être nécessaire de recourir au dynamitage.

« Je ne veux même pas y penser », dit M. Ptok, en jetant un regard soucieux vers le lac.

(d.a., vol. XI, p. 4-12)

Pourvoi et pourvoi incident rejetés, avec dépens relativement au pourvoi principal devant notre Cour en faveur des intimés.

Procureurs des appelants/intimés à l'appel incident : Fasken Martineau DuMoulin, Toronto.

Procureurs des intimés/appelants à l'appel incident : Blake, Cassels & Graydon, Toronto.

Procureurs de l'intervenant Ottawa Citizen : Gowling Lafleur Henderson, Ottawa.

Procureurs des intervenants l'Association canadienne des journaux, Ad IDEM/Canadian Media Lawyers Association, ACDIRT Canada/ Association des journalistes électroniques, Magazines Canada, l'Association canadienne des journalistes, les Journalistes canadiens pour la liberté d'expression, Writers' Union of Canada, Professional Writers Association of Canada, Book and Periodical Council et PEN Canada : Brian MacLeod Rogers, Toronto.

Procureur de l'intervenante la Société Radio-Canada : Société Radio-Canada, Toronto.

Procureurs de l'intervenante l'Association canadienne des libertés civiles : Torys, Toronto.

Solicitors for the intervener Danno Cusson: Heenan Blaikie, Ottawa.

Procureurs de l'intervenant Danno Cusson : Heenan Blaikie, Ottawa.

Please see paras. 24, 39-44 & 48-51

Harris v. Glaxosmithkline Inc. et al.

[Indexed as: Harris v. GlaxoSmithKline Inc.]

106 O.R. (3d) 661

Leave to appeal refused by the SCC

2010 ONCA 872

Court of Appeal for Ontario,

Rosenberg, Moldaver and Karakatsanis JJ.A.

As he then was

December 20, 2010*

* This judgment was recently brought to the attention of the editors.

Torts -- Abuse of process -- Plaintiff bringing action against defendants for damages for abuse of process based on fact that she was unable to buy cheaper generic version of drug manufactured by defendants while proceedings by defendants against generic manufacturer were outstanding in Federal Court -- Motion judge properly striking statement of claim and dismissing action -- Plaintiff not party to any legal process initiated by defendants -- Statement of claim also alleging no overt act outside of alleged abusive process -- Abuse of process claim bound to fail. [page662]

Torts -- Conspiracy -- Plaintiff bringing action against defendants for damages for conspiracy based on fact that she was unable to buy cheaper generic version of drug manufactured by defendants while proceedings by defendants against generic manufacturer were outstanding in Federal Court -- Motion judge properly striking statement of claim and dismissing action -- Defendants' predominant purpose in bringing Federal Court proceedings not to injure plaintiff -- Plaintiff unable to show unlawful act on part of defendants -- Plaintiff not having viable claim for conspiracy.

Waiver of tort -- Wrongdoing -- Plaintiff bringing action against defendants for damages for abuse of process based on fact that she was unable to buy cheaper generic version of drug manufactured by defendants while proceedings by defendants against generic manufacturer were outstanding in Federal Court -- Motion judge properly striking claim and dismissing action -- Plaintiff unable to point to any predicate wrongdoing on part of defendants -- Predicate wrongdoing essential element of waiver of tort.

The plaintiff was a user of the drug Paxil, which was manufactured and sold by the defendants. Between 1999 and 2003, the defendants filed six Notice of Compliance ("NOC") Proceedings in the Federal Court against several generic drug makers who sought to introduce a generic equivalent of Paxil into the Canadian market. Upon the commencement of an NOC Proceeding, the Minister of Health is automatically enjoined from issuing an NOC to the generic drug manufacturer for a period of up to 24 months from the date of the filing. The defendants were unsuccessful in four of the six proceedings and discontinued the other two. However, by virtue of the automatic stays, the defendants retained the exclusive right to market Paxil during the four years in question. The plaintiff brought a proposed class action against the defendants alleging causes of action in abuse of process, conspiracy and waiver of tort. She claimed that she had suffered damages as a result of the postponement of the sale of the generic drug as she was required to purchase Paxil at a "supra-competitive price" during that period. The defendants moved successfully for an order striking out the claim and dismissing the action. The plaintiff appealed.

Held, the appeal should be dismissed.

The motion judge properly found the following to be the constituent elements of the tort of abuse of process: (1) the plaintiff is a party to a legal process initiated by the defendant; (2) the legal process was initiated for the predominant purpose of furthering some indirect, collateral and improper objective; (3) the defendant took or made a definite

act or threat in furtherance of the improper purpose; and (4) some measure of special damage has resulted. The first element was not satisfied as the plaintiff was not a party to a legal process initiated by the defendants. The third element was also not satisfied as there was no overt act outside of the alleged abusive process. It was plain and obvious that the claim for abuse of process could not succeed.

