Court File No. CV-16-11272-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N :

THE CATALYST CAPITAL GROUP INC.

Plaintiff

- and -

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants

COSTS SUBMISSIONS OF WEST FACE CAPITAL INC.

September 2, 2016

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

Kent E. Thomson (LSUC #24264J)
kentthomson@dwpv.com

Matthew Milne-Smith (LSUC #44266P)
mmilne-smith@dwpv.com

Andrew Carlson (LSUC #58850N)
acarlson@dwpv.com

Tel: 416.863.0900
Fax: 416.863.0871

Lawyers for the Defendant,
West Face Capital Inc.

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PART I - OVERVIEW

1. In this action, commenced in June 2014, The Catalyst Capital Group Inc. ("**Catalyst**") made serious allegations of impropriety and dishonest conduct against both West Face Capital Inc. ("**West Face**") and Brandon Moyse. After two years of tactical delays and unsuccessful interlocutory manoeuvering by Catalyst, this Court "dismissed in its entirety"[1] Catalyst's claim that West Face had misappropriated and misused Catalyst's confidential information regarding its strategy to acquire WIND Mobile Inc. ("**WIND**").[2]

2. This is a case that should never have been pursued to trial, and for which a significant award of costs is appropriate. Among other things, Catalyst made numerous

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1 *Catalyst Capital Group Inc. v. Moyse*, 2016 ONSC 5271 at paras. 8 & 169, Tab B [*Reasons*].

2 The Court also dismissed Catalyst's ancillary claims against West Face, such as its claim that West Face had induced Mr. Moyse to breach his employment agreement with Catalyst, and its claim that Mr. Moyse had committed the tort of spoliation (for which Catalyst claimed West Face should be held vicariously liable). See Reasons at paras. 135 & 166-167.

unfounded allegations of serious misconduct; participated in publicizing these allegations in the mainstream media, for the obvious purpose and with the effect of embarrassing West Face; swore misleading affidavits about essential facts; failed or refused to admit key facts until it was forced to do so following its belated disclosure of key documents virtually on the eve of trial; and gave evidence at trial that was unworthy of belief and rejected.

3. In these circumstances, West Face respectfully requests an award of costs on a substantial indemnity basis in the total amount of $1,239,970.41 (including fees, disbursements and HST where applicable). In the alternative, West Face respectfully requests an award of costs on a partial indemnity basis, in the total amount of $843,246.50 (again, including fees, disbursements and HST where applicable). A Bill of Costs supporting these amounts is attached at **Tab A**.[3] West Face's claims for costs represent a fraction of the actual cost incurred by West Face in defending the unfounded claims and allegations made against it by Catalyst.

4. Having been wholly successful in defeating the claims made by Catalyst, West Face's *entitlement* to costs was dealt with in this Court's Reasons,[4] and cannot seriously be debated. Likewise, in light of the various reductions and factors discussed more fully below, the *quantum* of costs reflected by West Face's Bill of Costs is entirely fair and reasonable in the circumstances. Thus, the key issue for this Court is how to exercise its discretion to determine the appropriate *scale* of the costs award. For all of the

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[3] West Face's Bill of Costs, Tab A.

[4] Reasons at para. 169.

reasons discussed below, it is submitted that an award of costs on a substantial indemnity basis is entirely justified.

PART II - RELEVANT FACTUAL BACKGROUND

5. In considering an award of costs in this matter, it is important to contrast the facts as they are now known with what Catalyst pleaded, swore in affidavits, and publicized. When Catalyst first commenced this action over two years ago, it amounted to little more than a garden variety employment law dispute regarding the enforceability of the six-month non-competition covenant in Mr. Moyse's employment contract with Catalyst.[5] As counsel for Catalyst put it in his Opening Statement at trial:

> The case, though it's evolved, started, obviously, quite innocuously as an action to enforce the restrictive covenant and the confidentiality undertaking of Moyse's employment with Catalyst.[6]

6. These employment law issues were largely rendered moot on July 16, 2014, three and a half weeks after both Mr. Moyse's employment at West Face and this proceeding had commenced, when West Face and Mr. Moyse consented to an Interim Order placing Mr. Moyse on leave pending the hearing of Catalyst's motion for a six-month interlocutory injunction against Mr. Moyse. Mr. Moyse had been firewalled from any communications about WIND at West Face during his entire brief tenure.[7] Catalyst's motion to enforce its non-competition clause was granted approximately six weeks before the six month non-competition period was to expire. Justice Lederer

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5 While Catalyst's initial Statement of Claim issued June 25, 2014 made vague allegations that Mr. Moyse and West Face had misappropriated confidential information of Catalyst, the Claim did not make any specific allegations about WIND, which had yet to be sold to either Catalyst or West Face. Catalyst's Amended Amended Amended Statement of Claim dated February 25, 2016 indicates the amendments made to each iteration of Catalyst's Claim. The thrice-amended Claim is attached at Tab C.

6 Opening Statement of counsel for Catalyst, June 6, 2016, at p. 6:5-9, Tab D.

7 Reasons at para. 60.

awarded costs of $75,000 to Catalyst, but only in the cause, and West Face seeks no costs in respect of those events (which focussed primarily on the conduct of Mr. Moyse).[8] Mr. Moyse ultimately never returned to work at West Face in light of the continued litigation described below.

7. Catalyst enjoyed a period of exclusive negotiations with VimpelCom Ltd. ("**VimpelCom**") for the purchase of WIND from July 23 to August 18, 2014. We now know that Catalyst's proposed transaction with VimpelCom was never contingent on receiving regulatory concessions from Industry Canada. Instead, Catalyst's negotiations with VimpelCom broke down because Catalyst was not willing to agree to, or even to negotiate, a modest break fee of $5 to $20 million requested by VimpelCom's Chairman in mid-August 2014. Rather than accede to VimpelCom's request, Catalyst decided, on the advice of its sophisticated legal and financial advisors, to tell VimpelCom that it was "out to lunch", and to shut down communications with VimpelCom and let Catalyst's period of exclusivity expire. Thereafter, VimpelCom concluded the WIND deal with the consortium that included West Face on September 16, 2014.[9]

8. The evidence also clearly established a second reason why Catalyst would never have successfully completed its proposed acquisition of WIND: it viewed as "crucial"[10] the obtaining of regulatory concessions from the Government of Canada that would have granted Catalyst the unrestricted right to sell WIND and/or its spectrum to an incumbent after five years.[11] By the time negotiations between Catalyst and

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8 See *Catalyst Capital Group Inc. v. Moyse*, [2015] O.J. No. 1080 (S.C.J.), *per* Lederer J. at para. 5, Tab E.
9 Reasons at paras. 127-130.
10 Or perhaps “very, very important”. Reasons at para. 11.
11 Reasons at para. 131.

VimpelCom stalled, however, the Government had made crystal clear to Catalyst that it would never grant such a concession.[12]

9. Neither of these two facts were known to West Face until Catalyst made documentary productions in March and April 2016, but they were of course known at all times by Catalyst.[13]

10. It was against this important but undisclosed backdrop that, in the Fall of 2014, Catalyst (twice) amended its Claim: first, to allege that West Face had been able to acquire WIND only by misusing Catalyst's confidential information, which West Face was alleged to have deliberately "solicited" from Mr. Moyse; and second, to seek relief in the form of a constructive trust over West Face's interest in WIND and/or an accounting of all of West Face's profits associated with the acquisition and subsequent sale of WIND.

11. Catalyst thus transformed what was then and should have remained an "innocuous" (and at that point, largely moot) departing-employee case into extremely high-stakes and contentious litigation in which Catalyst sought against West Face more than $500 million in damages and/or disgorgement,[14] based on very serious – but entirely speculative and unfounded – allegations of dishonest conduct essentially amounting to corporate espionage and theft.

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12 Reasons at paras. 11(d), 124 & 131.

13 Catalyst produced the majority of its documents in two tranches, delivered March 23 and April 6, 2016.

14 While Catalyst never particularized this figure before trial, this was the amount that counsel for Catalyst requested in his Opening Statement. See Opening Statement of counsel for Catalyst, June 6, 2016, at p. 4:23-5:4, Tab F.

12. Having launched an entirely speculative claim for hundreds of millions of dollars, Catalyst spent the next year and a half engaging in tactical delays and interlocutory manoeuvres that had the effect of preventing or impeding any real progress toward trial.[15] The trial date was therefore set at the insistence of West Face and Mr. Moyse, rather than at the request of Catalyst.

13. In January 2015, Catalyst commenced a motion for extraordinary relief against both West Face and Mr. Moyse, including: (i) an interlocutory injunction restraining West Face from participating in the management and/or strategic direction of WIND; (ii) an order authorizing an Independent Supervising Solicitor (an "**ISS**") to forensically image and analyze all of West Face's electronic devices, for the stated purpose of determining **whether** West Face had obtained and misused confidential information belonging to Catalyst;[16] and (iii) an order jailing Mr. Moyse for contempt. The ISS request is particularly important for the issue of costs. Catalyst conceded at an early stage that it had no evidence that Mr. Moyse transmitted confidential information of Catalyst about WIND to West Face. Moreover, at trial Mr. Glassman admitted that the impetus behind Catalyst's decision to up the ante so dramatically was nothing more than his "conclusion", upon reading public news articles about the consortium's WIND transaction on September 16, 2014, "that something fishy had happened".[17] In short,

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[15] See Justice Newbould's Reasons for Judgment in the Plan of Arrangement proceeding, reported at *Re: Mid-Bowline Group Corp.*, 2016 ONSC 669 at para. 33, Tab G [*Mid-Bowline*], as well as Justice Swinton's reasons denying Catalyst's motions for an extension of time to seek leave to appeal and for leave to appeal the decision of Justice Glustein, reported at *The Catalyst Capital Group Inc. v. Moyse*, 2016 ONSC 554 (Div. Ct.) at paras. 30-32, Tab H.

