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

CLOSING SUBMISSIONS OF WEST FACE CAPITAL INC.

June 14, 2016

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PART I - OVERVIEW

1. Catalyst's claims against West Face Capital Inc. ("**West Face**") in this proceeding border on being vexatious. They are completely devoid of merit. Catalyst has abused this Court's processes in its efforts to pursue a vendetta against a former employee and a business competitor. Catalyst's claims against West Face are an abuse of the obligation to pursue litigation fairly, in good faith and with appropriate diligence. They are an abuse of the truth.

2. When these proceedings were first commenced roughly two years ago, in June 2014, Catalyst was upset – perhaps understandably, at first – that its junior analyst Brandon Moyse had left Catalyst to join West Face, and had initially been less than forthcoming about providing several writing samples to his prospective new employer. Catalyst successfully brought a motion for an interlocutory injunction to enforce Mr. Moyse's six-month non-compete covenant in his employment agreement with

Catalyst. That could and should have been the end of this case. Mr. Moyse's restrictive covenant expired in December 2014, shortly after the injunctive relief sought by Catalyst was granted.

3. Unfortunately, however, Catalyst became even more upset when West Face succeeded in participating in an acquisition of WIND Mobile Inc. in September 2014 after Catalyst had failed to do so the month before. Catalyst was no longer content simply to enjoin Mr. Moyse from working at West Face on a temporary basis. Instead, Catalyst sought to fault West Face for its own failure to acquire WIND.

4. The central problem with Catalyst's claim in this regard is that it is contrived and baseless, both in fact and in law. Catalyst has only itself to blame for its failure to acquire WIND in August 2014. Rather than concede that this is so, however, Catalyst has engaged for two years in classic "bitter bidder" litigation in which it seeks to impute to West Face information it clearly did not have at the time, and to fault West Face for conduct it did not engage in. This is hardly fair or appropriate.

5. The evidence establishes that Catalyst made a series of missteps along the way, and misevaluated its proposed transaction with VimpelCom to acquire WIND in virtually every way imaginable:

(a) Catalyst believed incorrectly that WIND could not and would not be viable as a stand-alone business in the hands of a new owner unless that owner was given the unrestricted right to sell WIND or its spectrum to an incumbent after five years;

(b) Catalyst believed incorrectly that no purchaser could finance the acquisition of WIND, and the build-out of WIND's LTE network, without the unrestricted right to sell WIND or its spectrum to an incumbent after five years;

(c) Catalyst believed incorrectly that it could persuade the Government of Canada to grant it significant regulatory concessions, including the right to operate a wholesale leasing business involving the rental of WIND's spectrum to incumbents, and the unrestricted right to sell WIND or its spectrum to an incumbent after five years;

(d) Catalyst believed incorrectly that it could: (i) persuade VimpelCom to enter into a Share Purchase Agreement that, during the Interim Period between executing the Agreement and closing, prohibited Catalyst from seeking from the Government of Canada the right to sell WIND or its spectrum to an incumbent after five years; and (ii) then immediately breach that prohibition by engaging in the very negotiations the Agreement precluded Catalyst from pursuing;

(e) Catalyst reacted with petulance in mid-August 2014 when faced with a request from the Chair of the Board of VimpelCom for a minimal break fee of only $5 to $20 million to protect VimpelCom from the regulatory risks associated with a sale to Catalyst. Rather than negotiate this last remaining issue with VimpelCom on a constructive and collaborative basis, Catalyst told VimpelCom that it was "out to lunch", permitted its

period of exclusivity with VimpelCom to expire, and invited VimpelCom to consider alternative offers. Catalyst followed this approach on the advice of its lawyers from Faskens, and its financial advisors from Morgan Stanley; and

(f) Catalyst seriously miscalculated the options VimpelCom had available to it at the time. One of those options, proposed by a consortium of investors that included West Face, provided VimpelCom with the simple, clean exit from its investment in WIND that VimpelCom had been seeking for months. The proposal of the consortium was accepted by VimpelCom in September 2014, and completed shortly thereafter.

6. For over a year in this litigation, Catalyst blamed West Face for its failure to complete its proposed transaction with VimpelCom while failing or refusing to disclose the real reason why that transaction had failed. Indeed, Catalyst actively misled West Face concerning the important issue of whether a break fee had been requested by VimpelCom. Catalyst only admitted that this had occurred when it was confronted with incontrovertible, contemporaneous, documentary evidence that put the lie to its assertions.