To make out a conspiracy to injury, the defendant's predominant purpose must be to inflict harm on the plaintiff. It is not enough if harm is the collateral result of acts pursued predominantly out of self-interest. It was plain and obvious that the plaintiff could not establish that the defendants' predominant purpose in bringing the Federal Court proceedings was to injure her. The defendants' predominant purpose was to lawfully advance its self-interest. Even if the defendants acted with bad intentions in bringing the NOC Proceedings, there can be [page663] no liability when the defendant merely employs regular legal process to its proper conclusion. Moreover, the plaintiff could not show a wrongful act on the part of the defendants. The NOC Proceedings were not contrary to law or to statute. They were proceedings that the defendants were at liberty to bring. The motion judge correctly concluded that it was plain and obvious that the plaintiff did not have a viable claim for conspiracy.

Waiver of tort requires some predicate wrongdoing. There was none to be found in this case. The motion judge correctly dismissed the waiver of tort claim.

Cases referred to

Metrick v. Deeb, [2003] O.J. No. 2221, 172 O.A.C. 229, 16 C.C.L.T. (3d) 298, 123 A.C.W.S. (3d) 831 (C.A.) [Leave to appeal to S.C.C. refused [2003] S.C.C.A. No. 378], consd

Other cases referred to

Apotex Inc. v. Merck & Co. Inc., [2009] F.C.J. No. 712, 2009 FCA 187, [2010] 2 F.C.R. 389, 76 C.P.R. (4th) 1, 178 A.C.W.S. (3d) 212, 2010EXP-3842; Aronowicz v. Emtwo Properties Inc. (2010), 98 O.R. (3d) 641, [2010] O.J. No. 475, 2010 ONCA 96, 258 O.A.C. 222, 64 B.L.R. (4th) 163, 316 D.L.R. (4th) 621; AstraZeneca Canada Inc. v. Canada (Minister of Health), [2006] 2 S.C.R. 560, [2006] S.C.J. No. 49, 2006 SCC 49,

272 D.L.R. (4th) 577, 354 N.R. 88, J.E. 2006-2157, 52 C.P.R. (4th) 145, 151 A.C.W.S. (3d) 682, EYB 2006-110778; Belsat Video Marketing Inc. v. Astral Communication Inc., [1998] O.J. No. 654, 54 O.T.C. 84, 81 C.P.R. (3d) 1, 77 A.C.W.S. (3d) 732 (Gen. Div.); Canada (Competition Act, Director of Investigation and Research) v. Warner Music Canada Ltd., [1997] C.C.T.D. No. 53, 78 C.P.R. (3d) 321 (Comp. Trib.); Crofter Hand Woven Harris Tweed Co. v. Veitch, [1942] A.C. 435, [1942] 1 All E.R. 142 (H.L.); Positive Seal Dampers Inc. v. M. & I. Heat Transfer Products Ltd. (1991), 2 O.R. (3d) 225, [1991] O.J. No. 3383, 33 C.P.R. (3d) 417, 26 A.C.W.S. (3d) 208 (Gen. Div.); Reach M.D. Inc. v. Pharmaceutical Manufacturers Assn. of Canada (2003), 65 O.R. (3d) 30, [2003] O.J. No. 2062, 227 D.L.R. (4th) 458, 172 O.A.C. 202, 17 C.C.L.T. (3d) 149, 25 C.P.R. (4th) 417, 123 A.C.W.S. (3d) 411 (C.A.); Roman Corp. v. Hudson's Bay Oil and Gas Co., [1973] S.C.R. 820, [1973] S.C.J. No. 70, 36 D.L.R. (3d) 413

Statutes referred to

Competition Act, R.S.C. 1985, c. C-34, ss. 32 [as am.], 79(5)

Food and Drugs Act, R.S.C. 1985, c. F-27 [as am.]

Patent Act, R.S.C. 1985, c. P-4 [as am.]

Rules and regulations referred to

Food and Drug Regulations, C.R.C., c. 870, Part C, Division 8, C.08.004

Patented Medicines (Notice of Compliance) Regulations, SOR/93-133, ss. 5(1) [as am.], 6(1) [as am.], (5)(b) [as am.], 7(1)(e), 8 [as am.]

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 21, 21.01(1)(a), (b)

Authorities referred to

Fleming, John, The Law of Torts, 9th ed. (North Ryde, N.S.W.: LBC Information Services, 1998)

APPEAL from the order of Perell J. (2010), 101 O.R. (3d) 665, [2010] O.J. No. 1710 (S.C.J.) striking a statement of claim and dismissing an action. [page664]

William V. Sasso, Jacqueline A. Horvat and Professor Ed

Morgan, for appellant.

David W. Kent, W. Brad Hanna and Geoff Moysa, for respondents.

The judgment of the court was delivered by

MOLDAVER J.A.: --

Introduction

[1] The respondents (collectively "GSK") are a group of related companies engaged in the business of pharmaceutical research and development, as well as the manufacture and sale of pharmaceuticals. One of GSK's products is Paxil, a prescription drug used to treat anxiety, depression and other disorders.

