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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

and

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

Defendants

MOTION RECORD OF THE DEFENDANT/MOVING PARTY WEST FACE CAPITAL INC. (VOLUME 1 OF 19)

December 7, 2016

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

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

Tel: 416.863.0900
Fax: 416.863.0871

Lawyers for the Defendant
WEST FACE CAPITAL INC.

TO: **LAX O'SULLIVAN LISUS GOTTLIEB LLP**
Barristers and Solicitors
145 King Street West
Suite 2750
Toronto ON M5H 1J8

Rocco Di Pucchio (LSUC# 381851)
Tel: 416.598.2268
Fax: 416.598.3730
Email: rdipucchio@counsel-toronto.com
Andrew Winton (LSUC# 54473I)
Tel: 416.644.5342
Fax: 416.598.3730
Email: awinton@counsel-toronto.com
Bradley Vermeersch (LSUC# 69004K)
Tel: 416.646.7997
Fax: 416.598.3730
Email: vbermeersch@counsel-toronto.com

Tel: 416.598.1744
Fax: 416.598.3730

Lawyers for the Plaintiff
THE CATALYST CAPITAL GROUP INC.

AND TO: **NORTON ROSE FULBRIGHT CANADA LLP**
Barristers and Solicitors
Suite 2300
Toronto-Dominion Centre
TD South Tower
79 Wellington Street West
P.O. Box 128
Toronto ON M5K 1H1

Orestes Pasparakis (LSUC# 36851T)
Tel: 416.216.4815
Fax: 416.216.3930
Email: orestes.pasparakis@nortonrosefullbright.com
Rahool Agarwal (LSUC# 545281)
Tel: 416.216.3943
Fax: 416.216.3930
Email: rahool.agarwal@nortonrosefullbright.com
Michael Bookman (LSUC# 65047W)
Tel: 416.216.2492
Fax: 416.216.3930
Email: michael.bookman@nortonrosefullbright.com

Tel: 416.360.8511
Fax: 416.360.8277

Lawyers for the Defendant
VIMPELCOM LTD.

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

James D. G. Douglas (LSUC# 20569H)
Tel: 416.367.6029
Fax: 416.361.2747
Email: jdouglas@blg.com
Caitlin Sainsbury (LSUC# 54122D)
Tel: 416.367.6438
Fax: 416.361.2745
Email: csainsbury@blg.com
Graham Splawski (LSUC# 68589T)
Tel: 416.367.6206
Fax: 416.361.2786
Email: gsplawski@blg.com

Tel: 416.367.6000
Fax: 416.367.6749

Lawyers for the Defendant
GLOBALIVE CAPITAL INC.

AND TO: **STIKEMAN ELLIOTT LLP**
Barristers and Solicitors
5300 Commerce Court West
199 Bay Street
Toronto ON M5L 1B9

David R. Byers (LSUC# 22992W)
Tel: 416.869.5697
Fax: 416.947.0866
Email: dbyers@stikeman.com
Daniel Murdoch (LSUC# 53123L)
Tel: 416.869.5529
Fax: 416.947.0866
Email: dmurdoch@stikeman.com
Vanessa Voakes (LSUC# 58486L)
Tel: 416.869.5538
Fax: 416.947.0866
Email: vvoakes@stikeman.com

Tel: 416.869.5500
Fax: 416.947.0866

Lawyers for the Defendant
UBS SECURITIES CANADA INC.

AND TO: **BLAKE, CASSELS & GRAYDON LLP**
Barristers and Solicitors
199 Bay Street
Suite 4000
Box 25
Commerce Court West
Toronto ON M5L 1A9

Michael Barrack (LSUC# 21941W)
Tel: 416.863.5280
Fax: 416.863.2653
Email: michael.barrack@blakes.com
Kiran Patel (LSUC# 58398H)
Tel: 416.863.2205
Fax: 416.863.2653
Email: kiran.patel@blakes.com

Tel: 416.863.2400
Fax: 416.863.2653

Lawyers for the Defendants
TENNENBAUM CAPITAL PARTNERS LLC, 64NM HOLDINGS GP LLC, 64NM HOLDINGS LP and LG CAPITAL INVESTORS LLC

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

Lucas E. Lung (LSUC# 52595C)
Email: llung@lerners.ca
Tel: 416.601.2673
Fax: 416.867.9192

Lawyers for the Defendant
SERRUYA PRIVATE EQUITY INC.

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

Junior Sirivar (LSUC# 47939H)
Tel: 416.601.7750
Fax: 416.868.0673
Email: jsirivar@mccarthy.ca
Jacqueline Cole (LSUC# 65454L)
Tel: 416.601.7704
Fax: 416.868.0673
Email: jcole@mccarthy.com

Tel: 416.362.1812
Fax: 416.868.0673

Lawyers for the Defendant NOVUS WIRELESS COMMUNICATIONS INC.

AND TO: **DENTONS CANADA LLP**
Barristers and Solicitors
77 King Street West
Suite 400
Toronto-Dominion Centre
Toronto ON M5K 0A1

Michael Schafler (LSUC# 39368J)
Tel: 416.863.4457
Fax: 416.863.4592
Email: michael.schafler@dentons.com
Ara Basmadjian (LSUC# 64315H)
Tel: 415.863.4647
Fax: 416.863.4592
Email: ara.basmadjian@dentons.com

Tel: 416.863.4511
Fax: 416.863.4592

Lawyers for the Defendant
MID-BOWLINE GROUP CORP.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

and

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

Defendants

INDEX

	Gabriel De Alba on June 6, 2016	
6.	Exhibit 6 - Catalyst's Amended Amended Statement of Claim dated December 16, 2014	194-214
7.	Exhibit 7 - Catalyst's Notice of Motion dated January 13, 2015	215-231
	VOLUME 2	
8.	Exhibit 8 - Catalyst's Motion Record dated February 18, 2015	232-589
	VOLUME 3	
9.A	Exhibit 9 - Vol. 1 of West Face's Responding Motion Record dated March 9, 2015	590-1042
	VOLUME 4	
9.B	Exhibit 9 - Vol. 2 of West Face's Responding Motion Record dated March 9, 2015	1043-1487
	VOLUME 5	
9.C	Exhibit 9 - Vol. 3 of West Face's Responding Motion Record dated March 9, 2015	1488-1819
	VOLUME 6	
9.D	Exhibit 9 - Vol. 4 of West Face's Responding Motion Record dated March 9, 2015	1820-2262
	VOLUME 7	
10.	Exhibit 10 - Catalyst's Supplementary Motion Record dated May 1, 2015	2263-2569
	VOLUME 8	
11.	Exhibit 11 - Defendants' Joint Supplementary Responding Motion Record dated June 8, 2015	2570-2815
	VOLUME 9	
12.	Exhibit 12 - Endorsement of Justice Glustein dated July 7, 2015	2816-2828
13.	Exhibit 13 - Catalyst's Notice of Appeal dated July 22, 2015	2829-2839

	Discovery of Gabriel De Alba held May 11, 2016	
	VOLUME 15	
42.	Exhibit 42 - Email from Andrew Winton to Matthew Milne-Smith dated June 1, 2016	5859-5887
43.	Exhibit 43 - The Globe and Mail article dated June 1, 2016	5888-5889
44.	Exhibit 44 - Email from Matthew Milne-Smith to Andrew Winton dated June 1, 2016	5890-5892
45.	Exhibit 45 - Email from Rocco DiPucchio to Matthew Milne-Smith dated June 2, 2016	5893-5895
46.	Exhibit 46 – Trial Affidavit of Newton Glassman sworn May 27, 2016	5896-5914
47.	Exhibit 47 - Trial Affidavit of Gabriel De Alba sworn May 27, 2016	5915-5952
48.	Exhibit 48 - Trial Affidavit of Anthony Griffin sworn June 4, 2016	5953-6003
49.	Exhibit 49 - Trial Affidavit of Thomas Dea sworn June 3, 2016	6004-6022
50.	Exhibit 50 - Trial Affidavit of Hamish Burt sworn June 1, 2016	6023-6033
51.	Exhibit 51 - Trial Affidavit of Michael Leitner sworn June 1, 2016	6034-6047
52.	Exhibit 52 - Trial Affidavit of Simon Lockie sworn June 6, 2016	6048-6067
53.	Exhibit 53 - Trial Affidavit of Supriya Kapoor sworn June 2, 2016	6068-6071
54.	Exhibit 54 - Trial Affidavit of Yujia Zhu sworn June 3, 2016	6072-6075
55.	Exhibit 55 - Trial Affidavit of Brandon Moyse sworn June 2, 2016	6076-6134
	VOLUME 16	
56.	Exhibit 56 - Catalyst's Opening Statement dated June 6, 2016	6135-6181
57.	Exhibit 57 - West Face's Opening Statement dated June 6, 2016	6182-6249
58.	Exhibit 58 - Moyse's Opening Statement dated June 6, 2016	6250-6275
59.	Exhibit 59 - Examination in Chief of Gabriel De Alba - June 6, 2016	6276-6317
60.	Exhibit 60 - Cross-Examination of Gabriel De Alba - June 6 & 7, 2016	6318-6462
61.	Exhibit 61 - Examination in Chief of Newton Glassman - June 7,	6463-6501

81.	Exhibit 81 - Catalyst's Closing Submissions	7766-7883
82.	Exhibit 82 - West Face's Closing Submissions	7884-8157
83.	Exhibit 83 - West Face's Costs Submissions	8158-8200
84.	Exhibit 84 - Justice Newbould's Costs Endorsement dated October 7, 2016	8201-8208
85.	Exhibit 85 - Catalyst's Notice of Appeal dated September 13, 2016	8209-8222

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

- and -

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

Defendants

NOTICE OF MOTION

The Defendant, West Face Capital Inc. ("**West Face**"), will make a motion to a Judge of the Commercial List on a date and time to be fixed at 330 University Avenue, Toronto, Ontario.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THE MOTION IS FOR:

1. An Order dismissing or permanently staying this proceeding against West Face, or in the alternative, striking out the Statement of Claim of the Plaintiff The Catalyst Capital Group Inc. ("**Catalyst**") as against West Face on the grounds that:

   (a) the Claim against West Face is an abuse of process;

(b) the Claim against West Face is barred by the doctrines of *res judicata*, cause of action estoppel, issue estoppel, and collateral attack; and

(c) the Claim is frivolous, vexatious, or otherwise would bring the administration of justice into dispute.

2. To the extent necessary, leave to admit into evidence the record in Court File No. CV-16-11272-00CL in the Superior Court of Justice (Commercial List) (the "**Moyse Litigation**").

3. To the extent necessary, an Order striking the Jury Notice served by Catalyst in this case.

4. The costs of this motion, and this proceeding, on a substantial indemnity basis.

5. Such further and other relief as this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

A. Overview

6. Catalyst has already brought, litigated, and lost the Moyse Litigation concerning the alleged misuse by West Face of confidential information belonging to Catalyst. The Moyse Litigation related to West Face's participation in the acquisition of WIND Mobile Corp. ("**WIND**") in September 2014 as a member of a consortium of investors. Catalyst commenced the Moyse Litigation against West Face in June 2014, and amended its Statement of Claim in October 2014 to assert claims and allegations in respect of the acquisition of an interest in WIND by West Face.

7. The claims asserted by Catalyst in these proceedings (the "**New Litigation**") overlap considerably with those asserted by Catalyst in the Moyse Litigation. Both concern West Face's participation in the successful acquisition of WIND, and Catalyst's allegation that West Face is to blame for Catalyst's failure to do so.

8. Catalyst was aware of the material facts underlying its claims against West Face in the New Litigation when it amended its claim in the Moyse Litigation in October 2014 to assert claims and allegations concerning the participation by West Face in the acquisition of WIND. Catalyst made tactical decisions in the Moyse Litigation not to assert against West Face the various causes of action it now advances in the New Litigation, and it must now live with the consequences of those decisions.

9. In Reasons for Decision rendered on August 18, 2016, following the completion of a trial on the Commercial List, Justice Newbould dismissed all of the claims asserted by Catalyst against West Face in the Moyse Litigation in their entirety. In doing so, Justice Newbould made a series of findings that cannot be re-litigated or attacked collaterally in these proceedings, and are fatal to Catalyst's latest claims against West Face concerning the acquisition of WIND.

A. A BRIEF HISTORY OF WIND

10. WIND is a Canadian wireless telecommunications provider. At the end of 2013, the majority of its voting shares were held by the Defendant Globalive Capital Inc. ("**Globalive**"), while a majority of the total equity was held by the Defendant VimpelCom Ltd. ("**VimpelCom**"). VimpelCom is headquartered in the Netherlands and controlled by Russian shareholders.

11. Foreign ownership of the wireless industry in Canada has at all times been heavily regulated.

12. By the end of 2013, VimpelCom had become frustrated by the regulatory hurdles it faced in Canada that had prevented it from either acquiring Globalive's interest in WIND, or selling VimpelCom's interest. VimpelCom had engaged the Defendant UBS Securities Canada Inc. ("**UBS**") to assist it in its efforts to find a purchaser for its debt and equity interests in WIND or for WIND in its entirety.

13. Catalyst and West Face both participated in negotiations with VimpelCom in the first half of 2014. Both parties' interest in WIND was discussed in the business media during the course of VimpelCom's efforts to sell WIND in 2013 and 2014.

14. Catalyst was not willing to purchase WIND unless it obtained regulatory concessions from Industry Canada granting to Catalyst the unrestricted right to sell or transfer WIND's wireless spectrum to one of the incumbent wireless carriers (Rogers, Telus or Bell) after five years. Catalyst believed that this regulatory concession was necessary in order for WIND to succeed as a business.

15. Catalyst was advised categorically and repeatedly by the Government of Canada and by Catalyst's own expert advisers that such a concession would not be granted. Catalyst intended not to close any transaction to acquire WIND from VimpelCom if such a concession could not be obtained.

16. On July 23, 2014, VimpelCom entered into exclusive negotiations with Catalyst concerning the negotiation of a Share Purchase Agreement for the acquisition of WIND. This period of exclusivity was extended several times, ultimately to August 18, 2014.

17. On August 7, 2014 the Defendants West Face, Tennenbaum Capital Partners LLC ("**Tennenbaum**"), and the principals of the Defendants 64NM Holdings GP LLC ("**64NM GP**"), 64NM Holdings LP ("**64NM LP**") and LG Capital Investors LLC ("**LG Capital**") (West Face, Tennenbaum and LG Capital, together, the "**New Investors**") made an unsolicited offer to VimpelCom to purchase its interests in WIND (the "**August 7 Proposal**"). The August 7 Proposal was not unlawful or improper in any way.

18. Moreover, Catalyst was aware of the August 7 Proposal in or around August or September, 2014, but made no complaint or claim concerning that Proposal. That is so even though Catalyst was already embroiled in the Moyse Litigation with West Face.

19. On or around August 15, 2014, VimpelCom requested that Catalyst agree to a $5 to $20 million break fee if regulatory approval of the potential sale of WIND to Catalyst was not granted within 60 days following execution of the Share Purchase Agreement then being negotiated.

20. Upon consulting with Catalyst's legal and financial advisors as well as with Catalyst Partner Gabriel de Alba, Catalyst's founder and Managing Partner Newton Glassman decided to reject outright VimpelCom's request for a break fee, without discussion or negotiation. Rather than attempt to satisfy VimpelCom's concerns, Catalyst rejected VimpelCom's request for a break fee, cut off further communications with

VimpelCom, let its period of exclusivity expire, and encouraged VimpelCom to explore its options. VimpelCom did so in the period after its exclusivity obligations to Catalyst came to an end on August 18. One of those options involved VimpelCom selling its interests in WIND to a consortium that included the New Investors, Globalive, Novus Wireless Communications Inc. ("**Novus**"), and Serruya Private Equity Inc. ("**Serruya**") (Globalive, Novus, Serruya, and the New Investors collectively, the "**Consortium**").

21. On September 16, 2014, VimpelCom and members of the Consortium announced that they had reached an agreement whereby the Consortium would acquire all of VimpelCom's debt and equity interests in WIND.

22. In November 2014, the ownership structure of WIND was reorganized so that WIND became an indirect wholly-owned subsidiary of the Defendant Mid-Bowline Group Corp. ("**Mid-Bowline**"), with the various members of the Consortium holding voting shares in proportion to their equity contributions.

B. THE MOYSE LITIGATION

(i) The Commencement of the Moyse Litigation

23. In May 2014, Brandon Moyse, a 26 year-old analyst at Catalyst, decided to resign his position at Catalyst and accept a job offer from West Face. Mr. Moyse began working at West Face on June 23, 2014. Before he did so, in response to concerns expressed by Catalyst through its counsel, West Face erected an ethical wall that expressly precluded Mr. Moyse from sharing with anyone at West Face confidential information of Catalyst concerning WIND, and from playing any role whatsoever in West Face's efforts to acquire WIND. That ethical wall was complied with assiduously.

24. On June 25, 2014, Catalyst issued the Statement of Claim in the Moyse Litigation against West Face and Mr. Moyse. Among other things, Catalyst alleged that Mr. Moyse had misappropriated unspecified confidential information of Catalyst for use by West Face.

25. On July 16, 2014, West Face and Mr. Moyse consented to an Interim Order placing Mr. Moyse on indefinite leave from West Face. Ultimately, Mr. Moyse never returned to work at West Face.

26. On October 9, 2014, following the acquisition of WIND by the Consortium, Catalyst amended its pleading in the Moyse Litigation to allege explicitly that: "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]". Those allegations were invented from whole cloth, and are completely devoid of merit.

27. As described above, at the time this amendment was made, Catalyst was aware that West Face had participated in an unsolicited offer to VimpelCom on August 7, during Catalyst's period of exclusivity. Catalyst chose, however, not to assert any claims or causes of action against West Face or any of the other Defendants associated with the alleged breach by VimpelCom of its exclusivity obligations to Catalyst.

28. On December 16, 2014, Catalyst further amended its Statement of Claim in the Moyse Litigation to seek: (i) a constructive trust over West Face's interest in WIND; and

(ii) an accounting of profits earned by West Face with respect to its investment in WIND as a result of the alleged misuse of Catalyst's confidential information. Again, Catalyst chose not to assert any claims or causes of action associated with the alleged breach by VimpelCom of its exclusivity obligations to Catalyst.

(ii) The Injunction Motion Before Glustein J.

29. In January 2015, Catalyst commenced a motion for, among other things, an injunction restraining West Face from "[p]articipating in the management and/or strategic direction of [WIND]" (the "**Injunction Motion**").

30. On March 9, 2015, West Face filed voluminous evidence responding to the Injunction Motion, including an Affidavit of Anthony Griffin sworn March 7, 2015. Mr. Griffin is one of West Face's four Partners, and was the Partner who had primary responsibility for West Face's pursuit of WIND during most of the period in question.

31. In his March 7, 2015 affidavit, Mr. Griffin provided extensive evidence concerning the participation by West Face in the acquisition of WIND, including a detailed description of the August 7 Proposal, and how the Investors ultimately reached an agreement with VimpelCom to acquire WIND.

32. On May 13, 2015, counsel to West Face cross-examined James Riley, one of Catalyst's three Partners and its Chief Operating Officer, and Catalyst's principal affiant in support of the Injunction Motion. Mr. Riley admitted that Catalyst had considered asserting claims against West Face for inducing breach. These are the very claims that lie at the heart of the New Litigation.

33. By May 2015 *at the latest*, Catalyst knew the facts necessary to amend its Claim in the Moyse Litigation to assert the claims that it now belatedly brings against West Face.

34. Catalyst's Injunction Motion was heard and dismissed in its entirety by Justice Glustein in July 2015. Justice Glustein's Reasons are reported at 2015 ONSC 4388.

35. Catalyst's subsequent attempt to appeal the dismissal of the Injunction Motion to the Court of Appeal was quashed in early November 2015.

36. Catalyst's subsequent motions for an extension of time to seek leave to appeal and for leave to appeal the dismissal of the Injunction Motion to the Divisional Court were dismissed by Justice Swinton in January 2016. Justice Swinton's Reasons are reported at 2016 ONSC 554.

(iii) The Plan of Arrangement Application

37. In January 2016, Mid-Bowline (the entity through which the Consortium held their interests in WIND) brought an application for an order approving a plan of arrangement (the "**Plan of Arrangement**") pursuant to which the shares of Mid-Bowline were to be transferred to Shaw Communications Inc. ("**Shaw**") for approximately $1.6 billion.

38. The Plan of Arrangement provided that the shares of Mid-Bowline were to be transferred to Shaw free and clear of the constructive trust over West Face's indirect interest in WIND that Catalyst had asserted in its Amended Amended Statement of Claim dated December 16, 2014.

39. Catalyst was given notice of Mid-Bowline's Application in late December, 2015. The hearing of the Plan of Arrangement was scheduled for January 25, 2016.

40. In support of the Application, on January 8, 2016, Mid-Bowline served on Catalyst a four-volume Application Record that included, *inter alia*, affidavits of:

(a) Mr. Griffin, on behalf of West Face;

(b) Hamish Burt, on behalf of LG Capital;

(c) Michael Leitner, on behalf of Tennenbaum; and

(d) Simon Lockie, on behalf of Globalive.

41. These four affidavits confirmed the previous evidence of Mr. Griffin in his March 7, 2015 affidavit (described above) concerning the manner in which the Consortium came to acquire WIND, and contained no new or material information in that regard.

42. Catalyst opposed the Plan of Arrangement on the basis that it was not fair and reasonable in light of Catalyst's claim in the Moyse Litigation for a constructive trust over West Face's interest in WIND. West Face therefore asked the Court to order an expedited trial of Catalyst's claim. On January 25, 2016, during oral argument concerning the approval by the Court of the proposed Plan of Arrangement, Catalyst expressed for the first time its intention to assert claims of inducing breach of the Catalyst-VimpelCom exclusivity agreement against West Face and other members of the Consortium.

43. Catalyst's claim for inducing breach was premised explicitly on the unsolicited August 7 Proposal, which Catalyst had been aware of since no later than September, 2014.

44. Catalyst claimed that the facts giving rise to its purported "new" claim for inducing breach (the very same claim now asserted by Catalyst in the New Litigation) were first disclosed to Catalyst in the materials filed by Mid-Bowline in the Application for approval of the Plan of Arrangement. Catalyst claimed that it had not previously been aware of the participation of others besides West Face (*i.e.*, the Defendants Tennenbaum and LG Capital) in the unsolicited August 7 Proposal.

45. In Reasons for Judgment delivered the following day (January 26, 2016), Justice Newbould rejected the position of Catalyst. In doing so, he made the following findings.

(a) "[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";

(b) "On his cross-examination on May 13, 2015 Mr. Riley … 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 agreement between VimpelCom and Catalyst…"; and

(c) "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 [January 25, 2016] that anything was first said by Catalyst about that".

46. Justice Newbould held that Catalyst's threatened claim for inducing breach of contract "could have been started in March, 2015 when the facts were disclosed and known to Catalyst". He further held that Catalyst had not acted in good faith:

> *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.

47. Justice Newbould's decision is final, and his findings cannot now be re-litigated or attacked collaterally in this proceeding. Paragraphs 98 to 99 of Catalyst's Claim in the New Litigation allege that Catalyst only learned of the New Investors' efforts to acquire WIND in January 2016 (mistakenly stated as January 2015). This allegation is precluded by Justice Newbould's findings in the Plan of Arrangement proceedings, and barred by the doctrines of issue estoppel, collateral attack, and abuse of process.

48. In his Reasons, Justice Newbould also ordered an expedited trial of an issue in respect of Catalyst's constructive trust claim that had previously been asserted in the Moyse Litigation. This trial of an issue in the Plan of Arrangement proceeding was scheduled for late February. Catalyst was directed not to raise its inducing breach claim in this mini trial because it had not acted in good faith.

49. Shortly after Justice Newbould released his Plan of Arrangement Reasons, Catalyst consented to an Order approving the Plan of Arrangement, thereby agreeing that it would not pursue a claim for a constructive trust over the shares of Mid-Bowline to be

transferred to Shaw. The Plan of Arrangement transaction closed shortly thereafter with no need for an expedited trial of Catalyst's constructive trust claim. The late February trial date was abandoned.

50. In light of the approval of the Plan or Arrangement, Catalyst was given another opportunity to further amend its Statement of Claim in the Moyse Litigation, including to assert a claim for inducing breach, and the trial was scheduled for May 2016 (later postponed to June). Examinations for Discovery had not occurred at that point, and Catalyst had yet to deliver an Affidavit of Documents.

51. On February 25, 2016, Catalyst delivered an Amended Amended Amended Statement of Claim in the Moyse Litigation. While Catalyst deleted its claim for a constructive trust, and added new allegations of spoliation against Mr. Moyse, it again made the tactical choice not to assert claims of inducing breach and/or conspiracy against West Face. Nor did Catalyst seek to add as parties any of the other Defendants to the New Litigation.

(iv) The Trial of the Moyse Litigation

52. The Moyse Litigation proceeded to trial before Justice Newbould in June, 2016. There were six extended hearing days of evidence and one full day of closing submissions.

53. The parties called a total of 13 witnesses to give live testimony at trial, as follows:

(a) Catalyst called four witnesses at trial:

(i) Newton Glassman, Catalyst's CEO and Managing Partner;

(ii) Gabriel De Alba, Catalyst's Managing Director and the lead Partner of Catalyst on the deal team that negotiated with VimpelCom for the purchase of WIND;

(iii) James Riley, Catalyst's COO, a lawyer, and the lead Partner of Catalyst managing the Moyse Litigation; and

(iv) Martin Musters, a forensic expert.

(b) West Face called seven witnesses at trial:

(i) Mr. Griffin, West Face's Partner with initial primary responsibility over the WIND deal;

(ii) Tom Dea, West Face's Partner with primary responsibility for the hiring of Mr. Moyse;

(iii) Mr. Burt, a member of 64NM GP, the general partner of 64NM LP, the special-purpose investment vehicle created by LG Capital to participate in the acquisition of WIND;

(iv) Mr. Leitner, a Managing Partner of Tennenbaum;

(v) Mr. Lockie, the Chief Legal Officer of Globalive and former Chief Regulatory Officer of WIND;

(vi) Supriya Kapoor, West Face's Chief Compliance Officer; and

(vii) Yu-Jia Zhu, West Face's Vice-President who worked on the WIND deal and interviewed Mr. Moyse.

(c) Mr. Moyse called two witnesses:

(i) himself; and

(ii) Kevin Lo, a forensic expert.

54. For efficiency, the parties' evidence in chief in the Moyse Litigation was primarily put in by way of detailed pre-trial affidavits, with exhibits. In addition, the parties agreed that all of the evidence from multiple interlocutory motions that preceded trial, including dozens of affidavits, hundreds of exhibits, and thousands of pages of cross-examination transcripts, were to be treated as having been admitted at trial and could be relied upon in the parties' closing submissions.

55. The parties' written closing submissions totalled close to 500 pages.

56. If this proceeding is permitted to continue against West Face, there can be little doubt that many of the very same witnesses that testified about the WIND transaction in the Moyse Litigation will be again called at the trial of the New Litigation to testify about the same transaction. These include: Messrs. Glassman, De Alba, Riley, Griffin, Burt, Leitner, Lockie, and Zhu. This will result in duplication of expense, and use of court resources, that could have been avoided had Catalyst asserted the causes of action raised in the New Litigation in a timely manner.

(v) The Reasons for Judgment

57. On August 18, 2016, Justice Newbould released his Reasons for Judgment in the Moyse Litigation (the "**Trial Reasons**"), in which he dismissed Catalyst's action "in its entirety". Justice Newbould found as a fact that:

(a) Mr. Moyse did not convey any confidential information of Catalyst to West Face;

(b) *even if* Mr. Moyse had communicated confidential information of Catalyst to West Face, such information was not misused in any way by West Face in its acquisition of an interest in WIND; and

(c) *even if* Mr. Moyse had communicated confidential information of Catalyst to West Face, and *even if* West Face had misused such confidential information in its acquisition of an interest in WIND, this could not have caused any harm to Catalyst, for two reasons: (i) it was Catalyst's refusal to agree to the $5 to 20 million break fee requested by VimpelCom, and not the August 7 Proposal, that caused Catalyst to fail in its negotiations with VimpelCom; and (ii) *even if* Catalyst had been able to finalize and enter into a Share Purchase Agreement with VimpelCom to acquire WIND, Catalyst would never have closed such a transaction because it required, but could not obtain, the regulatory concessions that it deemed necessary from the Government of Canada.