7. Unlike Catalyst, West Face and its three other consortium members believed in WIND as a stand-alone entity. They were willing to acquire the company without regulatory concessions, including the ability to sell WIND or its spectrum to an incumbent. They were also willing to simply step into VimpelCom's shoes in an "elegant" two stage transaction structured in such a way as to obviate the need for

regulatory approval for the first stage, which did not effect a change of control of WIND, while assuming all of the risks associated with obtaining regulatory approval for a subsequent share re-organization involving all four consortium members. In the period following the completion of this acquisition in 2014, West Face and its fellow consortium members regularized the operations of WIND. They hired new senior management, acquired new LTE spectrum, implemented a new business plan, increased WIND's subscriber base and transformed WIND into a profitable and successful business. They were rewarded for their considerable efforts earlier this year when they sold the business to Shaw Communications Inc. for $1.6 billion, after having acquired it for a fraction of that amount.

8. Having misevaluated WIND as a business, having pursued an ill-considered regulatory strategy with the Government of Canada that was doomed to fail, and having refused to assume the risks taken by West Face and its consortium members, Catalyst now asks this Court to nonetheless grant it West Face's entire reward by way of an accounting and disgorgement of profit. Catalyst has no basis whatsoever for its extravagant request.

9. Catalyst's action is narrowly confined to claims for breach of confidence. That cause of action requires (i) possession of confidential information; (ii) conveyance of that information in confidence; and (iii) misuse of the confidential information to the plaintiff's detriment. Catalyst cannot establish <u>any</u> element of this test, let alone <u>all three</u>.

10. Catalyst claims that the relevant confidential information concerned its vaunted regulatory strategy to acquire WIND, and that the information in question was conveyed

to West Face by Brandon Moyse. Mr. Moyse was a junior analyst who, with respect to the alleged confidential information, knew only that: (i) WIND was for sale; (ii) Catalyst was a potential purchaser; and (iii) at a particular point in time in late March and early May 2014, Catalyst had taken the position in discussions with the Government of Canada that it would not acquire WIND without certain regulatory concessions. The first two pieces of information were admittedly not confidential; nor, by Catalyst's own evidence, was the third. On the contrary, Mr. Glassman testified that the fact that "government regulations would have to change for something to work" was "a view held generally in the industry".[1] The subsequent course of Catalyst's negotiations with the Government of Canada and VimpelCom were unknown to Mr. Moyse following his resignation from Catalyst on May 24, 2016.

11. Even assuming that Mr. Moyse had relevant confidential information concerning Catalyst's regulatory strategy, the evidence establishes overwhelmingly that he did not convey any such information to anyone at West Face at any time. Forewarned of Catalyst's concerns about Mr. Moyse's involvement in a "telecom deal", West Face implemented a number of prophylactic measures to ensure that he did not convey any information about the only "telecom deal" West Face was working on at the time – WIND Mobile. Among other things:

(a) well before he joined West Face, West Face's General Counsel cautioned Mr. Moyse not to convey any confidential information of Catalyst to anyone at West Face;

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[1] Glassman Cross, June 8, 2016, at p. 561:15-21.

(b) again, before he joined West Face, West Face erected a "Confidentiality Wall" that prohibited communications of any kind about WIND between Mr. Moyse and West Face's deal team;

(c) four days before he joined West Face on June 23, 2014, West Face's Chief Compliance Officer spoke to Mr. Moyse to ensure that he understood and would comply with the Confidentiality Wall;

(d) on June 19, 2014, West Face's IT department denied Mr. Moyse access to West Face's WIND computer directory;

(e) at the time he received a written job offer from West Face, its Partner Tom Dea cautioned Mr. Moyse to abide by his confidentiality obligations to Catalyst. He also instructed all West Face investment professionals not to discuss WIND with Mr. Moyse. Instead, they were instructed to ensure that all discussions about the file took place behind closed doors and away from the common area where Mr. Moyse sat. This is precisely what occurred during the brief period of only three weeks that Mr. Moyse worked at West Face in June and July 2014; and

(f) West Face agreed to an Interim Consent Order that placed Mr. Moyse on leave on July 16, a week before Catalyst entered exclusive negotiations with VimpelCom, a month before that exclusivity expired, and two months before the West Face consortium acquired WIND. Thereafter, Mr. Moyse never returned to work at West Face.

12. Finally, there is no evidence that West Face misused any confidential information belonging to Catalyst at any time. Indeed, the evidence demonstrates that the investment thesis of West Face and its fellow consortium members was fundamentally different from and inconsistent with that of Catalyst, rendering the latter irrelevant. Moreover, nothing West Face did could have harmed Catalyst. Catalyst failed to sign an Agreement to acquire WIND during its period of exclusive negotiations with VimpelCom solely because of Catalyst's intransigent refusal to meet reasonable terms requested by the Board of VimpelCom, and not because of anything West Face said or did. This is most assuredly not a case where West Face somehow "scooped" an opportunity that properly belonged to Catalyst. Rather, it is a case where Catalyst squandered a potentially valuable opportunity to acquire WIND, and has only itself and its advisors to blame.