[2] The appellant, Ms. Harris, is a Paxil user. She is the representative plaintiff in a class action in which she, and other Paxil users, contend that from 1999 to 2003, GSK misused a process under the Patent Act, R.S.C. 1985, c. P-4 to delay the entry into the Canadian market of a less expensive generic equivalent of Paxil. During that four-year period, Paxil users were required to buy Paxil at a "supra-competitive" price for which they now seek to hold GSK accountable.

[3] In her claim on behalf of the class, the appellant alleges three causes of action against GSK: (1) abuse of process; (2) conspiracy; and (3) waiver of tort.

[4] In April 2010, GSK moved under rules 21.01(1)(a) and (b) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 for an order striking out the appellant's claim and dismissing the action. On April 22, 2010, Perell J., of the Superior Court of Justice, granted GSK's motion. He did so on the basis that the pleadings did not disclose a viable cause of action against GSK. In his view, it was plain and obvious that the action could not succeed.

[5] The appellant challenges that ruling on appeal. In

essence, she submits that the motion judge made the following five errors:

(1) he misdirected himself on the constituent elements of the tort of abuse of process;

(2) he erred in holding that the facts as pleaded did not and could not establish the tort of conspiracy;

(3) he misdirected himself in holding that a waiver of tort claim could not succeed absent a predicate wrongdoing; [page665]

(4) he overstepped his mandate on a Rule 21 motion by making findings of fact that he was precluded from making; and

(5) he erred in summarily disposing of important and novel issues of law in the absence of a full and complete factual record.

[6] For reasons that follow, I am satisfied that the motion judge was correct in dismissing the action against GSK. In short, I agree with him that the pleadings do not disclose a viable cause of action against GSK. Accordingly, I would dismiss the appeal.

Background

[7] The reasons of the motion judge are detailed and comprehensive. It is unnecessary to duplicate them. Most of the heavy lifting has been done. By way of background, I consider it sufficient to outline, in summary form, the regulatory regime by which GSK is governed and the salient facts that the appellant and other Paxil users rely on in support of their claim against GSK.

The Regulatory Regime

[8] The marketing of drugs in Canada is governed by the Food and Drugs Act, R.S.C. 1985, c. F-27 ("FDA") and the Patent Act. The FDA deals with the safety and efficacy of drugs. Regulations made under that Act (the Food and Drug Regulations, C.R.C., c. 870, Part C, Division 8, C.08.004) provide that a drug cannot be marketed in Canada unless and until the Minister of Health has issued a Notice of Compliance ("NOC") in respect of it.

[9] The Patent Act deals with intellectual property issues relating to patented drugs and their subsequent generic copies.

The Patented Medicines (Notice of Compliance) Regulations, SOR/93-133 ("PM(NOC) Regulations") provide that all patents pertaining to a drug for which a NOC has been issued may be listed in the Patent Register. These regulations further provide for a process whereby the interests of innovator patentees are balanced against the competing interests of generic manufacturers.

[10] A subsequent manufacturer that wishes to market a generic version of a patented drug can simply wait for the relevant patents to expire. Alternatively, s. 5(1) of the PM(NOC) Regulations allows a manufacturer to serve a Notice of Allegation ("NOA") on the patentee asserting that the listed patents [page666] are invalid and/or will not be infringed by the proposed generic equivalent.

[11] Section 6(1) of the PM(NOC) Regulations provides that a patentee who receives a NOA may challenge the allegations made by the generic manufacturer by applying for judicial review in the Federal Court (a "NOC Proceeding"). In the NOC Proceeding, the patentee disputes the NOA and asserts the validity and/or infringement of the patent in issue. The patentee is given an opportunity to demonstrate that the allegations set forth in the NOA are "not justified".

[12] Upon the commencement of a NOC Proceeding, s. 7(1)(e) of the PM(NOC) Regulations takes effect and automatically enjoins the Minister from issuing a NOC to the generic drug manufacturer for a period of up to 24 months from the date of the filing.

[13] If the patentee prevails in a NOC Proceeding, the Minister is enjoined from issuing a NOC to the generic manufacturer prior to the expiry of the patent in issue. Alternatively, the court may dismiss a NOC Proceeding if it finds that the patent is invalid or would not be infringed, or that the patent holder has failed to show that the allegations in the NOA are not justified. In that event, the Minister may immediately issue a NOC for the generic product.

[14] A possible check on the automatic 24-month stay

contemplated by the filing of a NOC Proceeding is found in s. 6(5)(b) of the PM(NOC) Regulations. Under that provision, the court may dismiss a s. 6(1) application on the ground that "the application is redundant, scandalous, frivolous or vexatious or is otherwise an abuse of process".