58. The last of these three central findings of Justice Newbould is equally applicable to the New Litigation. If it was Catalyst's refusal to agree to a break fee that caused Catalyst

to fail to acquire WIND, and if Catalyst would never have acquired WIND in any event and regardless of what members of the Consortium did – which Justice Newbould has already found – then Catalyst's claims in the New Litigation must also fail.

59. Justice Newbould made a number of specific findings that supported this conclusion, and that are fatal to Catalyst's accusation in the New Litigation that certain Defendants conspired to misuse its confidential information and induce VimpelCom to breach its exclusivity agreement with Catalyst:

(a) "…there are explanations for West Face's conduct other than the use of confidential Catalyst information" [para. 73];

(b) "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" [para. 85];

(c) "The evidence of Hamish Burt, a member of 64NM, 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" [para. 86];

(d) "…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 obviously have 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" [para. 87];

(e) "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" [para. 89];

(f) "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 marketplace by VimpelCom as early as April, 2014" [para. 94];

(g) "There was [a] 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 to survive" [para. 96];

(h) "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" [para. 104];

(i) "…neither VimpelCom nor Globalive had any discussion with any of the consortium members who had made the proposal before the exclusivity period with Catalyst expired on August 18, 2014" [para. 105];

(j) "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 [August 7] proposal did not contain such a condition because [West Face] 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" [para. 109];

(k) "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… 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" [para. 114];

(l) "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" [para. 121];

(m) "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" [para. 122]

(n) "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" [para. 123]

(o) "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" [para.124]

(p) "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" [para. 125]

(q) "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" [para. 127]

(r) "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"" [para. 128]

(s) "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" [para. 129]

(t) "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" [para. 130]

(u) "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" [para. 131]

C. DUPLICATIVE EFFORTS

60. In total, West Face incurred more than $2 million in legal fees and expenses defending Catalyst's allegations in the Moyse Litigation. This included significant costs for documentary production, examinations for discovery, and trial.

61. In the Moyse Litigation, West Face made considerable efforts and incurred significant expense to search for, collect, identify, and produce all relevant, non-privileged documents within its possession, power or control.

62. West Face's counsel reviewed over 10,000 emails and other documents and ultimately produced over 2,800 documents in the Moyse Litigation. A first tranche of over 1,500 documents was produced on March 13, 2015, a second tranche of over 300 additional emails was produced on January 9, 2016, and a third tranche of **[over]** 1,000 additional documents was produced on April 25 and 26, 2016 in response to a request from Catalyst.

63. In total, the parties' documentary productions in the Moyse Litigation totalled more than 7,300 documents. Catalyst produced approximately 3,400 documents, West Face produced over 2,800 documents, and Mr. Moyse produced over 1,100 documents. Oral examinations for discovery were also conducted.

64. If the New Litigation is permitted to proceed, West Face will be required to re-incur significant additional expenses in searching for, collecting, and identifying a highly overlapping set of documents; conducting examinations for discovery; and proceeding to trial.

D. THE NEW LITIGATION IS PRECLUDED BY CAUSE OF ACTION ESTOPPEL, ISSUE ESTOPPEL AND/OR ABUSE OF PROCESS

65. As described above, Justice Newbould has made numerous findings in the Moyse Litigation that are fatal to Catalyst's claims in the New Litigation.

66. Justice Newbould's Decision is final and binding on West Face and Catalyst, subject only to Catalyst's appeal in the Moyse Litigation. They cannot be re-litigated in these proceedings, or collaterally attacked.

67. This Court has the inherent jurisdiction to prevent an abuse of its processes. Allowing the New Litigation to proceed amounts to re-litigation of the Moyse Litigation, would risk inconsistent judgments, and bring the administration of justice into disrepute.

E. THE JURY NOTICE SHOULD BE STRUCK OUT

68. The New Litigation involves complex legal and factual issues of a commercial nature.

69. In particular, the New Litigation involves a $750 million claim for misuse of confidential information, conspiracy, breach of contract, and inducing breach of contract, made by a Toronto-based multi-billion dollar investment management firm. The eleven Defendants are located around the globe, and include other multi-billion dollar investment management firms, an international telecommunications giant, a multi-national investment bank, and numerous other private equity firms, funds, and special-purpose vehicles.

70. The New Litigation raises complex issues concerning the interpretation of a web of commercial relationships, dealings, and negotiations between the various commercial parties involved in the acquisition of VimpelCom's interests in WIND by the Consortium in September 2014.

71. For these reasons, this matter cannot be fairly tried by a jury.

72. The Court has the discretion to strike a jury notice in the appropriate case.

73. Specifically, there are cogent reasons to strike the jury notice, including the considerable complexity of the New Litigation and the questions of fact, law, and mixed fact and law that must be decided, particularly given that many factual findings and issues will have to be decided following a proper application of the legal principles of cause of action estoppel, issue estoppel, collateral attack, and abuse of process.

74. Justice to the parties will be better served by the striking of the jury notice.

75. In the alternative, the pith and substance of Catalyst's claims of misuse of confidential information by West Face is a claim for equitable damages for breach of the equitable duty of a third party recipient of confidential information to not use that information. As such, the New Litigation must be tried without jury.

76. The Jury Notice is inappropriate and should be struck out.

F. OTHER GROUNDS

77. Multiplicity of legal proceedings should be avoided.

78. The New Litigation is frivolous, vexatious, and an abuse of the processes of the Court.

79. Rules 1.04, 21.01(3)(d), 25.11, 37, 38 and 47 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

80. Sections 106, 108, and 138 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43.

81. The inherent jurisdiction of the Court.

82. Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

83. The Reasons for Judgment of Justice Newbould dated August 18, 2016 in Court File No. CV-16-11272-00CL, reported at 2016 ONSC 5271.

84. The Reasons for Judgment of Justice Newbould dated January 26, 2016 in Court File No. CV-15-11238-00CL, reported at 2016 ONSC 669.

85. The Trial Record from the Moyse Litigation.

86. The materials filed in the Plan of Arrangement proceedings.

87. The Affidavit of Andrew Carlson sworn December 7, 2016.

88. Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

December 7, 2016

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

Kent E. Thomson (LSUC# 24264J)
Matthew Milne-Smith (LSUC# 44266P)
Andrew Carlson (LSUC# 58850N)

Tel.: 416.863.0900
Fax: 416.863.0871

Lawyers for the Defendant,
West Face Capital Inc.

TO: **SEE SERVICE LIST**
(Service List attached)

THE CATALYST CAPITAL GROUP INC.
Plaintiff

-and-

VIMPELCOM LTD. et al.
Defendants

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

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT Toronto

NOTICE OF MOTION

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

Kent E. Thomson (LSUC# 24264J)
Matthew Milne-Smith (LSUC# 44266P)
Andrew Carlson (LSUC# 58850N)

Tel.: 416.863.0900
Fax: 416.863.0871

Lawyers for the Defendant, West Face Capital Inc.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

- and -

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

Defendants

AFFIDAVIT OF ANDREW CARLSON

I, Andrew Carlson, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I am an Associate lawyer with the law firm of Davies Ward Phillips & Vineberg LLP ("**Davies**"), lawyers for the Defendant West Face Capital Inc. ("**West Face**"). Since January 2015, I have been a member of the Davies team acting on behalf of West Face in various proceedings involving West Face and the Plaintiff, The Catalyst Capital Group Inc. ("**Catalyst**"). These involve this action, as well as the "**Moyse Litigation**" and the "**Plan of Arrangement Application**", both described in detail below.[1] Among other things, in the Moyse Litigation I attended multiple pre-trial cross-examinations and motion

[1] The Moyse Litigation proceeded as *The Catalyst Capital Group Inc. v. Brandon Moyse and West Face Capital Inc.* in the Ontario Superior Court of Justice (Commercial List), Court File No. CV-16-11272-00CL. The Plan of Arrangement Application proceeded as *Re: Mid-Bowline Group Corp.* in the Ontario Superior Court of Justice (Commercial List), Court File No. CV-15-11238-00CL.

hearings, the examinations for discovery of West Face's and Catalyst's discovery representatives, and multiple days of trial. I also attended at various chambers appointments in both of the above-noted proceedings before The Honourable Justice Newbould. I also frequently communicated with, or was copied on communications with, counsel to Catalyst. As such, I have personal knowledge of the matters contained in this Affidavit, except where such matters are based on information from others, in which instances I have named the source of my information and verily believe that information to be true.

2. With respect to the underlying facts giving rise to this action, I rely on the evidence adduced by the parties during the course of the Moyse Litigation, as well as findings of fact made by Justice Newbould in his Reasons for Judgment following the conclusion of the trial of the Moyse Litigation and in his Reasons delivered during the Plan of Arrangement Application.

3. My Affidavit does not refer to or rely on solicitor-client communications between West Face and its counsel, and my swearing of this Affidavit is not intended to waive or breach any privilege enjoyed by West Face.

4. I refer to a considerable volume of materials in this Affidavit. For this reason, I am providing the Exhibits to this Affidavit in electronic format on an encrypted USB drive. I have also made a virtual copy of the USB drive on Share File (a secure file-sharing website), and will provide access to that Share File site to counsel to the parties and to this Honourable Court.

5. I am swearing this Affidavit in support of West Face's motion to dismiss, permanently stay or strike out Catalyst's Statement of Claim in this proceeding on the grounds that this Claim is an abuse of process, and is otherwise barred by the doctrines of *res judicata*, collateral attack, and abuse of process by re-litigation. I refer to this proceeding throughout my Affidavit as the "**New Litigation**".

A. BACKGROUND FACTS

6. The following findings of fact were made by Justice Newbould in his Reasons for Judgment dated August 18, 2016 (the "**Trial Reasons**") following the conclusion of trial in the Moyse Litigation, or in his Reasons dated January 26, 2016 in the Plan of Arrangement Application (the "**Plan of Arrangement Reasons**"). The Trial Reasons are attached as Exhibit "1".[2] The Plan of Arrangement Reasons are attached as Exhibit "2".[3]

(a) WIND Mobile Corp. ("**WIND**") is a Canadian wireless telecommunications provider that was originally formed in 2008 pursuant to a joint venture between two parties: AAL Corp. (now the Defendant Globalive Capital Inc. ("**Globalive**")); and Orascom Telecom Holding S.A.E., a large Egyptian multi-national telecommunications company ("**Orascom**"). Globalive and Orascom held their interests in WIND indirectly through a corporation called Globalive Investment Holdings Corp. ("**GIHC**");[4]

(b) Due to regulatory restrictions on foreign ownership of Canadian telecommunications operators that existed at the time, Globalive held a

---

[2] *Catalyst Capital Group Inc. v. Moyse*, 2016 ONSC 5271, *per* Newbould J. [the *Trial Reasons*], West Face's Motion Record, Vol. 1, Exhibit 1, p. 85.

[3] *Re Mid-Bowline Group Corp.*, 2016 ONSC 669, *per* Newbould J. [the *Plan of Arrangement Reasons*], West Face's Motion Record, Vol. 1, Exhibit 2, p. 135.

[4] Trial Reasons, at para. 17, West Face's Motion Record, Vol. 1, Exhibit 1, p. 91.

majority of the voting interests in GIHC, even though Orascom held a majority of the total equity interests;[5]

(c) In 2011, the Defendant VimpelCom Ltd. ("**VimpelCom**") acquired the majority shareholder of Orascom;[6]

(d) Notwithstanding legislative amendments in 2012 that loosened restrictions on foreign control of smaller telecommunications service providers like WIND, foreign ownership of the wireless industry in Canada remained heavily regulated;[7]

(e) By 2013, VimpelCom had become frustrated by the regulatory hurdles it faced in Canada, including those that had prevented it from buying out Globalive's interests in WIND. VimpelCom engaged the Defendant UBS Securities Canada Inc. ("**UBS**") to assist it in its efforts to find a purchaser of WIND in its entirety and/or VimpelCom's debt and equity interests in WIND;[8]

(f) By the end of 2013, both Catalyst and West Face were interested in the WIND opportunity.[9] In 2014, both Catalyst and West Face had separate negotiations with VimpelCom and/or UBS with respect to WIND;[10]

---

5 Trial Reasons, at para. 18, West Face's Motion Record, Vol. 1, Exhibit 1, p. 91.
6 Trial Reasons, at para. 21, West Face's Motion Record, Vol. 1, Exhibit 1, p. 92.
7 Trial Reasons, at para. 22, West Face's Motion Record, Vol. 1, Exhibit 1, p. 92.
8 Trial Reasons, at paras. 22-24, West Face's Motion Record, Vol. 1, Exhibit 1, p. 92.
9 Trial Reasons, at paras. 25-29, West Face's Motion Record, Vol. 1, Exhibit 1, pp. 92-93.
10 Trial Reasons, at para. 30, West Face's Motion Record, Vol. 1, Exhibit 1, p. 93.

(g) Ultimately, on September 16, 2014, a consortium of investors that included West Face, Globalive, and the Defendants Tennenbaum Capital Partners ("**Tennenbaum**"), 64NM Holdings GP LLC, as the general partner of 64NM Holdings LP ("**64NM LP**"), a special-purpose vehicle created by LG Capital Investors LLC ("**LG Capital**"), Serruya Private Equity Inc. ("**Serruya**"), and Novus Wireless Communications Inc. ("**Novus**") (together, the "**Consortium**") announced that they had acquired all of VimpelCom's debt and equity interests in WIND;[11]

(h) In November 2014, the ownership structure of WIND was reorganized following receipt of the necessary regulatory approvals from the Federal Government, so that WIND became an indirect wholly-owned subsidiary of the Defendant Mid-Bowline Group Corp. ("**Mid-Bowline**"), with the various members of the Consortium holding voting shares in Mid-Bowline in proportion to their equity contributions.[12]

B. THE MOYSE LITIGATION

(i) The Commencement of the Moyse Litigation

7. Catalyst commenced the Moyse Litigation against West Face and Brandon Moyse in June 2014, shortly after Mr. Moyse resigned from Catalyst to join West Face as a junior associate. Among other things, Catalyst alleged that Mr. Moyse had conveyed unspecified confidential information of Catalyst to West Face. A copy of Catalyst's Statement of Claim issued on June 25, 2014 is attached as Exhibit "3".

---

[11] Trial Reasons, at para. 31, West Face's Motion Record, Vol. 1, Exhibit 1, p. 94.

[12] Plan of Arrangement Reasons, at para. 9, West Face's Motion Record, Vol. 1, Exhibit 2, p. 137.

8. On October 9, 2014, following the Consortium's publicly announced acquisition of VimpelCom's interest in WIND, Catalyst amended its pleading in the Moyse Litigation to assert specific claims in respect of West Face's participation in the acquisition of WIND. Among other things, Catalyst alleged that West Face had "wrongfully used" Catalyst's confidential information "to obtain an unfair advantage over Catalyst in its negotiations with [WIND]. But for the transmission of Confidential Information concerning [WIND] from [Mr.] Moyse to West Face, West Face would not have successfully negotiated a purchase of [WIND]".[13] A copy of Catalyst's Amended Statement of Claim filed October 9, 2014 is attached as Exhibit "4".

9. Representatives of Catalyst later gave evidence during discovery and at trial of the Moyse Litigation indicating that at the time that Catalyst delivered its Amended Statement of Claim in October, 2014, it was aware that West Face had made an acquisition proposal to VimpelCom in August 2014, during a period in which Catalyst was engaged in exclusive negotiations with VimpelCom. Specifically, on June 6, 2014 – the first day of trial – Catalyst called Gabriel De Alba as a witness. Mr. De Alba is Catalyst's Managing Director and was the lead Partner of Catalyst on the deal team that negotiated with VimpelCom for the purchase of WIND. During cross-examination, Mr. De Alba was asked the following questions and gave the following answers:

> Q. And you certainly knew in August or September of 2014 that the West Face consortium had made a proposal to VimpelCom?
>
> A. I don't recall if I knew that they -- the consortium had made a proposal.

[13] Catalyst's Amended Statement of Claim, at para. 34.6, West Face's Motion Record, Vol. 1, Exhibit 4, p. 184.

Q. You were informed by Chris Gauthier [of Bennett Jones, VimpelCom's counsel] at the time that they had made a proposal, correct?

A. That there was another party making a proposal. I don't recall if it was all the consortium or who it was.

Q. You were aware in August or September from Mr. Gauthier that Bennett Jones -- sorry, let me just make sure we're all on common ground. Mr. Gauthier was at Bennett Jones who were counsel to VimpelCom, correct?

A. Correct.

Q. And Mr. Gauthier informed you in August or September of 2014 that the West Face consortium, the consortium that included West Face, had made a proposal during the period of exclusivity?

A. I don't recall if he informed that there was another proposal or who precisely had made the proposal.

Q. You learned from Mr. Gauthier that the approach that had been pursued by the West Face consortium and by VimpelCom was to continue to receive proposals in order to have a potential alternative. You were aware of that in September/August of 2014, correct?

A. No, I learned that the proposal was submitted from this trial.

Q. Mr. de Alba, do you recall being examined for discovery by me on May the 11th of 2016?

…

MR. MILNE-SMITH: So Your Honour, we're on page 191 of the transcript [of the examination for discovery of Gabriel De Alba held May 11, 2016].

THE COURT: Page what?

MR. MILNE-SMITH: 191.

THE COURT: Yes.

MR. MILNE-SMITH: Starting at question 709, about half-way down the page.

BY MR. MILNE-SMITH:

Q. "Question: You believe that Mr. Saratovsky and the VimpelCom board breached their exclusivity obligations to Catalyst?

Answer: I do believe that.

Question: Okay. And when did you form that belief?

Answer: After, I need to remember precisely, but after we lost the exclusivity --

Question: Yes.

Answer: -- I learned from Mr. Gauthier that the approach that had been pursued by the West Face consortium and by VimpelCom was to continue to receive proposals in order to have a potential alternative. And he invited and noted that the exclusivity did not have a notification clause if other proposals would have been received, and he further, you know, mentioned that that's, you know, something that had been happening.

Question: And this you found out back in August 2014 after your exclusivity expired?

Answer: I don't remember precisely when.

Question: But in that August/September time frame?

Answer: I don't remember precisely when.

Question: It wasn't, like, this year, it was back at the time the events in question were happening?

Answer: Yeah, but I don't remember if -- yes."

Were you asked those questions and did you give those answers?

A. Yes.

Q. Thank you.

THE COURT: The next question, "And were they true."

BY MR. MILNE-SMITH:

Q. And were they true?

A. Yes.

Q. Were they true when given?

A. Yes.[14]

10. A copy of the relevant excerpt from the trial transcript containing this exchange is attached as Exhibit "5".

11. On December 16, 2014, Catalyst further amended its Claim in the Moyse Litigation to seek: (i) a constructive trust over West Face's interest in WIND; and (ii) an accounting of profits earned by West Face with respect to its investment in WIND as a result of the alleged misuse of Catalyst's confidential information. A copy of Catalyst's Amended Amended Statement of Claim dated December 16, 2014 is attached as Exhibit "6".

(ii) The Motion Before Justice Glustein

12. On January 13, 2015, Catalyst served a motion in the Moyse Litigation seeking two forms of interlocutory relief against West Face:

(a) first, an interlocutory injunction restraining West Face (and its officers, directors, employees, agents or any persons acting under its direction or on its behalf) from (i) participating in the management and/or strategic direction of WIND; and (ii) participating in the advanced wireless services spectrum

[14] Trial Transcript of Cross-Examination of Gabriel De Alba, June 6, 2016, pp. 238:18-243:17, West Face's Motion Record, Vol. 1, Exhibit 5, pp. 188-193.

auction that was being conducted at the time by Industry Canada (the "**WIND Injunction**");[15] and

(b) second, an order authorizing an Independent Supervising Solicitor (an "**ISS**") to create and review forensic images of all of West Face's electronic devices, for the stated purpose of identifying **whether** West Face had misused any confidential information belonging to Catalyst (the "**Imaging Order**").[16]

13. A copy of Catalyst's Notice of Motion dated January 13, 2015 is attached as Exhibit "7".

14. Catalyst amended its Notice of Motion on February 6, 2015 to seek an order jailing Mr. Moyse for allegedly destroying relevant documents in contempt of a previous court order (the "**Contempt Motion**").

15. Catalyst served its Motion Record on or around February 18, 2015. Catalyst's Motion Record included the Affidavit of James Riley sworn February 18, 2015. Mr. Riley is one of Catalyst's three Partners and its Chief Operating Officer. In his Affidavit, Mr. Riley deposed that during Catalyst's period of exclusive negotiations with VimpelCom, the parties had agreed on all but one point: "Catalyst wanted to ensure that its purchase was conditional on receiving certain regulatory concessions from Industry Canada, but

---

[15] Catalyst's Notice of Motion dated January 13, 2015, at para. (b), West Face's Motion Record, Vol. 1, Exhibit 7, pp. 215-216.

[16] Catalyst's Notice of Motion dated January 13, 2015, at para. (c), West Face's Motion Record, Vol. 1, Exhibit 7, p. 216-217.

VimpelCom would not agree to the conditions Catalyst sought".[17] Mr. Riley also deposed that the Consortium ultimately "purchased WIND from VimpelCom on what [Mr. Riley] believe[d] were essentially the same terms as Catalyst had proposed, with the one exception that the Consortium waived the regulatory conditions Catalyst had been seeking".[18]

16. A copy of Catalyst's Motion Record dated February 18, 2015 is attached as Exhibit "8".[19]

17. On March 13, 2015, West Face served and filed a four-volume Responding Motion Record responding to Catalyst's motion.[20] This Responding Motion Record included the Affidavit of Anthony Griffin sworn March 7, 2015. Mr. Griffin is one of West Face's four Partners, and was the Partner who had primary responsibility for West Face's pursuit of WIND during most of the period in question.

18. In his Affidavit sworn March 7, 2015, Mr. Griffin described how and when the Consortium acquired WIND. In doing so, he referred specifically to the unsolicited offer that West Face, Tennenbaum and LG Capital made to VimpelCom during the period in which Catalyst was engaged in exclusive negotiations with VimpelCom:

> **Overview**
>
> 5. West Face's interest in WIND dates back to at least November 2009, almost five years before Mr. Moyse joined

---

[17] Affidavit of James Riley sworn February 18, 2015, at para. 45, West Face's Motion Record, Vol. 2, Exhibit 8, p. 305.

[18] Affidavit of James Riley sworn February 18, 2015, at para. 46, West Face's Motion Record, Vol. 2, Exhibit 8, p. 306.

[19] The Affidavit of James Riley sworn February 18, 2015 was at Tab 3 to that Record.

[20] While West Face formally served its responding motion record on March 13, 2015, West Face's counsel had previously provided electronic copies of the Affidavits in West Face's responding motion record to Catalyst's counsel on March 9, 2015.

West Face as a junior associate, and almost three full years before he was employed by Catalyst. Critically, the necessary deal elements for a successful bid to acquire WIND, including price, were not confidential to any particular bidder. Rather, VimpelCom Ltd. (WIND'S principal equity-holder who controlled the sale process) and its financial advisor, UBS Investment Bank, had made it clear to all interested purchasers, including West Face, that VimpelCom required an enterprise value of $300 million and a transaction structure that minimized the regulatory risks that could prevent or delay closing.

6. **Before Mr. Moyse joined West Face on June 23, 2014, West Face** had already engaged in negotiations with VimpelCom to acquire WIND, **had formulated a strategy to acquire WIND in concert with others**, and had assembled the majority of the critical deal components that ultimately allowed it to participate successfully in the acquisition of WIND:

> (a) **we had been in contact with Anthony Lacavera and Tennenbaum Capital Partners, both of which would ultimately form critical parts of the successful investor syndicate that acquired WIND as described below**;
>
> (b) we had accepted VimpelCom's demand for an enterprise value in the range of $300 million for WIND; and
>
> (c) we knew from our communications with VimpelCom's financial advisor UBS that VimpelCom wanted to sell its entire interest in WIND quickly, while minimizing risk of regulatory approval.

7. **Tennenbaum and Mr. Lacavera ultimately proved critical in assisting West Face and its partners to structure a transaction that was satisfactory to VimpelCom**.

8. Mr. Moyse worked at West Face as a junior associate for three and a half weeks, from June 23, 2014 to July 16, 2014. Before he even arrived at the firm, West Face implemented a confidentiality wall to ensure that Mr. Moyse did not disclose any confidential Catalyst information he may have possessed to West Face relating to WIND or the AWS-3 auction.

9. Specifically with respect to WIND, during the short period in which Mr. Moyse worked for West Face, West Face was pursuing the WIND transaction with another strategic partner that ultimately declined to participate. In other words, while Mr. Moyse was at West Face, we were pursuing what proved to be a dead end, and even so, Mr. Moyse had no involvement in those negotiations.

10. On July 16, 2014, Mr. Moyse agreed to an interim consent order (the "**July 16 Consent Order**") precluding him from working at West Face. At that time, Mr. Moyse was immediately placed on indefinite leave by West Face. Since then, Mr. Moyse has performed no work for West Face and has had no involvement in any investment analysis or decision-making at West Face.

11. **One week after Mr. Moyse was placed on leave by West Face, Greg Boland, West Face's CEO, was informed by UBS that VimpelCom had granted another party (which we now know to be Catalyst) exclusive rights to negotiate a binding agreement to acquire WIND.** By that time, Mr. Moyse was on leave from West Face, and West Face was shut out from negotiations. **However, Catalyst failed to reach a definitive agreement with VimpelCom to acquire WIND during its exclusivity window, which expired on August 18, 2014.** As described below, Catalyst's failure to do so was entirely its own doing, and was in no way attributable to West Face, Mr. Moyse, or any alleged disclosure of confidential information.

12. **After Catalyst's exclusivity period expired on August 18, 2014, West Face and its partners, including Tennenbaum and Mr. Lacavera, moved swiftly to conclude a deal with VimpelCom**. West Face had been working on-and-off with those partners for months before Mr. Moyse ever joined West Face, and Mr. Moyse had already been on indefinite leave from West Face for over one month by that point. **The first phase of the WIND transaction closed on September 16, 2014, less than one month later, on a basis consistent with the previously disclosed deal parameters demanded by VimpelCom and UBS**.

…

Catalyst Wins the Right to Negotiate Exclusively with VimpelCom

71. At this time [late July 2014], **West Face explored alternative financing options, including by reviving its former discussions with the Tennenbaum Syndicate, as well as discussions with other potential partners**. As described above, West Face's discussions with Tennenbaum had pre-dated Mr. Moyse's employment at West Face. **Before discussions with Tennenbaum could advance however, on July 23, 2014 (a week after Mr. Moyse went on leave), I learned from Mr. Boland that VimpelCom had granted another bidder an exclusive negotiating period to conclude a binding agreement for the acquisition of WIND. Mr. Riley has now disclosed in paragraph 44 of his February 18, 2015 Affidavit that Catalyst was the other bidder in question. This period of exclusivity was extended several times, ultimately to August 18, 2014.**

72. During the period of exclusivity, VimpelCom was forbidden to, and in fact did not, negotiate with West Face. While we continued to work on refining our proposal, we could not receive any feedback from VimpelCom or its advisors nor could we receive any further information from WIND management as to whether our proposals would be satisfactory to VimpelCom. We had no insight into the status of Catalyst's negotiations and no ability to influence the outcome of these negotiations.

73. Ultimately, and despite having the benefit of an exclusive negotiating period, Catalyst was not able to conclude a deal with VimpelCom. Catalyst's period of exclusivity expired on August 18, 2014. **Based on paragraph 45 of Mr. Riley's February 18, 2015 Affidavit, I understand that an inability to address VimpelCom's regulatory concerns of the kind I have already discussed, and which were widely known to all bidders from late 2013, was the reason Catalyst was unable to proceed.** As described above, the wireless industry is a heavily regulated one in which Industry Canada-exercises significant regulatory discretion. As will be described below, **West Face and its fellow syndicate members were able to develop a structure that materially reduced or eliminated the regulatory risk to VimpelCom**. Mr. Moyse had nothing to do with the development of this structure or how it was implemented. As noted above, he had been on indefinite leave from West Face since July 16, 2014. Further, and also as described above, West Face had the pieces of what ultimately became the winning bid long before Mr. Moyse began working at West Face on June 23, 2014.

