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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E 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

and

CANACCORD GENUITY CORP.

Third Party

A N D B E T W E 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

A N D B E T W E E N:

BRUCE LANGSTAFF

Plaintiff by Counterclaim

and

THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION

Defendants to the Counterclaim

BOOK OF AUTHORITIES
OF WEST FACE CAPITAL INC. AND GREGORY BOLAND

(RE: Defendants' Anti-SLAPP Motions returnable May 17-21, 2021)

May 5, 2021

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

Kent E. Thomson (LSO# 24264J)
Tel: 416.863.5566
Email: kentthomson@dwpv.com

Matthew Milne-Smith (LSO# 44266P)
Tel: 416.863.5595
Email: mmilne-smith@dwpv.com

Andrew Carlson (LSO# 58850N)
Tel: 416.367.7437
Email: acarlson@dwpv.com

Maura O'Sullivan (LSO# 77098R)
Tel: 416.367.7481
Fax: 416.863.0871
Email: mosullivan@dwpv.com

Tel: 416.863.0900
Fax: 416.863.0871

Lawyers for the Defendants (Plaintiffs by Counterclaim), West Face Capital Inc. and Gregory Boland

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

Richard G. Dearden
Tel.: 613.786.0135
Fax: 613.788.3430
Email: richard.dearden@gowlingwlg.com
John Callaghan
Tel: 416.369.6693
Fax: 416.862.7661
Email: john.callaghan@gowlingwlg.com
Benjamin Na
Tel: 416.862.4455
Fax: 416.863.3455
Email: benjamin.na@gowlingwlg.com
Matthew Karabus
Tel: 416.369.6181
Fax: 416.862.7661
Email: matthew.karabus@gowlingwlg.com
Marco Romeo
Tel.: 416-862-5751
Fax: 416-862-7661
Email: marco.romeo@gowlingwlg.com

Tel: 416.862.7525
Fax: 416.862.7661

Lawyers for the Plaintiffs (Defendants to the Counterclaim), The Catalyst Capital Group Inc. and Callidus Capital Corporation and the Defendants to the Counterclaim, Gabriel De Alba, James Riley and Newton Glassman

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

David C. Moore (LSO# 16996)
Tel: 416.581.1818 ext. 222
Email: david@moorebarristers.ca
Ken Jones
Tel: 416.581.1818 ext. 224
Fax: 416.581.1279
Email: kenjones@moorebarristers.ca

Tel: 416.581.1818 ext. 222
Fax: 416.581.1279

Lawyers for the Plaintiffs (Defendants to the Counterclaim), The Catalyst Capital Group Inc. and Callidus Capital Corporation and the Defendants to the Counterclaim, Gabriel De Alba, James Riley and Newton Glassman

AND TO: **TORYS LLP**
Barristers and Solicitors
79 Wellington Street West
Suite 3000
Box 270, TD South Tower
Toronto ON M5K 1N2

Linda M. Plumpton
Tel: 416.865.8193
Fax: 416.865.7380
Email: lplumpton@torys.com
Leora Jackson
Tel: 416.865.7547
Fax: 416.865.7380
Email: ljackson@torys.com
Stacey Reisman
Tel: 416.865.7537
Fax: 416.865.7380
Email: sreisman@torys.com

Tel: 416.865.0040
Fax: 416.865.7380

Lawyers for the Defendants,
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

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

Lucas E. Lung (LSO# 52595C)
Tel: 416.601.2673
Fax: 416.601.4192
Email: llung@lerners.ca
Rebecca Shoom
Tel: 416.601.2382
Fax: 416.601.4185
Email: rshoom@lerners.ca

Tel: 416.867.3076
Fax: 416.867.9192

Lawyers for the Defendants,
Clarityspring Inc. and Nathan Anderson

TO: **MATHERS MCHENRY & CO.**
Suite 2700
TD Canada Trust Tower
161 Bay Street
Toronto ON M5J 2S1

Devin Jarcaig
Email: devin@mathersmchenryandco.com
Tel: 416.572.2140
Fax: 647.660.8119

Lawyers for the Defendant (Plaintiff by Counterclaim),
Bruce Langstaff

AND TO: **ST. LAWRENCE BARRISTERS LLP**
33 Britain Street
Second Floor
Toronto ON M5A 1R7

Phil Tunley
Tel: 647.964.3495
Email: phil@tunleylaw.ca
Alexi Wood
Tel: 647.245.8283
Fax: 647.245.2121
Email: alexi.wood@stlbarristers.ca

Tel: 647.964.3495
Fax: 647.245.8285

Lawyers for the Defendant,
Rob Copeland

AND TO: **KEVIN BAUMANN**

Email: pekiskokb@gmail.com
Tel: 403.505.7784

Defendant

AND TO: **JEFFREY MCFARLANE**
220 Dominion Drive
Suite B
Morrisville NC 27560

Email: jmcfarlane@triathloncc.com

Defendant

AND TO: **DARRYL LEVITT**
Suite 100
400 Applewood Cres.
Vaughan ON L4K 0C3

Email: darryl@dlevittassociates.com
Tel: 416.879.6965

Defendant

AND TO: **SOLMON ROTHBART TOURGIS SLODOVNICK LLP**
Suite 701
375 University Avenue
Toronto ON M5G 2J5

Melvyn L. Solmon
Tel: 416.947.1093
Email: msolmon@srglegal.com

Tel: 416.947.1093
Fax: 416.947.0079

Lawyers for the Defendant,
Richard Molyneux

AND TO: **WHITTEN & LUBLIN**
Barristers and Solicitors
141 Adelaide Street West
Suite 1100
Toronto ON M5H 3L5

Ben J. Hahn (LSO# 64412J)
Email: ben@whittenlublin.com
Tel: 647.494.9445
Fax: 416.644.5198

Lawyers for the Defendant,
Gerald Duhamel

AND TO: **McCarthy, Tétrault LLP**
Barristers and Solicitors
TD Bank Tower
66 Wellington Street West
Suite 5300
Toronto ON M5K 1E6

R. Paul Steep (LSO# (LSO #21869L))
Tel: 416.601.7998
Email: psteep@mccarthy.ca
Erin Chesney
Tel: 416.601.8215
Email: echesney@mccarthy.ca

Tel: 416.362.1812
Fax: 416.868.0673

Lawyers for the Defendant,
George Wesley Voorheis

AND TO: **A. Dimitri Lascaris Law Professional Corporation**
G101-360 Rue Saint-Jacques
Montreal QC H2Y 1P5

A. Dimitri Lascaris (LSO# 50074A)
Email: alexander.lascaris@gmail.com
Tel: 514.941.5991
Fax: 519.660.7845

Lawyers for the Defendant,
Bruce Livesey

AND TO: **Kalloghlian and Myers LLP**
Suite 2201
250 Yonge Street
Toronto ON M5B 2L7

A.J. Freedman
Email: aj@kalloghlianmyers.com
Tel: 647.968.9560
Fax:

Lawyers for the Defendant,
Bruce Livesey

AND TO: **CRAWLEY MACKEWN BRUSH LLP**
Barristers and Solicitors
179 John Street
Suite 800
Toronto ON M5T 1X4

Robert Brush
Tel: 416.217.0822
Fax: 416.217.0220
Email: rbrush@cmblaw.ca
Clarke Tedesco
Tel: 416.217.0884
Fax: 416.217.0220
Email: ctedesco@cmblaw.ca

Tel: 416.217.0110
Fax: 416.217.0220

Lawyers for the Third Party,
Canaccord Genuity Corp.

AND TO: **MACKENZIE BARRISTERS**
120 Adelaide Street West
Suite 2100
Toronto ON M5H 1T1

Gavin MacKenzie
Tel: 416.304.9293
Fax: 416.304.9296
Email: gavin@mackenziebarristers.com
Brooke MacKenzie
Tel: 416.304.9294
Fax: 416.304.9296
Email: brooke@mackenziebarristers.com

Tel: 416.304.9293
Fax: 416.304.9296

Lawyers for the Defendant to the Counterclaim,
Virginia Jamieson

AND TO: **EMMANUEL ROSEN**
ID No. 56548456
26 Shaar Ha'amakim Street
Hod Hasaron Merkus 45000

Defendant to the Counterclaim

AND TO: **ADAIR GOLDBLATT BIEBER LLP**
95 Wellington Street West
Suite 1830
Toronto ON M5J 2N7

John Adair (LSO# 52169V)
Tel: 416.941.5858
Email: jadair@agbllp.com
Michael Darcy
Tel: 416.583.2392
Fax: 647.689.2059
Email: mdarcy@agbllp.com

Tel: 416.499.9940
Fax: 647.689.2059

Lawyers for the Defendants to the Counterclaim,
B.C. Strategy Ltd. d/b/a Black Cube and B.C. Strategy UK Ltd. d/b/a Black Cube

AND TO: **INVOP LTD. D/B/A PSY GROUP INC.**
ID 58615667
7 Menahem Begin Str.
12th Floor
Ramat Gan 5268102

Defendant to the Counterclaim

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

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Defendants to the Counterclaim

A N D B E T W E E N:

BRUCE LANGSTAFF

Plaintiff by Counterclaim

and

THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION

Defendants to the Counterclaim

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See paras. 9-24 & 34-40

2014 ONSC 593
Ontario Superior Court of Justice

Canadian National Railway v. Holmes

2014 CarswellOnt 910, 2014 ONSC 593, 237 A.C.W.S. (3d) 59

Canadian National Railway Company and Scott Paul Holmes, Jennifer Parisien, also known as Jennifer Lynn Flynn in her personal capacity and as the sole proprietor and operating as Efficient Construction, Janice Shirley Maureen Holmes, Murray Fussie, Scott Albert Pole, Rick Sousa, also known as Ricky Sousa, in his personal capacity and operating as Trax Unlimited, Michael Sousa, also known as Mike Sousa, in his personal capacity and operating as Trax Unlimited, Julie Sousa, 2035113 Ontario Ltd., Complete Excavating Ltd., Monterey Consulting & Construction Ltd., 2071438 Ontario Ltd., operating as Complete Trax, 2071442 Ontario Ltd., The Scott Holmes Living Trust, The Jennifer Lynn Flynn Living Trust, Greyslone Ltd., and Belview Management Ltd.

Scott Paul Holmes. Jennifer Lynn Parisien also known as Jennifer Lynn Flynn, Complete Excavating Ltd., Monterey Consulting & Construction Ltd., 2035113 Ontario Ltd., 2071442 Ontario Ltd., The Scott Holmes Living Trust and The Jennifer Flynn Living Trust and Canadian National Railway Company, E. Hunter Harrison, Claude Mongeau, Olivier Chouc, Keith Creel, John Dalzell, Michael Cory, Nazam-U-Din Hasham, Michael Farkouh, Dave Roy, Nick Nielsen, Serge Meloche, Ben Fusco, Bruce Power, Robert Michael Zawerbny, Scott William McCallum, Marc Pontenier and Janice Shirley Maureen Holmes

J.A. Thorburn J.