[15] Another check on patentees who choose to institute NOC Proceedings is found in s. 8 of the PM(NOC) Regulations. Under that provision, where a NOC Proceeding is withdrawn or discontinued or is ultimately dismissed, the unsuccessful patentee is liable to the generic drug manufacturer for any losses the generic manufacturer may have suffered due to its inability to market its product during the stay period. The PM(NOC) Regulations do not, however, provide any form of relief to other persons or entities, including consumers who may have been adversely affected by a patentee's choice to instigate a NOC Proceeding.

[16] In Apotex Inc. v. Merck & Co. Inc., [2009] F.C.J. No. 712, 2009 FCA 187, the Federal Court of Appeal commented on the balance the PM(NOC) Regulations seek to achieve between the need for effective patent protection and the timely entry of generic drugs into the marketplace. The automatic stay that [page667] arises from the commencement of a NOC Proceeding is part of that balance. Its counterpart is the s. 8 obligation on the patentee to pay damages to a delayed generic entrant if the NOC Proceeding fails. At paras. 54 and 55 of his reasons, Noel J.A., for the court, recognized that "the automatic 24-month stay was capable of being used in a manner which does not advance patent protection" and "given the scheme, it is the patentee who has both the carriage of the proceeding and the interest in its dilatory prosecution". At para. 56, Noel J.A. quoted from AstraZeneca Canada Inc. v. Canada (Minister of Health), [2006] 2 S.C.R. 560, [2006] S.C.J. No. 49, in which Binnie J., for the court, made the following observations, at para. 39:

> By imposing the 24-month delay called for by the NOC Regulations, the decision of the Federal Court of Appeal undermines achievement of the balance struck by Parliament between the objectives of the FDA . . . and regulations

thereunder (making safe and effective drugs available to the public) and the Patent Act and its regulations (preventing abuse of the "early working" exception to patent infringement). Given the evident (and entirely understandable) commercial strategy of the innovative drug companies to evergreen their products by adding bells and whistles to a pioneering product even after the original patent for that pioneering product has expired, the decision of the Federal Court of Appeal would reward evergreening even if the generic manufacturer (and thus the public) does not thereby derive any benefit from the subsequently listed patents.

(Emphasis added)

[17] Binnie J.'s concerns about the commercial strategy of the innovative drug companies seeking to evergreen their products did not escape Noel J.A.'s attention. According to Noel J.A., s. 8 of the PM(NOC) Regulations was enacted to address the concerns mentioned by Binnie J. and others as to the various ways patentees might attempt to misuse the NOC regulatory regime. At paras. 58 to 60 of his reasons, Noel J.A. made the following observations:

> Section 8, by imposing on first persons a liability for the losses suffered by a second person, as a result of the operation of the automatic stay, when a prohibition application is withdrawn, discontinued or is ultimately unsuccessful, alleviates these concerns[.]
>
> By the same logic, [that a first person no longer has an exclusive interest in delaying the progress of a NOC Proceeding], a first person no longer has an exclusive interest in triggering the operation of the automatic stay by reference to patents which are not properly listed . . . or to "evergreen" a patented drug in order to perpetuate the benefit which the PM(NOC) Regulations provide . . . As a result of section 8, a first person must focus on the issue of infringement and consider the strength of its position before initiating a prohibition proceeding.
>
> This promotes the use of the PM(NOC) Regulations for the

> purpose for which they are intended: the prevention of infringement. Significantly, it [page668] does so in a manner which is consistent with maintaining the balance [of making safe and effective drugs available to the public and protecting the rights of patentees].

Monopoly Rights of Patentees

[18] In considering the rights of patentees, it is essential to differentiate between a monopoly, in the anti-competitive, unlawful sense of the word, and an intellectual property right, such as a patent. For present purposes, the distinction is important because the appellant, in her claim, makes numerous references to GSK's "monopoly" in respect of Paxil and the resulting "supra-competitive" prices GSK was able to charge.

[19] The distinction between intellectual property rights and unlawful anti-competitive acts is well-established in competition law. For example, s. 79(5) of the Competition Act, R.S.C. 1985, c. C-34 provides that "an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the . . . Patent Act . . . is not an anti-competitive act". See, also, Canada (Competition Act, Director of Investigation and Research) v. Warner Music Canada Ltd., [1997] C.C.T.D. No. 53, 78 C.P.R. (3d) 321 (Comp. Trib.), at p. 9 C.P.R., where, in discussing intellectual property rights, the tribunal stated that "[t]he right granted by Parliament to exclude others is fundamental to intellectual property rights and cannot be considered to be anti-competitive."

[20] While the normal exercise of an intellectual property right is not an "abuse of dominance" under the Competition Act, Parliament was alive to the fact that those rights can be used inappropriately. Section 32 of the Act gives the Federal Court broad remedial powers to address the use of intellectual property rights in ways that "unduly lessen" competition. This reflects recognition that intellectual property rights can be used in unlawfully anti-competitive ways. What then is the nature of a drug patent? It is a time-limited, statutorily-authorized monopoly on the production and sale of certain medicines. The patent-holder's right to exclude others is

fundamental to the nature of the patent, but those anti-competitive characteristics are dealt with in the statutory scheme of the Competition Act.