New Investor Syndicate Reaches Agreement to Acquire WIND

75. **By early August 2014, Tennenbaum, West Face and LG Capital Investors (collectively, the "New Syndicate") began work on a proposal that would avoid the need for regulatory approval prior to the full exit of VimpelCom by leaving AAL in place as the majority owner of the voting shares of WIND, with the New Syndicate providing a majority of the financing to buy out VimpelCom. The New Syndicate would take non-voting shares and thereby largely assume the regulatory risk itself. WIND'S existing third party debt would be refinanced by another investment firm with which Tennenbaum had a relationship.**

76. **The risk of this approach to the new investors was that AAL would have full voting control of WIND until regulatory approval was obtained, despite only contributing approximately 25% of the equity funding for the transaction. While AAL would commit to support a post-closing reorganization that would allow the New Syndicate members to acquire their proportionate shares of the voting interests in WIND, the reorganization would require regulatory approval. If that approval was denied, the members of the New Syndicate would have been required to remain in a non-voting equity position.**

77. **The advantage of this two-stage approach was to meet VimpelCom's need for a transaction that carried no regulatory risk to VimpelCom and that permitted VimpelCom to receive its consideration immediately upon signing of the purchase agreement, rather than waiting until after regulatory approval had been obtained. These advantages were only possible with the participation of AAL**. West Face's relationships with AAL and Mr. Lacavera went back to at least November 2009, and had been more recently rekindled through my conversation with Mr. Lacavera on November 4, 2013, not from anything Mr. Moyse did or said. **The New Syndicate submitted this proposal to VimpelCom on August 7, 2014, though we learned at that time that VimpelCom would not consider the proposal while it was engaged in exclusive negotiations**.

78. However, also on August 7, 2014, AAL advised the New Syndicate that it had entered into a support agreement with

> VimpelCom and was required to cease discussions with the New Syndicate. The deal remained in Catalyst's hands at that time, and we believed that our chances of proceeding with the transaction were essentially nil.
>
> 79. **The exclusivity period expired on August 18, 2014, and the New Syndicate moved quickly to get a deal done**. On August 21, 2014, VimpelCom agreed with West Face that it would not enter into another exclusivity arrangement with any party until August 25, 2014. West Face's understanding was that the New Syndicate needed to present an acceptable deal structure by that time if it wanted to be considered for exclusive negotiations on that date.
>
> 80. **On August 23, 2014, West Face's counsel delivered a revised proposal on behalf of the New Syndicate that addressed certain concerns raised by VimpelCom with the transaction structure in the New Syndicate's proposal from August 7, 2014. On August 25, 2014, West Face's counsel delivered to VimpelCom's counsel an executed conditional financing commitment letter on behalf of the New Syndicate, AAL and two other investors who would be co-investing with AAL.** VimpelCom thereafter granted exclusive negotiating rights to the New Syndicate, and further negotiations continued. In particular, VimpelCom remained concerned that, notwithstanding the proposed two-stage transaction, Industry Canada would take the position that approval was required for the first stage. To alleviate VimpelCom's concerns, the New Syndicate gave a representation that no regulatory approval was required to close the first phase of the transaction (whereby VimpelCom would be paid), and also agreed to indemnify VimpelCom in the event this representation was wrong. **Ultimately a definitive purchase agreement was signed and the transaction closed on September 16, 2014.**[21] (emphasis added)

19. A copy of West Face's four-volume Responding Motion Record dated March 9, 2015 is attached as Exhibit "9".[22]

---

[21] Affidavit of Anthony Griffin sworn March 7, 2015, at paras. 5-12, 71-73, & 75-80, West Face's Motion Record, Vol. 3, Exhibit 9, pp. 605-608, 629-630, 631-633.

[22] Mr. Griffin's March 7, 2015 Affidavit was at Tab A of that Record.

20. Additional motion records were served and filed by all three parties (Catalyst, West Face and Mr. Moyse) during the period between April 6, 2015 and June 8, 2015. In particular, Catalyst filed a Supplementary Motion Record on or around May 1, 2015, which included an additional Affidavit of James Riley sworn May 1, 2015. In this Affidavit, Mr. Riley again asserted that Catalyst's "anticipated deal" with VimpelCom was conditional on "the granting of certain regulatory concessions to a Catayst-owned [*sic*] WIND".[23] A copy of Catalyst's Supplementary Motion Record dated May 1, 2015 is attached as Exhibit "10".[24]

21. On May 13, 2015, my colleague Matthew Milne-Smith cross-examined Mr. Riley on his Affidavits sworn February 18 and May 1, 2015. During that cross-examination, Mr. Riley was asked the following questions and gave the following answers:

> 510 Q. That's fine. I take it I'm right that Catalyst has not commenced proceedings against VimpelCom for breach of that exclusivity obligation?
>
> A. No, we have not.
>
> 511 Q. There is no suggestion here that VimpelCom breached exclusivity?
>
> A. I wouldn't say that.
>
> 512 Q. You haven't sent a demand letter to VimpelCom?
>
> A. We have not at this time.
>
> 513 Q. You haven't made any allegation to VimpelCom in that regard?
>
> A. Not to my knowledge. However, when a contract is breached, as I recall, there's two -- you can -- under the theory

---

[23] Affidavit of James Riley sworn May 1, 2015, at para. 42, West Face's Motion Record, Vol. 7, Exhibit 10, p. 2277-2278.

[24] The Affidavit of James Riley sworn May 1, 2015 was at Tab 1 of that Record.

> of Lumly and Guy [*sic*], and I'm not trying to play lawyer, you can go after one of two parties, the party breaching or the party inducing a breach.
>
> 514 Q. There's been no pleading of inducing breach of contract?
>
> A. There's been no pleading.[25]

22. The transcript of Mr. Riley's May 13, 2015 cross-examination was served and filed on or around June 8, 2015 as part of a Joint Supplementary Responding Motion Record of the Defendants. A copy of the Joint Supplementary Responding Motion Record of the Defendants is attached as Exhibit "11".[26]

23. As will be discussed below, this cross-examination evidence of Mr. Riley was later considered and commented on by Justice Newbould in the related Plan of Arrangement Application discussed below, in relation to the claim that Catalyst now brings in this New Litigation for inducing breach of contract.

24. Ultimately, Catalyst's motion was heard by Justice Glustein on July 2, 2015. Justice Glustein dismissed Catalyst's motion in its entirety on July 7, 2015. A copy of Justice Glustein's Endorsement is attached as Exhibit "12".

(iii) Catalyst's Attempted Appeal of the Imaging Order

25. On July 22, 2015, Catalyst served a Notice of Appeal and Appellant's Certificate in which it purported to appeal directly to the Court of Appeal from Justice Glustein's dismissal of both the Imaging Order (against West Face) and the Contempt Order

---

[25] Transcript of Cross-Examination of James Riley held May 13, 2015, at qq. 510-514, West Face's Motion Record, Vol. 8, Exhibit 11, p. 2642.

[26] The Transcript of the Cross-Examination of Mr. Riley held May 13, 2015 was at Tab 10 of that Record.

(against Mr. Moyse). Catalyst did not purport to appeal the dismissal of the WIND Injunction.

26. Catalyst did not seek leave to appeal from the Divisional Court. This was so even though Catalyst's Notice of Appeal recognized that Justice Glustein's dismissal of the Imaging Order was an interlocutory order. Instead, Catalyst took the position in its Notice of Appeal that Justice Glustein's dismissal of the Contempt Order was a final order, and that the Court of Appeal had jurisdiction to hear its appeals of both the Contempt Order and the Imaging Order on the basis of sections 6(1) and 6(2) of the *Courts of Justice Act*. A copy of Catalyst's Notice of Appeal is attached as Exhibit "13".

27. Two days later, on July 24, 2015, both counsel to Mr. Moyse and counsel to West Face sent letters to counsel to Catalyst advising that Catalyst's position was not correct in law, based on recent authority from the Court of Appeal (which had held that the dismissal of a motion for contempt is interlocutory in nature, as opposed to final). Both counsel to Mr. Moyse and counsel to West Face advised that if Catalyst did not withdraw its Notice of Appeal, they would bring motions to quash Catalyst's appeal. Copies of these letters are attached as Exhibits "14" and "15".

28. Catalyst never responded to these letters. Thus, both West Face and Mr. Moyse brought motions to quash Catalyst's appeal on the basis that the appeal lay to the Divisional Court, and only with leave. West Face and Mr. Moyse delivered their respective motion records, facta and authorities in early September 2015. In its Factum, West Face noted that even if Justice Glustein's dismissal of the Contempt Order constituted a final order (which it did not), the Court of Appeal would still have no

jurisdiction to hear the appeal of the interlocutory Imaging Order because Catalyst had not obtained leave to appeal. A copy of West Face's Factum is attached as Exhibit "16".

29. Despite receiving West Face's motion materials, Catalyst took no steps to seek an extension of time to bring a motion for leave to appeal.

30. Ultimately (and after missing the deadline for filing its responding motion materials), Catalyst consented to West Face's motion to quash the appeal of the Imaging Order. A copy of the Court of Appeal's Order quashing (on consent) Catalyst's appeal of the Imaging Order is attached as Exhibit "17".

31. Catalyst contested Mr. Moyse's motion to quash. That motion was heard on November 5, 2015. On November 17, 2015, the Court of Appeal released its decision granting Mr. Moyse's motion to quash and quashing Catalyst's appeal of the Contempt Order. A copy of the Court of Appeal's reasons is attached as Exhibit "18".

32. Catalyst then attempted to pursue its proposed appeal from the dismissal of the Imaging Order in the Divisional Court. Its subsequent combined motion in the Divisional Court for an extension of time to seek leave to appeal, and for leave to appeal itself, was dismissed by Justice Swinton in January 2016. A copy of Justice Swinton's Endorsement is attached as Exhibit "19".

33. Thus, Catalyst's interlocutory motion for the Imaging Order (the stated purpose of which was to determine **whether** West Face had misused any confidential information of Catalyst) took over a year from start to finish. West Face's position throughout that entire

time period was that Catalyst's motion was premature and unfounded, and that the parties should simply have proceeded to the normal discovery process.

C. THE PLAN OF ARRANGEMENT APPLICATION

34. As set out above, following the Consortium's successful acquisition of WIND, and after receipt of the necessary regulatory approvals, WIND became a wholly-owned subsidiary of Mid-Bowline, with each member of the Consortium holding voting interests in Mid-Bowline in proportion to their overall economic interests in WIND.[27]

35. On December 23, 2015, Mid-Bowline commenced an application for approval of a plan of arrangement (the "**Plan of Arrangement**") pursuant to which the shares of Mid-Bowline were to be transferred to Shaw Communications Inc. ("**Shaw**") for approximately $1.6 billion.

36. The Plan of Arrangement provided that the shares of Mid-Bowline were to be transferred to Shaw free and clear of Catalyst's claim for a constructive trust over West Face's indirect interest in WIND that Catalyst had asserted in its Amended Amended Statement of Claim of December 16, 2014.

37. The central reason why this transaction proceeded by way of plan of arrangement (as opposed to, for example, a share purchase agreement) was to enable Shaw to acquire clear title to the shares of WIND, while at the same time giving Catalyst an opportunity to be heard by the Court on the application for approval of the proposed Plan of Arrangement.

---

[27] Plan of Arrangement Reasons, at para. 9, West Face's Motion Record, Vol. 1, Exhibit 2, p. 137.

38. Within minutes of the proposed transaction being made public on December 16, 2015, Mr. Milne-Smith emailed Catalyst's counsel the press release announcing the transaction and the intended Plan of Arrangement Application. A copy of this email is attached as Exhibit "20".

39. On December 21, 2015, Mr. Milne-Smith emailed the Commercial List requesting an appointment with Justice Newbould, as co-ordinator of the Commercial List, so that a trial of an issue (or a "mini-trial", as Mr. Milne-Smith put it) could be scheduled to resolve Catalyst's anticipated objections to the Plan of Arrangement. Mr. Milne-Smith copied Catalyst's counsel on this email. A copy of this email is attached as Exhibit "21".

40. After a series of 9:30 a.m. chambers appointments before Justice Newbould in January 2016, the Plan of Arrangement approval hearing was ultimately scheduled to be heard for four days commencing on Monday, January 25, 2016.

41. On January 8, 2016, Mid-Bowline served and filed a four-volume Application Record. This Record included, among other things, Affidavits of:

(a) Mr. Griffin, on behalf of West Face;

(b) Hamish Burt, on behalf of LG Capital;

(c) Michael Leitner, on behalf of Tennenbaum, and

(d) Simon Lockie, on behalf of Globalive.

42. These Affidavits filed in the Plan of Arrangement Application repeated in detail the description previously set out by West Face approximately ten months before in the

Moyse Litigation, in Mr. Griffin's Affidavit of March 7, 2015, concerning how and when the Consortium came to acquire WIND, including by describing the roles played by West Face, LG Capital, Tennenbaum and Globalive in proceeding with and completing that acquisition.

43. A copy of Mid-Bowline's four-volume Application Record dated January 8, 2016 is attached as Exhibit "22".

44. Later that day, Catalyst delivered a Case Conference Memorandum to Justice Newbould, Mid-Bowline and Shaw in advance of a 9:30 a.m. chambers appointment before Justice Newbould scheduled for Monday, January 11, 2016. In that Memorandum, Catalyst stated, among other things, that the Moyse Litigation was then "at a very early stage", that "[p]leadings [were] not even closed", and that the "parties ha[d] not even started the discovery process".[28] Copies of Catalyst's Memorandum, and West Face's Responding Memorandum, are attached as Exhibits "23" and "24".

45. On January 14, 2016, Justice Newbould granted an Order transferring the Moyse Litigation to the Commercial List. Catalyst did not oppose the transfer. A copy of Justice Newbould's January 14 Order is attached as Exhibit "25".

46. By Monday, January 25, 2016 – the first day of the scheduled four day Plan of Arrangement approval hearing – Catalyst had filed no materials in response to the Plan of Arrangement Application. Nor had Catalyst's counsel taken any steps to cross-examine Messrs. Griffin, Burt, Leitner or Lockie on their Affidavits filed in support of the Plan of

[28] Catalyst's Memorandum dated January 8, 2016, at para. 7, West Face's Motion Record, Vol. 14, Exhibit 23, p. 5026.

Arrangement Application. I am informed by Mr. Milne-Smith and verily believe that before the hearing commenced, counsel to Catalyst took the position that the Plan of Arrangement approval hearing should be adjourned. Counsel to West Face and Mid-Bowline took the position that the hearing should proceed. Justice Newbould directed the parties to proceed with the hearing at 2:00 p.m. that day, rather than at 10:00 a.m. as had originally been scheduled.

47. I am also informed by Mr. Milne-Smith and believe that shortly before the Plan of Arrangement approval hearing was to commence at 2:00 p.m., Catalyst served and filed its Responding Application Record (mis-titled a Responding Motion Record) and Responding Factum opposing the Plan of Arrangement. Copies of these materials are attached as Exhibits "26" and "27".

48. Catalyst's Responding Application Record included the Affidavit of James Riley sworn January 25, 2016. In the last paragraph of this Affidavit, Mr. Riley set out Catalyst's position as to why the proposed Plan of Arrangement should not be approved by Justice Newbould:

> 21. Catalyst also believes it deserves the opportunity to have its claim [in the Moyse Litigation] heard and determined through a process that is fair and reasonable. **That includes**, at a minimum, the opportunity for proper documentary discovery, examinations and **the ability to amend the claim to take into account information learned for the first time through the materials filed on this application**. [29] (emphasis added)

[29] Affidavit of James Riley sworn January 25, 2016, at para. 21, West Face's Motion Record, Vol. 14, Exhibit 26, p. 5078.

49. The following day – January 26, 2016 – Justice Newbould released his Reasons in the Plan of Arrangement Application (the "**Plan of Arrangement Reasons**", previously attached as Exhibit "2"). In these Reasons, Justice Newbould stated, among other things:

> [51] On Monday [January 25, 2016], in his affidavit sworn that morning, Mr. Riley made a statement indicating Catalyst intends to seek as relief in the [Moyse Litigation] 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 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[s] 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. <u>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</u>.**
>
> [54] On his cross-examination on May 13, 2015 Mr. Riley … 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 agreement 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 [*sic*], and I'm not trying to play lawyer, you can go after one of two parties, the party breaching or the party inducing a breach.
>
> [55] Mr. Riley is a very experienced lawyer. He was aware of the case of *Lumley v. Guy*, (1853) 118 ER 749, a case in England in which an opera singer was induced by Covent Garden to leave another theatre at which the singer had an agreement to perform. It was in that case that the modern action for inducing breach of contract was established.
>
> [56] **Although Catalyst was aware on March 13, 2015 of the facts that Mr. Riley now asserts he wants to use in this intended inducing breach of contract action, and was aware of the nature of a breach of contract action as disclosed on his cross-examination, it was only on Monday of this week [January 25, 2016] that anything was first said by Catalyst about that**.[30] (emphasis added)

50. Justice Newbould held that Catalyst had known the facts necessary to commence the threatened claim for inducing breach of contract since March 2015 at the latest, and that Catalyst had not acted in good faith in its efforts to oppose the approval by the Court of the proposed Plan of Arrangement by lying in the weeds:

> [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

---

[30] Plan of Arrangement Reasons, at paras. 51-56, West Face's Motion Record, Vol. 1, Exhibit 2, pp. 149-150.

> new intended claim was not brought sooner.[31] (emphasis added)

51. In short, Justice Newbould was critical of Catalyst's attempt to oppose approval by the Court of the proposed Plan of Arrangement by arguing that the Court's approval could potentially affect claims that Catalyst had chosen not to assert, even though Catalyst could have done so months earlier.

52. In his Plan of Arrangement Reasons of January 26, 2015, Justice Newbould did not approve the proposed Plan of Arrangement. Instead, he ordered an expedited trial of the issue of "whether Catalyst has a right to a constructive trust" over West Face's indirect interests in WIND, to be heard on February 22 to 26, 2016. Justice Newbould held that it was "up to Mid-Bowline" as to whether this trial of an issue would include the more general issue of "whether Catalyst ha[d] any claim for misuse of Catalyst confidential information".[32] However, Justice Newbould held that, given the circumstances in which Catalyst had belatedly raised the prospect of asserting a potential inducing breach of contract claim, the trial of the issue in the Plan of Arrangement Application would not include Catalyst's threatened inducing breach of contract 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**.[33] (emphasis added)

---

31 Plan of Arrangement Reasons, at para. 59, West Face's Motion Record, Vol. 1, Exhibit 2, p. 151 .
32 Plan of Arrangement Reasons, at para. 50, West Face's Motion Record, Vol. 1, Exhibit 2, p. 148 .
33 Plan of Arrangement Reasons, at para. 61, West Face's Motion Record, Vol. 1, Exhibit 2, p. 151.

53. Shortly after Justice Newbould released his Plan of Arrangement Reasons – and before the Court had issued a formal order reflecting those Reasons – Catalyst's counsel, Mr. DiPucchio, advised by email that Catalyst intended to withdraw its claim for a constructive trust over West Face's interest in WIND. A copy of Mr. DiPucchio's January 31, 2016 email to this effect is attached as Exhibit "28".

54. Catalyst's withdrawal of its request for a constructive trust rendered the trial of an issue directed by Justice Newbould in the Plan of Arrangement Application unnecessary. Rather than proceed with the trial of an issue, the parties to the Plan of Arrangement Application negotiated, and ultimately agreed, to the terms of a Consent Order approving the proposed Plan of Arrangement. That Order was granted by Justice Newbould during a brief chambers attendance on the morning of February 3, 2016. Thereafter, the Plan of Arrangement was implemented, and the sale of WIND to Shaw was completed on or around March 1, 2016.

55. A copy of the Order of Justice Newbould of February 3, 2016 approving the Plan of Arrangement is attached as Exhibit "29".

D. THE CONTINUATION OF THE MOYSE LITIGATION

56. As an agreement was being reached to resolve the Plan of Arrangement Application, the parties to the Moyse Litigation discussed the various steps that would be required to prepare that litigation for trial, as well as potential trial dates. West Face had repeatedly communicated to Catalyst its desire that Catalyst's claims against it be determined by the Court as soon as possible, and that it therefore wanted to proceed to trial on an expeditious basis. By then, Catalyst's claims in the Moyse Litigation had been

outstanding for many months, and the parties had spent over a year litigating Catalyst's failed motion for an Imaging Order. As discussed below, counsel to the parties to the Moyse Litigation also discussed whether Catalyst would further amend its Claim in that litigation to add its threatened claim of inducing breach of contract against West Face, and, potentially, against other new Defendants.

57. On the afternoon of February 2, 2016, my colleague Kent Thomson and I had a conference call with Mr. DiPucchio (and, I believe, his associate Lauren Epstein). I took handwritten notes of that phone call. During that phone call, we discussed potential trial dates for the Moyse Litigation, and tentatively agreed to the weeks of Monday, May 16 and Tuesday, May 24, 2016 (May 23 was a holiday), subject to the Court's availability.

58. During this call Mr. Thomson took the position that if Catalyst actually intended to assert a claim against West Face for inducing breach of contract, it should do so promptly by amending its Claim in the Moyse Litigation so that all of Catalyst's claims against West Face concerning the acquisition of WIND could be heard and determined at the same time, assuming that any proposed additional defendants to that claim would agree. Independent from my handwritten notes, I specifically recall that Mr. DiPucchio indicated that he would consider that course of action, but expressed concern about the relatively tight time-frame within which the inducing breach claim would have to be pleaded and discovered.

59. According to my handwritten notes, the words Mr. DiPucchio used in response to Mr. Thomson's request were:

> I guess so. At [the] end of [the] day [we are] just talking about money. Let me think about that. I may want it all tried together. If we can accomplish everything by May in principle I'm not objecting to that.

60. A copy of my handwritten notes from this phone call is attached as Exhibit "30". A copy of a typewritten transcription of these notes, which I verify is accurate, is attached as Exhibit "31".

61. During this phone call Mr. DiPucchio **did not take the position** that Catalyst had been directed or ordered not to assert its inducing breach claim in the Moyse Litigation, either by Justice Newbould's Plan of Arrangement Reasons or otherwise. No such direction or order had even been given. As is made clear above, Justice Newbould's Plan of Arrangement Reasons dealt with the scope of the claims Catalyst could assert in the February trial of an issue His Honour directed in that proceeding in relation to Catalyst's claim for a constructive trust. Those Reasons did not limit or determine in any way the scope of the claims Catalyst could assert in the Moyse Litigation.

62. Thereafter, Catalyst took no steps in the Moyse Litigation to assert claims of inducing breach against West Face, or against anyone else for that matter. Catalyst did not propose or deliver any such amendments to its Claim, nor seek the consent of West Face or leave from Justice Newbould to do so.

63. During the chambers appointment before Justice Newbould referred to above that occurred the following day, on the morning of February 3, 2016, counsel to the parties in the Moyse Litigation discussed with Justice Newbould potential trial dates for that litigation. Counsel and Justice Newbould ultimately agreed that the trial of the Moyse Litigation would be heard over six days commencing on May 18, 2016. A copy of the

counsel slip that included Justice Newbould's endorsement of the trial date commencing May 18, 2016 is attached as Exhibit "32". As set out further below, these trial dates were later moved to commence on June 6, 2016. The trial of the Moyse Litigation proceeded then for six days of evidence plus an additional day of closing submissions on June 14, 2016.

(i) Justice Newbould Did Not Make an Order Precluding Catalyst from Amending its Claim in the Moyse Litigation

64. Catalyst has appealed to the Court of Appeal from the Judgment of Justice Newbould in the Moyse Litigation. In its appeal, Catalyst has taken the position that Justice Newbould somehow "barred" Catalyst from amending its Claim in the Moyse Litigation to advance the claims it now seeks to assert in this New Litigation, and that Justice Newbould also prevented Catalyst from "leading facts" about these claims at the trial of the Moyse Litigation. Specifically, in its Supplementary Notice of Appeal dated October 21, 2016 (a copy of which is attached as Exhibit "33"), Catalyst alleges the following:

> 30. The trial judge [Justice Newbould] deprived Catalyst of procedural fairness by barring Catalyst from advancing certain claims and leading facts about these claims but then making factual findings about these claims in any event.
>
> 31. Prior to the trial, the trial judge refused to permit Catalyst to amend its Statement of Claim to include allegations that West Face had induced VimpelCom to breach a contract that provided Catalyst with an exclusive negotiating period with VimpelCom (the "Exclusivity Agreement").
>
> 32. The trial judge held that Catalyst's allegations of inducing breach of contract against West Face would not form any

> portion of the trial between Catalyst, West Face, and Moyse (the "Moyse Litigation").[34]

65. As is made clear above, the factual premises underlying these allegations are incorrect. To be perfectly clear, Justice Newbould **did not** "refuse to permit Catalyst to amend its Statement of Claim [in the Moyse Litigation] to include allegations that West Face had induced VimpelCom to breach a contract that provided Catalyst with an exclusive negotiating period with VimpelCom." No such amendment was proposed by Catalyst, let alone objected to by West Face or denied by Justice Newbould at any time.

66. Moreover, and as described in detail below, Catalyst's conduct throughout the period from January 2016 to the commencement of trial in the Moyse Litigation in June 2016 suggests that Catalyst itself did not believe that any such restriction had been placed on it. In fact, the first time that Catalyst suggested that it had been "barred" from amending its Claim in the Moyse Litigation as a result of Justice Newbould's Plan of Arrangement Reasons was **after** West Face had declared its intention to bring this motion to strike Catalyst's New Litigation as an abuse of process.

(ii) Pre-Trial Steps in the Moyse Litigation in the Period from February to June, 2016

67. Following the resolution of the Plan of Arrangement Application on February 3, 2016, counsel to the parties to the Moyse Litigation continued to discuss pre-trial steps to the Moyse Litigation.

68. Notably, at this stage, examinations for discovery in the Moyse Litigation had yet to be conducted. Nor had Catalyst delivered its Affidavit of Documents. West Face

---

[34] Catalyst's Supplementary Notice of Appeal, at paras. 30-32, West Face's Motion Record, Vol. 14, Exhibit 33, p. 5174.

delivered its Affidavit of Documents on January 9, 2016, and had previously produced over 1,500 documents to Catalyst on March 13, 2015 in the context of the motion before Justice Glustein.

69. On or around February 8, 2016, Mr. Milne-Smith and I had a conference call with Mr. DiPucchio as well as counsel to Mr. Moyse (Messrs. Rob Centa and Kris Borg-Olivier) to discuss a timetable of pre-trial steps. I took handwritten notes of that phone call.[35] During that phone call, Mr. DiPucchio indicated for the first time that while Catalyst would "probably" be delivering a new amended pleading in the Moyse Litigation, that pleading would not include allegations of inducing breach of contract, and would not add additional defendants. Rather, Mr. DiPucchio stated that if Catalyst was going to bring such a claim, it intended to do so as a separate action. Once again, Mr. DiPucchio did **not** take the position that Catalyst had been directed or ordered not to assert an inducing breach claim in the Moyse Litigation, either by Justice Newbould's Plan of Arrangement Reasons or otherwise. A copy of my handwritten notes from this phone call is attached as Exhibit "34". A copy of a typewritten transcription of these notes, which I verify is accurate, is attached as Exhibit "35".

70. Catalyst ultimately delivered its Amended Amended Amended Statement of Claim on February 25, 2016. While Catalyst deleted its claim for a constructive trust, and added new allegations of spoliation against Mr. Moyse, it did not assert claims of inducing breach of contract and/or conspiracy against West Face. Nor did Catalyst seek to add as parties any of the other Defendants that it now asserts claims against in this New

[35] While these notes are dated February 7, 2016 on their face, I believe that date is wrong, as that was a Sunday. The most likely date of this phone call was Monday, February 8, 2016.

Litigation. A copy of Catalyst's Amended Amended Amended Statement of Claim is attached as Exhibit "36".

71. On March 10, 2016, the parties attended at a 9:30 chambers appointment before Justice Newbould for the purpose of obtaining his endorsement of an agreed upon timetable of steps leading up to the commencement of trial on the agreed upon date of May 18, 2016. However, Justice Newbould informed the parties that he was no longer available for a May trial because he was needed on another exigent matter. The parties and Justice Newbould therefore rescheduled the trial of the Moyse Litigation to be heard in the period from June 6 to 14, 2016. Justice Newbould also endorsed a timetable of pre-trial steps that the parties had agreed to.

(iii) Discovery in the Moyse Litigation

72. As touched on above, West Face had produced over 1,500 documents on March 13, 2015 in the context of the motion before Justice Glustein. West Face had also produced another 300 additional documents on January 9, 2016 in conjunction with its delivery of its Affidavit of Documents.