PART II - THE PARTIES, THE WITNESSES, AND THEIR CREDIBILITY

13. In his recent decision in *Husky v. Schad*, Justice Newbould cited the following decisions as being particularly helpful in describing the approach the Court should follow in evaluating evidence led at trial:

> 36. In making credibility and reliability assessments, I find helpful the statement of O'Halloran J.A. in *R. v. Pressley* (1948), 94 C.C.C. 29 (B.C. C.A.):
>
> 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.
>
> 37. I also find it helpful, particularly in this case, the statement of Farley J. in *Bank of America Canada v. Mutual Trust Co.*

> (1998), 18 R.P.R. (3d) 213 (Ont. Gen. Div. [Commercial List]) at para. 23:
>
> Frequently in cases judges will be called upon to make findings concerning credibility of witnesses. This usually is a most difficult task absent the most blatant of lying which is tripped up by confession, by self-contradictory evidence, by directly opposite material developed at the relevant time period or by evidence of an extremely reliable nature from third parties. One is always cognizant that people's perceptions of the same event can sincerely differ, that memories fade with time, that witnesses may be innocently confused over minor (and even major) matters as well as the aspect of rationalization, a very human and understandable imperfection. A point that a witness may not be sure of initially becomes eventually a point that the witness is certain about because it fits the theory of his side. Rationalization will also affect some person's views so that a certainty that a fact was "A" evolves into a confirmation that that fact was "not A".[2]

14. Justice Newbould also described the requisite approach that should be followed this way, in his decision in *Manulife*:

> The most satisfactory judicial test of the reliability of evidence lies in its harmony or lack of harmony with the preponderance of probabilities disclosed by the facts and circumstances of the particular case. In this case, I have relied on the contemporaneous documentation as being particularly helpful in reaching conclusions as to the preponderance of probabilities.[3]

A. The Parties

15. The Plaintiff, The Catalyst Capital Group Inc. ("**Catalyst**"), is a Toronto-based investment management firm, the principals of which are Newton Glassman, Gabriel De Alba, and James Riley.

16. The Defendant, West Face Capital Inc. is also a Toronto-based investment management firm. In September 2014, West Face participated in the acquisition of WIND Mobile Corp. ("**WIND**") together with a group of investors (the "**Investors**") that

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2 *Husky Injection Molding Systems Ltd. v. Schad,* 2016 ONSC 2297 at paras. 36-37.

3 *Mandeville v. Manufacturers Life Insurance Co*. (2012), 6 B.L.R. (5th) 175 at para. 8, affirmed 120 OR (3d) 81 (C.A.).

included Globalive Capital Inc., Tennenbaum Capital Partners, LLC, and 64NM Holdings, LP. More detailed information about West Face and the Investors is set out below.

17. The Defendant Brandon Moyse is a now 28 year-old investment analyst at Stornoway Portfolio Management Inc. Mr. Moyse worked as a junior analyst at Catalyst from November 2012 until May 2014, when he resigned from Catalyst to accept a position as an analyst at West Face. He worked at West Face for a mere three weeks, from June 23 to July 15, 2014, before he was placed on leave pursuant to an Interim Consent Order issued on July 16, 2014 by Justice Firestone. Mr. Moyse never returned to work at West Face.

B. Background to West Face and the Investors

i. West Face and the West Face Witnesses

18. Founded in 2006, West Face is a Toronto-based investment management firm specializing in event-oriented investments where its ability to navigate complex investment processes is the most significant determinant of returns.[4] West Face has had a deep and longstanding interest in the telecom sector, and a great deal of expertise in evaluating investment opportunities in this area.[5]

19. West Face is led by its President and Chief Executive Officer, Greg Boland, along with three other Partners: Peter Fraser, Thomas Dea and Anthony Griffin. The four Partners have, on average, over twenty years of experience in the financial industry

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[4] Griffin Affidavit sworn June 4, 2016, at para. 18.
[5] Griffin Affidavit sworn June 4, 2016, at para. 28.

and draw on a deep network of strong relationships to provide a unique pipeline of investment opportunities.[6]

20. West Face called two of its Partners as witnesses at trial: Mr. Griffin and Mr. Dea. West Face also called its Vice-President, Yu-Jia Zhu, and its Chief Compliance Officer, Supriya Kapoor.