[16] See Catalyst's Amended Notice of Motion dated February 6, 2015, at para. (c)(i), Tab I, and Affidavit of James Riley sworn February 18, 2015, at para. 91, Tab J.

[17] Glassman Cross-Examination, June 7, 2016, at p. 344:1-11, Tab K. Notably, Mr. Glassman's stated rationale for drawing this conclusion proved to be unfounded.

this case was, and in respect of WIND had always been, the very definition of a fishing expedition.

14. To make matters worse, Catalyst's description of the confidential information it suspected Mr. Moyse of disclosing was false. Catalyst particularized the confidential information that Mr. Moyse had supposedly misappropriated for West Face in two affidavits sworn by Catalyst's Chief Operating Officer James Riley dated February 18 and May 1, 2015. In his February affidavit, Mr. Riley claimed that the "only point" over which Catalyst and VimpelCom could not agree was that "Catalyst wanted to ensure that its purchase was conditional on receiving certain regulatory concessions from Industry Canada",[18] and that West Face succeeded in acquiring WIND by "agreeing to the one term that Catalyst had been concerned about from the outset of its review of the WIND Mobile situation".[19] In his May affidavit, Mr. Riley repeated his assertion that the final but unsigned share purchase agreement that had been negotiated between VimpelCom and Catalyst was conditional on "the granting of certain regulatory concessions to a Catalyst-owned WIND".[20] Catalyst's argument for why West Face caused it loss was that VimpelCom only reneged on these terms after West Face made an offer to VimpelCom's Board on August 7, 2014. As we now know, Mr. Riley's assertions about the key terms of Catalyst's share purchase agreement with VimpelCom were categorically false, and were in fact eventually disproved by Catalyst's own productions.[21] They ought never to have been made.

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18 Affidavit of James Riley sworn February 18, 2015, at para. 45, Tab J.

19 Affidavit of James Riley sworn February 18, 2015, at para. 47(c), Tab J.

20 Affidavit of James Riley sworn May 1, 2015, at para. 42, Tab L.

21 In particular, Catalyst was ultimately forced to admit in answers to undertakings following Mr. De Alba's examination for discovery on May 11, 2016 that not a single draft of the share purchase agreement being

15. Despite West Face not having access to Catalyst's documents that disproved Mr. Riley's key assertions about the WIND negotiations, Catalyst's motion against West Face and Mr. Moyse was dismissed in its entirety by Justice Glustein.[22] Catalyst's subsequent appeal to the Court of Appeal was quashed,[23] and its motions to the Divisional Court for an extension of time and for leave to appeal were both dismissed.[24]

16. While West Face has already been partially indemnified by the Court through costs awards made against Catalyst in respect of its many losing motions and ill-fated appeals, this background provides the context in which Catalyst chose to deliver its Amended Amended Amended Statement of Claim, filed shortly before trial on February 25, 2016.

17. By that date, Catalyst had received "voluminous"[25] disclosure of all of the relevant facts and documents it needed to assess the merits of its speculative claims. Indeed, since as early as March 2015, Catalyst had in its possession copies of all of West Face's approximately 1,500 emails with Mr. Moyse. Catalyst also had hundreds of additional documents relating to both West Face's negotiations with VimpelCom and its participation in the consortium's acquisition of WIND, which were produced in January 2016. Furthermore, Catalyst knew in considerable detail the evidence West Face

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negotiated between Catalyst and VimpelCom was predicated on Catalyst receiving any regulatory concessions from the Government of Canada. See response no. 14 of the May 27, 2016 version of the Undertakings, Advisements, and Refusals Chart of the Examination for Discovery of Gabriel De Alba held May 11, 2016, Tab M.

22 See the Endorsement of Justice Glustein, reported at *The Catalyst Capital Group Inc. v. Moyse*, 2015 ONSC 4388, Tab N.

23 See the Orders of the Court of Appeal quashing Catalyst's purported appeals vis-à-vis West Face and Mr. Moyse, respectively, Tab O, and the Court of Appeal's reasons reported at 2015 ONCA 784, Tab P.

24 See Justice Swinton's Reasons reported at *The Catalyst Capital Group Inc. v. Moyse*, 2016 ONSC 554, Tab H.

25 This was the word used by Justice Glustein to describe West Face`s disclosures as at July 2, 2015. See *The Catalyst Capital Group Inc. v. Moyse*, 2015 ONSC 4388 at para. 56, Tab N. By February 25, 2016, West Face had produced further documents and evidence as described in the body of this paragraph.

intended to rely upon in defending its claims, based on the various affidavits and exhibits previously filed by West Face's witnesses during the interlocutory motions before Justices Lederer and Glustein, and during the Plan of Arrangement proceedings. These included detailed affidavits sworn by: Anthony Griffin, Tom Dea, Alex Singh, Chap Chau, Harold Burt-Gerrans, Asser El Shanawany, Michael Leitner, Hamish Burt and Simon Lockie. Indeed, before it delivered its thrice-Amended Claim in late February 2016, Catalyst had already cross-examined two of West Face's key trial witnesses, Mr. Griffin and Mr. Dea. Catalyst had also received the benefit of a complete forensic analysis and report on Mr. Moyse's personal electronic devices by the ISS, who determined that there was no evidence that Mr. Moyse had ever conveyed to West Face confidential information of Catalyst concerning WIND.

18. Moreover, by February 25, 2016, Catalyst also had the benefit of receiving Justice Newbould's Reasons for Judgment in the Plan of Arrangement proceeding. In those Reasons, Justice Newbould stated that, in considering all of the aforementioned documents and evidence, Catalyst's case at that stage "look[ed] weak".[26] While only a preliminary assessment, this gave Catalyst the benefit of an honest assessment by a senior justice of the Commercial List. Notably, this opinion was given before Catalyst had disclosed its own documents, which only served to make Catalyst's case even weaker.

19. Finally, and perhaps most important, from the very beginning of this case Catalyst had access to its own contemporaneous records regarding its negotiations and communications with VimpelCom and the Government of Canada. As noted by the

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[26] *Mid-Bowline*, *supra*, at para. 42, Tab G.

Court, it was Catalyst's evidence, and not West Face's, which ultimately proved dispositive of the issue of whether Catalyst had ever suffered any detriment and/or damage as a result of the alleged misuse of confidential information by West Face.[27]

20. It was in this context, when Catalyst ought to have known that its claims had no prospect of success, that Catalyst chose to amend its Claim further in February 2016, and proceed to trial, thereby forcing West Face to incur all of the cost and expense associated with defending to the bitter end a contentious, high-stakes, $500 million claim. Unsurprisingly, West Face and its counsel were required to perform a significant amount of work to prepare for trial. Among other things, they: (i) reviewed over 10,000 documents in order to prepare West Face's Affidavit of Documents; (ii) received production of, reviewed, and analyzed Catalyst's thousands of documentary productions; (iii) prepared for and conducted an examination for discovery of Mr. De Alba; (iv) prepared detailed trial affidavits for seven witnesses – including two witnesses who were located out of the jurisdiction,[28] and one who had to be called solely because Catalyst continued to level new allegations until literally the day before trial;[29] (v) prepared West Face's own witnesses for discovery and to testify at trial; and (vi) prepared direct examinations of West Face's witnesses as well as cross-examinations of Catalyst's witnesses.

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[27] Reasons at paras. 126-131.

[28] Messrs. Leitner and Burt reside in the U.S. West Face's counsel had to fly to New York for a business day the week before trial to work with them to prepare and finalize their affidavits. The timing was exacerbated by Catalyst's failure to serve its trial affidavits until late in the evening on May 27, 2016, which was three days after the deadline by which Catalyst had undertaken to deliver them. West Face also had to bear the expense of flying these witnesses to Toronto to testify.

[29] West Face was forced to prepare and file the affidavit of Mr. Yu-Jia Zhu on the last business day before trial because, on that day, Catalyst for the first time advised that it was going to make an allegation that Mr. Zhu's hand-written notes of his job interview of Mr. Moyse on April 15, 2014 suggested that Mr. Moyse and Mr. Zhu had discussed WIND during this interview. These late-breaking allegations were completely rejected. See Reasons at para. 82, footnote 6.

21. Ultimately, the trial was heard over six extended days commencing on June 6, 2016, with an additional lengthy day for closing submissions. While the evidence was heard in a highly compressed time frame, the volume of evidence adduced during the course of trial was considerably more extensive than would normally have been led during a typical six-day trial. Not only did the Court sit from 9:00 a.m. until at least 5:00 p.m. each day, but the direct evidence of all parties was put in principally by way of lengthy pre-trial affidavits (with exhibits), thus permitting the majority of trial time to be devoted to cross-examinations. Moreover, the trial proceeded almost entirely electronically, which created further efficiencies. These procedures allowed the Court to hear a volume of evidence more typical of a two- or three-week trial than a six-day trial.

22. Despite all of the above, not a shred of evidence emerged to substantiate any of Catalyst's accusations against West Face. On the contrary, throughout the proceeding and long before trial, *it was clear that all available evidence directly contradicted Catalyst's claims of misconduct* — including evidence of Catalyst not disclosed until the Spring of 2016.