[21] It is against this statutory and legal framework that the appellant's claim against GSK must be assessed.

The Failed NOC Proceedings

[22] Between 1999 and 2003, GSK filed six NOC Proceedings in the Federal Court against several generic drug makers who sought to introduce a generic equivalent of Paxil into the [page669] Canadian market. None of the NOC Proceedings were successful. However, by virtue of the automatic stays that took effect upon their filing, GSK retained the exclusive right to market Paxil during the four years in question.

[23] Referring to the NOC Proceedings as "objectively baseless", the appellant claims that GSK initiated them so that GSK could continue to charge consumers a "supra-competitive" price for Paxil. In doing so, GSK used the court process for an improper collateral purpose and caused damage to the class members -- hence the abuse of process claim.

[24] As for the conspiracy claim, the appellant alleges that GSK engaged in a course of conduct, the predominant purpose of which was to cause injury to the class members by forcing them to pay a "supra-competitive" price for Paxil during the years 1999 to 2003. Alternatively, the appellant claims that GSK's use of the regulatory NOC process was unlawful, it was directed at the class members and GSK should have known in the circumstances that the class members would be injured, as indeed they were.

[25] Finally, with respect to waiver of tort, the appellant claims the right to waive damages for the torts of conspiracy and abuse of process and, instead, to seek disgorgement of any profits made by GSK over the four-year period from 1999 to 2003. In this regard, the appellant claims that GSK's conduct constitutes an "affront to good conscience and require[s] a restitutionary disposition that will satisfy equity in the circumstances of this case as pleaded".

[26] As indicated, the motion judge rejected each of the claims put forward by the appellant. In his view, the statement of claim did not disclose a viable cause of action against GSK. I agree and now consider the claims asserted.

Abuse of Process

[27] At para. 48 of his reasons, the motion judge defined the constituent elements of the tort of abuse of process as follows:

> The case law authorities establish that there are four constituent elements to the tort of abuse of process: (1) the plaintiff is a party to a legal process initiated by the defendant; (2) the legal process was initiated for the predominant purpose of furthering some indirect, collateral and improper objective; (3) the defendant took or made a definite act or threat in furtherance of the improper purpose; and (4) some measure of special damage has resulted: Hawley v. Bapoo (2005), 76 O.R. (3d) 649 (Ont. S.C.J.) at para. 86, var'd (2007), 156 C.R.R. (2d) 351 (Ont. C.A.); Metrick v. Deeb (2002), 14 C.C.L.T. (3d) 297 (Ont. S.C.J.) at para. 9, aff'd (2003), 172 O.A.C. 229 (C.A.), leave to appeal ref'd, [2003] S.C.C.A. No. 378, 195 O.A.C. 398n (S.C.C.); Scintilore Explorations Ltd. v. Larache, [1999] O.J. No. 2847 (S.C.J.); P.M. Perell, "Tort Claims for Abuse of Process" (2007) 33 Adv. Q. 193 at p. 193; J. Irvine, "The Resurrection of Tortious Abuse of Process" 47 C.C.L.T. 217. [page670]

[28] In my view, the motion judge correctly defined the elements of the tort of abuse of process. His conclusion finds support in academic writings and an established line of authorities.

[29] The appellant referred to this court's decision in Metrick v. Deeb, [2003] O.J. No. 2221, 172 O.A.C. 229 (C.A.), leave to appeal refused [2003] S.C.C.A. No. 378, as authority for the proposition that the tort of abuse of process consists of only two elements: (1) using the legal process for an improper or collateral purpose; and (2) the need for a definite

act or threat in furtherance of the illegitimate purpose.

[30] Those two elements were taken from a passage in Fleming, The Law of Torts, 9th ed. (North Ryde, N.S.W.: LBC Information Services, 1998), at p. 668, which the court referred to as "instructive". In its brief endorsement, the court directed its attention to the second of the two elements and found that it had not been made out on the evidence.

[31] Metrick should not be taken as authority for the proposition that the tort of abuse of process consists of only two elements. The court in that case was not called upon to consider the constituent elements of the tort. It was simply responding to the particular issues raised in that case, one of which related to the need for a definite act or threat in furtherance of the illegitimate purpose. In that regard, the court found [at para. 3] the following quote from Fleming instructive: "Some such overt conduct is essential, because there is clearly no liability when the defendant merely employs regular legal process to its proper conclusion, albeit with bad intentions" (emphasis added).

[32] As we shall see, that principle is applicable to the case at hand, both as regards to the tort of abuse of process and also the tort of conspiracy.

[33] Having concluded that the motion judge correctly identified the constituent elements of the tort of abuse of process, the appellant's claim necessarily founders on the first element. In short, she was not a party to the NOC Proceedings.