21. Mr. Griffin was the Partner who had primary responsibility for the WIND file at West Face from early November 2013 to July 2014, and he continued to be involved throughout this matter until it culminated in a transaction to acquire WIND in mid-September 2014. Mr. Griffin's background in the financial industry is described in paragraph 20 of his Affidavit sworn June 4, 2016.[7] Mr. Griffin testified in detail regarding West Face's efforts, proposals and negotiations to acquire WIND. Mr. Griffin testified that Mr. Moyse conveyed no information whatsoever to him or to anyone else at West Face concerning WIND, VimpelCom or Catalyst's involvement in a transaction pertaining to WIND. Moreover, Mr. Moyse had no involvement whatsoever in the WIND transaction during the brief period that he worked at West Face in 2014. In fact, he was barred from doing so by an impenetrable Confidentiality Wall that was erected before Mr. Moyse commenced employment with West Face on June 23, 2014. Mr. Griffin was a credible witness whose testimony was unshaken on cross-examination.

22. Mr. Dea had primary responsibility for, and was most directly involved in, the hiring of Mr. Moyse by West Face in May 2014.[8] Mr. Dea's education and background

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6 Griffin Affidavit sworn June 4, 2016, at para. 19.
7 Griffin Affidavit sworn June 4, 2016, at para. 20.
8 Dea Affidavit sworn June 3, 2016, at para. 1.

in the financial industry is set out in paragraph 4 of his Affidavit sworn June 3, 2016.[9] As explained more fully below, Mr. Dea testified that Mr. Moyse's hiring had nothing to do with WIND and that Mr. Moyse never communicated any of Catalyst's confidential information about WIND to employees of West Face, either before, during or after his brief period of employment at the time. Mr. Dea had little involvement in the WIND file after June 2014 as a result of a personal matter that arose at that time. His evidence was also credible and unshaken in cross-examination.

23. On the last business day before trial, Catalyst made the suggestion for the first time that Mr. Zhu and Mr. Moyse may have discussed WIND during Mr. Zhu's job interview of Mr. Moyse on April 15, 2014. Mr. Zhu refuted categorically this baseless contention, and testified that WIND was never mentioned during his interview with Mr. Moyse. Mr. Zhu was also forthright and credible.[10]

24. Ms Kapoor was responsible for creating and implementing West Face's Confidentiality Wall with respect to WIND and Mr. Moyse. Significantly, she did so on June 19, 2014, before Mr. Moyse began his employment at West Face. Ms Kapoor testified that Mr. Moyse and all relevant West Face personnel abided fully with the Confidentiality Wall and never communicated any information about WIND to each other.[11] Ms Kapoor was a serious and credible witness whose evidence was not challenged in cross-examination.

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9 Dea Affidavit sworn June 3, 2016, at para. 4.
10 Zhu Affidavit sworn June 3, 2016, at para. 1; see also Zhu Chief, June 10 at p. 1287:22-24.
11 Kapoor Affidavit sworn June 2, 2016, at para. 8. See also Kapoor Chief, June 10, at p. 1285:8-11.

ii. Globalive and Mr. Lockie

25. West Face also called as a witness Simon Lockie, the Chief Legal Officer of Globalive Capital Inc. ("**Globalive**"), a privately-held Canadian diversified investment company founded in 1997 by Anthony Lacavera. Globalive participated in the acquisition of WIND with West Face and the other Investors in September 2014.[12]

26. Mr. Lockie was directly involved in the affairs of WIND as its Chief Regulatory Officer throughout the period from 2008 to 2014. Mr. Lockie testified that West Face never conveyed information to him or others at Globalive about Catalyst's strategies or intentions for WIND.[13] He also testified that from the time Catalyst obtained exclusive negotiating rights with VimpelCom in late July 2014, VimpelCom perceived Catalyst to be the only credible bidder, and made extensive efforts to close a deal with Catalyst.[14] Mr. Lockie also contradicted Catalyst's belief, central to its supposedly confidential regulatory strategy, that the Government of Canada's prohibition on the transfer of WIND's spectrum to an incumbent was a late breaking development, surprising in any way, or a "unilateral and retroactive amendment" to WIND's spectrum licenses effected unlawfully by the Government in the period after WIND acquired spectrum and commenced operations in 2008.[15] Mr. Lockie's evidence was credible and largely unchallenged by cross-examination.

27. Mr. Lockie, of course, had extensive knowledge, experience, and expertise dealing with the Canadian wireless regulatory environment.