23. This failure to disclose crucial evidence was compounded by Catalyst's repeated refusal to concede even the most uncontentious facts, by its persistent reliance on incomplete, misleading and internally contradictory evidence, and by its refusal to abandon its positions even when they were conclusively shown to be unsupportable. Despite the absence of any factual support, and in the face of overwhelming contrary evidence, Catalyst continued to reiterate its baseless allegations of dishonest and intentional misconduct, both in the course of this proceeding and in a parallel public

relations campaign that it conducted against West Face — an issue that is also discussed further below.

24. In circumstances where any reasonable party with proper respect for the judicial process would have conceded long ago that it had overreached and withdrawn its allegations against West Face, Catalyst pursued relentlessly its increasingly hopeless claims for more than two years, to the conclusion of trial. An impartial observer might well conclude that in pursuing this matter Catalyst was motivated not by any *bona fide* desire to see justice done, but rather by a vindictive wish to inflict public harassment, embarrassment and enormous expense on a former employee and a commercial competitor. Indeed, Catalyst has persisted in these efforts even after the release of this Court's Reasons on August 18, 2016, promising publicly in a statement issued to the *Financial Post* to pursue an appeal and attributing the result at trial to "severe indications of possible bias" by the Trial Judge.[30] These comments can best be described as entirely unjustified and irresponsible.

PART III - SUBMISSIONS

A. The Law of Costs in Ontario

25. Section 131 of the *Courts of Justice Act* confirms the broad discretion enjoyed by this Court in awarding West Face its costs against Catalyst.[31] This discretion is, in turn,

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[30] See the article titled “Catalyst Capital Group Inc to appeal after judge dismisses Wind Mobile lawsuit” by the *Financial Post*, dated August 19, 2016, Tab Q.

[31] R.S.O. 1990, c. C.43, s. 131(1) ("Costs"). As that provision notes: "Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid."

informed by the various factors listed in Rule 57.01(1) of the *Rules of Civil Procedure*,[32] the most relevant of which are discussed in greater detail below.

26. The jurisprudence is clear that the discretionary exercise of awarding costs is governed by the need to achieve a fair and reasonable result.[33] This concern with fairness and reasonableness informs not merely the quantum of costs, but also the question of whether costs should be awarded on a partial or substantial indemnity scale. Rule 57.01(4) affirms the Court's authority "to award all or part of the costs on a substantial indemnity basis". Where costs are awarded on a substantial indemnity basis, they should generally be 1.5 times the amount that would otherwise be awarded as partial indemnity costs.[34]

27. Some of the cases discussed below awarded costs on a full indemnity basis and bear certain similarities to the facts of this case. West Face has not made such a request in order to be scrupulously fair and avoid even the appearance of over-reaching. The principles that justify the granting of costs on a substantial indemnity scale have been considered by our courts on many occasions. In *Davies v. Clarington*, the Court of Appeal explained that elevated costs are warranted "only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties" – *i.e.*, where the trial judge has found "egregious behaviour, deserving of sanction."[35]

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32 R.R.O. 1990, Reg. 194.

33 See *Davies v. Clarington*, 2009 ONCA 722, *per* Epstein J.A. at para. 52 [*Davies v. Clarington*], West Face's Book of Authorities, Tab 12.

34 See Rule 1.03.

35 See *Davies v. Clarington*, *supra*, at paras. 29 & 40, West Face's Book of Authorities, Tab 12, quoting *Young v. Young*, [1993] 4 S.C.R. 3.

28. West Face acknowledges that this is a high standard, and that such an award represents the exception rather than the rule. However, the standard is met in a case like this where litigation has been pursued by Catalyst as a tool to publicly harass a direct competitor with fruitless litigation. As explained by the Court of Appeal:

> [45] [**A**] **distinction must be made between hard-fought litigation that turns out to have been misguided, on the one hand, and malicious counter-productive conduct, on the other**. The former, the thrust and parry of the adversary system, does not warrant sanction: the latter well may. In *Apotex v. Egis Pharmaceuticals*…, **substantial indemnity costs were justified as a means**…"**to discourage harassment of another party by the pursuit of fruitless litigation . . . particularly where a party has conducted itself improperly in the view of the court**"….[36]

29. In the *Apotex v. Egis* decision cited by the Court of Appeal, Apotex had sought an interlocutory injunction to restrain commercial competitors from entering the Canadian pharmaceutical market with a particular drug. In doing so, Apotex had unsuccessfully alleged, *inter alia*, fraud, deceit, conspiracy and misuse of confidential information. In an earlier ruling, Justice Henry had described the making of such claims, "without any acceptable evidentiary basis" and based on "speculation only", as "a classic case for the award of solicitor-and-client costs."[37] In quantifying that award, he further explained that "[t]he reality of commercial life is that to mount a successful defence against a determined plaintiff is costly", and "[a]ny individual or corporation attacked in the courts is entitled to retain the legal services that can best submit its

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[36] See *Davies v. Clarington*, *supra*, at para. 45 (emphasis added), West Face's Book of Authorities, Tab 12, citing *Apotex Inc. v. Egis Pharmaceuticals* (1991), 4 O.R. (3d) 321 (Gen. Div.), *per* Henry J. at p. 5 (QL) (emphasis added) [*Apotex v. Egis (1991)*], West Face's Book of Authorities, Tab 3.

[37] See *Apotex Inc. v. Egis Pharmaceuticals* (1990), 2 O.R. (3d) 126 (Gen. Div.), *per* Henry J. at p. 5 (QL), *leave to appeal refused,* [1991, unreported] (1990), 2 O.R. (3d) 126 at p. 1 note (Div. Ct.) [*Apotex v. Egis (1990)*], West Face's Book of Authorities, Tab 2. This statement was quoted with approval by Epstein J.A., who agreed that such "unsubstantiated allegations [are] commonly accepted as a basis for attracting a higher costs award." See *Davies v. Clarington*, *supra*, at paras. 45 & 47 (emphasis added), West Face's Book of Authorities, Tab 12.

cause to the court." As he concluded, Apotex had elected to use the court to "play hard ball against the defendants and lost." As such, it could "scarcely complain" when it was required to indemnify the defendants for their costs.[38]

30. For the reasons set out below, West Face respectfully submits that the current proceeding constituted "fruitless" and "counter-productive" litigation based on "speculation only" which was prosecuted by Catalyst with the principal goal of "harassing" West Face and Mr. Moyse. As found by Justice Henry in similar circumstances, an award of costs on a substantial indemnity scale is entirely fitting.

B. The Costs Sought by West Face are Fair and Reasonable

31. West Face's claim for costs of $1,239,970.41 (on a substantial indemnity scale) or of $843,246.50 (on a partial indemnity scale) is entirely fair and reasonable in light of: (i) the principle of indemnity; (ii) the amount claimed and recovered; (iii) the apportionment of liability; (iv) the complexity of the proceeding; and (v) the importance of the issues.[39]

32. Catalyst's claims for $500 million represented an existential threat to West Face. Quite apart from the vast potential monetary liability, a finding of dishonest conduct against West Face could have been ruinous to its business and reputation as a fiduciary manager of the funds of its investors. Exacerbating the importance of Catalyst's claim was the very public manner in which Catalyst chose to prosecute this matter, as discussed below. West Face had no choice but to leave no stone unturned in its

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[38] See *Apotex v. Egis (1991)*, *supra,* at pp. 4 & 11 (QL), West Face's Book of Authorities, Tab 3.
[39] See, respectively, Rules 57.01(1)(0.a), 57.01(1)(a), 57.01(1)(b), 57.01(1)(c), & 57.01(1)(d).

defence. Nonetheless, as explained below, West Face is not claiming all of these costs which it understandably incurred.

33. As reflected in the attached Bill of Costs, West Face's claim for costs represents only a fraction of the actual cost and expense incurred by West Face in defending the allegations made against it by Catalyst. West Face's actual costs in defending the action easily exceeded $2 million, which excludes all of the expense previously incurred by West Face in defending Catalyst's various interlocutory motions and attempted appeals for which costs have already been awarded.

34. The amounts reflected in West Face's Bill of Costs have been reduced in an effort to ensure that West Face's claim for costs is scrupulously fair and reasonable in the circumstances of this case. Among other reductions, West Face's Bill of Costs reflects a much smaller number of lawyers, law clerks and students than actually worked on this case at the Davies firm. West Face has not claimed any time spent by law students, nor the time spent by a number of lawyers who were involved in defending Catalyst's claims. Moreover, in respect of the limited number of lawyers and law clerks who are reflected in the enclosed Bill of Costs, West Face has reduced substantially the number of hours they actually worked (and billed) as well as their hourly billing rates.

35. The various reductions of West Face are as follows:

(a) Since Davies was retained by West Face in January 2015, 42 individuals have worked on this matter, including 14 lawyers, 16 law clerks and librarians, and 12 students. West Face is only claiming the time spent by

the leading members of its defence team, being 4 lawyers,[40] 2 law clerks,[41] and no students.

(b) Whereas the actual time spent on this case by the 14 lawyers, 16 law clerks and librarians, and 12 students totalled 3,894 hours, West Face is only claiming 2,206.9 of these hours – or roughly 56.5% of the total effort.

(c) For those 4 lawyers and 2 law clerks in respect of whom a claim for costs is being made, West Face is claiming significantly lower partial and substantial indemnity rates than those actually charged.