[34] In addressing the first element of the tort, the motion judge explored what he referred to as the "many policy reasons" against eliminating it and extending the tort of abuse of process to non-parties. For present purposes, it is unnecessary to outline the policy reasons he explored. I only mention the fact that he considered policy matters because that is one of the complaints the appellant raises in support of her argument that the motion judge misidentified "mutuality" as one of the constituent elements of the tort of abuse of process. In short,

the appellant submits that the motion judge was not entitled on a Rule 21 [page671] motion, absent an evidentiary record, to consider policy matters. In doing so, he engaged in unwarranted speculation.

[35] I disagree. In the factum she filed on the motion, the appellant took the position that there were "no policy reasons for denying those persons [non-parties] the right to say that they were abused and to recover damages they have suffered as a result". That being so, she cannot fault the motion judge for taking up the issue.

[36] Be that as it may, even if the appellant is correct that the motion judge should not have entered into the realm of policy, his doing so occasioned no harm. The constituent elements of the tort of abuse of process remain the same and the motion judge would have come to the same conclusion had he said nothing about policy considerations.

[37] The motion judge also found that the third element of the tort of abuse of process was not made out on the pleadings. At para. 72 of his reasons, he made the following observations, with which I agree:

> In the case at bar, based on the allegations pleaded in the statement of claim, there is no overt act outside of the alleged abusive process. From a reading of the statement of claim, all that can be said is that GSK made an application under s. 6 of the NOC Regulations, which automatically triggered the injunctive provisions of s. 7 of the regulation, which, in turn, delayed the entry of generic drugs into the market but exposed GSK to a claim under s. 8 of the regulation. Ms. Harris submits that the overt act outside the NOC Proceeding was GSK's act of continuing to sell Paxil at supra-competitive prices, which is to say the act of selling at prices untouched by competition. That overt act, however, is not outside the NOC Proceedings. The act of bringing a NOC Proceeding is precisely the act of prohibiting competition so that sales may continue untouched by competition or at what Ms. Harris likes to call supra-competitive pricing.

[38] For these reasons, I am satisfied that the motion judge correctly determined that the tort of abuse of process was not made out on the pleadings.

Conspiracy

(i) Conspiracy to injure [See Note 1 below]

[39] To make out a conspiracy to injure, the defendant's predominant purpose must be to inflict harm on the plaintiff. It is not enough if harm is the collateral result of acts pursued predominantly out of self-interest. The focus is on the actual intent [page672] of the defendants and not on the consequences that the defendants either realized or should have realized would follow.

[40] In Roman Corp. v. Hudson's Bay Oil and Gas Co., [1973] S.C.R. 820, [1973] S.C.J. No. 70, at p. 830 S.C.R., Martland J. quoted with approval Lord Simon L.C.'s statement of the law in Crofter Hand Woven Harris Tweed Co. v. Veitch, [1942] A.C. 435, [1942] 1 All E.R. 142 (H.L.), at pp. 444-45 A.C.:

> The question to be answered, in determining whether a combination to do an act which damages others is actionable, even though it would not be actionable if done by a single person, is not "did the combiners appreciate, or should they be treated as appreciating, that others would suffer from their action," but "what is the real reason why the combiners did it?" Or, as Lord Cave puts it, "what is the real purpose of the combination?" The test is not what is the natural result to the plaintiffs of such combined action, or what is the resulting damage which the defendants realize or should realize will follow, but what is in truth the object in the minds of the combiners when they acted as they did.

[41] In Belsat Video Marketing Inc. v. Astral Communication Inc., [1998] O.J. No. 654, 81 C.P.R. (3d) 1 (Gen. Div.), at para. 53, Rosenberg J. observed that steps taken for the purpose of protecting a party's trade or business interests amount to legitimate promotion of a self-interest and, hence, do not give rise to the tort of conspiracy to injure:

> If the real purpose of a combination is not to injure the plaintiffs but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie although damage to another ensues, provided that no resort is made to unlawful means in carrying out such purpose. An ordinary commercial transaction, the predominant purpose of which is to advance economic interests, does not constitute a conspiracy even though the complaining party may suffer an economic loss as a result.

(Emphasis added)

See, also, Positive Seal Dampers Inc. v. M. & I. Heat Transfer Products Ltd. (1991), 2 O.R. (3d) 225, [1991] O.J. No. 3383 (Gen. Div.), at pp. 237-38 O.R., per Anderson J.