Heard: January 7, 2014; January 20, 2014
Judgment: January 24, 2014
Docket: CV-08-7670-00CL, CV-13-10158-00CL

Counsel: Monique Jilesen, Julia Lefebvre, for Moving Party, Canadian National Railway Company
David Porter, Eric Block, for Moving Parties, John Dalzell, Serge Meloche, Ben Fusco, Bruce Power, Robert Zawerbny, Scott McCallum and Marc Pontenier
Norman Groot, for Responding Party, Derrick Snowdy

***J.A. Thorburn J.*:**

The Issues to be Determined

1 The moving parties seek an Order "to restrain Derrick Snowdy from directly or indirectly assisting any person to disclose any documentary or oral discovery in these proceedings or the content of any such documentary or oral discovery."

2 The Respondent Snowdy is a private investigator who is not a party to this action.

3 The deemed undertaking rule set out in Rule 30.1.01 of the *Rules of Civil Procedure*, R.R.O., 1990, Reg. 194 provides that, "All parties and their lawyers are deemed to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceeding in which the evidence was obtained." This rule applies to both documentary and oral discovery.

4 The issues in this case are:

a) can a third party be restrained from retaining, using and/or disclosing to others, documents obtained through the discovery process; and

b) should Snowdy be so restrained.

5 Snowdy claims he no longer has these documents in his possession, and had given an undertaking, "not to acquire any documents produced by CN on discovery from Holmes or anyone else subject to the deemed undertaking rule, for the duration of this action."

The Evidence

Legal Proceedings

6 In August 2008, Canadian National Railway (CN) commenced this civil proceeding against Holmes and others. Holmes was a former track supervisor in the engineering group at CN. CN claims he approved fraudulent invoices from companies owned or controlled by him. Damages for deceit, breach of contract, breach of trust, breach of fiduciary duty, breach of confidence, deceit, conversion and conspiracy are sought against Holmes and others. Also in August 2008, a Mareva injunction and Anton Piller Order were granted against Holmes.

7 In February 2011, Holmes brought an action against CN claiming misconduct against CN and some of its current and former officers and employees.

8 In March 2011, the court ordered that the Crown brief in a related criminal proceeding (which had been stayed) be provided to Holmes.

Circumstances Surrounding the Collection of Documents from Holmes

9 Snowdy claims he was retained by a client (whom he did not identify) to conduct an investigation into CN. He says he has been collecting documents about CN since 2008 and has created an anonymous "mailbox" for persons who wish to provide information without attribution.

10 Snowdy got to know Holmes in 2011. In Snowdy's factum, it is admitted that,

> Snowdy enticed Holmes to communicate with him by providing Holmes with information about the historical working relationship between Justice Campbell and CN solicitor Peter Griffen...where an alleged concern was raised that Mr. Griffen and Campbell enjoyed an extraordinary relationship beyond that which was apparent and known to the people who appeared before them.

11 On his cross-examination in respect of this motion, Snowdy admitted that he further enticed Holmes, "by advising him that he had information on [CN] solicitor Jileson such as her home address, husband's identity, her financial picture and her phone records...related to her participation in a scheme related to a horribly constructed criminal investigation" and that someone had gone through her garbage.

12 At the time he received the documents from Holmes, Snowdy says he believed he was allowed to have them.

13 Holmes provided Snowdy with a USB key that contained thousands of CN documents that were produced to Holmes in this legal proceeding against him.

Motions to Prevent Dissemination of CN Discovery Documents

14 On October 1, 2013 CN served a motion record on Holmes claiming that "the documents provided by Holmes to the media and to the OPP are the property and confidential information of CN and are subject to the deemed undertaking rule."

On October 17, CN brought its motion to prevent Holmes from disseminating documents subject to the implied undertaking rule. Snowdy says,

> At the October 17 motion, I learned that documents that Holmes gave me may be the subject of his deemed undertaking rule obligation. I advised my clients that CN may bring a motion against me to acquire my CN investigation file on their suspicion that the document in the APTN article was provided to them by me, and that it was not safe for me to remain in possession of my CN investigation file. Accordingly, it was agreed that I would transfer it to New York, outside of the jurisdiction of the Ontario courts.

15 On October 17th, Holmes was ordered to produce a list of all documents he disseminated to third parties and the names of the third parties who received them.

16 On November 1st, Holmes advised CN that he had given Snowdy a USB device containing documents and that, "without prior knowledge or consent of Holmes, Mr. Snowdy recovered the residual data from the aforementioned deleted files and has distributed some or all of the recovered documents to third party recipients, including the APTN..."

17 On November 7th, Holmes was ordered to seek the immediate return of the electronic storage devices that contained some or all of CN's documentary discovery.

18 On November 14th, Holmes asked Snowdy to return any electronic storage device that might contain CN's documents in this proceeding. Snowdy advised that it was not in his client's interests "to divulge what materials have been obtained in my investigation wholly or in part."

19 On November 26th, Snowdy advised CN that Holmes had provided him with a USB device that contained, "several thousand pages of documents related to the litigation between CN Rail and Holmes." Snowdy advised that he had provided documents to third party media outlets.

20 In light of Snowdy's receipt and dissemination of CN's productions to third parties, CN brought this motion to seek an Order to restrain Derrick Snowdy from directly or indirectly assisting any person to disclose any documentary or oral discovery in these proceedings or the content of any such documentary or oral discovery.

Snowdy's Admissions on Cross Examination

21 At his cross examination on December 19th, Snowdy testified that he had "no idea" that CN was looking for the CN documents given to him by Holmes. He later conceded that Holmes had advised him in early October 2013, that CN was bringing a motion because they wanted the documents returned.

22 Snowdy also testified that he and others went through "extraordinary efforts" to remove the CN files from the jurisdiction. Sometime after November 11, 2013, he put everything he received from Holmes onto several external hard drives, took them to Ottawa and then to the Peninsula Hotel in New York. He claims he does not know the name of the client in New York.

23 He took the documents to New York so that they would not be subject to the jurisdiction of the Ontario courts. After being asked to retrieve the documents, he called his client in New York to determine what had happened to the documents and where they had been sent. He received no response to his message and claims he has no other means of contacting his client.

24 Snowdy states he no longer has any of the documents he was given by Holmes. The USB key, and any copies he had, were given to the Independent Supervising Solicitor who was retained by the moving parties, in part, to receive documents from Snowdy.

Snowdy's Reponse to the Request for Injunctive Relief

25 Snowdy's position is that no restraining order should be granted for the following reasons:

a) he is not a party to this proceeding and is therefore not covered by the deemed undertaking rule in Rule 30.1.01 of the *Rules of Civil Procedure*;

b) at the time he collected the documents from Holmes, he had no idea there was a rule preventing Holmes from disclosing them to him;

c) CN has made no effort to seek the return of documents from other third parties to whom Snowdy disclosed the information and thus, there is no irreparable harm;

d) Snowdy no longer has any of the CN documents in issue;

e) the appropriate remedy for Holmes' decision to disclose documents to Snowdy contrary to the implied undertaking rule, is to strike Holmes' claim; and

f) in his affidavit filed after the first day of hearing, he stated that, "I undertake to this Court not to acquire any [documents related to CN] from Holmes or anyone else subject to the deemed undertaking rule related to this action for the duration of this action."

Analysis of the Law and Conclusion

Legal Interpretation of the Deemed Undertaking Rule

26 Rule 30.1.01 of the *Rules of Civil Procedure* provides that all parties are deemed to undertake not to use evidence or information obtained on discovery for any purpose other than the proceeding in which the evidence was obtained.

27 Rule 30 does not explicitly address the use by third parties of documents subject to the deemed undertaking rule.

28 However, the Supreme Court of Canada in *Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc.*, [2008] 1 S.C.R. 157 (S.C.C.), at para. 25, held that, "[t]he general ideal [of the deemed undertaking rule], metaphorically speaking, is that whatever is disclosed in the discovery room stays in the discovery room unless eventually revealed in the courtroom or disclosed by judicial order."

29 Similarly, in *Globe & Mail c. Canada (Procureur général)*, [2010] 2 S.C.R. 592 (S.C.C.), at para. 77, the Supreme court held that the deemed undertaking rule "is meant to allow the parties to obtain as full a picture of the case as possible, without the fear that disclosure of the information will be harmful to their interests, privacy-related or otherwise."

30 The UK decision in *The Distillers Co. (Biochemicals) Ltd. v. Times Newspapers Ltd.* (1974), [1975] 1 All E.R. 41 (Eng. Q.B.), deals specifically with the application of the deemed undertaking rule to third parties. In that case, a number of claimants sued the plaintiff for damages arising out of the use of the drug thalidomide. On discovery, the plaintiff provided the claimants with a large number of documents which they handed over to a third party retained to advise them. The third party sold the documents to the Times Newspapers Ltd.. The court issued an injunction against the Times, restraining its publication of the documents. In so doing, the court held that,

a) those who disclose documents on discovery are entitled to the protection of the court against any use of the documents otherwise than in the action in which they are disclosed;

b) this protection can be extended to prevent the use of the documents by any person in whose hands they come unless it be directly connected with the action in which they are produced; and

c) it is a matter of public interest that documents disclosed on discovery should not be permitted to be put to improper use and that the court should give its protection in the right case.

31 In *Fraser v. Evans* (1968), [1969] 1 Q.B. 349 (Eng. C.A.), 361, Lord Denning held that, "the jurisdiction is based ... on the duty to be of good faith. No person is permitted to divulge to the world, information which he has received in confidence, unless he has just cause or excuse for doing so. Even if he comes by it innocently, nevertheless, once he gets to know it was originally given in confidence, he can be restrained from breaking that confidence."

32 Rule 1.04 of the Ontario *Rules of Civil Procedure* provides that the Rules are to be "liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits."

33 The deemed undertaking rule prohibits the use of materials or information obtained in discovery for an ulterior or collateral purpose: see *Kitchenham v. AXA Insurance (Canada)*, 2008 ONCA 877, 94 O.R. (3d) 276 (Ont. C.A.), at paras. 28, 31; and *Goodman v. Rossi* (1995), 24 O.R. (3d) 359 (Ont. C.A.), at pp. 367 -371. The rationale is that parties will be reticent to make full disclosure if they believe documents they produce in the course of discovery may be used for an ulterior purpose.

Application of the Deemed Undertaking Rule to the Facts of this Case

34 Although Snowdy was not a party to these proceedings, he sought out Holmes knowing Holmes was a party to the litigation. Snowdy enticed Holmes to provide him with the documents he had obtained from CN in the course of discovery.

35 When Snowdy found out that CN had obtained an Order requiring Holmes to return CN's discovery documents, and knowing that CN might seek an Order against him to return the documents in his possession, Snowdy sought to circumvent that process by taking the documents out of the jurisdiction.