36. While the rates used in West Face's Bill of Costs are higher than those specified in the "Costs Grid" contained in the Practice Direction of the Costs Subcommittee of the Civil Rules Committee, senior Justices of the Commercial List have held repeatedly that such rates are wholly outdated and of limited or no use in sophisticated commercial litigation. In his decision in *Stetson Oil & Gas Ltd. v. Stiffel Nicolaus Canada Inc.*, for instance, Justice Newbould held that the rates set out in the Practice Direction should no longer be used:

> Regarding the use of the rates recommended in the practice direction of the Costs Subcommittee of the Civil Rules Committee, I have considerable difficulty with the rates in that practice direction. They were the rates contained in the cost grid introduced in January, 2002. When the cost grid was abolished on July 1, 2005, they were continued in the practice direction. **These rates are completely outdated and unrealistic for an action fought by two major downtown Toronto law firms**.[42]

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40 Messrs. Thomson, Milne-Smith, Alexander, and Carlson.

41 Ms. Barbiero and Ms. Bilous.

42 See *Stetson Oil & Gas Ltd. v. Stiffel Nicolaus Canada Inc.*, 2013 ONSC 5213, *per* Newbould J. at para. 22 (emphasis added) [*Stetson Oil & Gas*], West Face's Book of Authorities, Tab 34.

37. Rather than be constrained by outdated rates listed in the Costs Grid, Justice Newbould held instead that an appropriate partial indemnity costs award in complex commercial litigation should be calculated at approximately 60% of the time actually charged, and that substantial indemnity costs should be calculated at the rate of approximately 90% of the time actually charged.[43] West Face's claims for costs are substantially below these thresholds, both on a partial indemnity and on a substantial indemnity basis. West Face's partial indemnity claim is less than 35% of its actual total costs; its substantial indemnity claim is less than 55% of its actual total costs.

38. There can be no dispute that this proceeding was factually and legally complex:

(i) A total of 13 witnesses were called to give live testimony at trial. Catalyst called four witnesses, West Face called seven, and Mr. Moyse called two;

(ii) As noted above, for efficiency, the parties' evidence in chief was put in by way of lengthy pre-trial affidavits, with exhibits. Catalyst's trial affidavits totalled 56 pages and attached 78 exhibits; West Face's trial affidavits totalled 117 pages and attached 89 exhibits; and Mr. Moyse's trial affidavit totalled 58 pages and attached 85 exhibits;

(iii) In addition, the parties agreed that all of the evidence from the multiple interlocutory motions that preceded trial, including dozens

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[43] See *Stetson Oil & Gas, supra,* at para. 25, West Face's Book of Authorities, Tab 34. See also *Castillo v. Xela Enterprises Ltd.,* 2015 ONSC 7978, *per* Newbould J. at para. 12 [*Castillo v. Xela*], West Face's Book of Authorities, Tab 9.

of affidavits, hundreds of exhibits, and thousands of pages of cross-examination transcripts, were "fair game" at trial and could be relied upon in the parties' closing submissions;

(iv) The parties' documentary productions 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; and

(v) The parties' written closing submissions totalled close to 500 pages.

39. In considering the amounts claimed by West Face, this Court should bear in mind the principle that hindsight is not appropriately applied in determining whether a successful defendant expended unnecessary effort in defeating very serious claims brought against it. This point was well explained by Justice Henry in the *Apotex v. Egis* ruling, where he awarded substantial costs to the defendants even though their counsel were not called upon to respond to Apotex's injunction application:

> It is not appropriate to apply the test of hindsight (20/20 vision) to determine whether a service charged for was an extra service or frill not reasonably necessary to defend the client's position. **The time to view the decision to commit services to the project is before the hearing or trial – not on the basis of hindsight which might indicate that as it turned out, the service was unnecessary.** In the case at bar, I did not even call on counsel for the defendants yet it was essential that they be fully prepared in case I had done so.[44]

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[44] See *Apotex v. Egis (1991)*, *supra*, at pp. 10-11 (QL), West Face's Book of Authorities, Tab 3.

40. Moreover, as a general rule, "[i]t is not the court's function when fixing costs to second guess successful counsel [regarding] the amount of time spent unless the time spent was obviously too much."[45]

41. In responding to Catalyst's claims, West Face acted reasonably in deciding to retain a team of experienced commercial litigators from a leading law firm, whose hard work disproved conclusively the entirety of Catalyst's claims. These efforts were entirely justified, and proportionate to the profound threat posed by Catalyst's claims and accusations.

C. Catalyst Should Have Expected to Pay a Generous Quantum of Costs on a Substantial Indemnity Basis

42. Rule 57.01(1)(0.b) codifies the common sense principle that the appropriate quantum and scale of costs is properly influenced by "the amount of costs that an unsuccessful party *could reasonably expect to pay*." This is often a key factor in justifying significant costs awards in high stakes commercial litigation.

43. In a recent ruling awarding costs on a substantial indemnity scale, Justice Newbould noted that – where "a very large claim [was] made" and where the claim made serious allegations of intentional misconduct against the defendants – "[*t*]*he plaintiff had to know that a full and spirited defence would be advanced and that it would be expensive*."[46] A second recent ruling by Justice Myers made a similar point:

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[45] See *Castillo v. Xela, supra,* at para. 10, West Face's Book of Authorities, Tab 9.

[46] See *Bieberstein v. Kirchberger*, 2015 ONSC 6136, *per* Newbould J. at para. 7 (emphasis added) and at para. 15 ("The plaintiff had to expect that [the defendants] would vigorously defend this action") (emphasis added) [*Biebestein v. Kirchenberger*], West Face's Book of Authorities, Tab 7. Notably, the claim in question was for $10 million, which is only a fraction of the amount sought by Catalyst (see *Bieberstein v. Kirchberger*, 2013 ONSC 7173, *per* Mesbur J. at para. 1, West Face's Book of Authorities, Tab 6).

> [10] Making scurrilous allegations…that are not sustained can subject the unsuccessful party to punitive costs….[**The defendants**] **could only be expected to have responded to such allegations fully, completely, and resolutely**….[I]n my view, **a party who makes allegations of impropriety that are not sustained ought reasonably to expect to pay substantial indemnity costs and that the successful parties will leave no stone unturned to defend their reputations**.[47]

44. It has also been found that substantial indemnity costs may properly be awarded against a plaintiff where "the nature of the complaints was exaggerated substantially as were the alleged [losses]" suffered by the plaintiff.[48]

45. In this regard, in his decision in *Kerr v. Danier Leather Inc*., Justice Binnie noted famously the modern reality confronting a party who engages in high-stakes litigation and loses:

> [P]rotracted litigation has become the **sport of kings** in the sense that only kings or equivalent can afford it. **Those who inflict it on others in the hope of significant personal gain and fail can generally expect adverse cost consequences**.[49]

46. A different (but equally telling) athletic metaphor was used by Justice Newbould in a recent ruling affirmed by the Court of Appeal. Having dismissed a claim in which the plaintiff had impugned "the integrity of the professional persons" who ran the corporate defendant, the Court awarded costs on a substantial indemnity scale:

> [19] [The plaintiff] Cummings made very serious allegations against [the defendant] Solutia. **He had to expect that Solutia would do everything it could to defend these allegations and, in view of the widespread allegations made, would know that it would be costly for Solutia to do so**…. **He was playing hardball and could only expect that if he threw only balls and**

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47 See *Fletcher v. Matychuk*, 2015 ONSC 5051, *per* Myers J. at para. 10 (emphasis added) [*Fletcher v. Matychuk*], West Face's Book of Authorities, Tab 17.

48 See *I. Young & Co. v. Magee,* [2005] O.J. No. 3808 (S.C.J.), *per* Somers J. at para. 3 [*I. Young & Co.*], West Face's Book of Authorities, Tab 26.

49 See *Kerr v. Danier Leather Inc.*, 2007 SCC 44, *per* Binnie J. at para. 63 (emphasis added), West Face's Book of Authorities, Tab 29.

> **no strikes, he would have to account in a substantial way to Solaria for its costs and disbursements**.[50]

47. Justice Mew made a similar point, but resorted to military (rather than sporting) imagery in explaining why an unsuccessful plaintiff should expect an award of elevated costs after prosecuting litigation which challenged the "professional integrity" of the defendants' employees:

> [35] **Tactically,** [the plaintiff] **Dr. Chandra played a high stakes game. The phrase "live by the sword, die by the sword" comes to mind**.
>
> [36] **In the end, he failed abjectly.**[51]

48. Whichever of the foregoing metaphors is selected, it is clear that Catalyst's attack on West Face failed completely and calamitously, and Catalyst must be taken to have expected that such a defeat would be accompanied by significant costs consequences. This is particularly true given Catalyst's status as a highly sophisticated commercial party, with access to top-tier legal advice, and with considerable litigation experience in its own right. It was Catalyst that chose to commence and continue – on the flimsiest of foundations – a high-stakes, winner-take-all claim. Both the scope of the remedy claimed, and the damaging and public nature of the allegations levelled, must have created in Catalyst an expectation that West Face would respond with all of the resources available to it.

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[50] See *Cummings v. Solutia SDO Ltd.*, [2008] O.J. No. 4427 (S.C.J.), *per* Newbould J. at para. 19 (emphasis added), *leave to appeal refused on this point*, 2009 ONCA 510, *per curiam* at para. 7 ("[T]he application judge…rendered a decision which was well within his discretion and well founded on the record before him") [*Cummings v. Solutia*], West Face's Book of Authorities, Tab 11.