[42] In the case at hand, it is difficult to discern from the appellant's pleading what the appellant alleges was GSK's predominant purpose in bringing the NOC Proceedings. Para. 57 of the amended statement of claim, reproduced in full below, reads as follows:

> Some, but not all, of the defendants' predominant purposes, concerns, motivations and intentions were to:
>
> (a) cause each of the Class Members to pay the Overcharge so that they would receive more income from the sale of Paxil than they would have if there was a generic equivalent for sale in Canada during the Class Period; [page673]
>
> (b) suppress, delay and eliminate competition in the supply and sale of a generic equivalent in Canada in order to cause each of the Class Members to pay the Overcharge;
>
> (c) maintain their monopoly in the sale of Paxil in order to maintain its supra-competitive price during the Class Period;
>
> (d) harm Class Members by requiring them to pay the Overcharge;
>
> (e) receive directly or indirectly increased revenue from the sale of Paxil; and
>
> (f) avoid detection and conceal the conspiracy from Tracey and the other Class Members and the regulatory authorities in Canada.

(Emphasis added)

[43] Assuming that there can be more than one "predominant" purpose, a cursory examination of para. 57 of the amended statement of claim shows that there is considerable overlap in five of the six alleged "predominant" purposes. (Para. 57(f) is a non-sequitur. It relates to how the conspiracy was meant to operate.)

[44] Stripping the five "predominant purpose" clauses to their essentials, the discernable predominant purpose would appear to be that GSK engaged in a course of conduct designed to obtain the highest possible price from consumers with a view to maximizing its revenue from the sale of Paxil -- in other words, a classic commercial purpose that cannot amount to a conspiracy to injure even though, as a result, there is an economic impact on consumers.

[45] GSK submits that this is where the distinction between an anti-trust monopoly and the rights accruing to a patentee must be borne in mind. To the extent GSK's predominant purpose in bringing the NOC Proceedings was to extend the patent rights it had enjoyed in relation to the sale of Paxil, GSK submits that that conduct could not amount to a conspiracy to injure. The PM(NOC) Regulations permitted GSK to do just that. GSK was entitled to defend the validity and scope of its patents. The fact that a patent confers on its owner the power to exclude others certainly has economic implications. But, as GSK points out, those implications are necessarily consequential and, in any event, intended by Parliament and thus not unlawfully anti-competitive.

[46] Viewed through that lens, GSK submits, correctly in my view, that the appellant "cannot convert the legitimate interest of a patentee in protecting (and monetizing) its intellectual property rights into anti-competitive monopoly practices in order to conjure up the improper predominant purpose required for the tort of conspiracy". [page674]

[47] The motion judge agreed with GSK's submissions on this issue. At para. 86 of his reasons, he stated:

> The resort to a NOC Proceeding is a part of the ordinary competition between innovators and generic manufacturers. The case law establishes that provided that there are no unlawful acts, an ordinary commercial transaction with the predominant purpose of advancing one's own economic interests does not constitute a conspiracy even though a party or a third party may suffer an economic loss.

(Authorities omitted)

And, at para. 89:

> GSK is not a public authority, a non-government organization, a charity, or a not-for-profit organization. It is a business enterprise with the purposeful activity of making money, which activity is not wrongdoing. As alleged in Ms. Harris' statement of claim, all of GSK predominate purposes are connected to GSK advancing its own self-interest by making money, which is normal and a norm for for-profit enterprises. In my opinion, it is plain and obvious that Ms. Harris cannot establish an intent to injure simply from the fact that GSK continued to make money from her and from others by acting in its own self interest and availing itself of the statutory rights under s. 6 of the NOC Regulations to protect existing patents while exposing itself to the attendant statutory liability under s. 8 of the NOC Regulations.

[48] I agree with those statements by the motion judge and would simply add that even if GSK acted with bad intentions in bringing the NOC Proceedings, as Fleming points out, at para. 31 above, "there can be no liability when the defendant merely employs regular legal process to its proper conclusion".

(ii) Conspiracy to do an unlawful act

[49] The motion judge gave the appellant the widest possible berth in respect of this allegation. He tested her complaint against this court's decision in Reach M.D. Inc. v. Pharmaceutical Manufacturers' Assn. of Canada (2003), 65 O.R. (3d) 30, [2003] O.J. No. 2062 (C.A.), where Laskin J.A., for the court, held, at paras. 52 and 53, that the concept of "illegal or unlawful means" is broad enough to include the doing of an act that the person or entity is "not authorized to

do" or "at liberty to commit".

[50] Applying that test to the case at hand, the motion judge stated the following, at para. 94 of his reasons:

> In the case at bar, GSK's NOC Proceedings were not contrary to law or to statute. GSK's NOC Proceedings were the opposite of unauthorized; they were proceedings that GSK was entitled to bring. In other words, they were acts that GSK was at liberty to commit. The NOC Proceedings are actually a response to NOC's initiated by Apotex and two other generic manufacturers. GSK has a statutory right to show that the generic manufacturer's allegations are "not justified." [page675]

[51] I agree with the motion judge's characterization of GSK's conduct. It follows that the pleadings do not substantiate a conspiracy based on unlawful means.

(iii) The sham litigation argument

[52] Having determined that the appellant's abuse of process and conspiracy allegations could not stand, the motion judge went on to consider the six cases in which GSK had commenced NOC Proceedings. Of those six cases, four were determined on their merits [See Note 2 below] and, in each instance, the courts found in favour of the generic manufacturers. GSK had failed to establish that all of the allegations set out by the generic manufacturers in their NOAs were unjustified.