36 Snowdy told the solicitors for CN that if he had been asked to return them, he would "sanitize" them.

37 Snowdy's acts demonstrate his animosity toward CN and its solicitors. His acts are also a deliberate attempt to circumvent the deemed undertaking rule that is meant to prevent the use of the documents by any person in whose hands they come unless it be directly connected with the action in which they are produced.

38 Snowdy's actions lead me to believe that his undertaking is insufficient and that an Order restraining him is required.

39 Finally, Snowdy admitted that Holmes provided him with thousands of documents which were comingled with other documents pertaining to CN, and it is therefore possible that he retains some of them in his possession. Moreover, his answers on cross-examination as to whether he retained any of the CN documents he received from Holmes were equivocal.

40 For these reasons, an Order is granted to restrain Derrick Snowdy from directly or indirectly assisting any person to disclose any documentary or oral discovery in these proceedings or the content of any such documentary or oral discovery.

41 If the parties are unable to agree on costs, they may provide me with brief written submissions and an outline of costs within 15 days.

Motion granted.

2016 ONSC 5271
Ontario Superior Court of Justice [Commercial List]

Catalyst Capital Group Inc. v. Moyse

2016 CarswellOnt 13362, 2016 ONSC 5271, [2016] O.J. No. 4367, 270 A.C.W.S. (3d) 385, 35 C.C.E.L. (4th) 242

THE CATALYST CAPITAL GROUP INC. (Plaintiff) and BRANDON MOYSE and WEST FACE CAPITAL INC. (Defendants)

Newbould J.

Heard: June 6-10, 13, 2016
Judgment: August 18, 2016*
Docket: CV-16-11272-00CL

Counsel: Rocco DiPucchio, Andrew Winton, Bradley Vermeersch, for Plaintiff
Robert A. Centa, Kris Borg-Olivier, Denise M. Cooney, for Defendant, Brandon Moyse
Kent E. Thomson, Matthew Mile-Smith, Andrew Carlson, for Defendant, West Face Capital Inc.

***Newbould J.*:**

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 C.C.C. 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 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 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 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.

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 *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.) 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 (Ont. C.A.) at para. 17 and *Rodaro v. Royal Bank* (2002), 59 O.R. (3d) 74 (Ont. 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 (S.C.C.), 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 (Ont. 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 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 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.

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 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 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 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 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 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.

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 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 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]

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 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 (Ont. C.A.), leave to appeal refused, (2001), [2000] S.C.C.A. No. 547 (Ont. C.A.), 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. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.) 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 (Alta. 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.

Action dismissed.

Footnotes

* Additional reasons at *Catalyst Capital Group Inc. v. Moyse* (2016), 2016 CarswellOnt 16043, 2016 ONSC 6285 (Ont. S.C.J. [Commercial List]), in respect of costs.

1 Unless stated otherwise, statements of fact in these reasons are findings of fact.

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.

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.

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.

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 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.

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. 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.

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.

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 (Ont. C.A.) 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. c. Jolivet*, 2000 SCC 29 (S.C.C.) at paras 24 and 28 and *R. v. Lapensee*, 2009 ONCA 646 (Ont. C.A.) at paras. 43, 49 and 52.

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.

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.

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 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.

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.

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 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.

2016 ONSC 6285
Ontario Superior Court of Justice [Commercial List]

Catalyst Capital Group Inc. v. Moyse

2016 CarswellOnt 16043, 2016 ONSC 6285, [2016] O.J. No. 5210, 272 A.C.W.S. (3d) 280, 35 C.C.E.L. (4th) 293

THE CATALYST CAPITAL GROUP INC (Plaintiff) and BRANDON MOYSE and WEST FACE CAPITAL INC (Defendants)

Newbould J.

Judgment: October 7, 2016
Docket: CV-16-11272-00CL

Proceedings: additional reasons to *Catalyst Capital Group Inc. v. Moyse* (2016), 2016 ONSC 5271, 2016 CarswellOnt 13362, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: Rocco DiPucchio, Andrew Winton, Bradley Vermeersch, for Plaintiffs
Robert A. Centa, Kris Borg-Olivier, Denise M. Cooney, for Defendant, Brandon Moyse
Kent E. Thomson, Matthew Mile-Smith, Andrew Carlson, for Defendant, West Face Capital Inc.

***Newbould J.*:**

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 (S.C.C.). 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 Co. of Canada v. Ontario (Municipal Employees Retirement Board)* (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 (Ont. Gen. Div.) per Blair J. (as he then was). In *Bisyk (No. 2), Re* (1980), 32 O.R. (2d) 281 (Ont. H.C.); aff'd [1981] O.J. No. 1319 (Ont. 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 (Ont. C.A.) at para. 47.

4 In *Thoughtcorp Systems Inc. v. Tanju*, [2009] O.J. No. 1856 (Ont. S.C.J.), 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.

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 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 (Ont. S.C.J. [Commercial List]) 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 (Ont. Div. Ct.), I fix the partial indemnity costs to be paid to Mr. Moyse by Catalyst at the amount claimed of $339,500.18.

Order accordingly.

Footnotes

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

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.

2018 ONCA 283
Ontario Court of Appeal

The Catalyst Capital Group Inc. v. Moyse

2018 CarswellOnt 4307, 2018 ONCA 283, [2018] O.J. No. 1523,
130 O.R. (3d) 675, 291 A.C.W.S. (3d) 149, 46 C.C.E.L. (4th) 35

The Catalyst Capital Group Inc. (Plaintiff / Appellant) and Brandon Moyse and West Face Capital Inc. (Defendants / Respondents)

Doherty, J. MacFarland, D.M. Paciocco JJ.A.

Heard: February 20-21, 2018
Judgment: March 22, 2018
Docket: CA C62655

Proceedings: affirming *Catalyst Capital Group Inc. v. Moyse* (2016), 35 C.C.E.L. (4th) 242, 2016 ONSC 5271, 2016 CarswellOnt 13362, Newbould J. (Ont. S.C.J. [Commercial List]); additional reasons at *Catalyst Capital Group Inc. v. Moyse* (2016), 2016 ONSC 6285, 2016 CarswellOnt 16043, 35 C.C.E.L. (4th) 293, Newbould J. (Ont. S.C.J. [Commercial List]); and refusing leave to appeal *Catalyst Capital Group Inc. v. Moyse* (2016), 2016 ONSC 6285, 2016 CarswellOnt 16043, 35 C.C.E.L. (4th) 293, Newbould J. (Ont. S.C.J. [Commercial List]); additional reasons to *Catalyst Capital Group Inc. v. Moyse* (2016), 35 C.C.E.L. (4th) 242, 2016 ONSC 5271, 2016 CarswellOnt 13362, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: Brian H. Greenspan, David C. Moore, Michelle Biddulph, for Appellant
Robert A. Centa, Kristian Borg-Olivier, Denise Cooney, for Respondent, Brandon Moyse
Kent E. Thomson, Matthew Milne-Smith, Andrew Carlson, for Respondent, West Face Capital Inc.

***Per curiam*:**

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 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.

Appeal dismissed; application dismissed.

Footnotes

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 (Ont. C.A.), at 203-208.

2018 ONCA 447
Ontario Court of Appeal

The Catalyst Capital Group Inc. v. Moyse

2018 CarswellOnt 7267, 2018 ONCA 447, 292 A.C.W.S. (3d) 38, 51 C.C.E.L. (4th) 251

The Catalyst Capital Group Inc. (Plaintiff / Appellant) and Brandon Moyse and West Face Capital Inc. (Defendants / Respondents)

Doherty, J. MacFarland, D.M. Paciocco JJ.A.

Heard: February 20-21, 2018
Judgment: May 11, 2018
Docket: CA C62655

Proceedings: additional reasons to *The Catalyst Capital Group Inc. v. Moyse* (2018), 130 O.R. (3d) 675, 2018 CarswellOnt 4307, 2018 ONCA 283, D.M. Paciocco J.A., Doherty J.A., J. MacFarland J.A. (Ont. C.A.); affirming *Catalyst Capital Group Inc. v. Moyse* (2016), [2016] O.J. No. 4367, 35 C.C.E.L. (4th) 242, 2016 ONSC 5271, 2016 CarswellOnt 13362, Newbould J. (Ont. S.C.J. [Commercial List]); additional reasons at *Catalyst Capital Group Inc. v. Moyse* (2016), [2016] O.J. No. 5210, 2016 ONSC 6285, 2016 CarswellOnt 16043, 35 C.C.E.L. (4th) 293, Newbould J. (Ont. S.C.J. [Commercial List]); and refusing leave to appeal *Catalyst Capital Group Inc. v. Moyse* (2016), [2016] O.J. No. 5210, 2016 ONSC 6285, 2016 CarswellOnt 16043, 35 C.C.E.L. (4th) 293, Newbould J. (Ont. S.C.J. [Commercial List]); additional reasons to *Catalyst Capital Group Inc. v. Moyse* (2016), [2016] O.J. No. 4367, 35 C.C.E.L. (4th) 242, 2016 ONSC 5271, 2016 CarswellOnt 13362, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: Brian H. Greenspan, David C. Moore, Michelle Biddulph, for Appellant
Robert A. Centa, Kristian Borg-Olivier, Denise Cooney, for Respondent, Brandon Moyse
Kent E. Thomson, Matthew Milne-Smith, Andrew Carlson, for Respondent, West Face Capital Inc.

***Per curiam*:**

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.

Order accordingly.

2019 CarswellOnt 4694
Supreme Court of Canada

Catalyst Capital Group Inc. v. Brandon Moyse, et al.

2019 CarswellOnt 4694, 2019 CarswellOnt 4695, [2018] S.C.C.A. No. 295

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

Per curiam

Judgment: March 28, 2019
Docket: 38232

Proceedings: Leave to appeal refused, 2018 CarswellOnt 4307, 291 A.C.W.S. (3d) 149, [2018] O.J. No. 1523, 130 O.R. (3d) 675, 2018 ONCA 283, 46 C.C.E.L. (4th) 35 (Ont. C.A.)Affirmed, 2016 CarswellOnt 13362, 270 A.C.W.S. (3d) 385, [2016] O.J. No. 4367, 2016 ONSC 5271, 35 C.C.E.L. (4th) 242 (Ont. S.C.J. [Commercial List])Leave to appeal refused, 2016 CarswellOnt 16043, 272 A.C.W.S. (3d) 280, [2016] O.J. No. 5210, 2016 ONSC 6285, 35 C.C.E.L. (4th) 293 (Ont. S.C.J. [Commercial List])Additional reasons, 2016 CarswellOnt 13362, 270 A.C.W.S. (3d) 385, [2016] O.J. No. 4367, 2016 ONSC 5271, 35 C.C.E.L. (4th) 242 (Ont. S.C.J. [Commercial List])Leave to appeal refused, 2018 CarswellOnt 7267, 292 A.C.W.S. (3d) 38, 2018 ONCA 447, 51 C.C.E.L. (4th) 251 (Ont. C.A.)Additional reasons, 2018 CarswellOnt 4307, 291 A.C.W.S. (3d) 149, [2018] O.J. No. 1523, 130 O.R. (3d) 675, 2018 ONCA 283, 46 C.C.E.L. (4th) 35 (Ont. C.A.)