[51] See *Chandra v. Canadian Broadcasting Corp.*, 2015 ONSC 6519, *per* Mew J. at paras. 35 & 36 (emphasis added), and at para. 37 ("The consequences of that failure go well beyond the small fortune that he must have spent on his own legal representation") (emphasis added) [*Chandra v. CBC*], West Face's Book of Authorities, Tab 10.

49. In this regard, it is significant that Catalyst itself demanded that West Face pay Catalyst's "costs of this action on a substantial indemnity basis" when it *commenced* its action.[52] It cannot now pretend to be surprised when an identical demand is made of it at the *conclusion* of the proceeding.

D. Catalyst's Conduct in Lengthening the Proceeding Justifies West Face's Claim for Costs on a Substantial Indemnity Basis

50. Rules 57.01(1)(e) and (g), authorize this Court to take into account any party's conduct which unnecessarily lengthened the proceeding and any refusal by a party to admit matters that should have been admitted. West Face submits that both forms of conduct can and should be attributed to Catalyst.

i. Catalyst's Refusal to Disclose the Truth Regarding the "Break Fee" Unnecessarily Lengthened the Action

51. Our courts have confirmed repeatedly that a party's failure to fulfil properly its disclosure obligations can justify an elevated costs award.[53] Such an award is particularly apt where a party's "failure to honour [its] undertakings…had a tendency to prolong the trial well beyond the time it should have taken to complete it."[54]

52. In a recent ruling – which awarded costs on a full indemnity scale – Justice Granger referred harshly to the defendant's belated disclosure of important evidence,[55]

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52 See Catalyst's Amended, Amended, Amended Statement of Claim at para. 1(g), Tab C.

53 See *Debora v. Debora*, [2005] O.J. No. 1055 (S.C.J.), *per* Backhouse J. at para. 11, *affirmed on this point, varied on other points*, [2006] O.J. No. 4826 (C.A.), *per* Weiler J.A. at para. 84, West Face's Book of Authorities, Tab 13.

54 See *I. Young & Co.*, *supra*, at para. 4, West Face's Book of Authorities, Tab 26.

55 See *GasTOPS Ltd. v. Forsyth*, 2010 ONSC 7068, *per* Granger J. at paras. 12-19 & 25 ("[I]t is clear that the position put forward in the affidavits of Forsyth, Brouse and Jeff Cass which were sworn in November 1996, was fundamentally and deliberately false. I am driven to the conclusion that the defendants did not intend to produce the documents which were found on the backup tapes during the cross-examination of Brouse during this trial….There can be no doubt that this [false] statement was the cornerstone of the defendants' defence of the main action…") (see paras. 12 & 15, emphasis added) [*GasTOPS v. Forsyth*], West Face's Book of Authorities, Tab 19. For a *second* case in which full indemnity costs were awarded on similar facts,

and concluded that the consequent prolongation of the proceedings justified this extraordinary award:

> [27] …**The defendants deliberately intended** to frustrate these proceedings through deception and **as a result of their actions increased the complexity and length of these proceedings**. The actions of the defendants are proper grounds upon which **order the defendants to completely indemnify the plaintiff for its legal fees at the maximum possible rate**. [56]

53. Regrettably, the conduct described in the foregoing cases finds parallels in Catalyst's conduct in the present proceeding. For well over a year, Catalyst blamed West Face publicly and in these proceedings for its failure to reach a deal with VimpelCom while failing or refusing to disclose that the real reason why its negotiations with VimpelCom broke down was Catalyst's refusal to agree to, or even negotiate, the break fee VimpelCom had requested.[57] More egregiously, for more than a year in the pre-trial phase of this proceeding, Catalyst actively misled West Face and the Court concerning this important issue.

54. West Face attempted to obtain evidence from Catalyst regarding VimpelCom's request for a break fee in the context of Catalyst's high stakes interlocutory motion initiated in January 2015. In defending that motion, West Face's counsel asked Mr. Riley during his cross-examination on May 13, 2015 whether VimpelCom had ever asked Catalyst for a break fee. Mr. Riley responded "I don't know", but formally undertook to make inquiries and advise West Face: (i) whether VimpelCom had ever requested a break fee from Catalyst; (ii) if so, the precise terms of any such request;

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see *Envoy Relocation Services Inc. v. Canada*, 2013 ONSC 2622, *per* Annis J. at paras. 76-85 and 97-103 ("The concealment of crucial evidence that played a major role in the outcome of the case and misled the court is grave misconduct") (see para. 99, emphasis added) [*Envoy Relocation v. Canada*], West Face's Book of Authorities, Tab 15.

[56] See *GasTOPS v. Forsyth*, *supra,* at para. 27 (emphasis added), West Face's Book of Authorities, Tab 19.

[57] Reasons at paras. 126-130.

and (iii) whether Catalyst had agreed to any request for a break fee that was, in fact, made by VimpelCom.[58]

55. It is highly questionable whether Mr. Riley answered this question honestly during his cross-examination. His evidence that he did not know about VimpelCom's request for a break fee was at odds with his role and responsibilities at Catalyst, and with the "flat" team structure spoken of at length at trial by Messrs. Glassman and De Alba. Mr. Riley is Catalyst's Chief Operating Officer and one of its three Partners. He also served as Catalyst's only affiant prior to trial, and was the executive at Catalyst primarily responsible for managing this litigation and instructing counsel. Mr. Glassman testified at trial that relevant information concerning the proposed VimpelCom transaction was shared freely with Mr. Riley, and that Mr. Riley "would have known [about VimpelCom's request for a break fee] by the end of the transaction, for sure".[59]

56. In any event, in its answers to undertakings arising from Mr. Riley's cross-examination, Catalyst's response to the question of whether VimpelCom had ever **asked** for a break fee was the misleading statement that "[t]he parties never **negotiated** a break fee". On this basis, Catalyst stated that the **terms** of such a break fee were therefore "**N/A**".[60] Rather than answer West Face's questions concerning this important issue directly and in a straightforward and forthright fashion, Catalyst engaged instead in a game of deflection and obfuscation.

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58 See Transcript of Cross-Examination of James Riley held May 13, 2016, at qq. 554-557, Tab R.

59 Glassman Cross-Examination, June 7, 2016, at p. 362:5-20, Tab S.

60 See responses no. 15 & 16 of the Undertakings, Advisements, and Refusals Chart of the Cross-examination of James Riley held May 13, 2016, Tab T.

57. Unfortunately, this was the state of the record for over a year, as Catalyst failed to correct its misleading answer. It did not correct the answer in the motion before Justice Glustein. Nor did Catalyst correct its answer throughout its purported appeal of Justice Glustein's order to the Court of Appeal, or during its subsequent motions for an extension of time and for leave to appeal to the Divisional Court. It also did not correct this answer at the time it sought to oppose the approval by this Court of Mid-Bowline's proposed Plan of Arrangement.

58. Instead, Catalyst only conceded the true state of affairs **almost a year later**, when Catalyst produced documents proving that VimpelCom had requested a break fee, and Mr. De Alba was forced to admit for the first time during his examination for discovery on May 11, 2016 that Catalyst had, in fact, been asked for a break fee by VimpelCom. Mr. De Alba also revealed for the first time that even though he was Catalyst's principal negotiator in the VimpelCom transaction and occupied an office right down the hall from Mr. Riley's, he <u>was not consulted</u> when Catalyst answered the undertakings given by Mr. Riley during his cross-examination on May 13, 2015.[61]

59. During Mr. De Alba's discovery, he gave a further undertaking to advise who at Catalyst had been consulted in answering the break fee undertakings given during the cross-examination of Mr. Riley held on May 13, 2015. Catalyst delivered its answer to this undertaking on the eve of trial, on May 27, 2016, and stated that no one had been consulted. Instead, Catalyst advised that Mr. Riley had answered this undertaking "to

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[61] See Transcript of Examination for Discovery of Gabriel De Alba held May 11, 2016, at qq. 742-758, <u>Tab U</u>.

the best of his recollection".[62] This was a remarkable response given that the very reason the initial undertaking had been requested by West Face was because Mr. Riley had testified during his cross-examination that he did not know whether VimpelCom had ever asked for a break fee. Rather than seek readily available and accurate information to enable him to answer his important undertaking properly and truthfully, Mr. Riley made no inquiries of anyone, and instead misled West Face (and the Court).

60. Thereafter, Catalyst's answers concerning what transpired when this misleading answer to undertaking was given changed yet again. On June 3, 2016 (the last business day before trial), Catalyst's counsel revised the undertaking Catalyst had delivered the week before. In the revised answer, Catalyst indicated that, in providing his answer to his original undertaking given in May 2015, Mr. Riley had asked Mr. Zach Michaud whether there was a break fee in the transaction, rather than whether VimpelCom had asked for a break fee.[63] Mr. Riley conceded in cross-examination at trial that he either asked Mr. Michaud the wrong question or Mr. Michaud gave the wrong answer, and further confirmed that he had made no inquiries of Mr. De Alba before providing his misleading answer.[64]

61. It is impossible to overstate the significance of these events. They demonstrate Catalyst's efforts to mislead West Face (and the Court) for over a year in respect of this crucially important and potentially dispositive issue.

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62 See response no. 47 of the May 27, 2016 version of the Undertakings, Advisements, and Refusals Chart of the Examination for Discovery of Gabriel De Alba held May 11, 2016, Tab M.