73. On Friday, April 8, 2016 – three months after receiving West Face's additional productions and the last day for raising document production issues according to the parties' agreed upon timetable that had been endorsed by Justice Newbould – counsel to Catalyst sent counsel to West Face a letter requesting production of a number of categories of additional documents. In this letter, Catalyst's counsel requested that West Face produce, among other things, the following categories of documents:

> -All correspondence … internally at Wind Face [*sic*] regarding WIND Mobile, Globalive, Anthony Lacavera, and/or Vimpelcom prior to April 2014.
>
> -All correspondence … with external parties concerning WIND Mobile, Globalive, Anthony Lacavera, and/or Vimpelcom prior to April 2014.
>
> -All documents … provided to West Face by Anthony Lacavera, including copies of the documents exchanged through the Dropbox account that West Face gained access to on April 16, 2014…..
>
> -All documents … relating to West Face's analysis of WIND Mobile, Globalive, and/or Vimpelcom.
>
> -All documents … relating to West Face's analysis of wireless spectrum, spectrum mapping or wireless spectrum auctions.[36]

74. A copy of this letter from counsel to Catalyst dated April 8, 2016 is attached as Exhibit "37".

75. The parties were able to resolve consensually at least some of Catalyst's requests for further production. However, Catalyst requested a case conference before Justice Newbould in order to address the remaining alleged deficiencies in West Face's document productions. On April 12, 2016, Catalyst's counsel delivered a Case Conference Memorandum to Justice Newbould, in which they requested a direction that West Face produce, among other documents: "Correspondence/Documents between the Consortium/Lacavera". In their Case Conference Memorandum, counsel to Catalyst stated:

> **Correspondence/Documents between the Consortium/ Lacavera:** Catalyst has produced a large number of documents evidencing communication between members of

[36] Letter from Andrew Winton to Matthew Milne-Smith dated April 8, 2016, at pp. 1-2, West Face's Motion Record, Vol.14, Exhibit 37, pp. 5209-5210.

> the deal team and the information that the team was using to make decisions. West Face has produced very few communications between members of the consortium formed for the Wind Transaction. Additionally, it has held back documents referred to in relevant emails, including a web-based file sharing program used by Lacavera to communicate data to West Face within the relevant time period. These documents are important to the action.[37]

76. A copy of this Case Conference Memorandum dated April 12, 2016 is attached as Exhibit "38".

77. Later that evening, counsel to West Face delivered our Responding Case Conference Memorandum. This Memorandum stated the following, in respect of the request of Catalyst referred to above:

> **Request**: All documents provided to West Face by Anthony Lacavera.
>
> **Response**: This is a fishing expedition. These documents are not relevant to Catalyst's claim that Mr. Moyse (not Mr. Lacavera) provided specific, confidential information concerning Catalyst's regulatory strategy to West Face. This request must also be considered in light of Catalyst's prior threat to pursue an action for inducing breach of contract.[38]

78. A copy of West Face's Responding Case Conference Memorandum dated April 12, 2016 is attached as Exhibit "39".

79. In summary, West Face took the position that a number of the additional documents requested by Catalyst were not relevant to Catalyst's allegations pleaded in its Amended Amended Amended Statement of Claim. These included documents provided to West Face by Mr. Lacavera. West Face also took the position that it should

---

[37] Catalyst's Case Conference Memorandum dated April 12, 2016, at para. 3(b), West Face's Motion Record, Vol. 14, Exhibit 38, p. 5212.

[38] West Face's Responding Case Conference Memorandum dated April 12, 2016, at para. 11, West Face's Motion Record, Vol. 14, Exhibit 39, p. 5219.

not be required to produce documents in other categories that did not relate to the pleaded allegation that Mr. Moyse (as opposed to Mr. Lacavera or some other party) had provided confidential information of Catalyst to West Face. At no point in this skirmish concerning West Face's production obligations did West Face or Catalyst take the position that Catalyst had been directed or ordered not to assert its proposed inducing breach claim within the Moyse Litigation, either by Justice Newbould's Plan of Arrangement Reasons or otherwise.

80. This case conference was held on April 13, 2016. After Justice Newbould provided the parties with directions, they were able to agree on the scope of additional productions by West Face. West Face ultimately produced approximately 1,000 additional documents on April 25 and 26, 2016 in response to Catalyst's requests.

81. Examinations for discovery were held on May 10, 11 and 12, 2016. The examination of West Face's representative, Mr. Griffin, took place on May 10, 2016. Catalyst's counsel, Andrew Winton, examined Mr. Griffin on behalf of Catalyst. I attended that examination. A copy of the non-confidential portion of the transcript of the examination for discovery of Mr. Griffin is attached as Exhibit "40".

82. The examination of Catalyst's representative, Mr. De Alba, occurred on May 11, 2016. Mr. Milne-Smith conducted that examination on behalf of West Face. I also attended that examination. Moreover, I prepared West Face's brief of "read-ins" from Mr. De Alba's discovery transcript, which was admitted as evidence at the trial of the Moyse Litigation. The portions of the transcript of Mr. De Alba's examination for discovery

that I cite below were all contained in West Face's read-in brief, a copy of which is attached as Exhibit "41".

83. During Mr. De Alba's examination for discovery, Mr. Milne-Smith asked the following questions, and Catalyst's counsel, Mr. DiPucchio, gave the following answers and undertaking:

> 503 Q. Do you have any evidence that VimpelCom or any of its affiliates as defined in the agreement breached the exclusivity agreement?
>
> MR. DIPUCCHIO: Well, okay, help me out with this. You guys made a big deal about an inducing claim being completely separate from what we're dealing with here, so why is that relevant?
>
> MR. MILNE-SMITH: If you're not pursuing it –
>
> MR. DIPUCCHIO: Well, I'm not saying I'm not pursuing it. I'm just trying to figure out why it's relevant to this proceeding.
>
> MR. MILNE-SMITH: Because I'm still not clear if you're pursuing it in this proceeding.
>
> MR. DIPUCCHIO: But that's a different question. You can write to me on that.
>
> BY MR. MILNE-SMITH:
>
> 504 Q. Are you pursuing an inducing breach claim in this proceeding?
>
> MR. DIPUCCHIO: I don't think we have to answer that today, counsel. In this proceeding?
>
> MR. MILNE-SMITH: In this proceeding, the one that's going to trial.
>
> MR. DIPUCCHIO: No, obviously the pleadings aren't for inducing.
>
> BY MR. MILNE-SMITH:

> 505 Q. Are you pursuing a claim in this proceeding that AAL Telecom Holdings Incorporated, any of its subsidiaries or any of its three principals that I will identify - Mr. Scheschuk, Mr. Lacavera or Mr. Lockie - are you pursuing a claim that any of those parties have breached any kind of legal duty or obligation to Catalyst in respect of their discussions with West Face?
>
> MR. DIPUCCHIO: As part of this claim?
>
> MR. MILNE-SMITH: Yes.
>
> U/T MR. DIPUCCHIO: Let me consider that question and I'll get back to you on that, okay? I think the answer to that is no, obviously, but let me just consider that, okay?[39]

84. At no point during this exchange, or at any other point during the discovery of Mr. De Alba, did Catalyst's counsel take the position that Catalyst had been directed or ordered not to assert its inducing breach claim in the Moyse Litigation, either by Justice Newbould's Plan of Arrangement Reasons or otherwise.

85. On Tuesday, May 24, 2016 (less than two weeks before the start of the trial of the Moyse Litigation), Catalyst delivered a response to some, but not all, of the undertakings and advisements given at Mr. De Alba's examination for discovery. Catalyst's response to the undertaking given above, namely, "To confirm that Catalyst is not pursuing a claim in this proceeding that AAL Telecom Holdings Incorporated, any of its subsidiaries or any of its three principals (Mr. Scheshuk, Mr. Lacavera or Mr. Lockie) have breached any kind of legal duty or obligation to Catalyst in respect of their discussions with West Face", was "Confirmed".[40]

---

[39] Transcript of Examination for Discovery of Gabriel DeAlba held May 11, 2016, qq. 503-505, West Face's Motion Record, Vol.14, Exhibit 41, p. 5492-5493.

[40] Catalyst's Revised Undertakings, Under Advisements, and Refusals Chart of the Examination for Discovery of Gabriel De Alba held May 11, 2016, dated June 2, 2016, at no. 34, West Face's Motion Record, Vol. 14, Exhibit 41, p. 5858.8.

86. At the same time, Catalyst also delivered a response to the following question taken under advisement:

> To the extent that Catalyst intends to lead evidence at trial concerning a breach of exclusivity by VimpelCom, to advise what this evidence will be, including by identifying which communications between West Face and VimpelCom Catalyst alleges were in breach of exclusivity.[41]

87. Catalyst's response to this question was:

> Catalyst does not intend to lead evidence concerning a breach of the exclusivity agreement between Catalyst and VimpelCom in this proceeding.[42]

88. Catalyst ultimately delivered its final "revised" answers to undertakings and advisements on Thursday, June 2, 2016 – the second last business day before trial. Catalyst did not revise its answer to either of the above questions. Thus, at no point did Catalyst take the position during the discovery process in the Moyse Litigation, including in its answers to undertakings and advisements, that Catalyst had been directed or ordered not to assert its inducing breach claim in the Moyse Litigation, either by Justice Newbould's Plan of Arrangement Reasons or otherwise. A copy of the read-in portion of Catalyst's "revised" undertakings, advisements and refusals chart dated June 2, 2016 is included in West Face's read-in brief, previously attached as Exhibit "41".

---

[41] Catalyst's Revised Undertakings, Under Advisements, and Refusals Chart of the Examination for Discovery of Gabriel De Alba held May 11, 2016, dated June 2, 2016, at no. 48, West Face's Motion Record, Vol. 14, Exhibit 41, p. 5858.9.

[42] Catalyst's Revised Undertakings, Under Advisements, and Refusals Chart of the Examination for Discovery of Gabriel De Alba held May 11, 2016, dated June 2, 2016, at no. 48, West Face's Motion Record, Vol. 14, Exhibit 41, p. 5858.9.

E. THE COMMENCEMENT OF THE NEW LITIGATION

89. Catalyst issued its Statement of Claim in the New Litigation on Tuesday, May 31, 2016 (less than a week before the commencement of trial in the Moyse Litigation).

90. Catalyst's counsel, Mr. Winton, emailed Mr. Milne-Smith a copy of the Claim at 12:09 p.m. on Wednesday, June 1, 2016. A copy of this email is attached as Exhibit "42".

91. Within four hours, by 4:13 p.m. on June 1, *The Globe and Mail* had published an online article about Catalyst's latest Claim against West Face. According to a letter from Catalyst's counsel the following day (discussed in more detail below), the Claim had not been served on all of the Defendants at the time this article was published. A copy of this article is attached as Exhibit "43".

92. At 5:24 p.m. on June 1, Mr. Milne-Smith emailed a letter to Mr. Winton advising that Davies had been instructed to accept service of the new Claim on behalf of West Face. Notably, Mr. Milne-Smith also advised of West Face's intention to bring this motion to strike or dismiss the Claim as an abuse of process, as follows:

> Please be advised that **West Face considers this Claim to be an abuse of process**, for at least two reasons. First, **it represents litigation by installment**. As found by Justice Newbould in paragraph 56 of his Reasons for Judgment in the Plan of Arrangement proceedings dated January 26, 2016, "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". Moreover, on examination for discovery Mr. de Alba admitted that he was informed by Mr. Gauthier, counsel to VimpelCom, that the consortium of which West Face was a member had made a proposal to VimpelCom during the period of Catalyst's exclusivity, and that he was aware of this fact "at the time the events in question were happening". As such, there is no reason that the claims first asserted today should not have been asserted

> at the time that Catalyst amended its claim to add allegations about the WIND transaction on October 29, 2014 [*sic*], given that the evidence that will be relevant to Catalyst's claim in its new proceeding overlaps substantially with the evidence will be lead [*sic*] in the trial that starts on Monday.
>
> …
>
> Please be advised that we intend to bring this new claim to Justice Newbould's attention in advance of our 9:30 appointment on Friday. **Our present intention, following the conclusion of the trial in the Moyse action, is to bring motions to** (a) transfer this matter to the Commercial List before Justice Newbould; (b) to the extent necessary, strike the jury notice you intend to serve; and (c) **strike or dismiss the Statement of Claim as an abuse of process with costs on a full indemnity basis**…. (emphasis added)

93. A copy of Mr. Milne-Smith's letter of June 1, 2016 is attached as Exhibit "44".

94. At 4:51 p.m. on Thursday, June 2, 2016, Catalyst's counsel emailed to Mr. Milne-Smith a letter responding to Mr. Milne-Smith's letter of June 1, 2016. In this letter, Mr. DiPucchio stated, among other things:

> This is not litigation by instalment. **During the hearing in January 2016, West Face argued that the inducing breach claim should not form any part of the trial that is to commence on Monday (the "Moyse Action"). In paragraph 61 of Justice Newbould's Endorsement on January 26, 2016 he states "[t]he trial of the issue that I have ordered is not to consider any such claim". Catalyst was not permitted to amend its statement of claim to add any allegations that are in the Claim.** As such, Catalyst commenced an action, within the relevant limitation period, to enforce its legal rights. Based on Justice Newbould's January 26 Endorsement, it is irrelevant that evidence in the Moyse Action will overlap with possible evidence in the Claim. (emphasis added)

95. A copy of Mr. DiPucchio's letter dated June 2, 2016 is attached as Exhibit "45".

96. Mr. DiPucchio's letter of June 2, 2016 – written in response to West Face's stated intention to bring this motion to strike or dismiss the new Claim as an abuse of process – was the first time Catalyst or its counsel took the position that Justice Newbould's Plan of Arrangement Reasons dated January 26, 2016 somehow precluded Catalyst from amending its Claim in the Moyse Litigation to add claims of inducing breach of contract. As is made clear above:

(a) the factual assertions made by Mr. DiPucchio in his letter of June 2, 2016 were incorrect, and did not recount accurately what transpired during the Plan of Arrangement Application either on January 25, 2016 or subsequently; and

(b) Catalyst was put on notice **before the Moyse Litigation proceeded to trial** that West Face would seek to stay or dismiss any additional claims Catalyst attempted to assert against it concerning its acquisition of WIND as an abuse of process.

97. Having been put on notice of West Face's position, Catalyst did not propose or seek an adjournment of the trial in the Moyse Litigation to enable it to assert claims of inducing breach against West Face or others. Instead, Catalyst elected to proceed to trial of the Moyse Litigation.

F. THE TRIAL OF THE MOYSE LITIGATION

98. The Moyse Litigation proceeded to trial before Justice Newbould in June, 2016. The Court sat each day from 9:00 a.m. until approximately 5:00 p.m. There were six

extended hearing days of evidence (June 6-10 and 13) and one full day of closing submissions (June 14).

99. The parties called a total of 13 witnesses to give live testimony at trial, as follows:

(a) Catalyst called four witnesses at trial:

(i) Newton Glassman, Catalyst's CEO and Managing Partner;

(ii) Gabriel De Alba, Catalyst's Managing Director and the lead Partner of Catalyst on the deal team that negotiated with VimpelCom for the purchase of WIND;

(iii) James Riley, Catalyst's COO, a lawyer, and the lead Partner of Catalyst managing the Moyse Litigation; and

(iv) Martin Musters, a forensic computer expert.

(b) West Face called seven witnesses at trial:

(i) Mr. Griffin, West Face's Partner with initial primary responsibility over the WIND deal;

(ii) Tom Dea, West Face's Partner with primary responsibility for the hiring of Mr. Moyse;

(iii) Mr. Burt, a member of 64NM GP, the general partner of 64NM LP, the special-purpose investment vehicle created by LG Capital to participate in the acquisition of WIND;

(iv) Mr. Leitner, a Managing Partner of Tennenbaum, who led their team on the acquisition of WIND;

(v) Mr. Lockie, the Chief Legal Officer of Globalive and former Chief Regulatory Officer of WIND;

(vi) Supriya Kapoor, West Face's Chief Compliance Officer; and

(vii) Yu-Jia Zhu, West Face's Vice-President who worked on the WIND deal and interviewed Mr. Moyse.

(c) Mr. Moyse called two witnesses:

(i) himself; and

(ii) Kevin Lo, a forensic computer expert.

100. For efficiency, the parties' evidence in chief was primarily put in by way of detailed pre-trial affidavits, with exhibits. In addition, the parties agreed that all of the evidence from the multiple interlocutory motions that preceded trial, including dozens of affidavits, hundreds of exhibits, and thousands of pages of cross-examination transcripts, were to be treated as having been admitted at trial and could be relied upon in the parties' closing submissions.

101. The trial affidavits submitted by Glassman, De Alba, Griffin, Dea, Burt, Leitner, Lockie, Kapoor, Zhu, and Moyse are attached (without their exhibits) as Exhibits "46" to "55". I have not attached to my Affidavit all of the pre-trial affidavits or cross-examination transcripts, but many of those are already attached as part of the records filed during the

motion before Justice Glustein (see, for example, Exhibits "8", "9", and "10") and/or the Plan of Arrangement Application (see Exhibit "22").

102. At trial, Catalyst's counsel examined Catalyst's own witnesses in chief – including Messrs. Glassman, De Alba, and Riley, and cross-examined each of West Face's witnesses, including multiple representatives of the Defendants to this New Litigation – namely, Messrs. Griffin, Burt, Leitner, and Lockie (whose positions are set out above). Excerpts from the trial transcripts of the parties' opening statements as well as various examinations and cross-examinations are attached as follows:

(a) Catalyst's, West Face's, and Mr. Moyse's opening statements are attached as Exhibits "56", "57", and "58";

(b) the examination in chief and cross-examination of Mr. De Alba are attached as Exhibits "59" and "60";

(c) the examination in chief and cross-examination of Mr. Glassman are attached as Exhibits "61" and "62";

(d) the examination in chief and cross-examination of Mr. Riley are attached as Exhibits "63" and "64";

(e) the examination in chief and cross-examination of Mr. Griffin are attached as Exhibits "65" and "66";

(f) the examination in chief and cross-examination of Mr. Burt are attached as Exhibits "67" and "68";

(g) the examination in chief and cross-examination of Mr. Leitner are attached as Exhibits "69" and "70";

(h) the examination in chief and cross-examination of Mr. Lockie are attached as Exhibits "71" and "72";

(i) the examination in chief and cross-examination of Mr. Dea are attached as Exhibits "73" and "74";

(j) the examination in chief and cross-examination of Mr. Zhu are attached as Exhibits "75" and "76";

(k) the examination in chief and cross-examination of Ms Kapoor are attached as Exhibits "77" and "78";

(l) the examination in chief and cross-examination of Mr. Moyse are attached as Exhibits "79" and "80".

103. The parties' written closing submissions totalled close to 500 pages. Copies of Catalyst's and West Face's written closing submissions are attached as Exhibits "81" and "82".

G. THE REASONS FOR JUDGMENT IN THE MOYSE LITIGATION

104. On August 18, 2016, Justice Newbould released his Reasons for Judgment in the Moyse Litigation (previously defined as the "**Trial Reasons**"), in which he dismissed

Catalyst's action "in its entirety".[43] A copy of the Trial Reasons was previously attached as Exhibit "1".

105. Justice Newbould dismissed every claim asserted by Catalyst against both West Face and Mr. Moyse. In doing so, His Honour found as a fact that:

(a) Mr. Moyse did not convey any confidential information of Catalyst to West Face concerning WIND;[44]

(b) *even if* Mr. Moyse had communicated confidential information of Catalyst to West Face, such information was not misused in any way by West Face in its acquisition of an interest in WIND;[45] and

(c) *even if* Mr. Moyse had communicated confidential information of Catalyst to West Face, and *even if* West Face had misused such confidential information in its acquisition of an interest in WIND, this could not have caused any harm to Catalyst, for two reasons: (i) it was Catalyst's refusal to agree to a break fee of $5 to $20 million requested by VimpelCom, and not the August 7 Proposal, that caused Catalyst to fail in its negotiations with VimpelCom; and (ii) *even if* Catalyst had been able to finalize and enter into a Share Purchase Agreement with VimpelCom to acquire WIND, Catalyst would never have closed such a transaction because it required, but could not obtain from the Government of Canada, certain regulatory concessions

---

[43] Trial Reasons, at paras. 8 & 169, West Face's Motion Record, Vol. 1, Exhibit 1, pp. 87, 133.

[44] Trial Reasons, at paras. 72-73, 81, & 117-118, West Face's Motion Record, Vol. 1, Exhibit 1, pp. 105-106, 108, 120.

[45] Trial Reasons, at paras. 119-125, West Face's Motion Record, Vol. 1, Exhibit 1, pp. 120-122.

that it deemed necessary as preconditions to the completion of the acquisition.[46]

106. Justice Newbould made a number of specific findings that supported these conclusions, including:

> **Was Catalyst information conveyed by Mr. Moyse to West Face?**
>
> [72] …Catalyst acknowledges that it cannot point to any direct evidence to demonstrate that Moyse transferred Catalyst's confidential information concerning WIND to West Face…
>
> [73] …there are explanations for West Face's conduct other than the use of confidential Catalyst information.
>
> …
>
> **Allegations of breach of confidence**
>
> …
>
> [85] …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.

---

[46] Trial Reasons, at paras. 126-131, West Face's Motion Record, Vol. 1, Exhibit 1, pp. 122-124.

[87] ….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 obviously have 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.

[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…

…

[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 marketplace by VimpelCom as early as April, 2014….

…

[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 to survive…

…

[104] …the [August 7 Proposal] was unsolicited and sent to VimpelCom without any substantive communications with VimpelCom since the exclusivity period had commenced on July 23, 2014.

[105] …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.

…

[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 [August 7] proposal did not contain such a condition because [West Face] 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.

…

[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… 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.

…

Did West Face make use of any Catalyst confidential information?

…

[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.

[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.

[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 damages?

...

[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.[47]

---

[47] Trial Reasons, at paras. 72-73, 85-87, 89, 94, 96, 104-105, 109, 114, 121-125, & 127-131, West Face's Motion Record, Vol. 1, Exhibit 1, pp. 105-106, 109-110, 112, 115-117, 119-124.

H. COSTS IN THE MOYSE LITIGATION

107. Following the release by Justice Newbould of his Trial Reasons, West Face sought costs on a substantial indemnity basis. A copy of West Face's Costs Submission is attached as Exhibit "83".

108. On October 7, 2016, Justice Newbould released his Costs Endorsement respecting the trial of the Moyse Litigation. Justice Newbould awarded West Face its costs on a substantial indemnity basis of $1,239,965, as West Face had requested, and Mr. Moyse his costs on a partial indemnity basis in the amount of $339,500.18. In his Costs Endorsement, Justice Newbould stated:

> [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.[48] (emphasis added)

109. A copy of Justice Newbould's Costs Endorsement is attached as Exhibit "84".

I. DUPLICATIVE EFFORTS

110. In total, West Face incurred more than $2 million in legal fees and expenses defending Catalyst's claims and allegations in the Moyse Litigation. Despite being awarded substantial indemnity costs, West Face will only be indemnified for a portion of this amount (if it prevails on appeal). West Face's costs included significant amounts for interlocutory motions, documentary production, examinations for discovery, and trial.

---

[48] Costs Endorsement, at para. 10, West Face's Motion Record, Vol. 19, Exhibit 84, p. 8204.

111. In the Moyse Litigation, West Face made considerable efforts and incurred significant expense to search for, collect, identify, and produce all relevant, non-privileged documents within its possession, power or control. I had primary responsibility at Davies for this exercise.

112. In total, the parties' productions in the Moyse Litigation totalled more than 7,300 documents. Catalyst produced approximately 3,400 documents, West Face produced over 2,800 documents, and Mr. Moyse produced over 1,100 documents. As set out above, oral examinations for discovery were also conducted for three days in May 2016.

J. CATALYST'S APPEAL

113. Catalyst is appealing to the Court of Appeal from Justice Newbould's trial judgment, and is also seeking leave to appeal from his Order as to costs. A copy of Catalyst's Notice of Appeal is attached as Exhibit "85" (Catalyst's Supplementary Notice of Appeal was previously attached as Exhibit "33"). The parties have agreed to a schedule and requested that the Court of Appeal hear the appeal as soon after March 3, 2017 as possible, subject to the Court's availability.

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario this 7th day of December, 2016

Commissioner for Taking Affidavits
(or as may be)

MEERA PERSAUD

Meera Persaud, a Commissioner, etc., Province of Ontario, while a Student-at-Law. Expires April 13, 2018.

ANDREW CARLSON

THE CATALYST CAPITAL GROUP INC.
Plaintiff

-and-

VIMPELCOM LTD. et al.
Defendants

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

AFFIDAVIT OF ANDREW CARLSON
SWORN DECEMBER 7, 2016

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

Matthew Milne-Smith (LSUC# 44266P)
Email: mmilne-smith@dwpv.com
Tel: 416.863.5595
Andrew Carlson (LSUC# 58850N)
Email: acarlson@dwpv.com
Tel: 416.367.7437

Tel: 416.863.0900
Fax: 416.863.0871

Lawyers for the Defendant,
WEST FACE CAPITAL INC.

File Number: 256687

This is Exhibit "1" referred to in the Affidavit of Andrew Carlson sworn December 7, 2016

Meera Persaud

Commissioner for Taking Affidavits (or as may be)

Meera Amanda Persaud, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law.
Expires April 13, 2018.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

NEWBOULD J.

TABLE OF CONTENTS

REASONS FOR JUDGMENT

Nature of action

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

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

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

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

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

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

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

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

Assessment of the evidence

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

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

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

---

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

(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

---

[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.

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

---

[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.

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 *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at para. 129.

[69] Under the third element, misuse is any use of the information which is not authorized by the party who originally communicated it: see *Lac* at para. 139. Under this third branch, it is also necessary that the defendant's misuse of the information caused detriment to the plaintiff. See *Lac* at para. 161; *Lysko v. Braley* (2006), 79 O.R. (3d) 721 (C.A.) at para. 17 and *Rodaro v. Royal Bank of Canada* (2002), 59 O.R. (3d) 74 (C.A.) at para. 48.

[70] Equity will pursue confidential information that comes into the hands of a third party who receives it with knowledge that it was communicated in breach of confidence. In *Cadbury Schweppes Inc. v FBI Foods Ltd.* [1999] 1 S.C.R. 142, the Supreme Court of Canada confirmed the principle by which third party recipients of confidential information may be held liable. In that case Justice Binnie stated:

> **19** Equity, as a court of conscience, directs itself to the behaviour of the person who has come into possession of information that is in fact confidential, and was accepted on that basis, either expressly or by implication. Equity will pursue the information into the hands of a third party who receives it with the knowledge that it was communicated in breach of confidence (or afterwards acquires notice of that fact even if innocent at the time of acquisition) and impose its remedies.

[71] Thus, if West Face received confidential information of Catalyst from Mr. Moyse and used it in its acquisition of its interest in WIND to the detriment of Catalyst, relief would be available to Catalyst.

Was Catalyst information conveyed by Mr. Moyse to West Face?

[72] The first hurdle faced by Catalyst is to establish on a balance of probabilities that West Face received any information from Mr. Moyse regarding Catalyst's involvement with WIND. Catalyst acknowledges that it cannot point to any direct evidence to demonstrate that Moyse transferred Catalyst's confidential information concerning WIND to West Face. It contends that the Court must look to the overall course of conduct of West Face to determine if it can be inferred that the transfer of confidential Catalyst information occurred.

[73] Catalyst relies on a passage from *Gurry on Breach of Confidence: The Protection of Confidential Information*, 2d ed. (Oxford: Oxford University Press, 2012), at §15.02 which states that an inference of misuse may be drawn from an altered course of conduct on the part of the confidant which is explicable only by reference to the unauthorized use of confidential

information. If that were the test, Catalyst's claim would woefully fail as there are explanations for West Face's conduct other than the use of confidential Catalyst information.

[74] I accept the statement in Catalyst's written submissions as to when inferences may be drawn:

> The general rule with respect to inference drawing is that the inference must be reasonably and logically drawn from a fact or group of facts established by evidence. The first step in the inference-drawing process is that the primary facts which provide the basis for the inference must be established by the evidence. Inferences can be drawn on the basis of reasonable probability.

[75] It is necessary, however, to be careful not to engage in speculation. In *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.), Doherty J.A. stated at p. 530:

> 52. A trier of fact may draw factual inferences from the evidence. The inferences must, however, be ones which can be reasonably and logically drawn from a fact or group of facts established by the evidence. An inference which does not flow logically and reasonably from established facts cannot be made and is condemned as conjecture and speculation. As Chipman J.A. put it in *R. v. White* (1994), 89 C.C.C. (3d) 336 at p. 351, 28 C.R. (4th) 160 (Nfld. C.A.):
>
> > These cases establish that there is a distinction between conjecture and speculation on the one hand and rational conclusions from the whole of the evidence on the other. The failure to observe the distinction involves an error on a question of law.