Counsel: Counsel — not provided

Per curiam:

1 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.

2016 ONSC 669
Ontario Superior Court of Justice [Commercial List]

Mid-Bowline Group Corp., Re

2016 CarswellOnt 1041, 2016 ONSC 669, [2016] O.J. No. 434, 262 A.C.W.S. (3d) 843

In the Matter of the Business Corporations Act, R.S.O. 1990, c. B.l6, as amended, Section 182

In the Matter of Rule 14.05(2) of the Rules of Civil Procedure

In the Matter of a proposed arrangement involving Mid-Bowline Group Corp., its shareholders and option holders, Shaw Communications Inc., and 1503357 Alberta Ltd

Newbould J.

Heard: January 25, 2016
Judgment: January 26, 2016
Docket: CV-15-11238-00CL

Counsel: Kent E. Thomson, Matthew Milne-Smith, for Applicant
Rocco DiPucchio, Lauren P.S. Epstein, for Catalyst Capital Group Inc.
Michael Schafler, Ara Basmadjian, for Shaw Communications Inc.
Robert A. Centa, for Brandon Moyse

***Newbould J.*:**

1 This is an application by Mid-Bowline Group Corp. pursuant to section 182 of the Ontario *Business Corporations Act* for approval of a proposed plan of arrangement. The arrangement contemplates that a subsidiary of Shaw Communications Inc. will acquire all of the outstanding shares of Mid-Bowline, the owner of WIND Mobile Corp., for approximately $1.6 billion.

2 WIND is a private Ontario company. It is Canada's fourth largest wireless earner, currently serving approximately 940,000 subscribers in British Columbia, Alberta and Ontario. WIND was formed in 2008. The majority of its voting shares were held by Globalive Capital Inc. ("Globalive Capital"), while the majority of its total equity was held by Orascom Telecom Holdings S.A.E. ("Orascom"). In 2011, Orascom's majority equity stake in the company was acquiredindirectlyby VimpelCom Ltd.("VimpelCom").

3 Mid-Bowline is an Ontario private, closely-held company that indirectly owns 100 percent of WIND. The shareholders of Mid-Bowline include, among others, funds managed by West Face Capital Inc. ("West Face"), Tennenbaum Capital Partners, LLC (Tennenbaum"), Globalive Capital and 64NM Holdings, LP (together the "Investors").

4 The plan is opposed by The Catalyst Capital Group Inc. by reason of its claim that one of the shareholders of Mid-Bowline, West Face, acquired confidential information belonging to Catalyst that was used by West Face in its acquisition of an interest in WIND through Mid-Bowline. Catalyst claims a constructive trust over the Mid-Bowline shares owned by West Face. The terms of the plan of arrangement would release any constructive trust claim that Catalyst has over the shares of Mid-Bowline owned by West Face that are being sold to Shaw.

5 The plan of arrangement, as amended, provides that Shaw shall acquire the shares of Mid-Bowline free of any claim against those shares, including the shares of West Face, but that Catalyst shall continue to have the right to claim against West Face the profits earned by West Face from the sale to Shaw. That is, the claim by Catalyst for a constructive trust over the shares of

Mid-Bowline owned by West Face is released in order to permit Shaw to acquire the shares of Mid-Bowline free of any claim against those shares but the right of Catalyst to pursue its claims for the profit earned by West Face on those shares survives.

6 The only reason that this transaction is proceeding by way of plan of arrangement is to provide Shaw with clear title to the shares of WIND. Had this not been required because of the Catalyst claim, the shareholders of Mid-Bowline were prepared to proceed by a share purchase agreement without any requirement of Court approval. During negotiations with Shaw, Mid-Bowline disclosed the claim of Catalyst to a constructive trust over the shares of Mid-Bowline owned by West Face. Shaw made clear that it would not acquire WIND unless it acquired the shares free and clear of any claim to them.

7 So far as the requirements of section 182 of the OBCA are concerned, I am satisfied that the statutory procedures in section 182 have been met and that the application has been put forward in good faith. Trying to deal with the Catalyst claim in the manner proposed by Mid-Bowline in the circumstances of this case was not, as claimed by Catalyst, an exercise of bad faith. It was put forward in an open and transparent manner and designed to protect any legitimate right that Catalyst may have.

8 The third requirement of section 182 is that the arrangement is fair and reasonable. Catalyst says that it is not and that this Court has no authority under section 182 to exterminate the substantive or procedural rights of third parties.

The Catalyst claim and its background

9 In 2013, VimpelCom decided to divest its interest in WIND, and a number of interested potential buyers came forward. Ultimately, in September 2014, the Investors, acting through Mid-Bowline, acquired VimpelCom's debt and equity interest in WIND. The ownership structure of WIND was subsequently reorganized so that WIND became an indirect, wholly-owned subsidiary of Mid-Bowline.

10 Catalyst was a bidder for WIND and from July 23 to August 18, 2014 VimpelCom conducted exclusive negotiations with Catalyst for Catalyst to buy WIND. No agreement was reached.

11 The Catalyst litigation arises out of West Face's hiring of Brandon Moyse, then a 26 year-old junior analyst at Catalyst. Mr. Moyse applied for a job at West Face in March 2014 and received an offer of employment on May 26, 2014. He started work at West Face on June 23, 2014 and ceased working there three and a half weeks later, on July 16, 2014. Mr. Moyse was not recruited or otherwise solicited for employment by West Face. He applied to West Face on his own initiative.

12 At the time of Mr. Moyse's hiring, West Face had already been pursuing an acquisition or financing of WIND for over six months, since November 2013. It was well-known throughout the industry that VimpelCom wanted to sell its interest in WIND because of the well-publicized regulatory challenges it had faced as a foreign owner. West Face conducted due diligence and made a series of offers to VimpelCom before Mr. Moyse was ever hired.

13 Upon learning of Mr. Moyse's move to West Face, Catalyst immediately advised West Face of its position that Mr. Moyse was prohibited from working for West Face as a result of a non-competition clause in his employment agreement. Catalyst also advised West Face that Mr. Moyse had received access to confidential information regarding a "telecom file" during his employment with Catalyst. This was the first time, after it had already hired Mr. Moyse, that West Face learned that Catalyst had been pursuing what West Face assumed to be the WIND opportunity.

14 The evidence of Mr. Griffin of West Face, which has not been denied in any way, is that upon learning of Catalyst's objections to Mr. Moyse's hiring, West Face took the position that Mr. Moyse's non-competition covenant was unenforceable, and denied receiving any confidential information from Mr. Moyse. Out of an abundance of caution, given Catalyst's express concerns about the "telecom file", West Face nonetheless established strict firewalls around West Face's own work on WIND. Mr. Moyse was denied access to computer files relating to that project, and all members of the WIND team at West Face were explicitly instructed not to speak to Mr. Moyse about that transaction.

15 Two days after Mr. Moyse's departure from West Face on July 18, 2014, the strategic partner with whom West Face had been working on a potential acquisition of WIND for the previous month backed out. The WIND deal that West Face had been pursuing while Mr. Moyse had worked there became a dead end.

16 The further evidence of Mr. Griffin, which has also not been denied, is that one week after Mr. Moyse left West Face, on July 23, 2014, VimpelCom informed West Face that it had entered into exclusive negotiations with another bidder, which West Face presumed to be Catalyst (and which Catalyst ultimately confirmed in this litigation). Nonetheless, West Face decided to join with a group of investors in the event that VimpelCom's preferred bidder was unable to reach an agreement during the period of exclusivity. This group ("New Investors") included Tennenbaum and 64NM who had themselves been pursuing the investment independently for a number of months.

17 The further evidence of Mr. Griffin, which has also not been denied, is that on August 6, 2014, uncertain as to when the exclusivity period would end, the New Investors, which did not include Globalive Capital, submitted an unsolicited offer for WIND. A more formal proposal followed the next day, August 7. The proposal left Globalive Capital's voting majority voting interest in WIND undisturbed. On August 7 however, Globalive Capital agreed to a support agreement with VimpelCom, which obliged Globalive Capital to support VimpelCom in its exclusive negotiations with Catalyst.

18 The further evidence of Mr. Griffin, which has also not been denied, is that upon the expiry of exclusivity, the New Investors revived their efforts with VimpelCom and, subject to VimpelCom's approval, with Globalive Capital. Ultimately a definitive purchase agreement was signed by all parties and the purchase of WIND closed on September 16, 2014 pursuant to which Mid-Bowline became the owner of WIND.

19 On June 25, 2014 Catalyst commenced an action against Brandon Moyse and West Face. It claimed injunctive relief, including preventing Mr. Moyse from disclosing confidential information. An interlocutory motion by Catalyst regarding Mr. Moyse was heard on October 27, 2014 by Mr. Justice Lederer who on November 10 granted an interlocutory injunction enjoining Mr. Moyse from disclosing any confidential information belonging to Catalyst, or competing with Catalyst until December 22, 2014 (being the date six months after he left Catalyst's employment).

20 On December 16, 2014, Catalyst delivered an Amended Statement of Claim in which it alleged that Mr. Moyse while employed by Catalyst was a member of the team studying the WIND opportunity and privy to Catalyst confidential information concerning that opportunity. It alleged that West Face obtained that confidential information to obtain an unfair advantage over Catalyst in its negotiations with VimpelCom regarding WIND and that but for the transmission of the confidential information West Face would not have successfully negotiated a purchase of WIND. Catalyst claimed a constructive trust over West Face's interest in WIND and an accounting of all profits earned by West Face as a result of its misuse of confidential information obtained from Mr. Moyse.

Catalyst claims a need for a trial

21 Catalyst claims that it requires the full panoply of a trial process in its action against West Face, saying that the action it started in June, 2014 is at an early stage and that there has been no discovery or production of documents. It says that on this application its rights are being decided without any witnesses. This ignores the history of the action and what has occurred to date.

22 So far as the plan of arrangement application is concerned, a four day hearing was established on January 4, 2016 for four days beginning January 25, 2016. Catalyst had the draft material of Mid-Bowline in December and was served with the motion record on January 8, 2016 that included the affidavit of Mr. Griffin as well from the other investors in Mid-Bowline, being representatives of Globalive Capital, Tennenbaum and 64NM. Four days was scheduled for evidence and it was anticipated that the deponents of the affidavits at least would be examined and cross-examined. However, no evidence was filed by Catalyst to contradict the Mid-Bowline evidence, and no request was made by Catalyst to cross-examine any Mid-Bowline witness. As a result, the reporter was cancelled and the matter proceeded by oral argument on the material filed.