63 See the revised answer to undertaking no. 47 as set out in the letter from Rocco DiPucchio to counsel to West Face, dated June 3, 2016, Tab V.

64 Riley Cross-examination, June 8, 2016, at p. 593:5 – p. 604:12, Tab W.

ii. Catalyst's "Scorched Earth Litigation" and Refusal to Concede Matters Unnecessarily Lengthened the Action

62. Catalyst's approach to the current proceeding can accurately be characterized – borrowing the words of Justice Brown – as "baseless, hugely expensive, scorched earth litigation." In the case before Brown J., the plaintiff had "advanced bald allegations…, for which she offered no evidence in support, and which she persisted in pursuing at the hearing notwithstanding admissions made on her behalf…against the position she took and the contrary evidence filed from independent witnesses." Despite the lack of merit to her position, "she compelled the creation of a massive record" and put the defendant "to a huge legal expense by persisting in objection long after it became clear that no evidence existed to give rise to a genuine issue for trial."[65] Justice Brown's conclusion, affirmed by the Court of Appeal, was that this "conduct tended to lengthen unnecessarily the duration of this proceeding", thereby triggering both Rule 57.01(1)(e) and Rule 57.01(1)(g), and justifying an extraordinary award of full indemnity costs.[66]

63. While every case turns on its own facts, Catalyst's overarching approach to this proceeding bears many of these same hallmarks of "scorched earth litigation." Indeed, Catalyst's conduct was arguably worse than that of the plaintiff in the case before Justice Brown. Not only did Catalyst pursue relentlessly its meritless claims, it was also guilty of repeatedly shifting the nature and focus of its allegations, thereby further needlessly lengthening the duration of this proceeding. West Face was forced again

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[65] See *Smith Estate v. Rotstein*, 2010 ONSC 4487, *per* Brown J. (as he then was) at paras. 41-44 & 47-51, *affirmed on this issue, but varied,* 2011 ONCA 491, *per* Armstrong J.A. at para. 64 ("I see no basis upon which to interfere [with] the motion judge's conclusion that the award of costs should be on a full indemnity scale") (emphasis added), *leave to appeal refused*, [2011] S.C.C.A. No. 441 [*Smith Estate v. Rotstein*], West Face's Book of Authorities, Tab 32.

[66] See *Smith Estate v. Rotstein*, *supra,* at paras. 41, 47 & 51 (ONSC) and at para. 64 (ONCA), West Face's Book of Authorities, Tab 32.

and again to "prove a negative" in the face of Catalyst's ever-changing allegations of misconduct.

64. Catalyst also needlessly prolonged the current proceeding by its repeated refusal to concede matters that should clearly have been conceded. Consistent with the language of Rule 57.01(g), this Court and the Court of Appeal have confirmed repeatedly that such behaviour justifies a substantial indemnity costs award.[67] A statement made by Justice Pierce in the course of awarding costs on a substantial indemnity scale could apply with equal force to the conduct of Catalyst's witnesses at trial:

> [34] I found that "Generally, Mr. Gartner's **testimony was characterized by arrogance and obfuscation.**" …
> …
> [36] **The trial was significantly lengthened** by Mr. Gartner's **refusal to admit that which should have been admitted, even to the point of challenging the agreed statement of fact, disputing his knowledge of documents listed in his own affidavit of documents**, **and giving testimony that was obviously untruthful**. …[68]

65. Catalyst's pattern of refusing to admit even well-settled matters clearly prolonged the action, rendered it needlessly complicated, and justifies an award of costs on a substantial indemnity basis. Catalyst's refusals in this regard are well-documented in the Court's Reasons, particularly with regard to the evidence of Mr. Glassman.[69]

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[67] See, for example, *Hildebrand v. Schindler*, [2005] O.J. No. 4726 (C.A.), *per curiam* at para. 4 ("[T]he award of substantial indemnity costs was within [the trial judge's] discretion, especially considering that the appellant prolonged [the proceeding] by refusing to admit that the respondent was a shareholder"), West Face's Book of Authorities, Tab 24; and *Jassal v. Kaith*, 2016 ONSC 3650, *per* Le May J. at para. 11 ("The plaintiff denied a number of facts that, in my view, should have been admitted. In the circumstances, this is also a factor that supports an award of substantial indemnity costs in this case") [*Jassal v. Kaith*], West Face's Book of Authorities, Tab 28.

[68] See *1188710 Ontario Ltd. v. Gartner*, 2013 ONSC 2008, *per* Pierce J. at paras. 34 & 36 (emphasis added) and at paras. 33 & 38 [*1188710 Ont. v. Gartner*], West Face's Book of Authorities, Tab 1.

[69] Reasons at paras. 11, 12, 37, 38, 41, 43, 46, 51, 124 footnote 13, & 131 footnote 14.

E. Other Conduct by Catalyst Justifies the Costs Sought by West Face on a Substantial Indemnity Basis

66. Just as Rule 57.01(1)(i) expressly allows this Court to take into account "any other matter relevant to the question of costs", the common law has recognized a variety of factors that may properly be considered in determining whether costs should be awarded on a substantial indemnity scale. These include: (i) efforts by the unsuccessful party to deceive the Court and the other side; (ii) the making of unfounded allegations of intentional misconduct against the defendant; (iii) the public dissemination of meritless allegations; (iv) the launching of improper attacks on the integrity of the judiciary; and (v) the carrying on of abusive or oppressive litigation. It is respectfully submitted that Catalyst engaged in all of these forms of egregious conduct, and for this reason as well should be sanctioned through an award of elevated costs.

i. Catalyst's Efforts to Mislead the Court (and West Face) Warrant an Award of Substantial Indemnity Costs

67. The courts have confirmed repeatedly the appropriateness of awarding elevated costs (on a substantial or even a full indemnity scale) in order to sanction parties who have attempted to mislead the court or the opposing party. This sanction has been applied to parties who have given untruthful testimony, sworn false affidavits, or otherwise sought to deceive the court.[70] This has included parties who attempted to "tailor" their evidence "to fit the outcome [they are] trying to achieve."[71] Our courts have

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[70] See *Fitzpatrick v. Orwin*, 2012 ONSC 6712, *per* Stinson J. at paras. 7-9 [*Fitzpatrick v. Orwin*], West Face's Book of Authorities, Tab 16; *Foglia v. 1144341 Ontario Ltd.*, [2006] O.J. No. 1629 (S.C.J.), *per* Low J. at paras. 14 & 17 [*Foglia v. 1144341 Ont.*], West Face's Book of Authorities, Tab 18; *Jassal v. Kaith*, *supra*, at paras. 9 & 10, West Face's Book of Authorities, Tab 28; *GasTOPS v. Forsyth*, *supra,* at para. 29 and at paras. 12-19 & 25-27, West Face's Book of Authorities, Tab 19; and *1188710 Ont. v. Gartner*, *supra*, at paras. 33-38, West Face's Book of Authorities, Tab 1.

[71] See *Chandra v. CBC, supra,* at para. 29, West Face's Book of Authorities, Tab 10; *Jassal v. Kaith*, *supra*, at paras. 9-10, West Face's Book of Authorities, Tab 28; and *Royal Bank of Canada v. Tie Domi Enterprises Ltd.*, 2012 ONSC 625, *per* Allen J. at para. 5 [*RBC v. Tie Domi*], West Face's Book of Authorities, Tab 31.

expressed particular frustration with parties who have refused to abandon or modify patently misleading or deceptive positions, even when confronted with evidence that establishes the true state of affairs.[72]

68. Catalyst's pre-trial conduct alone is sufficient to meet the above criteria. In addition to the false evidence in affidavits sworn by Mr. Riley in support of Catalyst's various pretrial motions, the Reasons confirm that the trial evidence provided by Messrs. Glassman and De Alba was, *inter alia*: (i) overstated, "blown out of all proportion", or required to be taken with "a large grain of salt";[73] (ii) aggressive and/or argumentative;[74] (iii) nonsensical;[75] and (iv) unsupported by or directly contrary to the contemporaneous documentary evidence.[76]

69. These findings are clearly relevant when selecting the proper scale of costs. Although adverse findings of credibility "do not necessarily lead to cost consequences,"[77] "the fact that [a party's] testimony is untruthful is a factor that [the court] may take into account in considering the scale of costs to be awarded."[78] An elevated costs award will be particularly appropriate where an adverse credibility finding goes to a fundamental issue in the proceeding, or where such a finding is coupled with

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72 See *Foglia v. 1144341 Ont., supra*, at paras. 14 & 17 ("The plaintiff's own evidence was demonstrated to be untrue in a number of matters and his witnesses' testimony did not support his case."), West Face's Book of Authorities, Tab 18; *Smith Estate v. Rotstein*, *supra*, at paras. 41-44 & 47-51, West Face's Book of Authorities, Tab 32; *1188710 Ont. v. Gartner*, *supra*, at para. 33, West Face's Book of Authorities, Tab 1; and *RBC v. Tie Domi*, *supra*, at para. 5, West Face's Book of Authorities, Tab 31.

73 Reasons at paras. 10, 12, 38, 41 & 43.

74 Reasons at paras. 11-12.

75 Reasons at paras. 12, 38, 48, 49 footnote 3, 109, & 161.

76 Reasons at para. 50.

77 See *Guarantee Co. of North America v. Resource Funding Ltd.*, [2009] O.J. No. 612 (S.C.J.), *per* Newbould J. at para. 4, West Face's Book of Authorities, Tab 20.