Allegation of breach of confidence

[76] Catalyst contends that a number of things were confidential to it and that the confidential information was conveyed to West Face by Mr. Moyse. Catalyst contends that the information in its presentations to the Government contained key confidential information, including (i) that Catalyst was in advanced discussions with VimpelCom to gain control of WIND[5], (ii) that to

---

[5] This statement made to the Government was clearly misleading. Catalyst had not by the time of the presentation on March 27, 2014 had any access to the VimpelCom and WIND data room, which first took place in May 2014. It had not yet retained Morgan Stanley as its financial advisor and did not do so before May 6, 2014 when it approached Morgan Stanley to request that it advise it on the acquisition of WIND, and had not yet retained a technical expert in the areas of operating a wireless network as late as May 16, 2014. Catalyst had had no negotiations with VimpelCom having just signed a confidentiality agreement on March 21, 2014. The first draft of an agreement to purchase WIND by Catalyst was dated May 9, 2014 and sent by UBS, the financial advisor to Globealive to Morgan Stanley. I do not accept Mr. Glassman's evidence that it was possible to have advanced discussions on an informal basis. He did not know what Mr. De Alba had discussed with VimpelCom. The presentation to the Government

build a fourth wireless carrier, which was the Government of Canada's stated goal, would require concessions from the Government including an unrestricted ability to sell the business to an incumbent (Rogers, Bell or Telus) in five years, and (iii) that if the Government did not agree to such concessions, litigation would likely follow against the Government (by someone other than Catalyst) caused by the Government's retroactive change to the 2008 spectrum licenses which would likely be successful and force the Government to give concessions. That retroactive change precluded new entrants from indefinitely selling its spectrum to an incumbent carrier. The earlier licences had permitted such a sale after five years.

[77] Mr. Glassman's evidence was that while he was told by Industry Canada that the Government of Canada would not give any such concessions, he believed that it was just posturing and that he sensed that the Government was softening its view on concessions. He claimed that his knowledge of the softening of the Government's position on concessions was confidential to Catalyst and that Mr. Moyse was told of that. He asserted that knowledge of his analysis of the weakness of the Government's position, based on his knowledge of a U.S. case involving the *F.C.C v. NextWave*, would prove invaluable to any other potential bidder since it in essence would massively mitigate, if not entirely eliminate, their financial risk in bidding for WIND.

[78] Catalyst contends that it would never acquire WIND without the Government's agreement that the business could be sold after five years to an incumbent. Mr. Glassman's view was that an independent fourth wireless carrier would not be viable or be able to survive without Government concessions permitting its spectrum to be sold to an incumbent and would be able only to compete in the short term with the incumbents on price and would be quickly squeezed out by the incumbents.

[79] Catalyst claims that Mr. Moyse knew that Catalyst would not bid for WIND without the agreement being conditional on regulatory approval that provided concessions permitting WIND 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

---

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.

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

---

[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.

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]

[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

[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

---

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.

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

---

[8] Catalyst is critical of West Face for not calling Mr. Guffey as a witness and asks for an adverse inference to be drawn. I see no basis for any adverse inference. Mr. Guffey was not at all in the control of West Face and it was open to Catalyst to call Mr. Guffey as a witness. See *Parris v. Laidley*, 2012 ONCA 755 at para. 2. Moreover, the evidence of Mr. Guffey would have been cumulative to evidence of others, and no adverse inference should be drawn. See *R. v. Jolivet*, 2000 SCC 29 at paras 24 and 28 and *R. v. Lapensee*, 2009 ONCA 646 at paras. 43, 49 and 52.

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

[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.

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

---

[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.

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.

---

[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.

[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

---

[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.

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.

---

[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.

[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

---

[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.

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 (C.A.), leave to appeal refused, [2000] S.C.C.A. No. 547, at para. 10 as:

> The spoliation inference represents a factual inference or a legal presumption that because a litigant destroyed a particular piece of evidence, that evidence would have been damaging to the litigant.

[138] Thus there must be evidence of a particular piece of evidence that was destroyed.

[139] Courts in Canada have permitted a pleading of a tort of spoliation to stand to proceed to trial on the basis articulated in *Hunt v. Carey* Canada Inc., [1990] 2 S.C.R. 959 that it was not plain and obvious that such an action could never succeed. See *Spasic, supra* and *McDougall v. Black & Decker Canada Inc.* (2008), 97 Alta. L.R. (4th) 199 (C.A.). I was referred to no case in which spoliation was recognized as a tort and I do not believe the tort of spoliation has been recognized in Canada. Catalyst contends that the tort should be recognized in this case.

[140] I will deal with the various claims of spoliation made by Catalyst. The first has to do with Mr. Moyse deleting his browsing history from his personal computer.

[141] Mr. Moyse's evidence is as follows. He understood that pursuant to the order of July 16, 2014, a forensic image would be created of his computer's hard drive for the purpose of determining what, if any, documents he had in his possession that related to Catalyst or to the issues raised in Catalyst's lawsuit. He was not concerned that his devices would be reviewed to identify relevant documents that related to Catalyst or to the issues raised in Catalyst's lawsuit as he had good, reasonable explanations for every Catalyst-related document that would be found and intended to disclose all such documents in his affidavit of documents, as required under the order. He was troubled that Catalyst would have access to his personal internet browsing history, and in particular that he had accessed adult entertainment websites. He was concerned that it might become part of the public record in this litigation.

[142] Mr. Moyse therefore decided that prior to delivering his computer to his counsel, he would attempt to delete his internet browsing history from his computer. He did not believe that there was anything improper about his doing so as the order did not require him to maintain his computer "as is" for the five days before he was to deliver the computer or to preserve clearly irrelevant files. The focus of the order was to maintain and preserve documents relevant to this action. If the order had required him to maintain the computer "as is", he would not have used it at all prior to the image being taken. He felt that by deleting his browsing history he was deleting personal information not relevant to the litigation.

[143] He was aware that the mere act of deleting one's internet browsing history through the browser program itself does not fully erase the record, and that a forensic review of a computer would likely capture some or all recently deleted material. He did some internet searches on how

to ensure a complete deletion of his internet browsing history, and many websites said that cleaning the registry following the deletion of the internet history would accomplish this. He purchased two software products from a company called Systweak. The first was software named RegCleanPro which he purchased online on Saturday, July 12, 2014, for the purpose of deleting his internet browser history. On Sunday July 20, 2014 the day before he was to deliver his computer to his lawyers, he ran RegCleanPro software to clean up the computer registry after he had deleted his internet browser history.

[144] I accept Mr. Moyse's evidence as to why he deleted his internet browsing history. There is no evidence to contradict his statements as to why he deleted his internet browsing history. He was a young man at the time who had a very close relationship with his girlfriend who is now his fiancée. He did not want his internet searching to become part of the public record. In deleting this history, he did not intend to breach the order of July 16, 2014 or to destroy any evidence relevant to this litigation. This lack of intention to destroy relevant evidence precludes any finding of spoliation resulting from the deletion of his internet browsing history.

[145] In closing argument, it was conceded on behalf of Catalyst that there is no evidence that Mr. Moyse destroyed documents that no longer exist either at Catalyst or West Face. Catalyst contends however that by wiping his browsing history, Mr. Moyse may have wiped evidence that he looked at Catalyst documents in his Dropbox account after deciding he was leaving Catalyst. Catalyst says that if those documents that he may have looked at in his Dropbox account included Catalyst documents involving WIND, it would be evidence that might suggest he wanted them to discuss with West Face.

[146] There are difficulties with this contention. There is no evidence that Mr. Moyse ever transferred confidential Catalyst documents regarding WIND to his Dropbox account. Mr. Musters, the computer expert retained by Catalyst created a forensic image of Mr. Moyse's computer on June 21, 2014. The only time Mr. Moyse used his Dropbox account on his computer was on February 10, 2014 before Mr. Moyse was on the WIND team at Catalyst and long before he decided to leave Catalyst and go to West Face. There is no evidence what documents were in his Dropbox account that he accessed on that day. Moreover the timing does not lead to any cogent inference that documents accessed that day consisted of confidential

Catalyst documents regarding WIND that Mr. Moyse wanted to discuss with West Face. To make such a finding would amount to speculation rather than reasonably making an inference.

[147] Catalyst has not established that Mr. Moyse looked at any documents in his Dropbox account dealing with Catalyst's WIND initiative or that he did so in order to discuss them with West Face. Nor has Catalyst established that any evidence that might be relevant to this litigation was destroyed by the wiping of Mr. Moyse's internet browsing history.

[148] On July 16, 2014, the day on which the interim order was made requiring his personal computer to be turned over to his counsel, Mr. Moyse purchased online from Systweak a second software product named Advanced System Optimizer ("ASO") advertised as an all in one PC tune-up suite containing many different programs, one of which was a program called Secure Delete.

[149] On July 20, 2014, at 8:09 p.m., a folder called Secure Delete was created on Mr. Moyse's computer. Catalyst contends that although the forensic evidence does not conclusively establish that Moyse ran the Secure Delete program, the undisputed circumstances in which it was purchased, downloaded, and launched the night before his computer was scheduled to be forensically imaged lead to the logical and reasonable inference that Mr. Moyse ran it to delete relevant inculpatory evidence.

[150] This contention is somewhat contrary to the concession made in closing argument that Catalyst is not contending that Mr. Moyse destroyed documents that no longer exist either at Catalyst or West Face. In any event, I cannot find that Mr. Moyse ran the Secure Delete program in order to destroy documents or that any documents were destroyed.

[151] Mr. Moyse denies that he ever ran the Secure Delete program to delete any documents. His evidence is that he bought the ASO software because his computer was running slowly. On July 20, 2014, he opened both the RegCleanPro and the ASO software to see what they could do and he investigated what products the ASO offered and what the use of those products would entail. He did this by clicking on the various parts of the program. He said he was certain that he did not run the Secure Delete product or any other to delete any Catalyst documents or anything else from his computer that could have been relevant to this litigation and that since his computer

was returned to him after the image was taken from it, he has used ASO a number of times to clean up his computer and optimize its functioning.

[152] An Independent Supervising Solicitor ("ISS") was appointed to review the forensic images taken from Mr. Moyse's computer. The ISS's forensic expert reached the conclusion that it could not determine whether the Secure Delete function had been used to delete an individual file or files and that it accordingly could not express any conclusion on that possibility other than to note that it exists.

[153] Although not the case from the start, the forensic experts retained by Catalyst and Mr. Moyse now agree on most of the forensic evidence. Mr. Musters, the expert for Catalyst, at first stated in his affidavit that a Secure Delete folder is not created merely by downloading the ASO software but is only created when a user runs the Secure Delete feature to delete a file or folder from the computer. He concluded from the existence of the Secure Delete folder on Mr. Moyse's computer that Mr. Moyse had deleted one or more files on his computer. The evidence of Mr. Lo, the computer expert for Mr. Moyse, was that the presence of a Secure Delete folder on Mr. Moyse's system is not evidence that he ran the Secure Delete program, or used it to delete any files.

[154] At trial Mr. Musters acknowledged that he was wrong and that the presence of a Secure Delete folder does not mean that the function was used to delete a file. Both experts agreed that a Secure Delete folder, such as the one found on Mr. Moyse's computer, is created as soon as a user clicks Secure Delete on the ASO menu, but before the product is used for any purpose. The Secure Delete folder is created even if a user does not delete a single file.

[155] Although acknowledging his error in concluding that Mr. Moyse deleted a file merely from the presence of the Secure Delete folder on his computer, Mr. Musters did not change his opinion that Mr. Moyse most likely did use the Secure Delete function to delete files from his computer to prevent them being recovered by a forensic analysis. His reasoning however is something that falls outside of a forensic analysis and his expertise. What Mr. Musters was doing was engaging in an exercise of a judge or jury in considering possibilities unrelated to a forensic analysis. He said:

> My conclusion is based on a number of factors. The program was purchased and paid for. The Secure Delete feature is a function of a program called the advanced system optimizer, and when you load -- when you launch advanced system optimizer, you get a home screen, and the Secure Delete feature is not on the home screen. There are about five options, if you will, on the left-hand side, one of them is security and privacy. If you then go to the security and privacy, it gives you, I believe, three options, one of them being Secure Delete. Underneath the Secure Delete it says this is how you permanently erase a file, its contents, never to be recovered, and then you launch -- then you click on that Secure Delete feature to launch that function. That's when the folder gets created. I draw my conclusion in 13 on the fact that the program was bought, paid, installed, it wasn't easy to get to that function, and it was done on the night before the ISS was to examine the computer.

[156] In a prior affidavit after learning of his error, Mr. Musters expressed the opinion that Mr. Moyse likely used the Secure Delete program to delete files and relied on several factors, based much on the same reasoning as he expressed at trial. One was that Mr. Moyse had exhibited a pattern of conduct that was consistent with taking confidential information from his previous employer. He admitted on cross-examination that he did not know if the documents he was referring to were confidential. Another was that the running of the Secure Delete program the night before Mr. Moyse was to deliver his computer to a forensic expert was too coincidental to be an innocent "mistake". Mr. Moyse never said that what he did with the ASO software, including clicking on the Secure Delete portion of it, was a mistake.

[157] I am troubled by the assertions of Mr. Musters. They are really outside of his expertise and indicate somewhat of a less than neutral observation of an expert. They are argument and speculation.

[158] It would not be entirely surprising that Mr. Moyse purchased the ASO software for other than a nefarious purpose. He saw it while searching the internet for a product that would help him prevent disclosure of the fact that he had accessed adult websites on the internet. The AOS software was sold by the same company that sold the RegCleanPro that he used. He used the RegCleanPro software on the night before he was to turn over his computer to his counsel for the reasons he has stated. To then look at the ASO software, including looking at the Secure Delete program on it, at the same time without using it to delete files is not something that can be concluded is too coincidental, as stated by Mr. Musters. Mr. Moyse's evidence that he has used

the ASO software to optimize or clean up his computer since it has been returned to him was not challenged.

[159] Mr. Musters has also speculated that Mr. Moyse took steps by using the Registry Editor on his computer to remove evidence that he had used the Secure Delete program to delete files. Mr. Lo, the expert called by Mr. Moyse, testified that he found no evidence that Secure Delete had been used to delete any files or folders from Mr. Moyse's computer. Mr. Lo explained that if the program had been run on the computer, a Secure Delete Log which maintains records of the files deleted would have been found, but no such log exists on Mr. Moyse's computer. Mr. Musters agreed that using Secure Delete to delete files would result in the creation of a Secure Delete Log but he speculated that Mr. Moyse took steps by using the Registry Editor on his computer to remove evidence that he had used the Secure Delete program to delete files.

[160] Both experts agreed that it would be theoretically possible for a user to use the computer's Registry Editor to delete a Secure Delete Log. They differed on how easily that could be done. Mr. Musters said it could be done very easily. His explanation suffered somewhat by a hiccup in the information he said was available to the public which turned out to be information on how to remove the entire ASO program and not just the removal of the remnant files. Mr. Lo testified that it would be complicated and risky for a lay user to use a Registry Editor to hide the use of the Secure Delete program and said there was no evidence he found on Mr. Moyse's computer that he had done so.

[161] I have considerable doubt that Mr. Moyse had the expertise needed to hide the use of the Secure Delete program on his computer. He left on his computer the ASO software and the Secure Delete folder, along with emails and the receipts recording his purchase of the software, to be easily found by a forensic investigator. Mr. Musters asserted at one place in his evidence that Mr. Moyse's understanding that cleaning the registry of his computer to erase his browsing history made no sense, which is somewhat inconsistent with a view that Mr. Moyse knew enough about a registry to remove evidence of his use of the Secure Delete program.

[162] It is not necessary to come to a final conclusion on how easily one could hide the use of the Secure Delete program. Whether or not it would have been easy or difficult to use the registry to remove evidence that the Secure Delete program had been used to delete files, it

would be sheer speculation unsupported by any forensic evidence to find that Mr. Moyse did erase any prior use of the Secure Delete program. Mr. Musters in his April 30, 2015 affidavit said as much by saying it was impossible to determine whether the absence of wiping history in the Secure Delete system summary means that Mr. Moyse did not use the software to permanently delete files or folders or whether he used the software and then removed the evidence of his having done so by deleting the Secure Delete files from his registry. His conclusion that Mr. Moyse likely used the Secure Delete program to permanently delete files from his computer was not based on forensic evidence but on speculation outside of his field as a forensic computer analyst.

[163] Without cogent evidence that Mr. Moyse managed to remove from his computer the evidence that he had used the Secure Delete function, there is no cogent evidence that he used the Secure Delete program in the first place to delete any documents from his computer. I find that Catalyst has not established that Mr. Moyse used the Secure Delete program to delete to delete any relevant evidence.

[164] Regarding the wiping of his BlackBerry before returning it to Catalyst, Mr. Moyse's evidence is that his BlackBerry contained photographs and text messages of a personal and private nature, and he thought it was completely reasonable to take steps to ensure that they would not be accessible to the next user of the company issued BlackBerry. The only email address associated with the BlackBerry was his Catalyst email address, and Catalyst had full access to those emails on its server. Catalyst admits it would have had all emails that were sent through this account on his BlackBerry. Mr. Moyse's evidence is that he did not believe that he used his BlackBerry to communicate with West Face, although it turned out later that he had used it once or twice to receive telephone calls. Mr. Moyse admits it was a mistake to have wiped his BlackBerry.

[165] I accept that Mr. Moyse had no intent to destroy relevant evidence on his BlackBerry, and there is no evidence that any relevant evidence was destroyed. The call logs of his calls with West Face are in evidence.

[166] In summary, I find that Catalyst has not established that Mr. Moyse intentionally destroyed evidence in order to affect the outcome of this litigation. There is no basis to find that or infer a presumption that Mr. Moyse destroyed evidence that would be unfavourable to him.

[167] So far as the argument that West Face has liability for any spoliation of Mr. Moyse, I see no basis whatsoever for such a conclusion. Whatever Mr. Moyse did, he did it after he was on leave of absence from West Face and did it for his own concerns, not out of any concern to protect West Face in this litigation.

[168] I need not consider whether an independent tort of spoliation exists in Ontario.

Conclusion

[169] The action is dismissed in its entirety. The defendants are entitled to their costs. If not agreed, written submissions along with proper cost outlines may be made within 15 days and reply submissions may be made in writing within a further 15 days.

Newbould J.

Released: August 18, 2016

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

BETWEEN:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

– and –

BRANDON MOYSE and
WEST FACE CAPITAL INC.

Defendants

REASONS FOR JUDGMENT

Newbould J.

Released: August 18, 2016

This is Exhibit "2" referred to in the Affidavit of Andrew Carlson sworn December 7, 2016

Meera Persaud

Commissioner for Taking Affidavits (or as may be)

Meera Amanda Persaud, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law.
Expires April 13, 2018.

CITATION: Re: Mid-Bowline Group Corp, 2016 ONSC 669
COURT FILE NO.: CV-15-11238-00CL
DATE: 20160126

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

IN THE MATTER OF the *Business Corporations Act*, R.S.O. 1990, c. B.16, as amended, Section 182

AND IN THE MATTER OF Rule 14.05(2) of the *Rules of Civil Procedure*

AND IN THE MATTER OF a proposed arrangement involving Mid-Bowline Group Corp., its shareholders and optionholders, Shaw Communications Inc., and 1503357 Alberta Ltd.

BEFORE: Newbould J.

COUNSEL: *Kent E. Thomson and Matthew Milne-Smith*, for the Applicant

Rocco DiPucchio and Lauren P.S. Epstein, for The Catalyst Capital Group Inc.

Michael Schafler and Ara Basmadjian, for Shaw Communications Inc.

Robert A. Centa, for Brandon Moyse

HEARD: January 25, 2016

REASONS FOR JUDGMENT

[1] This is an application by Mid-Bowline Group Corp. pursuant to section 182 of the Ontario *Business Corporations Act* for approval of a proposed plan of arrangement. The arrangement contemplates that a subsidiary of Shaw Communications Inc. will acquire all of the

outstanding shares of Mid-Bowline, the owner of WIND Mobile Corp., for approximately $1.6 billion.

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

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

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

[5] The plan of arrangement, as amended, provides that Shaw shall acquire the shares of Mid-Bowline free of any claim against those shares, including the shares of West Face, but that Catalyst shall continue to have the right to claim against West Face the profits earned by West Face from the sale to Shaw. That is, the claim by Catalyst for a constructive trust over the shares of Mid-Bowline owned by West Face is released in order to permit Shaw to acquire the shares of Mid-Bowline free of any claim against those shares but the right of Catalyst to pursue its claims for the profit earned by West Face on those shares survives.

[6] The only reason that this transaction is proceeding by way of plan of arrangement is to provide Shaw with clear title to the shares of WIND. Had this not been required because of the

Catalyst claim, the shareholders of Mid-Bowline were prepared to proceed by a share purchase agreement without any requirement of Court approval. During negotiations with Shaw, Mid-Bowline disclosed the claim of Catalyst to a constructive trust over the shares of Mid-Bowline owned by West Face. Shaw made clear that it would not acquire WIND unless it acquired the shares free and clear of any claim to them.

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

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

The Catalyst claim and its background

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

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

[11] The Catalyst litigation arises out of West Face's hiring of Brandon Moyse, then a 26 year-old junior analyst at Catalyst. Mr. Moyse applied for a job at West Face in March 2014 and received an offer of employment on May 26, 2014. He started work at West Face on June 23,

2014 and ceased working there three and a half weeks later, on July 16, 2014. Mr. Moyse was not recruited or otherwise solicited for employment by West Face. He applied to West Face on his own initiative.

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

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

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

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

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

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

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

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

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

Catalyst claims a need for a trial

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

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

[23] I adjourned the hearing on Monday January 5 until 2 pm to give Mr. DiPuccio a chance to get instructions from Catalyst. Later in the morning Mr. DiPuccio delivered an affidavit of James Riley of Catalyst sworn that morning. It contained a statement that Mr. Riley understood from Mr. DiPuccio that the Plan hearing would not be decided on its merits as originally

scheduled pending a discussion on the terms on which the Plan might be amended so that West Face's proceeds from the sale to Shaw could be held in escrow pending an expedited trial of Catalyst's claim.

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

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

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

[27] On January 13, 2015, Catalyst commenced a motion for interlocutory relief against West Face for an order prohibiting West Face from playing any role in the management of WIND and an order requiring West Face to provide electronic images of all of its computers to the ISS for review. One of the stated purposes of Catalyst's motion for the imaging order was to determine

"whether [Mr.] Moyse in fact communicated Catalyst's Confidential Information to West Face and what use West Face made of such information". Catalyst amended its notice of motion on February 6 to also seek an order jailing Mr. Moyse for contempt of the earlier interim consent order of Justice Firestone.

[28] Catalyst's motion was heard by Justice Glustein on July 2, 2015. Although West Face delivered its responding motion record on March 10, 2015, 20 days after receiving Catalyst's materials, Catalyst did not deliver its reply materials until May 1, 2015, almost two months after receiving West Face's materials.

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

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

[30] There was filed on the motion before Justice Glustein five affidavits of Mr. Riley of Catalyst, affidavits of Mr. Moyse, two affidavits of Mr. Griffin of West Face, an affidavit of Mr. Dea of West Face, an affidavit of Mr. Burt-Gerrans who was the computer expert who imaged the West Face computer records and an affidavit of Mr. El Shanawany who was the corporate

planning and control officer of WIND. There were also voluminous transcripts of the cross-examination of all of these persons.

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

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

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

Fair and reasonable test

[34] In *BCE v. 1976 Debentureholders,* [2008] 3 S.C.R. 560 the Supreme Court of Canada held that determining whether a plan of arrangement is fair and reasonable involves two inquiries:

(a) whether the arrangement has a valid business purpose; and

(b) whether the arrangement resolves the objections of those whose legal rights are being arranged in a fair and balanced way.

[35] The valid-purpose inquiry is invariably fact-specific and the nature and extent of the evidence needed to satisfy this requirement will depend on the circumstances. See *BCE* at para. 146. The inquiry requires only the demonstration of a prospect of clearly identified benefits to the corporation that have a reasonable prospect of being realized if the proposed arrangement is implemented. See *Magna International Inc. (Re)* (2010), 75 B.L.R. (4th) 163 at para. 50 (Div Ct).

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

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

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

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

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

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

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

[41] In this case, the claim of Catalyst is that it is entitled to a constructive trust over the shares of Mid-Bowline owned by West Face. It is not an equity owner at the moment, but would be if a constructive trust were ordered in its favour. It is a stakeholder in West Face's interest in

Mid-Bowline to that extent. To say that a Court is powerless to make any order compromising the rights of Catalyst would be to give Catalyst a veto over the plan of arrangement merely by reason of its claim.

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

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

> From and after the Effective Time: (i) this Plan of Arrangement shall take precedence and priority over any and all Purchased Shares or Options issued prior to the Effective Time; (ii) the rights and obligations of the Former Shareholders and the former holders of Options shall be solely as provided for in this Plan of Arrangement; and (iii) all actions, causes of action, claims or proceedings (actual or contingent and whether or not previously asserted) based on or in any way relating to any Purchased Shares or Options shall be deemed to have been settled, compromised, released and determined without liability except as set forth herein; provided, however, that nothing in this section 4.5 shall be construed to extinguish the right of The Catalyst Capital Group Inc. to continue to assert its claims against West Face Capital Inc. in Ontario Superior Court of Justice Court File No.: CV-14-507120 (provided that the potential liability of West Face Capital Inc. is limited to the net profit of West Face Capital Inc. in respect of this Arrangement), with the exception of any constructive trust or equivalent remedy which shall be deemed to have been settled, compromised, released and determined without liability, along with all other claims in this section 4.5. (Underlining added).

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

money received by West Face from the sale of its share interest in Mid-Bowline. I would also direct that the word "net" be removed.

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

What should be done?

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

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

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

> **2** Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.
>
> **27** There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for adjudication, and impacts the role of counsel and judges. This balance must recognize that a process can be fair and just, without the expense

> and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.
>
> **28** This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible -- proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.

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

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

(i) The issue to be tried is whether Catalyst has a right to a constructive trust of the share interest of West Face in Mid-Bowline. Whether this includes the issue as to whether Catalyst has any claim for misuse of Catalyst confidential information is up to Mid-Bowline. Counsel are to attempt to agree on the language of the issue to be tried, failing which it shall be settled at a 9:30 a.m. appointment with me on February 1, 2016.

(ii) The pleadings to date will be used.

(iii) The affidavits to date in the Catalyst action against West Face and Mr. Moyse and in this application may be used at the hearing.

(iv) Any party may conduct further cross-examinations on the deponents of affidavits on matters not yet covered in the cross-examinations to date.

(v) Catalyst may cross-examine Messrs. Lockie, Burt and Leitner on their affidavits filed in this matter.

(vi) Mr. Moyse as a party has a right to participate.

(vii) Any further issues regarding the hearing are to be dealt with promptly at a 9:30 a.m. appointment with me.

Claim for inducing breach of contract

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

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

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

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

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

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

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

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

[58] In his letter of January 6, 2016 written with prejudice, Mr. DiPuccio asserted that Catalyst was not interested in holding up a sale of the shares of WIND to Shaw. I have some

---

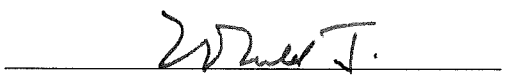
[1] I do not accept Catalyst's contention that the letter of January 6, 2016 from Mr. DiPuccio to counsel for Mid-Bowline and Shaw disclosed any such intent. That letter dealt entirely with the claim of Catalyst against Mid-Bowline.

doubts about that statement. The terms put in the letter to West Face were terms that Catalyst had to know would not be agreeable to West Face, and indeed Catalyst was told that shortly after the letter was sent. The proposed action now is also intended to interfere with the sale to Shaw. The vendors are all financial concerns with fund investors and to hold up the proceeds of the sale or to require their tracing in the hands of their fund investors that would be claimed in the claim against them for inducing a breach of contract is something that Catalyst has to know would not be agreeable to them.

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

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

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



Newbould J.

Date: January 26, 2016

This is Exhibit "3" referred to in the Affidavit of Andrew Carlson sworn December 7, 2016

Meerapersaud

Commissioner for Taking Affidavits (or as may be)

Meera Amanda Persaud, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law.
Expires April 13, 2018.