23 I adjourned the hearing on Monday January 5 until 2 pm to give Mr. DiPuccio a chance to get instructions from Catalyst. Later in the morning Mr. DiPuccio delivered an affidavit of James Riley of Catalyst sworn that morning. It contained a statement that Mr. Riley understood from Mr. DiPuccio that the Plan hearing would not be decided on its merits as originally scheduled pending a discussion on the terms on which the Plan might be amended so that West Face's proceeds from the sale to Shaw could be held in escrow pending an expedited trial of Catalyst's claim.

24 This statement was allegedly based on discussions held earlier in January in chambers in which the parties discussed trying to agree on a term that would allow the plan of arrangement to be approved on some terms that would protect Catalyst's rights. At that discussion counsel for Mid-Bowline made clear that it would not agree to hold the funds for West Face in escrow for reasons he explained. It was left that the parties would try to negotiate some other protection for Catalyst. However it was never discussed that the hearing scheduled for four days starting January 25 th would be put off or that the plan approval application would not be heard on its merits at that time. The failure of Catalyst to file any evidence in opposition to the plan of arrangement was a decision of its own choosing. Its decision not to cross-examine on any of the affidavits filed by Mid-Bowline was also of its choosing.

25 There is a history of full document production by West Face in the claim against it by Catalyst and of cross-examination on affidavits. There has also been delay caused by Catalyst sitting on its hands.

26 On July 16, 2014 a consent order of Justice Firestone ordered Mr. Moyse to turn his computer over to his counsel for the taking of a forensic image of the data kept by him on his computer, to be conducted by a professional firm. On November 10, 2014 Justice Lederer ordered that the forensic images that had been created were to be reviewed by an independent supervising solicitor ("ISS"). The ISS subsequently released a draft report on February 1 and its final report on February 17. As set out therein, the ISS found no evidence that Mr. Moyse had provided any of Catalyst's confidential information to West Face. It did, however, find evidence suggesting that Mr. Moyse had deleted his browser history.

27 On January 13, 2015, Catalyst commenced a motion for interlocutory relief against West Face for an order prohibiting West Face from playing any role in the management of WIND and an order requiring West Face to provide electronic images of all of its computers to the ISS for review. One of the stated purposes of Catalyst's motion for the imaging order was to determine "whether [Mr.] Moyse in fact communicated Catalyst's Confidential Information to West Face and what use West Face made of such information". Catalyst amended its notice of motion on February 6 to also seek an order jailing Mr. Moyse for contempt of the earlier interim consent order of Justice Firestone. (28] Catalyst's motion was heard by Justice Glustein on July 2, 2015. Although West Face delivered its responding motion record on March 10, 2015, 20 days after receiving Catalyst's materials, Catalyst did not deliver its reply materials until May 1, 2015, almost two months after receiving West Face's materials.

29 Justice Glustein rendered his decision five days after argument, on July 7, 2015, and dismissed Catalyst's motion in its entirety. With respect to the request that West Face provide electronic images of all of its computers to the ISS for review, Justice Glustein held that there was no evidence that West Face has failed to comply with its production obligations, let alone intentionally delete materials to thwart the discovery process or evade its discovery obligations. Justice Glustein noted that West Face had offered to turn over its own confidential information created, accessed or modified by Mr. Moyse to the ISS, but Catalyst has not accepted this offer. Regarding the productions of West Face, Justice Glustein stated:

> 56 Further, West Face has produced voluminous records relating to the allegations Catalyst has made, even before discovery, and in particular: (i) filed a four-volume responding motion record attaching 163 exhibits regarding WIND, the AWS-3 auction (since abandoned) and Callidus, (ii) produced a copy of the notebook Moyse used during his three and a half weeks at West Face, redacted only for information about West Face's active investment opportunities, (iii) produced all non-privileged, non-confidential emails sent to or from Moyse's West Face email account or known personal email accounts which were on West Face's servers, and (iv) produced 19 additional exhibits in response to undertakings given and questions taken under advisement at the cross-examination of Griffin on May 8, 2015.

30 There was filed on the motion before Justice Glustein five affidavits of Mr. Riley of Catalyst, affidavits of Mr. Moyse, two affidavits of Mr. Griffin of West Face, an affidavit of Mr. Dea of West Face, an affidavit of Mr. Burt-Gerrans who was the computer expert who imaged the West Face computer records and an affidavit of Mr. El Shanawany who was the corporate planning and control officer of WIND. There were also voluminous transcripts of the cross-examination of all of these persons.

31 After receiving Justice Glustein's decision on July 7, 2015, Catalyst appealed the decision to the Court of Appeal, even though Justice Glustein's decision was interlocutory. Within two days of receiving the notice of appeal, on July 24, 2015 counsel to West Face immediately notified Catalyst's counsel that it was not entitled to appeal directly to the Court of Appeal. Catalyst ignored this advice, following which West Face served a notice of motion to quash Catalyst's appeal on August 5, and an amended notice of motion, factum and book of authorities on September 11, 2015. Catalyst never responded to this motion, but instead on November 5, 2015, consented to an order quashing the appeal. Catalyst then waited until December 10, 2015 to deliver a notice of motion to extend the time for it to seek leave to appeal to the Divisional Court.

32 Catalyst's motion to extend the time to appeal to the Divisional Court and the appeal were heard together by Justice Swinton on January 21, 2016 and dismissed the following day. Justice Swinton was critical of Catalyst for appealing the decision of Justice Glustein to the Court of Appeal as the law was clear that interlocutory orders are appealable to the Divisional Court and Catalyst was represented by experienced litigation counsel. She also held that Catalyst had not given a reasonable explanation for the lengthy delay given the state of the law with respect to appeals to the Court of Appeal and the facts of this case. As to the merits of an appeal, Justice Swinton held there were none.

33 I can only conclude that Catalyst has purposely delayed its claim against West Face for tactical reasons. As long as a claim for an order of a constructive trust against the shares of Mid-Bowline held by West Face is outstanding, Catalyst knows that West Face cannot realistically sell those shares. Catalyst had to understand that WIND might well be sold, taken the Canadian market for spectrum and the fact that Mid-Bowline is owned by financial interests and is not an operator in the wireless business. Catalyst has been deeply involved in that market, not only with its failed negotiations to acquire WIND from VimpelCom but also with its large financial position in Mobilicity, another regional wireless catTier that had filed for CCAA protection.

Fair and reasonable test

34 In *BCE Inc., Re*, [2008] 3 S.C.R. 560 (S.C.C.) the Supreme Court of Canada held that determining whether a plan of arrangement is fair and reasonable involves two inquiries:

> (a) whether the arrangement has a valid business purpose; and
>
> (b) whether the arrangement resolves the objections of those whose legal rights are being arranged in a fair and balanced way.

35 The valid-purpose inquiry is invariably fact-specific and the nature and extent of the evidence needed to satisfy this requirement will depend on the circumstances. See *BCE* at para.

146 The inquiry requires only the demonstration of a prospect of clearly identified benefits to the corporation that have a reasonable prospect of being realized if the proposed arrangement is implemented. See *Magna International Inc., Re* (2010), 75 B.L.R. (4th) 163 (Ont. Div. Ct.) at para. 50.

36 The s. 192 process is generally applicable to change of control transactions that share two characteristics: the arrangement is sponsored by the directors of the target company; and the goal of the arrangement is to require some or all of the shareholders to surrender their shares to either the purchaser or the target company. See *BCE* at para. 126. This is precisely the situation here.

37 The benefit to Mid-Bowline and its shareholders is obvious. The sale to Shaw is at a tremendous price and if the sale does not close, there is no guarantee that another transaction would come along with a price of $1.6 billion. The purpose in being able to sell the interest of West Face in Mid-Bowline free of any constructive trust claim of Catalyst is required for the sale to occur.

38 Regarding the second part of the fair and reasonable test, whether the arrangement resolves the objections of those whose legal rights are being arranged in a fair and balanced way, it was stated in BCE:

> **147** The second prong of the fair and reasonable analysis focuses on whether the objections of those whose rights are being arranged are being resolved in a fair and balanced way.
>
> **148** An objection to a plan of arrangement may arise where there is tension between the interests of the corporation and those of a security holder, or there are conflicting interests between different groups of affected rights holders. The judge must be satisfied that the arrangement strikes a fair balance, having regard to the ongoing interests of the corporation and the circumstances of the case. Often this will involve complex balancing, whereby courts determine whether appropriate accommodations and protections have been afforded to the concerned parties. However, as noted by Forsyth J. in *Trizec*, at para. 36:
>
> > [T]he court must be careful not to cater to the special needs of one particular group but must strive to be fair to all involved in the transaction depending on the circumstances that exist. The overall fairness of any arrangement must be considered as well as fairness to various individual stakeholders.

39 I do not agree with Catalyst that there is no jurisdiction under section 192 to compromise rights of Catalyst. Section 192 is a flexible provision that has been broadly interpreted. In *BCE* it was stated:

> **124** In light of the flexibility it affords, the provision has been broadened to deal not only with reorganization of share capital, but corporate reorganization more generally. Section 192(1) of the present legislation defines an arrangement under the provision as including amendments to articles, amalgamation of two or more corporations, division of the business carried on by a corporation, privatization or "squeeze-out" transactions, liquidation or dissolution, or any combination of these.
>
> **125** This list of transactions is not exhaustive and has been interpreted broadly by courts. Increasingly, s. 192 has been used as a device for effecting changes of control because of advantages it offers the purchaser: C. C. Nicholls, *Mergers, Acquisitions, and Other Changes of Corporate Control* (2007), at p. 76....

40 In undertaking the fair and reasonableness inquiry, the interests of shareholders and other stakeholders is to be considered. See *BCE* at para. 115.

41 In this case, the claim of Catalyst is that it is entitled to a constructive trust over the shares of Mid-Bowline owned by West Face. It is not an equity owner at the moment, but would be if a constructive trust were ordered in its favour. It is a stakeholder in West Face's interest in Mid-Bowline to that extent. To say that a Court is powerless to make any order compromising the rights of Catalyst would be to give Catalyst a veto over the plan of arrangement merely by reason of its claim.

42 The voluminous evidence filed by the parties on the previous motion before Justice Glustein and now on this application (which is largely the same as previously filed before Justice Glustein) has disclosed no confidential information of Catalyst regarding WIND provided by Mr. Moyse to West Face. It is clear that West Face has produced all of its relevant documents. The case of Catalyst at this stage looks weak.