[53] The motion judge analyzed the four decisions, although he was not asked to do so by the parties. He did so because the appellant, in her submissions, had characterized the NOC Proceedings instituted by GSK as "frivolous", "meritless", "sham litigation", "spurious" and "objectively baseless". In the opinion of the motion judge, it was those allegations that form [at para. 105] "the lynchpin allegations of all of the claims against GSK". With that in mind, the motion judge analyzed the four decisions in which GSK was unsuccessful and, at para. 105 of his reasons, he stated, "[I]n my opinion, it is plain and obvious that these allegations are patently ridiculous and incapable of proof."

[54] The appellant argues that it was wrong for the motion judge to analyze the four decisions on his own motion. Of greater importance, she submits that it was not open to the motion judge on a Rule 21 motion to find, based on his review of the four decisions, that the appellant's "sham litigation" allegations were [at para. 105] "patently ridiculous and incapable of proof". According to the appellant, that finding, which exceeded the scope of the motion judge's mandate, coloured his perception of the appellant's claims and tainted his analysis of them.

[55] I agree with the appellant in part. In my view, it was open to the motion judge to look at the four decisions since they formed part of the record before him. I further think he was entitled, based on his review of those decisions, to conclude that the NOC Proceedings were not, on their face, sham proceedings. What he could not do, in my respectful view, was to use them to conclude that the plaintiff's allegations to the opposite effect [page676] "were patently ridiculous and incapable of proof". That finding could only be made on a full record.

[56] That said, I am satisfied that the motion judge's error was harmless. His findings in relation to the four decisions are obiter. They form no part of the analysis that led him to conclude, correctly in my view, that the pleadings as framed disclose no viable cause of action against GSK in tort.

[57] Accordingly, I would not give effect to this aspect of the appellant's argument.

(iv) Waiver of tort

[58] At para. 102 of his reasons, the motion judge dismissed the waiver of tort claim because, in his view, "it is plain and obvious that there is no predicate wrongdoing upon which to base a plea of waiver of tort".

[59] In concluding that there must be a predicate wrongdoing to substantiate "waiver of tort", the motion judge relied on this court's decision in Aronowicz v. Emtwo Properties Inc.

(2010), 98 O.R. (3d) 641, [2010] O.J. No. 475, 2010 ONCA 96, where Blair J.A. stated, at para. 82, "Whether the claim [waiver of tort] exists as an independent cause of action or whether it requires proof of all the elements of an underlying tort aside, at the very least, waiver of tort requires some form of wrongdoing" (emphasis added).

[60] I agree with the motion judge's analysis and conclusion.

Conclusion

[61] The motion judge determined that the amended statement of claim disclosed no viable cause of action against GSK. Hence, he concluded that it was the plain and obvious that the action against GSK could not succeed. I agree. Accordingly, I would dismiss the appeal.

Costs

[62] The parties are not seeking costs. Accordingly, there will be no order as to costs.

Appeal dismissed.

Notes

Note 1: GSK concedes, for purposes of this appeal, that wholly owned affiliated companies can enter into the type of agreement required to found a conspiracy.

Note 2: GSK discontinued the fifth and sixth proceedings.

No. 34111

July 14, 2011

Coram: McLachlin C.J. and Deschamps and Charron JJ.

BETWEEN:

Tracey Margaret Harris

Applicant

- and -

Glaxosmithkline Inc., Glaxosmithkline PLC, Beecham Group PLC, Smithkline Beecham PLC and Smithkline Beecham Corporation

Respondents

JUDGMENT

The application for leave to appeal from the judgment of the Court of Appeal for Ontario, Number C52138, 2010 ONCA 872, dated December 20, 2010, is dismissed without costs.

Le 14 juillet 2011

Coram : La juge en chef McLachlin et les juges Deschamps et Charron

ENTRE :

Tracey Margaret Harris

Demanderesse

- et -

Glaxosmithkline Inc., Glaxosmithkline PLC, Beecham Group PLC, Smithkline Beecham PLC et Smithkline Beecham Corporation

Intimées

JUGEMENT

La demande d'autorisation d'appel de l'arrêt de la Cour d'appel de l'Ontario, numéro C52138, 2010 ONCA 872, daté du 20 décembre 2010, est rejetée sans dépens.

J.S.C.C.
J.C.S.C.

THE CATALYST CAPITAL GROUP INC. et al. Plaintiffs	-and-	WEST FACE CAPITAL INC. et al. Defendants	-and-	CANACCORD GENUITY CORP. Third Party
WEST FACE CAPITAL INC. et al. Plaintiffs by Counterclaim	-and-	THE CATALYST CAPITAL GROUP INC. et al. Defendants to the Counterclaim		

Court File No. CV-17-587463-00CL

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