Court File No.
CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants

STATEMENT OF CLAIM

TO THE DEFENDANT(S):

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The Claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the *Rules of Civil Procedure*, serve it on the Plaintiff's lawyer or, where the Plaintiff does not have a lawyer, serve it on the Plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this Statement of Claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your Statement of Defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a Statement of Defence, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your Statement of Defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF'S CLAIM, and $1,000.00 for costs, within the time for serving and filing your Statement of Defence, you may move to have this proceeding dismissed

by the Court. If you believe the amount claimed for costs is excessive, you may pay the Plaintiff's Claim and $400.00 for costs and have the costs assessed by the Court.

Date June 25, 2014 Issued by _____
Local Registrar

Address of court office: 393 University Avenue
10th Floor
Toronto, Ontario
M5G 1E6

TO: Brandon Moyse
23 Brant Street, Apt. 509
Toronto ON M5V2L5

AND TO: West Face Capital Inc.
2 Bloor Street East, Suite 3000
Toronto, ON M4W 1A8

CLAIM

1. The Plaintiff claims:

(a) An interim, interlocutory and/or permanent injunction restraining the defendant Brandon Moyse ("Moyse"), his agents or any persons acting on his direction or on his behalf, and the defendant West Face Capital Inc. ("West Face"), its officers, directors, employees, agents or any persons acting under its direction or on its behalf, and any other persons affected by the Order granted, from:

(i) Soliciting or attempting to solicit equity or other forms of capital for any partnership, investment fund, pooled fund or other form of investment vehicle managed, advised or sponsored by Catalyst or the Catalyst Fund Limited Partnership IV (the "Fund") as at June 25, 2014, until June 25, 2015;

(ii) Interfering with the Plaintiff's relationships with its employees which, without limiting the generality of the foregoing, shall include any attempt to induce employees of the Plaintiff to leave their employment with the Plaintiff; and

(iii) Using or disclosing the Plaintiff's confidential and proprietary information (including, without limitation, (i) the identity or contact information of existing or prospective investors in the Fund and any such future partnership or fund, (ii) the structure of the Fund, (iii) marketing strategies for securities or investments in the capital of or owned by the Fund (iv)

investment strategies, (v) value realization strategies, (vi) negotiating positions, (vii) the portfolio of investments, (viii) prospective acquisitions to any such portfolio, (ix) prospective dispositions from any such portfolio, and (x) personal information about Catalyst and employees of Catalyst (collectively, the "Confidential Information") in any way, including in relation to any present- and future-related business;

(b) An order requiring the defendants to immediately return to Catalyst (or its counsel) all Confidential Information in their possession or control;

(c) An order prohibiting any of the defendants from, in any way, deleting, modifying or in any way interfering with any of their electronic equipment, including computers, servers and mobile devices, until further Order of this Honourable Court;

(d) An interim, interlocutory and permanent injunction prohibiting the defendant Brandon Moyse ("Moyse") from commencing or continuing employment at the defendant West Face Capital Inc. ("West Face") until December 25, 2014;

(e) Punitive damages in the amount of $300,000, as against West Face, and $50,000, as against Moyse;

(f) Postjudgment interest in accordance with section 129 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;

(g) The plaintiff's costs of this action on a substantial indemnity basis, plus the applicable H.S.T.; and

(h) Such further and other relief as to this Honourable Court may seem just.

The Plaintiff – The Catalyst Capital Group Inc. ("Catalyst")

2. Catalyst is a corporation with its head office located in Toronto, Ontario. Catalyst is widely recognized as the leading firm in the field of investments in distressed and undervalued Canadian situations for control or influence, known as "special situations investments for control".

3. Catalyst uses a "flat" entrepreneurial staffing model whereby its analysts are given substantial training, autonomy and responsibility at a relatively early stage in their career as compared to its competitors in the special situations investments for control industry.

4. Moreover, Catalyst uses a unique compensation scheme to compensate its employees – in addition to their base salary and annual bonus, employees participate in a "60/40 Scheme" whereby the "carried interest" of each Fund is allocated sixty per cent to the deal team and forty per cent to Catalyst. The carried interest refers to the twenty per cent profit participation Catalyst may enjoy, subject to certain conditions.

5. Points in each deal that forms part of the sixty per cent are allocated on a deal-by-deal basis. At all material times, Catalyst employed only two investment analysts, and the deal teams on which Moyse participated involved only three or four Catalyst professionals. The 60/40 Scheme granted Catalyst's employees a partner-like interest in the success of the company.

The Defendants

6. West Face is a Toronto-based private equity corporation with assets under management of approximately $2.5 billion. In December 2013, West Face formed a credit fund for the

purpose of competing directly with Catalyst in the special situations investments for control industry.

7. Moyse is a resident of Toronto. Pursuant to an employment agreement dated October 1, 2012 (the "Employment Agreement"), Moyse was hired as an investment analyst by Catalyst effective November 1, 2012. Moyse had substantial autonomy and responsibility at Catalyst. He was primarily responsible for analysing new investment opportunities of distressed and/or under-valued situations where Catalyst could invest for control or influence.

The Special Situation Investment Market in Canada

8. The Canadian market for special situations investing is very competitive. A small number of Canadian firms seek opportunities to invest in situations where a corporation is distressed or undervalued, or face events that can have a significant effect on the company's operations, such as proxy battles, takeovers, executive changes and board shake-ups.

9. In these special situations, an investment firm's strategic plans and investment models are crucial to successfully executing an investment plan. Confidentiality is paramount: if a competitor has access to a firm's plans and modelling for a particular special situation, the competitor can "scoop" the opportunity, or it can take an adverse investment position which make the firm's plans either too costly to execute or, depending on the timing of the adverse action, can cause the plan to incur significant losses after it is past the point of no return.

10. Depending on how advanced a firm is in executing its investment strategy, a competitor's adverse position can have disastrous, immeasurable effects on the firm's goodwill and/or will cause a firm to incur large financial losses that are difficult to accurately quantify given the unpredictable range of possible outcomes for a given investment.

11. Within the special situations investment industry, "investment for control or influence" is a sub-industry with unique characteristics. "Investment for control or influence" refers to acquiring controlling or influential equity or debt positions in distressed companies in order to add value through operational involvement in an investment target by, among other things:

(a) Appointing a representative as interim CEO and other senior management;

(b) Replacing or augmenting management;

(c) Providing strategic direction and industry contacts;

(d) Establishing and executing turnaround plans;

(e) Managing costs through a rigorous working capital approval process; and

(f) Identifying potential add-on acquisitions.

12. The "investment for control or influence" sub-industry within the distressed investment industry has unique needs, including the need to ensure that employees are unable to resign and begin working for a competitor for a reasonable period of time in order to ensure that the competitor is unable to take advantage of the former employee's knowledge of the firm's strategic plans and models.

13. In the special situations for control industry, information is critical. The ability to collect and analyze information and to prepare confidential plans for complex investment opportunities is the difference between a plan's success or failure. For this reason, it is commonplace for firms specializing in the special situations for control or influence industry to require its employees to agree to a non-competition covenant prior to commencing employment. Likewise, when a

competitor hires directly from a firm within the industry, it is commonplace for the competitor to respect the other firm's non-competition covenant by not directly employing a lateral hire in the same market as they worked for the competitor during the term of the non-competition covenant.

The Employment Agreement

14. Under the Employment Agreement, Moyse was paid an initial salary of $90,000 and an annual bonus of $80,000. Moyse was also granted options on equity in Catalyst and participated in the 60/40 Scheme. Moyse's equity compensation (options and the 60/40 Scheme) was equal to or exceeded his base salary and annual bonus.

15. The Employment Agreement also included the following non-competition, non-solicitation and confidential information covenants (together, the "Restrictive Covenants"):

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

Non-Solicitation

You agree that while you are employed by the Employer and for a period of one year after your employment ends, regardless of the reason, you shall not, directly or indirectly:

(i) hire or attempt to hire or assist anyone else to hire employees of any of the protected entities who were so employed as at the date you cease to be an employee of [Catalyst] or persons who were so employed during the 12 months prior to your ceasing to be an employee of [Catalyst] or induce or attempt to induce any such employees of any of the protected entities to leave their employment; or

(ii) solicit equity or other forms of capital for any partnership, investment fund, pooled fund or other form of investment vehicle managed, advised and/or sponsored by any of the protected entities as at the date you ceased to be an employee of [Catalyst] or during the 12 months prior to your ceasing to be an employee of [Catalyst].

Confidential Information

You understand that, in your capacity as an equity holder and employee, you will acquire information about certain matters and things which are confidential to the protected entities, including, without limitation, (i) the identity of existing or prospective investors in the Fund and any such future partnership or fund, (ii) the structure of same, (iii) marketing strategies for securities or investments in the capital of or owned by the Fund or any such partnership of or any such partnership or fund, (iv) investment strategies, (v) value realization strategies, (vi) negotiating positions, (vii) the portfolio of investments, (viii) prospective acquisitions to any such portfolio, (ix) prospective dispositions from any such portfolio, and (x) personal information about [Catalyst] and employees of [Catalyst] and the like (collectively "Confidential Information"). Further, you understand that each of the protected entities' Confidential Information has been developed over a long period of time and at great expense to each of the protected entities. You agree that all Confidential Information is the exclusive property of each of the protected entities. For greater clarity, common knowledge or information that is in the public domain does not constitute "Confidential Information".

You also agree that you shall not, at any time during the term of your employment with us or thereafter reveal, divulge or make

> known to any person, other than to [Catalyst] and our duly authorized employees or representatives or use for your own or any other's benefit, any Confidential Information, which during or as a result of your employment with us, has become known to you.
>
> After your employment has ended, and for the following one year, you will not take advantage of, derive a benefit or otherwise profit from any opportunities belonging to the Fund to invest in particular' businesses, such opportunities that you become aware of by reason of your employment with [Catalyst].

16. Moyse agreed that the Restrictive Covenants were reasonable and necessary and reflected a mutual desire of Moyse and Catalyst that the Restrictive Covenants would be upheld in their entirety and be given full force and effect. In addition, Moyse acknowledged that if he breached the terms of the Restrictive Covenants, it would cause Catalyst irreparable harm and that Catalyst would be entitled to injunctive relief to prevent him from continuing to breach the Restrictive Covenants.

17. Under the Employment Agreement, Moyse was required to give Catalyst a minimum of thirty days' written notice of his intention to terminate his employment.

18. Moyse executed the Employment Agreement on October 3, 2012. In so doing, he acknowledged that he reviewed, understood and accepted the terms of the Employment Agreement, and that he had an adequate opportunity to seek and receive independent legal advice prior to executing the Employment Agreement.

Moyse Breaches the Employment Agreement

19. On May 26, 2014, Moyse informed Catalyst of his intention to resign from Catalyst and to begin working for West Face.

20. Through its counsel, Catalyst communicated its intention to enforce the Restrictive Covenants. Through their counsel, the Defendants responded by communicating their intention to breach the Restrictive Covenants, in particular the non-competition covenant.

21. Moreover, on our about June 18, 2014, Moyse's counsel communicated Moyse's intention to commence employment at West Face on June 23, 2014, prior to the expiry of the thirty-day notice period provided for in the Employment Agreement.

22. Catalyst continued to pay Moyse his salary until June 20, 2014, when it became clear to Catalyst that Moyse intended to breach the Employment Agreement.

The Misappropriation and Conversion of Catalyst's Confidential Information

23. As part of his deal screening/analysis responsibilities, Moyse performed valuations of companies using methodologies that are proprietary and unique to Catalyst in order to identify new investment opportunities for Catalyst.

24. Moyse received the Confidential Information in his capacity as an analyst at Catalyst, as acknowledged in the Employment Agreement.

25. In breach of his duty of confidence, Moyse forwarded the Confidential Information from his work email address – which is controlled by Catalyst – to his personal email address and to his personal Internet file storage accounts – which he alone controls – without Catalyst's knowledge or approval. The Confidential Information Moyse forwarded to his personal control includes information concerning projects Moyse was working on immediately prior to his resignation from Catalyst, including, but not limited to:

(a) Catalyst Weekly Reports – this document contains a summary of all existing investments and contemplated investment opportunities;

(b) Quarterly letters reporting on results of Catalyst's activities;

(c) Internal research reports;

(d) Internal presentations and supporting spreadsheets; and

(e) Internal discussions regarding the operations of companies in which Catalyst has made investments.

26. There was no legitimate business reason for Moyse to deal with the Confidential Information in this manner.

27. Moyse has wrongfully and unlawfully taken Catalyst's Confidential Information to advance his own business interests, and the interests of West Face, to the detriment of Catalyst. The Confidential Information was imparted to Moyse in confidence during the course of his employment with Catalyst and the unauthorized use of such information by the Defendants constitutes a breach of confidence.

West Face Induced Moyse to Breach the Employment Agreement

28. West Face and Moyse engaged in prolonged discussions regarding Moyse's resignation from Catalyst and immediate employment at West Face thereafter. During the course of these discussions, the parties discussed Moyse's contractual obligations to Catalyst.

29. Prior to Moyse's resignation from Catalyst, West Face was aware of the terms of the Employment Agreement and Moyse's duties and obligations to Catalyst, including the

Restrictive Covenants. Nevertheless, West Face unlawfully induced Moyse to breach the Employment Agreement with, and his obligations owed to, Catalyst, including, but not limited to the Restrictive Covenants.

30. Moyse and West Face knew that Catalyst intended to promote Moyse to the position of "associate" in 2014. But for West Face's inducement to Moyse to resign from Catalyst and commence employment at West Face before the end of the six-month non-competition period, Moyse would still be employed at, and would continue to honour his contractual obligations to, Catalyst.

Catalyst Will Suffer Irreparable Harm

31. Catalyst will suffer irreparable harm as a result of West Face's unlawful inducement of Moyse to breach the Employment Agreement. In particular, without limiting the generality of the foregoing, Catalyst risks losing its strategic advantage with respect to distress for control investments it has been planning for several months of which Moyse, in his role as analyst at Catalyst, is aware.

32. If Moyse is permitted to commence employment at West Face, a direct competitor to Catalyst, before the expiry of the six-month non-competition period, West Face will gain an unfair advantage in the small distressed investing for control industry by learning about investment opportunities Catalyst was studying and Catalyst's plans for taking advantage of those opportunities.

33. These opportunities and strategies are unique to Catalyst and are crucial to its success – if those plans are compromised, Catalyst will suffer a loss that cannot be measured in mere

damages. The damage will include damage to Catalyst's reputation as a leading distress for control investor and to its ability to solicit additional investments in its funds.

34. Moreover, by using the Confidential Information for their personal benefit and to Catalyst's detriment, Moyse and West Face will cause Catalyst to incur large financial losses that are difficult to accurately quantify given the unpredictable range of possible outcomes for a given investment.

Punitive Damages

35. Catalyst claims that the Defendants' egregious actions, as pleaded above, were so high-handed, wilful, wanton, reckless, contemptuous and contumelious of Catalyst's rights and interests so as to entitle Execaire to a substantial award of punitive, aggravated and exemplary damages.

36. Accordingly, the Defendants are liable, on a joint and several basis, to the Plaintiff for punitive damages as described in subparagraph 1(e) above.

37. Catalyst proposes that this action be tried at Toronto.

June 25, 2014

LAX O'SULLIVAN SCOTT LISUS LLP
Counsel
Suite 2750, 145 King Street West
Toronto, Ontario M5H 1J8

Rocco Di Pucchio LSUC#: 38185I
Tel: (416) 598-2268
rdipucchio@counsel-toronto.com

Andrew Winton LSUC#: 54473I
Tel: (416) 644-5342
awinton@counsel-toronto.com

Fax: (416) 598-3730

Lawyers for the Plaintiff

THE CATALYST CAPITAL GROUP INC.
Plaintiff

-and-

BRANDON MOYSE and WEST FACE CAPITAL INC.
Defendants

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

STATEMENT OF CLAIM

LAX O'SULLIVAN SCOTT LISUS LLP
Counsel
Suite 2750, 145 King Street West
Toronto, Ontario M5H 1J8

Rocco Di Pucchio LSUC#: 38185I
rdipucchio@counsel-toronto.com
Tel: (416) 598-2268

Andrew Winton LSUC#: 54473I
Tel: (416) 644-5342
awinton@counsel-toronto.com

Fax: (416) 598-3730

Lawyers for the Plaintiff

This is Exhibit "4" referred to in the Affidavit of Andrew Carlson sworn December 7, 2016

Commissioner for Taking Affidavits (or as may be)

Meera Amanda Persaud, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law.
Expires April 13, 2018.

LAX O'SULLIVAN SCOTT LISUS LLP
Suite 2750, 145 King Street West
Toronto ON M5H 1J8 Canada
Tel: 416 598 1744 Fax: 416 598 3730

LAX O'SULLIVAN SCOTT LISUS

Fax Transmission

Date: October 9, 2014 **File No.:** 13094

To:	Phone #	Fax #
Jeff Mitchell Dentons Canada LLP Toronto, ON		416 863 4592
Jeff Hopkins Grosman, Grosman & Gale LLP Toronto, ON		416 364-2490

From: Andrew Winton Phone: (416) 644-5342

Total pages sent (including cover): 20

IF YOU DO NOT RECEIVE ALL PAGES OF THIS FAX,
PLEASE CALL (416) 598-1744.

MESSAGE:

Please see attached correspondence.

ANDREW WINTON
Direct (416) 644-5342
awinton@counsel-toronto.com
File No. 13094

LAX O'SULLIVAN SCOTT LISUS LLP
Suite 2750, 145 King Street West
Toronto ON M5H 1J8 Canada
Tel: 416 598 1744 Fax: 416 598 3730

LAX O'SULLIVAN SCOTT LISUS

October 9, 2014

Mr. Jeff Mitchell
Dentons Canada LLP
Barristers and Solicitors
77 King Street West, Suite 400
Toronto-Dominion Centre
Toronto ON M5K 0A1

Mr. Jeff Hopkins
Grosman Grosman & Gale LLP
Barristers and Solicitors
390 Bay Street
Suite 1100
Toronto ON M5H 2Y2

Dear Sirs:

Re: The Catalyst Capital Group Inc. v Brandon Moyse et al.

Enclosed please find an Amended Statement of Claim, which is served upon you pursuant to the *Rules of Civil Procedure*.

Yours truly,

Andrew Winton

AJW
Encl.

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants

AMENDED THIS Oct 9, 2014 PURSUANT TO / MODIFIÉ CE CONFORMÉMENT À ☑ RULE/LA RÈGLE 26.02 (a) ☐ THE ORDER OF / L'ORDONNANCE DU DATED / FAIT LE (in Mystal) REGISTRAR SUPERIOR COURT OF JUSTICE GREFFIER COUR SUPÉRIEURE DE JUSTICE

AMENDED STATEMENT OF CLAIM

TO THE DEFENDANT(S):

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The Claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the *Rules of Civil Procedure*, serve it on the Plaintiff's lawyer or, where the Plaintiff does not have a lawyer, serve it on the Plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this Statement of Claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your Statement of Defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a Statement of Defence, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your Statement of Defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF'S CLAIM, and $1,000.00 for costs, within the time for serving and filing your Statement of Defence, you may move to have this proceeding dismissed

by the Court. If you believe the amount claimed for costs is excessive, you may pay the Plaintiff's Claim and $400.00 for costs and have the costs assessed by the Court.

Date June 25, 2014 ~~June 25, 2014~~ ~~October 9, 2014~~

Issued by "N. Mohamed"

Local Registrar

Address of court office: 393 University Avenue
10th Floor
Toronto, Ontario
M5G 1E6

TO: Brandon Moyse
23 Brant Street, Apt. 509
Toronto ON M5V2L5

AND TO: West Face Capital Inc.
2 Bloor Street East, Suite 3000
Toronto, ON M4W 1A8

CLAIM

1. The Plaintiff claims:

(a) An interim, interlocutory and/or permanent injunction restraining the defendant Brandon Moyse ("Moyse"), his agents or any persons acting on his direction or on his behalf, and the defendant West Face Capital Inc. ("West Face"), its officers, directors, employees, agents or any persons acting under its direction or on its behalf, and any other persons affected by the Order granted, from:

(i) Soliciting or attempting to solicit equity or other forms of capital for any partnership, investment fund, pooled fund or other form of investment vehicle managed, advised or sponsored by Catalyst or the Catalyst Fund Limited Partnership IV (the "Fund") as at June 25, 2014, until June 25, 2015;

(ii) Interfering with the Plaintiff's relationships with its employees which, without limiting the generality of the foregoing, shall include any attempt to induce employees of the Plaintiff to leave their employment with the Plaintiff; and

(iii) Using or disclosing the Plaintiff's confidential and proprietary information (including, without limitation, (i) the identity or contact information of existing or prospective investors in the Fund and any such future partnership or fund, (ii) the structure of the Fund, (iii) marketing strategies for securities or investments in the capital of or owned by the Fund (iv)

investment strategies, (v) value realization strategies, (vi) negotiating positions, (vii) the portfolio of investments, (viii) prospective acquisitions to any such portfolio, (ix) prospective dispositions from any such portfolio, and (x) personal information about Catalyst and employees of Catalyst (collectively, the "Confidential Information") in any way, including in relation to any present- and future-related business;

(b) An order requiring the defendants to immediately return to Catalyst (or its counsel) all Confidential Information in their possession or control;

(c) An order prohibiting any of the defendants from, in any way, deleting, modifying or in any way interfering with any of their electronic equipment, including computers, servers and mobile devices, until further Order of this Honourable Court;

(d) An interim, interlocutory and permanent injunction prohibiting the defendant Brandon Moyse ("Moyse") from commencing or continuing employment at the defendant West Face Capital Inc. ("West Face") until December 25, 2014;

(d.1) An interim, interlocutory and permanent injunction prohibiting West Face from voting its interest in Data and Audio Visual Enterprises Wireless Inc. in any proposed transaction involving Wind Mobile;

(d.2) General damages as against West Face in an amount to be particularized prior to trial;

(e) Punitive damages in the amount of $300,000, as against West Face, and $50,000, as against Moyse;

(f) Postjudgment interest in accordance with section 129 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;

(g) The plaintiff's costs of this action on a substantial indemnity basis, plus the applicable H.S.T.; and

(h) Such further and other relief as to this Honourable Court may seem just.

The Plaintiff – The Catalyst Capital Group Inc. ("Catalyst")

2. Catalyst is a corporation with its head office located in Toronto, Ontario. Catalyst is widely recognized as the leading firm in the field of investments in distressed and undervalued Canadian situations for control or influence, known as "special situations investments for control".

3. Catalyst uses a "flat" entrepreneurial staffing model whereby its analysts are given substantial training, autonomy and responsibility at a relatively early stage in their career as compared to its competitors in the special situations investments for control industry.

4. Moreover, Catalyst uses a unique compensation scheme to compensate its employees – in addition to their base salary and annual bonus, employees participate in a "60/40 Scheme" whereby the "carried interest" of each Fund is allocated sixty per cent to the deal team and forty per cent to Catalyst. The carried interest refers to the twenty per cent profit participation Catalyst may enjoy, subject to certain conditions.

5. Points in each deal that forms part of the sixty per cent are allocated on a deal-by-deal basis. At all material times, Catalyst employed only two investment analysts, and the deal teams on which Moyse participated involved only three or four Catalyst professionals. The 60/40 Scheme granted Catalyst's employees a partner-like interest in the success of the company.

The Defendants

6. West Face is a Toronto-based private equity corporation with assets under management of approximately $2.5 billion. In December 2013, West Face formed a credit fund for the purpose of competing directly with Catalyst in the special situations investments for control industry.

7. Moyse is a resident of Toronto. Pursuant to an employment agreement dated October 1, 2012 (the "Employment Agreement"), Moyse was hired as an investment analyst by Catalyst effective November 1, 2012. Moyse had substantial autonomy and responsibility at Catalyst. He was primarily responsible for analysing new investment opportunities of distressed and/or under-valued situations where Catalyst could invest for control or influence.

The Special Situation Investment Market in Canada

8. The Canadian market for special situations investing is very competitive. A small number of Canadian firms seek opportunities to invest in situations where a corporation is distressed or undervalued, or face events that can have a significant effect on the company's operations, such as proxy battles, takeovers, executive changes and board shake-ups.

9. In these special situations, an investment firm's strategic plans and investment models are crucial to successfully executing an investment plan. Confidentiality is paramount: if a competitor has access to a firm's plans and modelling for a particular special situation, the

competitor can "scoop" the opportunity, or it can take an adverse investment position which make the firm's plans either too costly to execute or, depending on the timing of the adverse action, can cause the plan to incur significant losses after it is past the point of no return.

10. Depending on how advanced a firm is in executing its investment strategy, a competitor's adverse position can have disastrous, immeasurable effects on the firm's goodwill and/or will cause a firm to incur large financial losses that are difficult to accurately quantify given the unpredictable range of possible outcomes for a given investment.

11. Within the special situations investment industry, "investment for control or influence" is a sub-industry with unique characteristics. "Investment for control or influence" refers to acquiring controlling or influential equity or debt positions in distressed companies in order to add value through operational involvement in an investment target by, among other things:

(a) Appointing a representative as interim CEO and other senior management;

(b) Replacing or augmenting management;

(c) Providing strategic direction and industry contacts;

(d) Establishing and executing turnaround plans;

(e) Managing costs through a rigorous working capital approval process; and

(f) Identifying potential add-on acquisitions.

12. The "investment for control or influence" sub-industry within the distressed investment industry has unique needs, including the need to ensure that employees are unable to resign and begin working for a competitor for a reasonable period of time in order to ensure that the

competitor is unable to take advantage of the former employee's knowledge of the firm's strategic plans and models.

13. In the special situations for control industry, information is critical. The ability to collect and analyze information and to prepare confidential plans for complex investment opportunities is the difference between a plan's success or failure. For this reason, it is commonplace for firms specializing in the special situations for control or influence industry to require its employees to agree to a non-competition covenant prior to commencing employment. Likewise, when a competitor hires directly from a firm within the industry, it is commonplace for the competitor to respect the other firm's non-competition covenant by not directly employing a lateral hire in the same market as they worked for the competitor during the term of the non-competition covenant.

The Employment Agreement

14. Under the Employment Agreement, Moyse was paid an initial salary of $90,000 and an annual bonus of $80,000. Moyse was also granted options on equity in Catalyst and participated in the 60/40 Scheme. Moyse's equity compensation (options and the 60/40 Scheme) was equal to or exceeded his base salary and annual bonus.

15. The Employment Agreement also included the following non-competition, non-solicitation and confidential information covenants (together, the "Restrictive Covenants"):

> Non-Competition
>
> You agree that while you are employed by the Employer and for a period of six months thereafter, if you leave of your own volition or are dismissed for cause and three months under any other circumstances, you shall not, directly or indirectly within Ontario:

(i) engage in or become a party with an economic interest in any business or undertaking of the type conducted by [Catalyst] or the Fund or any direct Associate of [Catalyst] within Canada, as the term Associate is defined in the *Ontario Business Corporations Act* (collectively the "protected entities"), or attempt to solicit any opportunities of the type for which the protected entities or any of them had a reasonable likelihood of completing an offering while you were under [Catalyst]'s employ; and

(ii) render any services of the type outlined in subparagraph (i) above, unless such services are rendered as an employee of or consultant to [Catalyst];

Non-Solicitation

You agree that while you are employed by the Employer and for a period of one year after your employment ends, regardless of the reason, you shall not, directly or indirectly:

(i) hire or attempt to hire or assist anyone else to hire employees of any of the protected entities who were so employed as at the date you cease to be an employee of [Catalyst] or persons who were so employed during the 12 months prior to your ceasing to be an employee of [Catalyst] or induce or attempt to induce any such employees of any of the protected entities to leave their employment; or

(ii) solicit equity or other forms of capital for any partnership, investment fund, pooled fund or other form of investment vehicle managed, advised and/or sponsored by any of the protected entities as at the date you ceased to be an employee of [Catalyst] or during the 12 months prior to your ceasing to be an employee of [Catalyst].