43 The provision added to the plan of arrangement to protect the right of Catalyst to damages is as follows:

> From and after the Effective Time: (i) this Plan of Arrangement shall take precedence and priority over any and all Purchased Shares or Options issued prior to the Effective Time; (ii) the rights and obligations of the Former Shareholders and the former holders of Options shall be solely as provided for in this Plan of Arrangement; and (iii) all actions, causes of action, claims or proceedings (actual or contingent and whether or not previously asserted) based on or in any way relating to any Purchased Shares or Options shall be deemed to have been settled, compromised, released and determined without liability except as set forth herein; provided, however, that nothing in this section 4.5 shall be construed to extinguish the right of The Catalyst Capital Group Inc. to continue to assert its claims against West Face Capital Inc. in Ontario Superior

> Court of Justice Court File No.: CV-14-507120 (provided that the potential liability of West Face Capital Inc. is limited to the net profit of West Face Capital Inc. in respect of this Arrangement), with the exception of any constructive trust or equivalent remedy which shall be deemed to have been settled, compromised, released and determined without liability, along with all other claims in this section 4.5. (Underlining added).

44 Apart from releasing its constructive trust claim, Catalyst has a concern that this provision would prevent it from tracing money paid to West Face in the event it were entitled to a judgment against West Face. It also is concerned that the words "net profit" are unclear because what is meant by "net" is unclear. I would direct that the provision be amended to make clear that the provision does not prevent Catalyst from proceeding with a tracing claim of the money received by West Face from the sale of its share interest in Mid-Bowline. I would also direct that the word "net" be removed.

45 On the state of the record before me, and taking into account the interests of all concerned, including Catalyst, I am of the view that the plan of arrangement is fair and reasonable.

What should be done?

46 Although Catalyst has not produced any evidence on this application, a decision of its own making, I would give Catalyst one last chance to call evidence, so long as it is done quickly. Shaw hopes to close the transaction on March 1, 2016 but this may be unlikely. The outside date for the closing of the transaction is July 1, 2016.

47 Contrary to the argument of Catalyst, it does not have a right to a lengthy process leading to a trial. This is particularly the case when Catalyst has purposely delayed pursuing its claim against West Face and taken clearly inappropriate proceedings to appeal the interlocutory decision of Justice Glustein. Apart from that appeal process, it did nothing to further the action.

48 The Supreme Court of Canada has made it clear that a cultural shift in the civil process is required. In *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87 (S.C.C.) Karakatsanis J. stated:

> 2 Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.
>
> 27 There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for adjudication, and impacts the role of counsel and judges. This balance must recognize that a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.
>
> 28 This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible — proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.

49 The reality in this case is that the issue needs to be decided quickly for all concerned. The wireless industry in Canada is in a state of flux and whether Shaw is or is not entitled to acquire WIND is important to that industry. This issue raised by Catalyst must be decided quickly. In light of all that has gone on in the past year and a half in its case against West Face and Mr. Moyse, that can be accomplished while protecting the rights of the parties.

50 Taking into account appeal periods, a further hearing involving this application and the claim of Catalyst against West Face and Mr. Moyse should proceed quickly, and I set four days from February 22 to 26, 2016, with further steps in the interim as follows:

> (i) The issue to be tried is whether Catalyst has a right to a constructive trust of the share interest of West Face in Mid-Bowline. Whether this includes the issue as to whether Catalyst has any claim for misuse of Catalyst confidential information is up to Mid-Bowline. Counsel are to attempt to agree on the language of the issue to be tried, failing which it shall be settled at a 9:30 a.m. appointment with me on February 1, 2016.
>
> (ii) The pleadings to date will be used.
>
> (iii) The affidavits to date in the Catalyst action against West Face and Mr. Moyse and in this application may be used at the hearing.
>
> (iv) Any party may conduct further cross-examinations on the deponents of affidavits on matters not yet covered in the cross-examinations to date.
>
> (v) Catalyst may cross-examine Messrs. Lockie, Burt and Leitner on their affidavits filed in this matter.
>
> (vi) Mr. Moyse as a party has a right to participate.
>
> (vii) Any further issues regarding the hearing are to be dealt with promptly at a 9:30 a.m. appointment with me.

Claim for inducing breach of contract

51 On Monday, in his affidavit sworn that morning, Mr. Riley made a statement indicating Catalyst intends to seek as relief in the action an order tracing all of the proceeds of the sale, relief that would involve amendments to the existing claim and that would "at first" glance be precluded by the proposed plan. His statement was that "In lieu of a claim for a constructive trust and an order holding the West Face proceeds of the Transaction in escrow, Catalyst intends to seek as relief in the Action an order tracing all of the proceeds of sale".

52 During argument, it became clear that the basis for this intended claim would be a claim for inducing breach of contract made against the parties that participated in the unsolicited bid to VimpelCom to acquire its interest in WIND during the period that Catalyst and VimpelCom were having exclusive discussions. Those parties apart from West Face were Tennenbaum and 64NM. This intended claim for tracing would be to trace all of the proceeds paid to all shareholder of Mid-Bowline and not just those paid to West Face. It would obviously require the addition of the other shareholders of Mid-Bowline.

53 Mr. Riley stated in his affidavit that the information giving rise to this new claim came from "information learned for the first time through the materials filed on this application". What information he was referring to was not stated. In argument it was stated that what he learned was that others were involved besides West Face in the unsolicited bid. However, it is quite clear that the information regarding the unsolicited bid was known by Mr. Riley early in 2015. It was contained in Mr. Griffin's affidavit sworn March 7, 2015 in response to Catalyst's motion seeking interlocutory relief against West Face.

54 On his cross-examination on May 13, 2015 Mr. Riley, the chief operating officer of Catalyst, discussed the notion of inducing a breach of contract when it was put to him that Catalyst had not sued VimpelCom for breach of the exclusivity terms between VimpelCom and Catalyst. He would not agree that VimpelCom had not breached its exclusivity clause and said further:

> However, when a contract is breached, as I recall, there's two-you can-under the theory of Lumley and Guy, and I'm not trying to play lawyer, you can go after one of the two parties, the party breaching or the party inducing a breach.

55 Mr. Riley is a very experienced lawyer. He was aware of the case of *Lumley v. Gye* (1853), 118 E.R. 749 (Eng. Q.B.), a case in England in which an opera singer was induced by Covent Garden to leave another theatre at which the singer had an agreement to perform. It was in that case that the modern action for inducing breach of contract was established.

56 Although Catalyst was aware on March 13, 2015 of the facts that Mr. Riley now asserts he wants to use in this intended inducing breach of contract action, and was aware of the nature of a breach of contract action as disclosed on his cross-examination, it was only on Monday of this week that anything was first said by Catalyst about that [1] .

57 The reason I believe why this was said was that late last week Mid-Bowline delivered its amended plan to permit Catalyst to continue with its damage claim against West Face but removing the right to continue with its constructive trust claim against West Face. Such a claim would not allow the proposed plan of arrangement to proceed and would give Catalyst leverage in any negotiations with Mid-Bowline.

58 In his letter of January 6, 2016 written with prejudice, Mr. DiPuccio asserted that Catalyst was not interested in holding up a sale of the shares of WIND to Shaw. I have some doubts about that statement. The terms put in the letter to West Face were terms that Catalyst had to know would not be agreeable to West Face, and indeed Catalyst was told that shortly after the letter was sent. The proposed action now is also intended to interfere with the sale to Shaw. The vendors are all financial concerns with fund investors and to hold up the proceeds of the sale or to require their tracing in the hands of their fund investors that would be claimed in the claim against them for inducing a breach of contract is something that Catalyst has to know would not be agreeable to them.

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

60 The evidence on the record is that VimpelCom told the parties who made the unsolicited bid that it could not deal with it while under an exclusivity arrangement with Catalyst and it did not do so. The proposed claim of Catalyst looks weak on the strength of the record before me and Catalyst has done nothing to adduce evidence to support the intended claim.

61 In the circumstances, I disregard the statement of Mr. Riley as to the intended claim Catalyst says it will bring. It is too late in the process and the provision in the amended plan of arrangement that would prevent such a claim being made is fair and reasonable. The trial of the issue I have ordered is not to consider any such claim.

Application granted.

Footnotes

1 I do not accept Catalyst's contention that the letter of January 6, 2016 from Mr. DiPuccio to counsel for Mid-Bowline and Shaw disclosed any such intent. That letter dealt entirely with the claim of Catalyst against Mid-Bowline.

See paras. 38, 65, 70-75 & 79-89

2018 ONSC 2471
Ontario Superior Court of Justice [Commercial List]

The Catalyst Capital Group Inc. v. VimpelCom Ltd.

2018 CarswellOnt 6161, 2018 ONSC 2471, 297 A.C.W.S. (3d) 332

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)

Hainey J.

Heard: August 16, 2017; August 17, 2017; August 18, 2017; April 16, 2018
Judgment: April 18, 2018
Docket: CV-16-11595-00CL

Counsel: Rocco DiPucchio, Andrew Winton, Brad Vermeersch, David Moore, for Catalyst Capital Group Inc.
Kent Thomson, Matthew Milne-Smith, Andrew Carlson, for West Face Capital Inc.
James D.G. Douglas, Caitlin R. Sainsbury, Graham Splawski, for Globalive Capital Inc.
Orestes Pasparakis, Rahool Agarwal, Michael Bookman, for VimpelCom Ltd.
Michael Barrack, Kiran Patel, Daniel Szirmak, for Tennenbaum Capital Partners LLC, 64NM Holdings GP LLC, 64NM Holdings LP, LG Capital Investors LLC
Junior Sirivar, Jacqueline Cole, for Novus Wireless Communications Inc.
Daniel S. Murdoch, for UBS Securities Canada Inc.
Jameel Madhany, for Serruya Private Equity Inc.

***Hainey J.*:**

Overview

Nature of the Motions

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

(a) Issue Estoppel;

(b) Cause of Action Estoppel; and

(c) Abuse of Process.

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

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

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

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

Parties

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

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

8 The 2014 Wind Shareholders are as follows:

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

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

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

10 The Consortium includes the following defendants:

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

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

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

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

Allegations

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

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

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

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

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

Facts

The Wind Transaction

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

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

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

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

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

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

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

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

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

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

(a) Our proposal will be superior to any other offer as our proposal will not require regulatory approval...

(b) Our transaction will not be a change of control of [Wind], and as a result requires no engagement with the regulatory authorities.

(c) [O]ur proposal will be economically superior to any other proposal...

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

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

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

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

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

27 On August 25, 2014, VimpelCom and the Consortium entered into an exclusivity agreement. On September 16, 2014, the Consortium concluded a deal with VimpelCom to purchase Wind for $300 million through a corporation called Mid-Bowline Group Corp. ("Mid-Bowline").

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

The Previous Litigation

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

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

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

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

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

The Plan of Arrangement Proceeding

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

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

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

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

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

Catalyst's Current Action

38 On June 1, 2016 Catalyst provided West Face with its statement of claim in this proceeding. This was five days before the commencement of the trial in the Moyse/West Face Action. West Face's counsel immediately wrote to Catalyst's counsel to complain that this new action was litigation by installment and an abuse of process. Catalyst's counsel responded that para. 61 of Newbould J.'s reasons for judgment in the plan of arrangement proceeding barred Catalyst from alleging that West Face had induced a breach of the Exclusivity Agreement in the Moyse/West Face Action.