78 See *Ontario Realty Corp. v. P. Gabriele & Sons Ltd.*, [2009] O.J. No. 5278 (S.C.J.), *per* Newbould J. at paras. 18 & 21, *varied on unrelated grounds*, 2010 ONCA 641 and 2010 ONCA 642, *leave to appeal refused,* [2010] S.C.C.A. No. 446, West Face's Book of Authorities, Tab 30.

a determination that the relevant party concealed other relevant evidence.[79] As discussed above, both of these exacerbating factors are present in the current proceeding.

70. Moreover, Catalyst is not in a position to argue that credibility was not a fundamental issue in this case. In his Opening Statements, Catalyst's counsel submitted that credibility was "the key issue":

> The key issue, Your Honour, at the end of the day for the court to consider is obviously credibility of the various witnesses that appear before you, and we're going to ask you to pay particular attention to Mr. Moyse's and West Face's story and how it's morphed throughout the course of these proceedings and you're going to have to carefully consider why and on what basis the defendants would have taken certain actions at certain points in time but for the inferences that we're going to ask you to draw.[80]

71. Contrary to Catalyst's Opening Statement, it was Catalyst's "story" that "morphed" (with respect to the break fee and with respect to salient elements of its proposed transaction with VimpelCom), and it is the credibility of Catalyst's witnesses that was found wanting, repeatedly and materially. These factors should also play a significant role in this Court's determination of whether to award West Face its costs on a substantial indemnity basis.

ii. Catalyst's Baseless Allegations of Dishonest Conduct Warrant an Award of Substantial Indemnity Costs

72. In its pleadings, in its "leaks" to the press (discussed below), and throughout this proceeding, Catalyst has levelled damaging and unwarranted allegations of intentional dishonesty and improper conduct against West Face.

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79 See *Envoy Relocation v. Canada*, *supra,* at paras. 101-103, West Face's Book of Authorities, Tab 15; and *Buccilli v. Pillitteri*, 2013 ONSC 1537, *per* Newbould J. at para. 5, West Face's Book of Authorities, Tab 8.

80 Opening Statement of counsel for Catalyst, June 6, 2016, at p. 46:17–47:2, Tab X.

73. As has been explained by the Supreme Court, such allegations "are serious and potentially very damaging to those accused of deception." Justice Arbour noted that, while "[a]n unsuccessful attempt to prove fraud or dishonesty on a balance of probabilities does not lead inexorably to the conclusion that the unsuccessful party should be held liable for solicitor-and-client costs", such an award will be appropriate in cases where the plaintiff could and should have recognized that the defendant's conduct was "neither dishonest nor fraudulent."[81]

74. Ontario courts have recognized for decades that the making of allegations of intentional misconduct is a very serious step in any litigation, and should not be taken lightly: "Since 1980, our courts have been more willing to award costs on a substantial indemnity basis where a party alleges fraud *or some other serious wrongdoing or impropriety that is seriously prejudicial to the reputation of a party* and those allegations are…found to be unsubstantiated*.*"[82]

75. This is a principle of general application, and is *not* limited to unproven allegations of conspiracy, fraud or deceit. *Any* baseless allegation that impugns a defendant's honesty or integrity will potentially attract the sanction of elevated costs – *e.g.,* unproven accusations of malicious prosecution,[83] breach of fiduciary duty,[84] stock

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81 See *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, *per* Arbour J. at para. 26, West Face's Book of Authorities, Tab 22.

82 See *Hawley v. Bapoo*, [2006] O.J. No. 2938 (S.C.J.), *per* Ducharme J. at para. 21 (emphasis added), *affirmed on this ground, varied on other grounds*, 2007 ONCA 503, *per curiam* at para. 18 ("[W]e are not satisfied that the trial judge's award of substantial indemnity costs…should be set aside") [*Hawley v. Bapoo*], West Face's Book of Authorities, Tab 23.

83 See *Hawley v. Bapoo*, *supra,* at paras. 23-25, West Face's Book of Authorities, Tab 23.

84 See *Bieberstein v. Kirchberger*, *supra,* at para. 7, West Face's Book of Authorities, Tab 7. Substantial indemnity costs have likewise been awarded in response to unproven allegations of *inducing* breach of fiduciary duty. See *Thoughtcorp Systems Inc. v. Tanju*, [2009] O.J. No. 1856 (S.C.J.), *per* Hoy J. (as she then was) at para. 21 [*Thoughtcorp Systems v Tanju*], West Face's Book of Authorities, Tab 35.

manipulation,[85] racial animus,[86] forgery,[87] and theft.[88] Most relevantly, Ontario courts have found that unsubstantiated allegations of *breach of confidence* will justify an elevated costs award against the plaintiff.[89]

76. Courts have viewed as particularly egregious the making of "baseless and speculative allegations" of intentional misconduct by a party who, at trial, "proffer[s] no evidence whatsoever that would support any finding of wrongdoing."[90] In describing such egregious behaviour, Justice Low used language that could readily be applied to Catalyst's conduct of the current proceeding:

> 17 **The action was either grossly ill-conceived or was an abuse of process. From an evidentiary viewpoint, there was no realistic prospect of making out the allegations based on the oral and documentary evidence** adduced up to the point when plaintiff sought leave to discontinue. **The plaintiff's own evidence was demonstrated to be untrue in a number of matters and his witnesses' testimony did not support his case. Either the plaintiff went into the trial knowing that he did not have proof of fraud or he did not trouble to ascertain what the witnesses' evidence would be**.
>
> …
>
> 19 … I do not view the case at bar as having merit and **I see its prosecution through several days of trial as oppressive of the defendant…given the nature of the allegations** made against him **in the absence of cogent supporting evidence**. [91]

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85 See *Stetson Oil & Gas, supra*, at para. 11, West Face's Book of Authorities, Tab 34.

86 See *Hamalengwa v. Duncan*, [2005] O.J. No. 3993 (C.A.), *per curiam* at para. 17, West Face's Book of Authorities, Tab 21.

87 See *Cummings v. Solutia, supra,* at paras. 3-5, West Face's Book of Authorities, Tab 11; and *Fletcher v. Matychuk, supra,* at paras. 4, 5 & 10, West Face's Book of Authorities, Tab 17.

88 See *1188710 Ont. v. Gartner, supra*, at para. 35, West Face's Book of Authorities, Tab 1.

89 See *Thoughtcorp Systems v. Tanju*, *supra,* at para. 21, West Face's Book of Authorities, Tab 35; and *Zesta Engineering Ltd. v. Cloutier*, 2013 ONSC 385, *per* Stinson J. at paras. 24-28, *varied on other grounds*, 2014 ONCA 762, West Face's Book of Authorities, Tab 37.

90 See *Fitzpatrick v. Orwin*, *supra,* at paras. 7-9, West Face's Book of Authorities, Tab 16. See also *Smith Estate v. Rotstein*, *supra,* at para. 45 ("[T]here was no evidence to support any of those allegations. They fell into the category of baseless allegations of wrongdoing and meritless claims of fraud, deceit, and dishonesty based on pure speculation against the other party which the jurisprudence has recognized may justify an award of elevated costs") (emphasis added), West Face's Book of Authorities, Tab 32; and *Apotex v. Egis (1990), supra,* at p. 5 (QL), West Face's Book of Authorities, Tab 2.

91 See *Foglia v. 1144341 Ont., supra*, at paras. 17 & 19 (emphasis added) and at para. 23, West Face's Book of Authorities, Tab 18.

77. Exacerbating its meritless allegation that West Face was guilty of breach of confidence, Catalyst further demanded punitive, aggravated and exemplary damages against West Face because of the *manner* in which West Face allegedly committed the underlying wrongdoing: "[T]he Defendants' egregious actions, as pleaded above, were…high-handed, wilful, wanton, reckless, contemptuous and contumelious of Catalyst's rights and interests."[92] While an unproven claim for punitive (or aggravated) damages does not necessarily justify the granting of elevated costs,[93] our courts have repeatedly awarded substantial indemnity costs against plaintiffs, like Catalyst, that have claimed punitive or aggravated damages based on unfounded accusations of intentional and dishonest wrongdoing.[94]

iii. Catalyst's Dissemination in the Press of its Baseless Allegations Also Warrants an Award of Substantial Indemnity Costs

78. Courts have also found that elevated costs may be triggered by a plaintiff's decision to disseminate through the media unfounded allegations of misconduct made against a defendant.[95] Catalyst engaged in this very sort of ancillary campaign against West Face.

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92 See Catalyst's Amended, Amended, Amended Statement of Claim at paras. 1(e) & 35-36, Tab C.

93 See *Springer v. Aird & Berlis LLP*, [2009] O.J. No. 2170 (S.C.J.), *per* Newbould J. at para. 5, West Face's Book of Authorities, Tab 33.

94 See *DiBattista v. Wawanesa Mutual Insurance Co.*, [2005] O.J. No. 4865 (S.C.J.), *per* Coats J. at para. 4, *affirmed on other grounds*, [2006] O.J. No. 3960 (C.A.) [*DiBattista v. Wawanesa*], West Face's Book of Authorities, Tab 14; and *Upchurch v. Oshawa*, 2013 ONSC 4498, *per* Glass J. at paras. 14-16, West Face's Book of Authorities, Tab 36.