Confidential Information

You understand that, in your capacity as an equity holder and employee, you will acquire information about certain matters and things which are confidential to the protected entities, including, without limitation, (i) the identity of existing or prospective investors in the Fund and any such future partnership or fund, (ii) the structure of same, (iii) marketing strategies for securities or investments in the capital of or owned by the Fund or any such partnership of or any such partnership or fund, (iv) investment strategies, (v) value realization strategies, (vi) negotiating positions, (vii) the portfolio of investments, (viii) prospective acquisitions to any such portfolio, (ix) prospective dispositions

> from any such portfolio, and (x) personal information about [Catalyst] and employees of [Catalyst] and the like (collectively "Confidential Information"). Further, you understand that each of the protected entities' Confidential Information has been developed over a long period of time and at great expense to each of the protected entities. You agree that all Confidential Information is the exclusive property of each of the protected entities. For greater clarity, common knowledge or information that is in the public domain does not constitute "Confidential Information".
>
> You also agree that you shall not, at any time during the term of your employment with us or thereafter reveal, divulge or make known to any person, other than to [Catalyst] and our duly authorized employees or representatives or use for your own or any other's benefit, any Confidential Information, which during or as a result of your employment with us, has become known to you.
>
> After your employment has ended, and for the following one year, you will not take advantage of, derive a benefit or otherwise profit from any opportunities belonging to the Fund to invest in particular' businesses, such opportunities that you become aware of by reason of your employment with [Catalyst].

16. Moyse agreed that the Restrictive Covenants were reasonable and necessary and reflected a mutual desire of Moyse and Catalyst that the Restrictive Covenants would be upheld in their entirety and be given full force and effect. In addition, Moyse acknowledged that if he breached the terms of the Restrictive Covenants, it would cause Catalyst irreparable harm and that Catalyst would be entitled to injunctive relief to prevent him from continuing to breach the Restrictive Covenants.

17. Under the Employment Agreement, Moyse was required to give Catalyst a minimum of thirty days' written notice of his intention to terminate his employment.

18. Moyse executed the Employment Agreement on October 3, 2012. In so doing, he acknowledged that he reviewed, understood and accepted the terms of the Employment

Agreement, and that he had an adequate opportunity to seek and receive independent legal advice prior to executing the Employment Agreement.

Moyse Breaches the Employment Agreement

19. On May 26, 2014, Moyse informed Catalyst of his intention to resign from Catalyst and to begin working for West Face.

20. Through its counsel, Catalyst communicated its intention to enforce the Restrictive Covenants. Through their counsel, the Defendants responded by communicating their intention to breach the Restrictive Covenants, in particular the non-competition covenant.

21. Moreover, on our about June 18, 2014, Moyse's counsel communicated Moyse's intention to commence employment at West Face on June 23, 2014, prior to the expiry of the thirty-day notice period provided for in the Employment Agreement.

22. Catalyst continued to pay Moyse his salary until June 20, 2014, when it became clear to Catalyst that Moyse intended to breach the Employment Agreement.

The Misappropriation and Conversion of Catalyst's Confidential Information

23. As part of his deal screening/analysis responsibilities, Moyse performed valuations of companies using methodologies that are proprietary and unique to Catalyst in order to identify new investment opportunities for Catalyst.

24. Moyse received the Confidential Information in his capacity as an analyst at Catalyst, as acknowledged in the Employment Agreement.

25. In breach of his duty of confidence, Moyse forwarded the Confidential Information from his work email address – which is controlled by Catalyst – to his personal email address and to his personal Internet file storage accounts – which he alone controls – without Catalyst's knowledge or approval. The Confidential Information Moyse forwarded to his personal control includes information concerning projects Moyse was working on immediately prior to his resignation from Catalyst, including, but not limited to:

(a) Catalyst Weekly Reports – this document contains a summary of all existing investments and contemplated investment opportunities;

(b) Quarterly letters reporting on results of Catalyst's activities;

(c) Internal research reports;

(d) Internal presentations and supporting spreadsheets; and

(e) Internal discussions regarding the operations of companies in which Catalyst has made investments.

26. There was no legitimate business reason for Moyse to deal with the Confidential Information in this manner.

27. Moyse has wrongfully and unlawfully taken Catalyst's Confidential Information to advance his own business interests, and the interests of West Face, to the detriment of Catalyst. The Confidential Information was imparted to Moyse in confidence during the course of his employment with Catalyst and the unauthorized use of such information by the Defendants constitutes a breach of confidence.

West Face Induced Moyse to Breach the Employment Agreement

28. West Face and Moyse engaged in prolonged discussions regarding Moyse's resignation from Catalyst and immediate employment at West Face thereafter. During the course of these discussions, the parties discussed Moyse's contractual obligations to Catalyst.

29. Prior to Moyse's resignation from Catalyst, West Face was aware of the terms of the Employment Agreement and Moyse's duties and obligations to Catalyst, including the Restrictive Covenants. Nevertheless, West Face unlawfully induced Moyse to breach the Employment Agreement with, and his obligations owed to, Catalyst, including, but not limited to the Restrictive Covenants.

30. Moyse and West Face knew that Catalyst intended to promote Moyse to the position of "associate" in 2014. But for West Face's inducement to Moyse to resign from Catalyst and commence employment at West Face before the end of the six-month non-competition period, Moyse would still be employed at, and would continue to honour his contractual obligations to, Catalyst.

Catalyst Will Suffer Irreparable Harm

31. Catalyst will suffer irreparable harm as a result of West Face's unlawful inducement of Moyse to breach the Employment Agreement. In particular, without limiting the generality of the foregoing, Catalyst risks losing its strategic advantage with respect to distress for control investments it has been planning for several months of which Moyse, in his role as analyst at Catalyst, is aware.

32. If Moyse is permitted to commence employment at West Face, a direct competitor to Catalyst, before the expiry of the six-month non-competition period, West Face will gain an

unfair advantage in the small distressed investing for control industry by learning about investment opportunities Catalyst was studying and Catalyst's plans for taking advantage of those opportunities.

33. These opportunities and strategies are unique to Catalyst and are crucial to its success – if those plans are compromised, Catalyst will suffer a loss that cannot be measured in mere damages. The damage will include damage to Catalyst's reputation as a leading distress for control investor and to its ability to solicit additional investments in its funds.

34. Moreover, by using the Confidential Information for their personal benefit and to Catalyst's detriment, Moyse and West Face will cause Catalyst to incur large financial losses that are difficult to accurately quantify given the unpredictable range of possible outcomes for a given investment.

West Face Misused Catalyst's Confidential Information Concerning the Wind Opportunity

34.1 One of the special situations that Catalyst was studying before Moyse terminated his employment with Catalyst concerned Wind Mobile ("Wind"), a Canadian wireless telecommunications company. Moyse was a member of Catalyst's investment team studying the Wind opportunity and was privy to Catalyst's Confidential Information concerning its plans concerning Wind opportunity, which included a potential acquisition of Wind.

34.2 In June 2014, Catalyst brought a motion for interim and interlocutory relief seeking, among other things, the return of any and all Confidential Information from West Face and Moyse. In particular, Catalyst was concerned about the potential communication of its Confidential Information relating to the Wind opportunity.

34.3 Catalyst's motion for interim relief was heard on July 16, 2014 and settled on consent.

34.4 Catalyst's motion for interlocutory relief was scheduled to be heard on August 7, 2014 but was adjourned to October 10, 2014. As a result, the motion for interim relief has not yet been determined.

34.5 On or about September 16, 2014, West Face publicly announced that it was leading a consortium of investors to purchase Wind. This was the very outcome Catalyst was concerned about when it learned that Moyse, a participant on Catalyst's Wind team, was joining West Face.

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.

34.7 As a result of West Face's misuse of Catalyst's Confidential Information, Catalyst has suffered damages, particulars of which will be provided prior to trial.

Through Moyse, West Face has Catalyst's Confidential Information Concerning Mobilicity

34.8 On September 29, 2013, Data & Audio-Visual Enterprises Holdings Inc. ("Holdings") and its wholly owned subsidiaries, Data & Audio-Visual Enterprises Wireless Inc. ("Wireless") and 8440522 Canada Inc. (collectively with Wireless and Holdings, the "Applicants" or "Mobilicity") filed an application for an Initial Order under the *Companies' Creditors Arrangement Act* (Canada) ("CCAA") in order to restructure their business and affairs or complete a sale of their business and assets.

34.9 Catalyst owns over $60 million in First Lien Notes issued by Wireless pursuant to a First Lien Indenture dated April 20, 2011 (the "First Lien Notes").

34.10 West Face owns approximately $3 million in First Lien Notes.

34.11 For several months, both before and after Mobilicity applied for CCAA protection, Catalyst studied Mobilicity as a special situation. Moyse was a member of Catalyst's investment team in the Mobilicity situation. In that respect, Moyse was privy to Catalyst's confidential information concerning its analysis of the Mobilicity situation.

34.12 West Face has wrongfully used Catalyst's Confidential Information concerning the Mobilicity opportunity to obtain an unfair advantage over Catalyst with respect to that opportunity. If West Face is able to vote its interest in Mobilicity with the benefit of its wrongful possession of Catalyst's Confidential Information, Catalyst will suffer irreparable harm.

Punitive Damages

35. Catalyst claims that the Defendants' egregious actions, as pleaded above, were so high-handed, wilful, wanton, reckless, contemptuous and contumelious of Catalyst's rights and interests so as to entitle ~~Execaire~~ Catalyst to a substantial award of punitive, aggravated and exemplary damages.

36. Accordingly, the Defendants are liable, on a joint and several basis, to the Plaintiff for punitive damages as described in subparagraph 1(e) above.

37. Catalyst proposes that this action be tried at Toronto.

~~June 25, 2014~~
October 9, 2014

June 25, 2014

LAX O'SULLIVAN SCOTT LISUS LLP
Counsel
Suite 2750, 145 King Street West
Toronto, Ontario M5H 1J8

Rocco Di Pucchio LSUC#: 38185I
Tel: (416) 598-2268
rdipucchio@counsel-toronto.com

Andrew Winton LSUC#: 54473I
Tel: (416) 644-5342
awinton@counsel-toronto.com

Fax: (416) 598-3730

Lawyers for the Plaintiff

THE CATALYST CAPITAL GROUP INC.
Plaintiff

-and-

BRANDON MOYSE and WEST FACE CAPITAL INC.
Defendants

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

STATEMENT OF CLAIM

LAX O'SULLIVAN SCOTT LISUS LLP
Counsel
Suite 2750, 145 King Street West
Toronto, Ontario M5H 1J8

Rocco Di Pucchio LSUC#: 38185I
rdipucchio@counsel-toronto.com
Tel: (416) 598-2268

Andrew Winton LSUC#: 54473I
Tel: (416) 644-5342
awinton@counsel-toronto.com

Fax: (416) 598-3730

Lawyers for the Plaintiff

This is Exhibit "5" referred to in the Affidavit of Andrew Carlson sworn December 7, 2016

Meera Persaud

Commissioner for Taking Affidavits (or as may be)

Meera Amanda Persaud, **a Commissioner, etc.,**
Province of Ontario, while **a Student-at-Law.**
Expires April 13, 2018.

afternoon, Mr. de Alba, that you only learned the terms of West Face's offer in the last two months. Do you recall that?

A. Correct.

Q. Were you aware that in his March 7th, 2015 affidavit Tony Griffin actually attached the West Face offer?

A. Yes.

Q. Did you review that affidavit at the time?

A. I don't recall seeing the offer then.

Q. Okay. So you'd certainly accept my proposition to you that those terms were known to Catalyst, whether or not you actually were aware of them?

A. If they were there, yes.

Q. And you certainly knew in August or September of 2014 that the West Face consortium had made a proposal to VimpelCom?

A. I don't recall if I knew that they -- the consortium had made a proposal.

Q. You were informed by Chris Gauthier at the time that they had made a proposal, correct?

A. That there was another party making a proposal. I don't recall if it was all the consortium or who it was.

Q. You were aware in August or September from Mr. Gauthier that Bennett Jones -- sorry, let me just make sure we're all on common ground. Mr. Gauthier was at Bennett Jones who were counsel to VimpelCom, correct?

A. Correct.

Q. And Mr. Gauthier informed you in August or September of 2014 that the West Face consortium, the consortium that included West Face, had made a proposal during the period of exclusivity?

A. I don't recall if he informed that there was another proposal or who precisely had made the proposal.

Q. You learned from Mr. Gauthier that the approach that had been pursued by the West Face consortium and by VimpelCom was to continue to receive proposals in order to have a potential alternative. You were aware of that in September/August of 2014, correct?

A. No, I learned that the proposal was submitted from this trial.

Q. Mr. de Alba, do you recall being examined for discovery by me on May the 11th of 2016?

THE COURT: Do you have a copy of that for me?

MR. MILNE-SMITH: Yes, sorry. The transcript is at tab 2, is it?

THE COURT: Tab 2 of what?

MR. MILNE-SMITH: Tab 2 of the cross-examination brief. Since this is the first time we're going to it, let me just help Your Honour make sure you get there.

So if you go into the Catalyst -- Catalyst, in the main folder, if you then go into transcripts and undertakings.

THE COURT: Okay.

MR. MILNE-SMITH: Then there are discovery transcripts.

THE COURT: Sorry. Just a minute. Under discovery transcripts?

MR. MILNE-SMITH: Yes, discovery transcripts.

THE COURT: Yes.

MR. MILNE-SMITH: And then de Alba.

THE COURT: Yes.

MR. MILNE-SMITH: And then there will be --

MS. BARBIERO: It's also tab 2 of our cross-examination brief.

MR. MILNE-SMITH: The folder I've taken you to is the very first --

THE COURT: 000?

MR. MILNE-SMITH: Correct. That will bring up the transcript.

THE COURT: Yes.

MR. MILNE-SMITH: So, Your Honour, we're on page 191 of the transcript.

THE COURT: Page what?

MR. MILNE-SMITH: 191.

THE COURT: Yes.

MR. MILNE-SMITH: Starting at question 709, about half-way down the page.

BY MR. MILNE-SMITH:

Q. "Question: You believe that Mr. Saratovsky and the VimpelCom board breached their exclusivity obligations to Catalyst?

Answer: I do believe that.

Question: Okay. When did you form that belief?

Answer: After, I need to remember precisely, but after we lost the exclusivity --
Question: Yes.
Answer: -- I learned from Mr. Gauthier that the approach that had been pursued by the West Face consortium and by VimpelCom was to continue to receive proposals in order to have a potential alternative. And he invited and noted that the exclusivity did not have a notification clause if other proposals would have been received, and he further, you know, mentioned that that's, you know, something that had been happening.
Question: And this you found out back in August 2014 after your exclusivity expired?
Answer: I don't remember precisely when.
Question: But in that August/September timeframe?
Answer: I don't remember precisely

when.

Question: It wasn't, like, this year, it was back at the time the events in question were happening?

Answer: Yeah, but I don't remember if -- yes."

Were you asked those questions and did you give those answers?

A. Yes.

Q. Thank you.

THE COURT: The next question, "And were they true."

BY MR. MILNE-SMITH:

Q. And were they true?

A. Yes.

Q. Were they true when given?

A. Yes.

Q. You gave evidence this afternoon, Mr. de Alba, about a conversation that you had with Mr. Boland on June 20th. Do you recall that?

A. Yes.

Q. Is it also true that the day before that conversation, in other words on June 19th, your counsel had written to counsel for West Face and threatened to commence litigation if the

This is Exhibit "6" referred to in the Affidavit of Andrew Carlson sworn December 7, 2016

Commissioner for Taking Affidavits (or as may be)

Meera Amanda Persaud, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law.
Expires April 13, 2018.

LAX O'SULLIVAN SCOTT LISUS LLP
Suite 2750, 145 King Street West
Toronto ON M5H 1J8 Canada
Tel: 416 598 1744 Fax: 416 598 3730

LAX O'SULLIVAN SCOTT LISUS

Fax Transmission

Date: December 16, 2014 **File No.:** 13094

To:	Phone #	Fax #
Jeff Mitchell Dentons Canada LLP Toronto, ON		416 863 4592
Jeff Hopkins Grosman, Grosman & Gale LLP Toronto, ON		416 364-2490

From: Andrew Winton Phone: (416) 644-5342

Total pages sent (including cover): 21

IF YOU DO NOT RECEIVE ALL PAGES OF THIS FAX,
PLEASE CALL (416) 598-1744.

MESSAGE:

Please see attached correspondence.

ANDREW WINTON
Direct: (416) 644-5342
awinton@counsel-toronto.com
File No. 13094

LAX O'SULLIVAN SCOTT LISUS LLP
Suite 2750, 145 King Street West
Toronto ON M5H 1J8 Canada
Tel: 416 598 1744 Fax: 416 598 3730

LAX O'SULLIVAN SCOTT LISUS

December 16, 2014

Mr. Jeff Mitchell
Dentons Canada LLP
Barristers and Solicitors
77 King Street West, Suite 400
Toronto-Dominion Centre
Toronto ON M5K 0A1

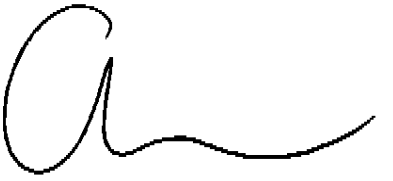
Mr. Jeff Hopkins
Grosman Grosman & Gale LLP
Barristers and Solicitors
390 Bay Street
Suite 1100
Toronto ON M5H 2Y2

Dear Sirs:

Re: The Catalyst Capital Group Inc. v Brandon Moyse et al.

Enclosed please find an Amended Amended Statement of Claim, which is served upon you pursuant to the *Rules of Civil Procedure*.

Yours truly,



Andrew Winton

AJW/cg
Encl.

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants

PURSUANT TO / CONFORMÉMENT À RULE/LA REGLE 26.02 ( ) AMENDED THIS / MODIFIÉ CE ☐ THE ORDER OF / L'ORDONNANCE DU DATED / FAITE ☐ GREFFIER REGISTRAR / SUPÉRIEUR COUR SUPÉRIEURE DE JUSTICE

AMENDED AMENDED STATEMENT OF CLAIM

TO THE DEFENDANT(S):

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The Claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the *Rules of Civil Procedure*, serve it on the Plaintiff's lawyer or, where the Plaintiff does not have a lawyer, serve it on the Plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this Statement of Claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your Statement of Defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a Statement of Defence, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your Statement of Defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF'S CLAIM, and $1,000.00 for costs, within the time for serving and filing your Statement of Defence, you may move to have this proceeding dismissed

by the Court. If you believe the amount claimed for costs is excessive, you may pay the Plaintiff's Claim and $400.00 for costs and have the costs assessed by the Court.

Date ~~June 25, 2014~~ ~~October 9, 2014~~ ~~December 16, 2014~~ June 25/14 Issued by N. Mohammad

Local Registrar

Address of court office: 393 University Avenue
10th Floor
Toronto, Ontario
M5G 1E6

TO: Brandon Moyse
23 Brant Street, Apt. 509
Toronto ON M5V2L5

AND TO: West Face Capital Inc.
2 Bloor Street East, Suite 3000
Toronto, ON M4W 1A8

CLAIM

1. The Plaintiff claims:

(a) An interim, interlocutory and/or permanent injunction restraining the defendant Brandon Moyse ("Moyse"), his agents or any persons acting on his direction or on his behalf, and the defendant West Face Capital Inc. ("West Face"), its officers, directors, employees, agents or any persons acting under its direction or on its behalf, and any other persons affected by the Order granted, from:

(i) Soliciting or attempting to solicit equity or other forms of capital for any partnership, investment fund, pooled fund or other form of investment vehicle managed, advised or sponsored by Catalyst or the Catalyst Fund Limited Partnership IV (the "Fund") as at June 25, 2014, until June 25, 2015;

(ii) Interfering with the Plaintiff's relationships with its employees which, without limiting the generality of the foregoing, shall include any attempt to induce employees of the Plaintiff to leave their employment with the Plaintiff; and

(iii) Using or disclosing the Plaintiff's confidential and proprietary information (including, without limitation, (i) the identity or contact information of existing or prospective investors in the Fund and any such future partnership or fund, (ii) the structure of the Fund, (iii) marketing strategies for securities or investments in the capital of or owned by the Fund (iv)

investment strategies, (v) value realization strategies, (vi) negotiating positions, (vii) the portfolio of investments, (viii) prospective acquisitions to any such portfolio, (ix) prospective dispositions from any such portfolio, and (x) personal information about Catalyst and employees of Catalyst (collectively, the "Confidential Information") in any way, including in relation to any present- and future-related business;

(b) An order requiring the defendants to immediately return to Catalyst (or its counsel) all Confidential Information in their possession or control;

(c) An order prohibiting any of the defendants from, in any way, deleting, modifying or in any way interfering with any of their electronic equipment, including computers, servers and mobile devices, until further Order of this Honourable Court;

(d) An interim, interlocutory and permanent injunction prohibiting the defendant Brandon Moyse ("Moyse") from commencing or continuing employment at the defendant West Face Capital Inc. ("West Face") until December 25, 2014;

(d.1) An interim, interlocutory and permanent injunction prohibiting West Face from voting its interest in Data and Audio Visual Enterprises Wireless Inc. in any proposed transaction involving Wind Mobile;

(d.2) General damages as against West Face in an amount to be particularized prior to trial;

(d.3) A constructive trust over all property, including, but not limited to, securities, security interests, debts and other financial instruments, acquired by West Face, its officers, directors, employees, agents or any persons acting under its direction or on its behalf, as a result of its misuse of the Confidential Information;

(d.4) In addition or in the alternative to the relief sought in paragraph 1(d.3), an accounting of all profits earned by West Face, its officers, directors, employees, agents, any persons acting under its direction or on its behalf, as a result of its misuse of the Confidential Information;

(e) Punitive damages in the amount of $300,000, as against West Face, and $50,000, as against Moyse;

(f) Postjudgment interest in accordance with section 129 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;

(g) The plaintiff's costs of this action on a substantial indemnity basis, plus the applicable H.S.T.; and

(h) Such further and other relief as to this Honourable Court may seem just.

The Plaintiff – The Catalyst Capital Group Inc. ("Catalyst")

2. Catalyst is a corporation with its head office located in Toronto, Ontario. Catalyst is widely recognized as the leading firm in the field of investments in distressed and undervalued Canadian situations for control or influence, known as "special situations investments for control".

3. Catalyst uses a "flat" entrepreneurial staffing model whereby its analysts are given substantial training, autonomy and responsibility at a relatively early stage in their career as compared to its competitors in the special situations investments for control industry.

4. Moreover, Catalyst uses a unique compensation scheme to compensate its employees – in addition to their base salary and annual bonus, employees participate in a "60/40 Scheme" whereby the "carried interest" of each Fund is allocated sixty per cent to the deal team and forty per cent to Catalyst. The carried interest refers to the twenty per cent profit participation Catalyst may enjoy, subject to certain conditions.

5. Points in each deal that forms part of the sixty per cent are allocated on a deal-by-deal basis. At all material times, Catalyst employed only two investment analysts, and the deal teams on which Moyse participated involved only three or four Catalyst professionals. The 60/40 Scheme granted Catalyst's employees a partner-like interest in the success of the company.

The Defendants

6. West Face is a Toronto-based private equity corporation with assets under management of approximately $2.5 billion. In December 2013, West Face formed a credit fund for the purpose of competing directly with Catalyst in the special situations investments for control industry.

7. Moyse is a resident of Toronto. Pursuant to an employment agreement dated October 1, 2012 (the "Employment Agreement"), Moyse was hired as an investment analyst by Catalyst effective November 1, 2012. Moyse had substantial autonomy and responsibility at Catalyst. He was primarily responsible for analysing new investment opportunities of distressed and/or under-valued situations where Catalyst could invest for control or influence.

The Special Situation Investment Market in Canada

8. The Canadian market for special situations investing is very competitive. A small number of Canadian firms seek opportunities to invest in situations where a corporation is distressed or undervalued, or face events that can have a significant effect on the company's operations, such as proxy battles, takeovers, executive changes and board shake-ups.

9. In these special situations, an investment firm's strategic plans and investment models are crucial to successfully executing an investment plan. Confidentiality is paramount: if a competitor has access to a firm's plans and modelling for a particular special situation, the competitor can "scoop" the opportunity, or it can take an adverse investment position which make the firm's plans either too costly to execute or, depending on the timing of the adverse action, can cause the plan to incur significant losses after it is past the point of no return.

10. Depending on how advanced a firm is in executing its investment strategy, a competitor's adverse position can have disastrous, immeasurable effects on the firm's goodwill and/or will cause a firm to incur large financial losses that are difficult to accurately quantify given the unpredictable range of possible outcomes for a given investment.

11. Within the special situations investment industry, "investment for control or influence" is a sub-industry with unique characteristics. "Investment for control or influence" refers to acquiring controlling or influential equity or debt positions in distressed companies in order to add value through operational involvement in an investment target by, among other things:

(a) Appointing a representative as interim CEO and other senior management;

(b) Replacing or augmenting management;

(c) Providing strategic direction and industry contacts;

(d) Establishing and executing turnaround plans;

(e) Managing costs through a rigorous working capital approval process; and

(f) Identifying potential add-on acquisitions.

12. The "investment for control or influence" sub-industry within the distressed investment industry has unique needs, including the need to ensure that employees are unable to resign and begin working for a competitor for a reasonable period of time in order to ensure that the competitor is unable to take advantage of the former employee's knowledge of the firm's strategic plans and models.

13. In the special situations for control industry, information is critical. The ability to collect and analyze information and to prepare confidential plans for complex investment opportunities is the difference between a plan's success or failure. For this reason, it is commonplace for firms specializing in the special situations for control or influence industry to require its employees to agree to a non-competition covenant prior to commencing employment. Likewise, when a competitor hires directly from a firm within the industry, it is commonplace for the competitor to respect the other firm's non-competition covenant by not directly employing a lateral hire in the same market as they worked for the competitor during the term of the non-competition covenant.

The Employment Agreement

14. Under the Employment Agreement, Moyse was paid an initial salary of $90,000 and an annual bonus of $80,000. Moyse was also granted options on equity in Catalyst and participated

in the 60/40 Scheme. Moyse's equity compensation (options and the 60/40 Scheme) was equal to or exceeded his base salary and annual bonus.

15. The Employment Agreement also included the following non-competition, non-solicitation and confidential information covenants (together, the "Restrictive Covenants"):

> Non-Competition
>
> You agree that while you are employed by the Employer and for a period of six months thereafter, if you leave of your own volition or are dismissed for cause and three months under any other circumstances, you shall not, directly or indirectly within Ontario:
>
> (i) engage in or become a party with an economic interest in any business or undertaking of the type conducted by [Catalyst] or the Fund or any direct Associate of [Catalyst] within Canada, as the term Associate is defined in the *Ontario Business Corporations Act* (collectively the "protected entities"), or attempt to solicit any opportunities of the type for which the protected entities or any of them had a reasonable likelihood of completing an offering while you were under [Catalyst]'s employ; and
>
> (ii) render any services of the type outlined in subparagraph (i) above, unless such services are rendered as an employee of or consultant to [Catalyst];
>
> Non-Solicitation
>
> You agree that while you are employed by the Employer and for a period of one year after your employment ends, regardless of the reason, you shall not, directly or indirectly:
>
> (i) hire or attempt to hire or assist anyone else to hire employees of any of the protected entities who were so employed as at the date you cease to be an employee of [Catalyst] or persons who were so employed during the 12 months prior to your ceasing to be an employee of [Catalyst] or induce or attempt to induce any such employees of any of the protected entities to leave their employment; or
>
> (ii) solicit equity or other forms of capital for any partnership, investment fund, pooled fund or other form of investment vehicle managed, advised and/or sponsored by any of the protected entities as at the date you ceased to be an employee of [Catalyst] or during

the 12 months prior to your ceasing to be an employee of [Catalyst].

Confidential Information

You understand that, in your capacity as an equity holder and employee, you will acquire information about certain matters and things which are confidential to the protected entities, including, without limitation, (i) the identity of existing or prospective investors in the Fund and any such future partnership or fund, (ii) the structure of same, (iii) marketing strategies for securities or investments in the capital of or owned by the Fund or any such partnership of or any such partnership or fund, (iv) investment strategies, (v) value realization strategies, (vi) negotiating positions, (vii) the portfolio of investments, (viii) prospective acquisitions to any such portfolio, (ix) prospective dispositions from any such portfolio, and (x) personal information about [Catalyst] and employees of [Catalyst] and the like (collectively "Confidential Information"). Further, you understand that each of the protected entities' Confidential Information has been developed over a long period of time and at great expense to each of the protected entities. You agree that all Confidential Information is the exclusive property of each of the protected entities. For greater clarity, common knowledge or information that is in the public domain does not constitute "Confidential Information".

You also agree that you shall not, at any time during the term of your employment with us or thereafter reveal, divulge or make known to any person, other than to [Catalyst] and our duly authorized employees or representatives or use for your own or any other's benefit, any Confidential Information, which during or as a result of your employment with us, has become known to you.