The Moyse/West Face Trial

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

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

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

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

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

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

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?

Positions of the Parties

The Defendants

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

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

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

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

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

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

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

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

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

The Plaintiff

51 Catalyst submits as follows:

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

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

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

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

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

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

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

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

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

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

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

Analysis

West Face's Motion

52 West Face relies upon the following three doctrines in support of its motion: (1) issue estoppel, (2) cause of action estoppel, and (3) abuse of process. In *Danyluk v. Ainsworth Technologies Inc.* [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.

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:

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

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

> [A]ll the facts which are alleged to constitute tortious conduct by the town in the present case existed when the prior action went to trial and it was there found that these facts did not support the present respondent's action for damage to his crops

by water. ... Nothing had changed between the bringing of the first action and the second one except that the respondent had received advice from a soil expert who expounded the aquifer theory.

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

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

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

Conclusion

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

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

Is Catalyst's Action barred by Abuse of Process?

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

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

86 In my view, these principles apply in this case for many of the same reasons that I have relied upon to conclude that issue estoppel and cause of action estoppel applies to Catalyst's Current Action. Catalyst unsuccessfully litigated its failure to acquire Wind in the Moyse/West Face Action. Justice Newbould made findings at trial that are determinative of its claims against the defendants in this proceeding. Catalyst's Current Action advances claims that it chose not to allege in the previous action. It also

seeks findings that are entirely inconsistent with Justice Newbould's findings in the Moyse/West Face Action. In my view, this constitutes an abuse of process because it would result in the relitigation of the reason why Catalyst's bid to acquire Wind failed.

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

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

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

Conclusion

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

Are the US Investors and Globalive Privies of West Face?

The US Investors

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

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

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

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

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

95 In his reasons for judgment, Newbould J. commented upon Leitner's and Burt's testimony. He described them both as "impressive" witnesses and accepted their evidence that the Consortium's proposal was not based upon any knowledge of Catalyst's bid or strategies. He had the following to say about their testimony at paras. 108, 114 and 116 of his reasons for judgment:

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

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

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

Conclusion

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

Globalive

99 As set out above, Globalive founded Wind with Orascom in 2008 and held the majority of the voting shares of Wind. In 2011, VimpelCom acquired the majority of Wind's equity when it acquired Orascom. This ownership structure, in which Globalive was the controlling shareholder of Wind but VimpelCom held the majority equity interest, remained in place until

September 2014 when the Consortium purchased VimpelCom's interest in Wind through Mid-Bowline. From 2008 until early 2015, Globalive's executives managed Wind's day-to-day operations.

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

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

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

102 Globalive clearly had a "meaningful voice" in the Moyse/West Face Action by reason of Lockie's participation as an important witness at trial. Further, Globalive had a clear "community of interest" with West Face in defeating Catalyst' claims against the Consortium. I am therefore satisfied that Globalive is a privy of West Face with respect to the Moyse/West Face Action.

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

Conclusion

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

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

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

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

> **4.5 Paramountcy**
>
> From and after the Effective Time ... all actions, causes of action claims or proceedings (actual or contingent and whether or not previously asserted) based on or in any way relating to any Purchased Shares or Options shall be deemed to have been settled, compromised, released and determined without liability except as set forth herein; provided, however, that nothing in this section 4.5 shall be construed to extinguish any right of The Catalyst Capital Group Inc. to assert any of the following matters, with the exception of any constructive trust or equivalent remedy over the Purchased Shares, which shall be deemed to have been settled, compromised, released and determined without liability, along with all other claims in this section 4.5:
>
> > (a) Its existing claims as asserted in the Amended Amended Statement of Claim as amended December 16, 2014 in the proceeding bearing Court File No. CV-14 — 507120 in the Ontario Superior Court of Justice, against West Face Capital Inc. and Brandon Moyse;
> >
> > (b) As against any person (as defined in the OBCA), any potential claim for a tracing of the money received by West Face Capital Inc. from the disposition of its interest in the Corporation pursuant to the Arrangement; or
> >
> > (c) As against the Former Shareholders, any potential claim relating to their acquisition from VimpelCom Ltd. of their interest directly or indirectly in WIND Mobile Corp., including, to the extent permitted by law, for a tracing of the money received by them pursuant to the Arrangement.

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

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

109 In my view, the application of the release in the plan of arrangement to VimpelCom and UBS is not a pure legal question because it requires a fact — driven analysis that includes consideration of the language of the document itself, the circumstances surrounding its execution, and evidence of the intention of the parties. The Supreme Court of Canada made it clear in *Creston Moly Corp. v. Sattva Capital Corp.* [29] that the interpretation of a contract is a question of mixed fact and law "as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix". [30]

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

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

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

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

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

Conclusion

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

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

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

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

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

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

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

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

Conclusion

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

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.

Motions granted.

Footnotes

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

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

3 *Catalyst Capital Group Inc. v. Moyse*, 2016 ONSC 5271, [2016] O.J. No. 4367 (Ont. S.C.J. [Commercial List]), [*Moyse/West Face decision"*].

4 *Catalyst Capital Group Inc. v. Moyse*, 2016 ONSC 6285, [2016] O.J. No. 5210 (Ont. S.C.J. [Commercial List]).

5 *The Catalyst Capital Group Inc. v. Moyse*, 2018 ONCA 283, 130 O.R. (3d) 675 (Ont. C.A.), [*Court of Appeal's decision*].

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

7 *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460 (S.C.C.), [*Danyluk*].

8 *Martin v. Goldfarb*, [2006] O.J. No. 2768, [2006] O.T.C. 629 (Ont. S.C.J.).

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

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*.

15 *Court of Appeal's decision*, *supra* note 5.

16 *Foreman v. Niven*, 2009 BCSC 1476, [2009] B.C.J. No. 2148 (B.C. S.C.).

17 *Court of Appeal's decision*, *supra* note 5.

18 *Henderson v. Henderson* (1843), 67 E.R. 313 (Eng. V.-C.).

19 *Las Vegas Strip Ltd. v. Toronto (City)* (1996), 30 O.R. (3d) 286 (Ont. Gen. Div.), [*Las Vegas Strip*].

20 *Las Vegas Strip Ltd. v. Toronto (City)* (1997), 32 O.R. (3d) 651 (Ont. C.A.).

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

22 *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 (S.C.C.).

23 *Gonzalez v. Gonzalez*, 2016 BCCA 376, 91 B.C.L.R. (5th) 221 (B.C. C.A.).

24 *Privacy Act*, R.S.B.C. 1996, c. 373.

25 *Rasanen v. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267 (Ont. C.A.).

26 *Ibid* at para. 47.

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

28 *Supra* note 6.

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

30 *Ibid* at para. 50.

31 *McCarthy Corp. PLC v. KPMG LLP*, [2007] O.J. No. 32 (Ont. S.C.J. [Commercial List]).

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

CITATION: The Catalyst Group Inc. v. Vimpelcom Ltd., et al., 2018 ONSC 6920
COURT FILE NO.: CV-16-1159500CL
DATE: November 19, 2018

SUPERIOR COURT OF JUSTICE – ONTARIO

- COMMERCIAL LIST

RE: THE CATALYST GROUP INC.

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

BEFORE: Hainey J.

COUNSEL: *David C. Moore, Kenneth G.G. Jones*, for the Plaintiffs

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

Orestes Pasparakis, Rahool P. Agarwal, Michael Bookman, for the Defendant, Vimpelcom Ltd.

James D.G. Douglas, Caitlin Sainsbury, Graham Splawski, for the Defendant, Globalive Capital Inc.

David Byers, Daniel Murdoch, Vanessa Voakes, for the Defendant, UBS Securities Canada Inc.

Lucas E. Lung, Jameel Madhany, for the Defendant, Serruya Private Equity Inc.

Junior Sirivar, Jacqueline Cole, for the Defendant, Novus Wireless Communications Inc.

Kent E. Thomson, Matthew Milne-Smith, Andrew Carlson, for the Defendant, West Face Capital Inc.

Michael D. Schafler, for the Defendant, Mid-Bowline Group Corp.

HEARD: In writing

COSTS ENDORSEMENT

Background

[1] On April 18, 2018 I dismissed Catalyst's action against the defendants as an abuse of process. The action was also dismissed against West Face, the US Investors and Globalive on the grounds of issue estoppel and cause of action estoppel.

[2] The defendants seek costs on a substantial indemnity basis in the total amount of $2,197,010.

[3] Catalyst submits that costs should be awarded on a partial indemnity basis in the total all-inclusive amount of $1,024,019.

Issue

[4] I must decide whether substantial indemnity costs are appropriate and whether the amount claimed for costs by each defendant is fair and reasonable.

Analysis

Should Substantial Indemnity Costs be Awarded?

[5] I have concluded that substantial indemnity costs are justified. This action was an abusive attempt by Catalyst to re-litigate the same allegations of serious misconduct by the defendants that were front and centre in the previous action between Catalyst and West Face that was dismissed by Newbould J. in August 2016. His decision was upheld by the Court of Appeal for Ontario on March 22, 2018. The Court of Appeal also upheld Newbould J.'s decision to award costs to West Face on a substantial indemnity basis for the following reasons set out at paras. 48-51 of the court's Reasons for Decision:

> [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.

[6] The same can be said about Catalyst's conduct in this action. It advanced the same very serious allegations against the defendants and attempted to re-litigate them before me in an abusive manner. Catalyst utterly failed in this action as well.

[7] Rule 57.01(1) of *The Rules of Civil Procedure* sets out the factors the court may consider when exercising its discretion to award costs. The relevant factors for this proceeding are the following:

(a) Catalyst claimed $1.3 billion in damages against the defendants and recovered nothing.

(b) The proceedings were highly complex. There were 11 defendants. The pleadings totalled close to 250 pages. The record was extremely voluminous and the hearing lasted three days.

(c) The issues were extremely important to all parties. This was "high stakes" litigation.

(d) Catalyst should have reasonably expected to pay significant costs to the defendants if its action was dismissed as an abuse of process. In fact, West Face's counsel warned Catalyst's counsel that it would be seeking costs on a full indemnity basis at the outset of the action because it constituted an abuse of process.

(e) Catalyst should not have taken the position in this proceeding that Newbould J. had banned it from amending its pleading in the Moyse action to advance a claim for inducing breach of its exclusivity agreement with Vimpelcom. The Court of Appeal for Ontario found that this had not occurred.

(f) Finally, Catalyst commenced separate proceedings for claims that should have been made in one proceeding. Catalyst's re-litigation of the same claims it had

advanced in the Moyse action was an abuse of process and supports an award of costs on a substantial indemnity basis.

Are the Amounts Claimed Fair and Reasonable?

[8] I must determine whether the amount claimed by each defendant on a substantial indemnity basis is fair and reasonable. Although this motion was complex, there were no productions, no examinations for discovery and no cross-examinations. There were three days of oral argument. West Face took the lead in advancing the defendants' arguments on the motion. Under these circumstances I do not regard total costs of $2,197,010 to be fair and reasonable. This is an excessive amount that could not have been within the reasonable expectation of Catalyst.