95 See *DiBattista v. Wawanesa, supra,* at para. 4 ("I find that all Defendants are entitled to costs on a substantial indemnity basis for the following reasons…The Plaintiffs disseminated their allegations against Wawanesa through the Toronto Star and by television"), West Face's Book of Authorities, Tab 14. See also *J.P. Levesque Bros. Haulage Ltd. v. Ontario*, 2013 ONSC 6676 *per* Nadeau J. at para. 20, *affirmed but varied*, 2015 ONCA 273, *per* Feldman J.A. at paras. 28, 43, 56 & 59-60 [*Levesque v. Ontario*], West Face's Book of Authorities, Tab 27. In *Levesque v. Ontario*, Justice Nadeau justified an award of full indemnity costs against the unsuccessful defendant ("MTO") based, in part, on its "extremely troublesome" conduct extrinsic to the litigation. He specifically referred to "the impropriety of the MTO Press Release." The Court of Appeal affirmed the trial judge's analysis (and repeated his reference to the "improper" Press Release), but varied the decision by reducing it to a substantial indemnity costs award.

79. In January 2015, a series of news articles appeared in the *National Post* and *The Globe and Mail* quoting from Catalyst's recently filed Notice of Motion for interlocutory relief, and publicizing Catalyst's allegations against West Face. These articles repeated Catalyst's entirely spurious allegations that: (a) West Face "used confidential information provided by a former employee to purchase its stake in the fledgling wireless carrier"; (b) "West Face only began showing interest in the mobile carrier after the former Catalyst employee joined the firm"; and (c) "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."[96]

80. West Face filed uncontested evidence at trial demonstrating that neither it nor its counsel had any involvement in this media coverage.[97] In telling contrast, Catalyst *refused* to answer questions about its role in instigating the publication of these damaging articles.[98] The timing of this media barrage was surely no coincidence, as it began immediately after: (i) the Court File was unsealed (a development of which Catalyst was aware, but West Face was not);[99] and (ii) the filing by Catalyst of its January 13, 2015 Notice of Motion (containing these very allegations, but without supporting affidavit material).

81. Remarkably, in the period after the media's attention was first drawn to the parties' dispute, Catalyst sought to ensure that the press coverage would be entirely

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96 See the article titled: “Bay Street feud over analyst hire escalates in court,” by *The Globe and Mail*, dated February 2, 2016, Tab Y; and the article titled: “Wind Mobile ownership under threat as Bay Street hiring tiff spirals into legal brawl,” by the *Financial Post*, dated February 4, 2015, Tab Z.

97 Affidavit of Anthony Griffin sworn March 7, 2015, at paras. 129-132, Tab AA.

98 See responses no. 5 & 6 of the Undertakings, Advisements, and Refusals Chart of the Cross-examination of James Riley held May 13, 2016, Tab T. See also Transcript of Cross-Examination of James Riley held May 13, 2016, at qq. 259-271 & 303, Tab BB.

99 At trial, Catalyst denied that it instructed its counsel to unseal the Court File, even though it had not denied this proposition during the earlier motion before Justice Glustein.

one-sided in nature, including by threatening to sue West Face and its counsel should they maintain West Face's public denial of Catalyst's allegations. After West Face's employment counsel, Jeff Mitchell of Dentons, received and responded to inquiries from the press (by stating that West Face denied and would defend Catalyst's unsubstantiated allegations, and by asserting his belief that Catalyst's motion had been brought for an improper purpose), Catalyst's counsel wrote to Mr. Mitchell on February 9, 2015 and threatened both West Face and Mr. Mitchell personally with defamation proceedings.[100] As Catalyst's counsel pointed out in his letter to Mr. Mitchell, these articles appeared in both the print and on-line versions of "national newspapers" and "were potentially read by an audience of hundreds of thousands".[101]

82. Catalyst's publicity campaign did not stop there. On June 1, 2016, three business days before the trial of this matter, an article appeared in *The Globe and Mail* publicizing the allegations made in Catalyst's new Statement of Claim against West Face, including its allegations that: (a) confidential information was "leaked" to West Face; (b) West Face "conspired" against Catalyst; and (c) Catalyst only "learned of" the alleged breach of the exclusivity agreement between VimpelCom and Catalyst through "recent court filings made by Shaw and WIND's former owners".[102]

83. Catalyst's contention that it only learned of the facts necessary to bring its latest claim through disclosure made during the Plan of Arrangement proceeding is directly

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100 Catalyst demanded an "immediate and unqualified retraction of the above statements and the delivery of apologies and correcting statements to reporters at *The Globe and Mail* and the *Financial Post* to whom the original statements were sent, in a form satisfactory to [Catalyst]." This demand, of course, was made in relation to Mr. Mitchell's comments in newspaper articles principally devoted to repeating Catalyst's unfounded (and now disproven) allegations against West Face. See letter from Rocco DiPucchio to Jeff Mitchell dated February 9, 2015, Tab CC.

101 See letter from Rocco DiPucchio to Jeff Mitchell dated February 9, 2015, Tab CC.

102 See article titled: "Catalyst suing former owners, bankers of Wind Mobile," by *The Globe and Mail*, dated June 1, 2016, Tab DD.

contrary to findings made by Justice Newbould in his Reasons for Decision dated January 26, 2016, in which this Court held that Catalyst was aware of the facts underlying Catalyst's new claim by no later than March 2015:

> [53] … [I]t is quite clear that the information regarding the unsolicited bid was known by [Catalyst] 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.
> …
> [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.[103]

84. The June 1 *Globe and Mail* article was published on the same day that West Face was served with Catalyst's latest Statement of Claim, which raises an inference that the media likely received the Claim before West Face did.

85. There can be no serious doubt that the media coverage concerning these proceedings was instigated by Catalyst. Nor can there be any doubt that this coverage was intended to inflict, and did inflict, reputational harm on West Face.

iv. Catalyst's Attack on the Conduct and Integrity of this Court Also Warrants an Award of Substantial Indemnity Costs

86. Catalyst's use of the press to disseminate wholly unfounded accusations of misconduct has continued even after the release by this Court of its Reasons on August

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[103] See *Mid-Bowline*, *supra*, at paras. 53 & 59 (emphasis added), Tab G.

18, 2016. Indeed, immediately thereafter Catalyst made a written statement to the *Financial Post* alleging that the Reasons displayed "severe indications of possible bias."[104] This is not a suggestion of a reasonable apprehension of bias; it is an accusation of something much more serious, namely actual bias. This accusation, never raised during the course of the proceeding, confirms Catalyst's willingness to make unsubstantiated allegations of serious misconduct against virtually anyone, including members of the judiciary, in an effort to advance its goals.

87. While this meritless allegation neither requires nor deserves further comment, West Face notes that Ontario courts have awarded substantial indemnity (and even full indemnity) costs against parties who have launched "scurrilous attack[s] on the administration of justice",[105] or who have "attempted to malign the justice system."[106] The most offensive examples of such conduct have involved direct attacks on the personal integrity of members of the judiciary: elevated costs have been awarded in response to baseless allegations of "bad faith" made against judges and masters,[107] and in response to a "shockingly uncivil" challenge to a ruling, which took the form of a "personal attack" accusing the issuing judge of having acted in a "misleading" manner.[108] Catalyst clearly has not been deterred from making unfounded allegations

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104 See the article titled “Catalyst Capital Group Inc to appeal after judge dismisses Wind Mobile lawsuit” by the *Financial Post*, dated August 19, 2016, Tab Q.

105 See *Envoy Relocation Services v. Canada*, *supra*, at paras. 117 & 124(f), West Face’s Book of Authorities, Tab 15**,** quoting from *Baryluk v. Campbell*, [2009] O.J. No. 2772 (S.C.J.), *per* Hackland J. at para. 9 [*Baryluk v. Campbell*], West Face’s Book of Authorities, Tab 4.

106 See *Best v. Ranking*, 2015 ONSC 6269, *per* Healey J. at para. 143, West Face’s Book of Authorities, Tab 5.

107 See *Baryluk v. Campbell*, *supra,* at paras. 4 & 9-10, West Face’s Book of Authorities, Tab 4.

108 See *Hornstein v. Veritas Group*, [2005] O.J. No. 3198 (Div. Ct.), *per* Greer J. (sitting alone) at para. 5 ("It must be brought home to the Applicants and their counsel that this is not tolerable. It is egregious conduct which calls for costs on a substantial indemnity basis") (emphasis added), West Face’s Book of Authorities, Tab 25.

of misconduct by the release of the Reasons. An award of substantial indemnity costs may assist in discouraging its objectionable behaviour.

PART IV - CONCLUSION

88. In conclusion, West Face respectfully submits that it should be awarded costs of $1,239,970.41, on a substantial indemnity basis. In the alternative, West Face requests its costs on a partial indemnity basis in the amount of $843,246.50.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of September, 2016.

Davies Ward Phillips & Vineberg LLP
40th Floor - 155 Wellington Street West
Toronto, ON M5V 3J7

Lawyers for the Defendant,
West Face Capital Inc.

THE CATALYST CAPITAL GROUP INC. and **BRANDON MOYSE ET AL**

Plaintiff | Defendants | Court File No: CV-16-11272-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

COSTS SUBMISSIONS OF THE DEFENDANT WEST FACE CAPITAL INC.

Davies Ward Phillips & Vineberg LLP
155 Wellington Street West
Toronto ON M5V 3J7

Kent E. Thomson (LSUC #24264J)
Kent.Thomson@dwpv.com

Matthew Milne-Smith (LSUC #44266P)
mmilne-smith@dwpv.com

Andrew Carlson (LSUC #58850N)
acarlson@dwpv.com

Tel: 416.863.0900
Fax: 416.863.0871

Lawyers for the Defendant,
West Face Capital Inc.