After your employment has ended, and for the following one year, you will not take advantage of, derive a benefit or otherwise profit from any opportunities belonging to the Fund to invest in particular' businesses, such opportunities that you become aware of by reason of your employment with [Catalyst].

16. Moyse agreed that the Restrictive Covenants were reasonable and necessary and reflected a mutual desire of Moyse and Catalyst that the Restrictive Covenants would be upheld in their entirety and be given full force and effect. In addition, Moyse acknowledged that if he breached the terms of the Restrictive Covenants, it would cause Catalyst irreparable harm and that Catalyst

would be entitled to injunctive relief to prevent him from continuing to breach the Restrictive Covenants.

17. Under the Employment Agreement, Moyse was required to give Catalyst a minimum of thirty days' written notice of his intention to terminate his employment.

18. Moyse executed the Employment Agreement on October 3, 2012. In so doing, he acknowledged that he reviewed, understood and accepted the terms of the Employment Agreement, and that he had an adequate opportunity to seek and receive independent legal advice prior to executing the Employment Agreement.

Moyse Breaches the Employment Agreement

19. On May 26, 2014, Moyse informed Catalyst of his intention to resign from Catalyst and to begin working for West Face.

20. Through its counsel, Catalyst communicated its intention to enforce the Restrictive Covenants. Through their counsel, the Defendants responded by communicating their intention to breach the Restrictive Covenants, in particular the non-competition covenant.

21. Moreover, on our about June 18, 2014, Moyse's counsel communicated Moyse's intention to commence employment at West Face on June 23, 2014, prior to the expiry of the thirty-day notice period provided for in the Employment Agreement.

22. Catalyst continued to pay Moyse his salary until June 20, 2014, when it became clear to Catalyst that Moyse intended to breach the Employment Agreement.

The Misappropriation and Conversion of Catalyst's Confidential Information

23. As part of his deal screening/analysis responsibilities, Moyse performed valuations of companies using methodologies that are proprietary and unique to Catalyst in order to identify new investment opportunities for Catalyst.

24. Moyse received the Confidential Information in his capacity as an analyst at Catalyst, as acknowledged in the Employment Agreement.

25. In breach of his duty of confidence, Moyse forwarded the Confidential Information from his work email address – which is controlled by Catalyst – to his personal email address and to his personal Internet file storage accounts – which he alone controls – without Catalyst's knowledge or approval. The Confidential Information Moyse forwarded to his personal control includes information concerning projects Moyse was working on immediately prior to his resignation from Catalyst, including, but not limited to:

(a) Catalyst Weekly Reports – this document contains a summary of all existing investments and contemplated investment opportunities;

(b) Quarterly letters reporting on results of Catalyst's activities;

(c) Internal research reports;

(d) Internal presentations and supporting spreadsheets; and

(e) Internal discussions regarding the operations of companies in which Catalyst has made investments.

26. There was no legitimate business reason for Moyse to deal with the Confidential Information in this manner.

27. Moyse has wrongfully and unlawfully taken Catalyst's Confidential Information to advance his own business interests, and the interests of West Face, to the detriment of Catalyst. The Confidential Information was imparted to Moyse in confidence during the course of his employment with Catalyst and the unauthorized use of such information by the Defendants constitutes a breach of confidence.

West Face Induced Moyse to Breach the Employment Agreement

28. West Face and Moyse engaged in prolonged discussions regarding Moyse's resignation from Catalyst and immediate employment at West Face thereafter. During the course of these discussions, the parties discussed Moyse's contractual obligations to Catalyst.

29. Prior to Moyse's resignation from Catalyst, West Face was aware of the terms of the Employment Agreement and Moyse's duties and obligations to Catalyst, including the Restrictive Covenants. Nevertheless, West Face unlawfully induced Moyse to breach the Employment Agreement with, and his obligations owed to, Catalyst, including, but not limited to the Restrictive Covenants.

30. Moyse and West Face knew that Catalyst intended to promote Moyse to the position of "associate" in 2014. But for West Face's inducement to Moyse to resign from Catalyst and commence employment at West Face before the end of the six-month non-competition period, Moyse would still be employed at, and would continue to honour his contractual obligations to, Catalyst.

Catalyst Will Suffer Irreparable Harm

31. Catalyst will suffer irreparable harm as a result of West Face's unlawful inducement of Moyse to breach the Employment Agreement. In particular, without limiting the generality of the foregoing, Catalyst risks losing its strategic advantage with respect to distress for control investments it has been planning for several months of which Moyse, in his role as analyst at Catalyst, is aware.

32. If Moyse is permitted to commence employment at West Face, a direct competitor to Catalyst, before the expiry of the six-month non-competition period, West Face will gain an unfair advantage in the small distressed investing for control industry by learning about investment opportunities Catalyst was studying and Catalyst's plans for taking advantage of those opportunities.

33. These opportunities and strategies are unique to Catalyst and are crucial to its success – if those plans are compromised, Catalyst will suffer a loss that cannot be measured in mere damages. The damage will include damage to Catalyst's reputation as a leading distress for control investor and to its ability to solicit additional investments in its funds.

34. Moreover, by using the Confidential Information for their personal benefit and to Catalyst's detriment, Moyse and West Face will cause Catalyst to incur large financial losses that are difficult to accurately quantify given the unpredictable range of possible outcomes for a given investment.

West Face Misused Catalyst's Confidential Information Concerning the Wind Opportunity

34.1 One of the special situations that Catalyst was studying before Moyse terminated his employment with Catalyst concerned Wind Mobile ("Wind"), a Canadian wireless

telecommunications company. Moyse was a member of Catalyst's investment team studying the Wind opportunity and was privy to Catalyst's Confidential Information concerning its plans concerning Wind opportunity, which included a potential acquisition of Wind.

34.2 In June 2014, Catalyst brought a motion for interim and interlocutory relief seeking, among other things, the return of any and all Confidential Information from West Face and Moyse. In particular, Catalyst was concerned about the potential communication of its Confidential Information relating to the Wind opportunity.

34.3 Catalyst's motion for interim relief was heard on July 16, 2014 and settled on consent.

34.4 Catalyst's motion for interlocutory relief was scheduled to be heard on August 7, 2014 but was adjourned to October 10, 2014. As a result, the motion for interim relief has not yet been determined.

34.5 On or about September 16, 2014, West Face publicly announced that it was leading a consortium of investors to purchase Wind. This was the very outcome Catalyst was concerned about when it learned that Moyse, a participant on Catalyst's Wind team, was joining West Face.

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.

34.7 As a result of West Face's misuse of Catalyst's Confidential Information, Catalyst has suffered damages, particulars of which will be provided prior to trial.

Through Moyse, West Face has Catalyst's Confidential Information Concerning Mobilicity

34.8 On September 29, 2013, Data & Audio-Visual Enterprises Holdings Inc. ("Holdings") and its wholly owned subsidiaries, Data & Audio-Visual Enterprises Wireless Inc. ("Wireless") and 8440522 Canada Inc. (collectively with Wireless and Holdings, the "Applicants", or "Mobilicity") filed an application for an Initial Order under the *Companies' Creditors Arrangement Act* (Canada) ("CCAA") in order to restructure their business and affairs or complete a sale of their business and assets.

34.9 Catalyst owns over $60 million in First Lien Notes issued by Wireless pursuant to a First Lien Indenture dated April 20, 2011 (the "First Lien Notes").

34.10 West Face owns approximately $3 million in First Lien Notes.

34.11 For several months, both before and after Mobilicity applied for CCAA protection, Catalyst studied Mobilicity as a special situation. Moyse was a member of Catalyst's investment team in the Mobilicity situation. In that respect, Moyse was privy to Catalyst's confidential information concerning its analysis of the Mobilicity situation.

34.12 West Face has wrongfully used Catalyst's Confidential Information concerning the Mobilicity opportunity to obtain an unfair advantage over Catalyst with respect to that opportunity. If West Face is able to vote its interest in Mobilicity with the benefit of its wrongful possession of Catalyst's Confidential Information, Catalyst will suffer irreparable harm.

Unjust Enrichment

34.13 As a result of the foregoing, West Face has been enriched by its wrongful conduct. It has managed to acquire property, including, but not limited to, securities, secured debt and other

financial instruments, that it would not have been able to acquire but for its misuse of Catalyst's Confidential Information.

34.14 Catalyst suffered a deprivation that corresponds to West Face's enrichment. But for West Face's conduct, Catalyst would have acquired the property that West Face acquired through its misuse of Catalyst's Confidential Information.

34.15 There is no juristic reason for West Face's enrichment and it would be unjust for West Face to retain the property it acquired through its wrongful conduct. Catalyst is entitled to a constructive trust over all property acquired by West Face to remedy West Face's unjust enrichment resulting from its misuse of Catalyst's Confidential Information.

34.16 In addition or in the alternative, if a constructive trust is unavailable because West Face has sold the property it wrongfully acquired or for any other reason, Catalyst is entitled to an accounting of all profits earned by West Face as a result of its misuse of Catalyst's Confidential Information and payment of those profits to Catalyst.

Punitive Damages

35. Catalyst claims that the Defendants' egregious actions, as pleaded above, were so high-handed, wilful, wanton, reckless, contemptuous and contumelious of Catalyst's rights and interests so as to entitle ~~Execaire~~ Catalyst to a substantial award of punitive, aggravated and exemplary damages.

36. Accordingly, the Defendants are liable, on a joint and several basis, to the Plaintiff for punitive damages as described in subparagraph 1(e) above.

37. Catalyst proposes that this action be tried at Toronto.

~~June 25, 2014~~
October 9, 2014

LAX O'SULLIVAN SCOTT LISUS LLP
Counsel
Suite 2750, 145 King Street West
Toronto, Ontario M5H 1J8

Rocco Di Pucchio LSUC#: 38185I
Tel: (416) 598-2268
rdipucchio@counsel-toronto.com

Andrew Winton LSUC#: 54473I
Tel: (416) 644-5342
awinton@counsel-toronto.com

Fax: (416) 598-3730

Lawyers for the Plaintiff

THE CATALYST CAPITAL GROUP INC.
Plaintiff

-and-

BRANDON MOYSE and WEST FACE CAPITAL INC.
Defendants

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

STATEMENT OF CLAIM

LAX O'SULLIVAN SCOTT LISUS LLP
Counsel
Suite 2750, 145 King Street West
Toronto, Ontario M5H 1J8

Rocco Di Pucchio LSUC#: 38185I
rdipucchio@counsel-toronto.com
Tel: (416) 598-2268

Andrew Winton LSUC#: 54473I
Tel: (416) 644-5342
awinton@counsel-toronto.com

Fax: (416) 598-3730

Lawyers for the Plaintiff

This is Exhibit "7" referred to in the Affidavit of Andrew Carlson sworn December 7, 2016

Meera

Commissioner for Taking Affidavits (or as may be)

Meera Amanda Persaud, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law.
Expires April 13, 2018.

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff/Moving Party

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants/
Responding Party

NOTICE OF MOTION

The Plaintiff ("Catalyst") will make a motion to a Judge on a date to be scheduled by the Civil Practice Court, or as soon after that time as the motion can be heard at the court house, 393 University Avenue, 10th Floor, Toronto, Ontario, M5G 1E6.

PROPOSED METHOD OF HEARING: The Motion is to be heard

[X] orally.

THE MOTION IS FOR

(a) If necessary, an Order abridging the time for delivery of this Notice of Motion;

(b) An interim, interlocutory and/or permanent injunction restraining the defendant West Face Capital Inc. ("West Face"), its officers, directors, employees, agents or any persons acting under its direction or on its behalf, and any other persons affected by the Order granted from:

(i) Participating in the management and/or strategic direction of Wind Mobile Corp. and any affiliated or related corporations (collectively, "Wind"); and

(ii) Without limiting the generality of the foregoing, participating in the Spectrum Auction, as that term is defined below;

(c) An Order authorizing an Independent Supervising Solicitor ("ISS") to attend West Face's premises to create forensic images of all electronic devices, including computers and mobile devices of West Face (the "Images") and to prepare a report which shall:

(i) identify whether the Images contain or contained Catalyst's confidential and proprietary information ("Confidential Information") and, if possible, provide particulars or where on the Images the Confidential information is located or was located, when it was accessed and by whom, and when it was copied, transferred, shared or deleted and by and to whom; and

(ii) in the case of any identified or recovered emails sent or received containing or referring to Confidential Information, provide the following particulars:

(1) who authored the email;

(2) to whom the email was sent, copied and/or blind copied;

(3) the date and time when the email was sent;

(4) the subject line of the email;

(5) whether the email contains any attachments, and if so, the names of the attachments and associated file information (i.e., size, date information);

(6) the contents of the email; and

(7) if the email was deleted, when the email was deleted.

(d) The costs of this motion on a substantial indemnity basis, plus applicable taxes; and,

(e) Such further and other relief as this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE

The Parties to this Action

(a) Catalyst is a corporation with its head office located in Toronto, Ontario. Catalyst is a world leader in the field of investments in distressed and undervalued Canadian situations for control or influence, known as "special situations investments for control".

(b) West Face is a Toronto-based private equity corporation with assets under management of approximately $2.5 billion. In December 2013, West Face formed a credit fund for the purpose of competing directly with Catalyst in the special situations investments industry.

(c) The defendant Brandon Moyse ("Moyse") was an investment analyst at Catalyst from November 2012 to June 22, 2014. Moyse was one of only two analysts and

had substantial autonomy and responsibility at Catalyst. He was primarily responsible for analysing new investment opportunities of distressed and/or under-valued situations where Catalyst could invest for control or influence.

(d) On May 26, 2014, Moyse informed Catalyst of his intention to resign from Catalyst and to commence employment at West Face prior to the expiry of a non-competition clause in his employment agreement with Catalyst (the "Non-Competition Covenant").

(e) On June 23, 2014, Moyse began working for West Face, in breach of the Non-Competition Covenant.

Moyse and West Face Falsely Assure Catalyst there has been no Wrongdoing

(f) Between May 30 and June 19, 2014, counsel for the parties to this action exchanged correspondence and communicated by telephone. Catalyst's counsel tried, but failed, to get the defendants' counsel to agree to terms which would avoid the need for litigation.

(g) In this exchange of correspondence, counsel for West Face and Moyse claimed that their clients were aware of and would respect Moyse's obligations to Catalyst regarding confidentiality. In particular, West Face's counsel wrote, "Your assertion that West Face induced Mr. Moyse to breach his contractual obligations to [Catalyst] is [...] baseless."

(h) As discussed in detail below, this statement is wrong. in March 2014, Tom Dea, a Partner at West Face ("Dea"), expressly asked Moyse to send him samples of his

work at Catalyst, and Moyse sent Dea four Catalyst investment analysis memos stamped "Confidential" and "For Internal Discussion Purposes Only".

(i) On June 19, 2014, Moyse's counsel communicated Moyse's intention to commence employment at West Face effective June 23, 2014. Moyse and West refused to preserve the *status quo* while Catalyst sought to enforce restrictive covenants which prevented Moyse from working at West Face prior to December 22, 2014. On June 24, West Face rebuffed Catalyst's efforts to negotiate a resolution, following which Catalyst commenced this action and brought a motion for injunctive relief.

(j) Notably, the defendants insisted on rushing to destroy the status quo even though West Face had no immediate need for Moyse's services: for the first two weeks of Moyse's employment at West Face, he was not assigned any tasks.

The Interim Injunction

(k) On July 16, 2014, at the hearing of Catalyst's motion for interim relief, the parties consented to an order (the "Interim Order"), pursuant to which:

(i) West Face agreed to preserve and maintain all records in its possession, power or control, whether electronic or otherwise, that relate to Catalyst, and/or relate to West Face's activities since March 27, 2014, and/or relate to or are relevant to any of the matters raised in Catalyst's action against West Face;

(ii) Moyse agreed not to work at West Face pending the determination of Catalyst's motion for interlocutory relief;

(iii) Moyse consented to the creation of a forensic image of his personal computer, iPad and smartphone, to be held in trust by his counsel pending the outcome of the motion for interlocutory relief; and

(iv) Moyse agreed to swear an affidavit of documents setting out all documents in his power, possession or control that relate to his employment at Catalyst.

(l) The affidavits of documents Moyse swore pursuant to the Interim Order revealed very damning facts which demonstrate that Moyse and West Face casually disregarded Catalyst's proprietary interest in its confidential information.

Moyse Communicated Catalyst's Confidential Information to West Face

(m) As a result of the Defendants' refusal to respect the status quo in June 2014, Catalyst moved with urgency to seek interim relief and prepared its interim relief materials without the benefit of any evidence from the Defendants.

(n) On July 7, 2014, Moyse and Dea swore responding affidavits which confirmed Catalyst's worst fear: Moyse had transferred Catalyst's confidential information to West Face, and West Face distributed that confidential information throughout the firm.

(o) At a meeting with Moyse on March 26, Dea asked Moyse to send him research and writing samples so Dea could assess Moyse's writing and research ability.

(p) In response to this request, Moyse sent Dea four memos, spanning over 130 pages, which related to actual or possible Catalyst investments (the "Investment Memos"). The Investment Memos contain Moyse's and other Catalyst employees' analyses of investment opportunities and were marked "Confidential" and "For Internal Discussion Purposes Only".

(q) Moyse admitted he did not consider these markings to have any meaning, that he knew what he did was wrong, and that he deleted his email to Dea.

(r) Dea also admitted that after he received the Investment Memos, he reviewed them and saw that they were marked confidential. Dea admitted that West Face considered the types of documents Moyse sent him to be confidential and that he would not want Moyse to treat West Face's confidential information in a similar fashion.

(s) Dea admitted that after he reviewed the documents and saw that they were marked "Confidential", he circulated the Investment Memos to his partners and to a vice-president at West Face.

(t) West Face never informed Catalyst that Moyse had given it copies of Catalyst's confidential information. Instead, West Face attached the Investment Memos to its responding motion record and filed them in open court. West Face did not seek Catalyst's permission to do so or otherwise give Catalyst an opportunity to seal the court file prior to the hearing of the motion for interim relief on July 16.

Moyse Reviewed Confidential Information Unrelated to his Work before he Resigned

(u) In addition to the Confidential Memos that he sent to West Face, on March 28, 2014, two days after Moyse met Dea, Moyse accessed, over a ten-minute span, several of Catalyst's letters to its investors (the "Investor Letters"), from the time period when Catalyst was active in an investment in Stelco. Catalyst and West Face were in direct competition with respect to the Stelco situation. Ten minutes is an insufficient amount of time to read the Investor Letters, which had nothing to do with Moyse's duties or responsibilities to Catalyst.

(v) On April 25, 2014, Moyse reviewed dozens of files related to Catalyst's investment in Stelco over a 75-minute period. Once again, there was no legitimate business reason why Moyse would review these documents, which he did in an insufficient amount of time to read the material he was accessing. Moyse admitted during cross-examination that he "routinely" reviewed transaction files from Catalyst's old transactions.

(w) At all material times, Moyse had accounts with two Internet-based file-storage services. These services enable users to create a folder on their computer which is synchronized over the Internet so that files stored in the folder can be viewed from any computer with an Internet connection. The services are capable of moving large amounts of data in a relatively brief period of time without leaving a record of the activity on the computer from which it was copied.

(x) In the opinion of Martin Musters, Catalyst's forensic IT expert ("Musters"), Moyse's conduct of reviewing several documents over a relatively brief period of time is consistent with transferring files to an Internet-based file storage account.

Moyse Retained Hundreds of Catalyst Documents After He Left Catalyst

(y) In his first affidavit sworn in response to Catalyst's motion for injunctive relief, Moyse swore that Catalyst had not provided any "actual" evidence that Moyse had transferred information from Catalyst's servers to his personal devices.

(z) However, pursuant to the Interim Order, Moyse provided Catalyst with two affidavits of documents which allegedly set out all of the documents in his power, possession or control that relate to his employment at Catalyst. Those affidavits disclosed over 830 Catalyst documents that remain in his possession. Just by reviewing the document titles alone, Catalyst identified 245 confidential documents that remained in Moyse's possession, power or control following his resignation from Catalyst and commencement of employment at West Face.

(aa) Moyse also admitted that he frequently emailed Catalyst documents to his personal email accounts and that he retained those documents on his personal devices. Moyse could not say with absolute certainty that his most recent search has been exhaustive, and he admitted that he deleted documents between March and May 2014, that he did not inform Catalyst when he resigned that he had its confidential information and that he did not offer to return confidential information to Catalyst.

(bb) Moyse's conduct fits the profile of an employee who took confidential information prior to his resignation from Catalyst.

West Face's Porous Confidential Wall

(cc) Prior to his resignation from Catalyst, Moyse was part of a team working on a significant investment opportunity in the telecommunications industry – the potential acquisition by Catalyst of Wind, one of Canada's few remaining independent mobile telecommunications companies.

(dd) Moyse had access to confidential information pertaining to Catalyst's plans for Wind.

(ee) At some point after it commenced its discussions with Moyse to come work at West Face, West Face also took an interest in Wind.

(ff) In addition, both West Face and Catalyst owned secured debt of Mobilicity, another mobile telecommunications company. Catalyst is Mobilicity's largest secured creditor while West Face owns or owned a much smaller portion of Mobilicity's secured debt.

(gg) In June 2014, after Catalyst's counsel expressed concern to West Face's counsel about the implications of West Face's efforts to hire Moyse on the rival investment firm's pursuit of the Wind opportunity, West Face claimed to have erected a "confidentiality wall" to separate Moyse from its own pursuit of Wind.

(hh) The "wall" erected by West Face was incredibly weak:

(i) it did not apply to all of West Face's employees;

(ii) it applied to Wind, but not to Mobilicity;

(iii) West Face took no steps to obtain acknowledgments from its investment team that a wall had been established;

(iv) No prohibition was imposed to prevent West Face's employees from accessing Moyse's data; and

(v) West Face has refused to state what consequences, if any, an employee would face if he or she did not comply with the confidentiality wall.

West Face Purchased Wind Using Catalyst's Confidential Information

(ii) In August 2014, Catalyst had an exclusive negotiation period to negotiate the purchase of Wind from its then-owners.

(jj) Those negotiations failed and the exclusivity period expired. The negotiations failed on issues relevant to the regulatory regime affecting Wind.

(kk) Within days of negotiations failing with Catalyst, West Face, together with partners in a syndicated investment group, successfully negotiated the purchase of Wind. Notably, the West Face syndicate waived any regulatory concerns that Catalyst continued to have.

(ll) West Face could not have negotiated the deal it did with Wind without access to Catalyst's confidential information, which was provided to it by Moyse.

(mm) Catalyst has amended its claim against West Face to seek a declaration that West Face holds its interest in Wind in trust for Catalyst.

The Interlocutory Injunction and the ISS

(nn) On November 10, 2014, the Court released its decision in Catalyst's motion for interlocutory relief to prevent Moyse from working at West Face prior to the expiry of the Non-Competition Covenant and to authorize an ISS to review the Images of Moyse's personal devices.

(oo) The Court granted the relief sought by Catalyst: Moyse was enjoined from working at West Face prior to December 22, 2014 and an ISS was authorized to review the Images and prepare a report.

(pp) The ISS is in the midst of preparing its report. The ISS process involves a review of the Images using search terms submitted by Catalyst to determine whether the Images contain or contained Catalyst's confidential information;

(qq) The ISS's work is ongoing and its report is not yet final. However, the ISS has reported on an interim basis on the number of "hits" that the search terms requested by Catalyst have generated. Among other things, the following search terms generated an unexplainably large number of "hits" on Moyse's personal computer:

(i) West Face: 5,360;

(ii) Callidus: 132;

(iii) Wind: 26,118;

(iv) Mobilicity: 768;

(v) Turbine (Catalyst's codename for the Wind opportunity): 756;

(vi) Boland (West Face's CEO): 554;

(vii) Dea: 4,013;

(viii) Auction: 6,489;

(ix) Spectrum: 3,852.

(rr) There is no legitimate business reason why these search terms would yield such a large number of hits on Moyse's personal computer. The inference to be drawn from these hits is that Moyse copied Catalyst's confidential information to his personal computer and transferred it to his new employer's at West Face, either before or after he officially commenced employment there in June 2014.

(ss) Hard drives, mobile devices and Internet accounts that could be inspected to determine whether West Face possesses or possessed Confidential Information are beyond the control or possession of Catalyst.

The Callidus Report

(tt) Callidus Capital Corporation ("Callidus") is a publicly traded corporation that specializes in innovative and creative financing solutions for companies that are unable to obtain adequate financing from conventional lending sources. Catalyst owns a 60 per cent interest in Callidus.

(uu) In November 2014, shortly after Catalyst successfully argued the interlocutory motion, the share price of Callidus began to drop precipitously without any apparent reason for the rapid decline.

(vv) Catalyst was initially unable to discover the cause of the price drop. However, based on confidential sources, it learned that West Face was "talking down" the stock on the street and had prepared a research report that purported to reveal problems with Callidus's loan book.

(ww) The identity of Callidus's borrowers is, in large part, not public information. If West Face had access to information about Callidus's borrowers, it obtained that information through improper means, likely from Moyse, who had no involvement with Callidus and yet who had 132 Callidus "hits" on his personal computer.

(xx) Despite repeated requests to West Face, it has refused to disclose its research report on Callidus. West Face's conduct of talking down the stock was directed primarily at attempting to cause harm to Catalyst, a majority shareholder in Callidus.

The Upcoming Spectrum Auction

(yy) In March 2015, Industry Canada is going to auction 30 MHz of AWS-3 spectrum to new entrants to the mobile telecommunications industry, including Wind and Mobilicity, to enable those new entrants to deliver services to more users at faster speeds (the "Spectrum Auction").

(zz) Bidders who intend to participate in the Spectrum Auction must submit a pre-auction financial deposit with their application to participate in the auction by no later than January 30, 2015.

(aaa) Armed with Catalyst's Confidential Information, which it obtained from Moyse, West Face will be able to help Wind compete unfairly against Mobilicity in the Spectrum Auction or otherwise use this information to its advantage in relation to Mobilicity.

Irreparable Harm

(bbb) The damage to Catalyst caused by West Face's conduct is not limited to monetary damages.

(ccc) Absent injunctive relief, Catalyst will suffer irreparable harm.

(ddd) Sections 101 and 104 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

(eee) Rules 1, 3, 37, 40 and 57 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. and

(fff) Such further and other grounds as the lawyers may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

(a) The pleadings in this action;

(b) The Reasons for Decision of Justice Lederer dated November 10, 2014;

(c) The affidavit of James A. Riley, to be sworn; and

(d) Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

January 13, 2015

LAX O'SULLIVAN SCOTT LISUS LLP
Counsel
Suite 2750, 145 King Street West
Toronto, Ontario M5H 1J8

Roeco Di Pucchio LSUC#: 38185I
Tel: (416) 598-2268
rdipucchio@counsel-toronto.com

Andrew Winton LSUC#: 54473I
Tel: (416) 644-5342
awinton@counsel-toronto.com

Fax: (416) 598-3730

Lawyers for the Plaintiff

TO: **DENTONS CANADA LLP**
77 King Street West, Suite 400
Toronto-Dominion Centre
Toronto ON M5K 0A1

Jeff Mitchell
Tel: (416) 863-4660

Andy Pushalik
Tel: (416) 862-3468

Fax: (416) 863-4592

Lawyers for the Defendant, West Face Capital Inc.

THE CATALYST CAPITAL GROUP INC.
Plaintiff

-and-

BRANDON MOYSE and WEST FACE CAPITAL INC.
Defendants

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

NOTICE OF MOTION

LAX O'SULLIVAN SCOTT LISUS LLP
Counsel
Suite 2750, 145 King Street West
Toronto, Ontario M5H 1J8

Rocco Di Pucchio LSUC#: 38185I
Tel: (416) 598-2268
rdipucchio@counsel-toronto.com

Andrew Winton LSUC#: 54473I
Tel: (416) 644-5342
awinton@counsel-toronto.com

Fax: (416) 598-3730

Lawyers for the Plaintiff/Moving Party

THE CATALYST CAPITAL GROUP INC.
Plaintiff

-and-

VIMPELCOM LTD. et al.
Defendants

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF
PROCEEDING COMMENCED AT
TORONTO

MOTION RECORD OF THE DEFENDANT/MOVING PARTY WEST FACE CAPITAL INC.
(VOLUME 1 OF 19)

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

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

Tel: 416.863.0900
Fax: 416.863.0871

Lawyers for the Defendant
WEST FACE CAPITAL INC.