[9] It is not appropriate for me to conduct a line-by-line analysis of the defendants' costs outlines. As West Face took the lead on behalf of the defendants it is entitled to the highest cost award. VimpelCom was the focal point of the action and had to undertake its own detailed review of Catalyst's claim. Its claim of over $750,000 is excessive, however, it is entitled to the second highest cost award because of its extensive involvement on the motion. I have set out below what I consider to be a fair and reasonable all-inclusive cost award for each of the defendants based upon their participation on the motion:

(a) West Face – $450,000

(b) Vimpelcom – $350,000

(c) Globalive – $225,000

(d) UBS – $225,000

(e) US Investors - $200,000

(f) Novus - $100,000

(g) Serruya - $50,000

[10] These amounts total $1,600,000. In my view, this is an overall amount that is fair and reasonable and ought to have been within the reasonable expectation of Catalyst.

[11] These costs are payable by Catalyst to the defendants within 30 days.

Hainey J.

Date: November 19, 2018

2019 ONCA 354
Ontario Court of Appeal

The Catalyst Capital Group Inc. v. VimpelCom Ltd.

2019 CarswellOnt 6611, 2019 ONCA 354, [2019] O.J. No. 2286,
145 O.R. (3d) 759, 306 A.C.W.S. (3d) 770, 95 B.L.R. (5th) 175

The Catalyst Capital Group Inc. (Plaintiff / Appellant) and VimpelCom Ltd., Globalive Capital Inc., UBS Securities Canada Inc., Tennenbaum Capital Partners LLC, 64NM Holdings GP LLC, 64NM Holdings LP, LG Capital Investors LLC, Serruya Private Equity Inc., Novus Wireless Communications Inc., West Face Capital Inc. and Mid-Bowline Group Corp. (Defendants / Respondents)

M. Tulloch, M.L. Benotto, Grant Huscroft JJ.A.

Heard: February 19-20, 2019
Judgment: May 2, 2019
Docket: CA C65431

Proceedings: affirming *The Catalyst Capital Group Inc. v. VimpelCom Ltd.* (2018), 2018 CarswellOnt 6161, 2018 ONSC 2471, Hainey J. (Ont. S.C.J. [Commercial List])

Counsel: John E. Callaghan, Benjamin Na, Matthew Karabus, David C. Moore, for Appellant
Orestes Pasparakis, Danny Urquhart, for Respondent, VimpelCom Ltd.
James D.G. Douglas, Caitlin R. Sainsbury, Graham Splawski, for Respondent, Globalive Capital Inc.
Daniel S. Murdoch, for Respondent, UBS Securities Canada Inc.
Michael Barrack, Kiran Patel, Daniel Szirmak, for Respondents, Tennenbaum Capital Partners LLC, 64NM Holdings GP LLC, 64NM Holdings LP and LG Capital Investors LLC
Lucas Lung, for Respondent, Serruya Private Equity Inc.
Geoff R. Hall, for Respondent, Novus Wireless Communications Inc.
Kent Thomson, Matthew Milne-Smith, for Respondent, West Face Capital Inc.

***M. 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 *Mid-Bowline Group Corp., Re*, 2016 ONSC 669 (Ont. S.C.J. [Commercial List]), 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 [*Catalyst Capital Group Inc. v. Moyse*] 2016 ONSC 5271, 35 C.C.E.L. (4th) 242 (Ont. S.C.J. [Commercial List]) ("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 (Ont. C.A.) ("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: (2019), [2018] S.C.C.A. No. 295 (S.C.C.).

(6) Decision of the Motions Judge: 2018 ONSC 2471 (Ont. S.C.J. [Commercial List])

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 (S.C.C.), 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 (Man. C.A.), at para. 31; *Burcevski v. Ambrozic*, 2011 ABCA 178, 505 A.R. 359 (Alta. C.A.), at paras. 7-9, leave to appeal

refused, [2011] S.C.C.A. No. 388 (S.C.C.). 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 (S.C.C.), 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. Minister of National Revenue* (1974), [1975] 2 S.C.R. 248 (S.C.C.), 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 (S.C.C.), 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 *Commissioners of Taxation for New South Wales v. Palmer*, [1907] A.C. 179 (New South Wales 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: *Abbott Laboratories v. Canada (Minister of Health)*, 2007 FCA 140, 282 D.L.R. (4th) 145 (F.C.A.), 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. Great Western Railway*, (1889) L.R. 14 App. Cas. 179 (U.K. 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 (S.C.C.), 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 (Ont. C.A.), at paras. 17-19; *Persaud v. Telus Corporation*, 2017 ONCA 479 (Ont. C.A.), at para. 26; *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 (S.C.C.), 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 (Eng. V.-C.), 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: *Doering v. Grandview (Town)* (1975), [1976] 2 S.C.R. 621 (S.C.C.), 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 (N.S. C.A.), at para. 37, leave to appeal refused, (1998), [1997] S.C.C.A. No. 656 (S.C.C.); *Pennyfeather v. Timminco Ltd.*, 2017 ONCA 369 (Ont. C.A.), at para. 128, leave to appeal refused, (2018), [2017] S.C.C.A. No. 279 (S.C.C.).

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 (Ont. C.A.), at para. 21, rev'd on other grounds, 2002 SCC 63, [2002] 3 S.C.R. 307 (S.C.C.). 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 (Ont. S.C.J.), 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 (Ont. Gen. Div.), at p. 297, aff'd, (1997), 32 O.R. (3d) 651 (Ont. 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 (Ont. C.A.), at para. 47, leave to appeal refused, [2018] S.C.C.A. No. 128 (S.C.C.) (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 (S.C.C.), 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 (B.C. C.A.), 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 (Sask. C.A.), 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 (Ont. C.A.), 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 Corp. PLC v. KPMG LLP*, [2007] O.J. No. 32 (Ont. S.C.J. [Commercial List]), 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. Neil J. Buchanan Ltd.*, [1980] 2 S.C.R. 228 (S.C.C.), 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 (Ont. C.A.), 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 (Ont. C.A.), 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.

***M.L. Benotto J.A.*:**

I agree.

***Grant Huscroft J.A.*:**

I agree.

Appeal dismissed.

2019 CarswellOnt 18743
Supreme Court of Canada

Catalyst Capital Group Inc. v. VimpelCom Ltd., et al.

2019 CarswellOnt 18743, 2019 CarswellOnt 18744, [2019] S.C.C.A. 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.

Per curiam

Judgment: November 14, 2019
Docket: 38746

Proceedings: Leave to appeal refused, 2019 CarswellOnt 6611, 306 A.C.W.S. (3d) 770, [2019] O.J. No. 2286, 145 O.R. (3d) 759, 2019 ONCA 354 (Ont. C.A.)Affirmed, 2018 CarswellOnt 6161, 297 A.C.W.S. (3d) 332, 2018 ONSC 2471 (Ont. S.C.J. [Commercial List])

Counsel: Counsel — not provided

Per curiam:

1 The application for leave to appeal from the judgment of the Court of Appeal for Ontario, Number C65431, 2019 ONCA 354, dated May 2, 2019, is dismissed with costs.

See paras. 54, 65-87, 113-117 & 354

2021 ONSC 125
Ontario Superior Court of Justice [Commercial List]

The Catalyst Capital Group Inc. v. West Face Capital Inc.

2021 CarswellOnt 4244, 2021 ONSC 125

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) and CANACCORD GENUITY CORP. (Third Party)

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)

BRUCE LANGSTAFF (Plaintiff by Counterclaim) and THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION (Defendants to the Counterclaim)

C. Boswell J.

Heard: December 2, 2020; December 3, 2020; December 4, 2020
Judgment: January 11, 2021
Docket: CV-17-587463-00CL

Counsel: David C. Moore, Kenneth G. Jones, John E. Callaghan, Benjamin Na, Matthew Karabus, for Plaintiffs and Defendants by Counterclaim, Newton Glassman, James Riley and Gabriel De Alba
Kent E. Thomson, Matthew Milne-Smith, Andrew Carlson, Maura O'Sullivan, for West Face Capital Inc. and Gregory Boland
Linda M. Plumpton, Andrew Bernstein, Leora Jackson, for Anson Defendants, 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
Devin Jarcaig, for Bruce Langstaff
Phil Tunley, Jennifer Saville, Alexi Wood, Lillian Cadieux-Shaw, for Rob Copeland
Kevin Baumann, for himself
John Adair, Michael Darcy, for B.C. Strategy Ltd. d/b/a Black Cube and B.C. Strategy U.K. Ltd. d/b/a Black Cube

***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.

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.

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 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." See1704604 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 ofPublic 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 addingsections 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:

> 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) ofthe 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 in1704604 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 Chruszat 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.

The Limited Extension to Communications with Third Parties

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 ofCanada, 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 NovaChemicals (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 ofRights 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.

Footnotes

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.

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.

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.

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.

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.

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

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

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

2021 ONSC 2072
Ontario Superior Court of Justice (Divisional Court)

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

2021 CarswellOnt 4048, 2021 ONSC 2072

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.

Heard: March 22, 2021
Judgment: March 22, 2021
Docket: 157/21

Counsel: John E. Callaghan, Benjamin Na, Matthew Karabus, David C. Moore, Kenneth G.G. Jones, for Moving Parties
Kent Thomson, Matthew Milne-Smith, Andrew Carlson, for Respondents, West Face Capital Inc. and Gregory Boland
Lucas Lung, Rebecca Shoom, for Respondents, ClaritySpring Inc. and Nathan Anderson
Linda M. Plumpton, Andrew Bernstein, Stacey Reisman, 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, AIMP GP, Anson Catalyst Master Fund LP, ACF GP, Moez Kassam, Adam Spears and Sunny Puri
Devin Jarcaig, for Respondent, Bruce Langstaff
Phil Tunley, Alexi N. Wood, for Respondent, Rob Copeland
A.J. Freedman, for Respondent, Bruce Livesey
Darryl Levitt, Respondent, for himself
Kevin Baumann, Respondent, for himself

Per curiam:

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.

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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SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

BOOK OF AUTHORITIES OF WEST FACE CAPITAL INC. AND GREGORY BOLAND

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

Kent E. Thomson (LSO# 24264J)
Email: kentthomson@dwpv.com
Tel: 416.863.5566
Matthew Milne-Smith (LSO# 44266P)
Email: mmilne-smith@dwpv.com
Tel: 416.863.5595
Andrew Carlson (LSO# 58850N)
Email: acarlson@dwpv.com
Tel: 416.367.7437
Maura O'Sullivan (LSO# 77098R)
Email: mosullivan@dwpv.com
Tel: 416.367.7481

Fax: 416.863.0871

Lawyers for the Defendants (Plaintiffs by Counterclaim),
West Face Capital Inc. and Gregory Boland