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12 Lockie Affidavit sworn June 6, 2016, at para. 38.
13 Lockie Affidavit sworn June 6, 2016, at para. 4. See also Lockie Chief at p. 1178:12-15.
14 Lockie Affidavit sworn June 6, 2016, at para. 38. See also Lockie Chief pp. 1175:23-1176:3.
15 Lockie Chief, June 10, at pp. 1189:22-1200:24.

iii. Tennenbaum and Mr. Leitner

28. West Face also called as a witness Michael Leitner, a Managing Partner of investment management firm Tennenbaum Capital Partner, LLC ("**Tennenbaum**"). Tennenbaum participated in the acquisition of WIND with West Face and the other Investors in September 2014.

29. Tennenbaum is a leading U.S. alternative investment management fund launched in 1999. Over the course of its history, it has invested in excess of US$15.5 billion in over 400 companies. It had a diverse range of investments and investors.[16] Mr. Leitner provided more detail about Tennenbaum in both his Affidavit sworn June 1, 2016 and during his examination in chief.[17]

30. Mr. Leitner is the senior partner leading Tennenbaum's technology/media/telecom (or "**TMT**") practice, largely as a result of his extensive experience in this field. In that regard, prior to joining Tennenbaum in 2005, Mr. Leitner served in various executive capacities for a host of technology and telecommunications companies.[18] With Tennenbaum alone he has led several billion dollars of investments in the communications, technology and media space,[19] including a significant investment in WIND's Vendor Debt since 2012. Mr. Leitner has been involved actively in this area in a variety of different capacities for almost three decades, and was, without question, the trial witness with the greatest depth of knowledge, experience, and expertise in *investments* in the wireless industry.

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16 Leitner Affidavit sworn June 1, 2016, at para. 8. See also Leitner Chief, June 9: p. 859; 19-25.
17 Leitner Affidavit sworn June 1, 2016, at paras. 9-10; and Leitner Chief, June 9: p. 859:10-15.
18 Leitner Affidavit sworn June 1, 2016, at para. 12; and Leitner Chief, June 9: pp. 860:9-861:1.
19 Leitner Chief, June 9: p. 861:2-5.

31. Mr. Leitner testified that Tennenbaum had no knowledge of Catalyst's regulatory strategy and received no information whatsoever from Mr. Moyse or West Face concerning Catalyst's participation in a transaction involving WIND. He also testified that Tennenbaum's investment thesis was "never predicated on obtaining regulatory concessions" from the Government of Canada, and rejected categorically Catalyst's contention[20] that without significant changes to the regulatory environment in Canada, WIND was not financeable.[21] Mr. Leitner's evidence was independent, well-founded, credible, and irreconcilable with Catalyst's entire regulatory strategy. He was also unshaken by cross-examination.

iv. 64NM, LG Capital, and Mr. Burt

32. West Face also called as a witness Hamish Burt, a member of 64NM Holdings GP, LLC, the general partner of 64NM Holdings, LP ("**64NM**"), a special-purpose investment vehicle created by LG Capital Investors LLC ("**LG Capital**") for the specific purpose of participating in the acquisition of WIND. LG Capital is a single-family office established by Larry Guffey of Blackstone in 2014. Mr. Burt testified that 64NM had no knowledge of Catalyst's regulatory strategy or other confidential information. His evidence was also credible, and essentially unchallenged in cross-examination.

v. West Face's Out of Court Witnesses

33. Over the course of this proceeding, West Face delivered Affidavits of several additional witnesses who Catalyst has either cross-examined or had the opportunity to cross-examine in the pre-trial phase of the case. It has been agreed between the

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[20] Leitner Chief, June 9 at p. 866:17-18.
[21] Leitner Chief, June 9 at pp. 872:25-874:8 and Leitner Cross, June 9 at pp. 885:3-886:6.

Parties that this evidence is available to the Court (subject to the Court's assessments of admissibility and relevance). This evidence includes:

(a) **the Affidavit of Alex Singh sworn July 7, 2014**. Mr. Singh is West Face's former General Counsel. Mr. Singh gave evidence that at the time West Face made a job offer to Mr. Moyse, he explained to Mr. Moyse that West Face takes issues of confidentiality very seriously, and fully expected Mr. Moyse to respect his confidentiality obligations to Catalyst. Catalyst's counsel cross-examined Mr. Singh on July 31, 2014. Catalyst did not ask to cross-examine Mr. Singh at trial;

(b) **the Affidavit of Harold Burt-Gerrans sworn March 9, 2015**. Mr. Burt-Gerrans is the Director of eDiscovery and Litigation Support at H&A eDiscovery Inc. Mr. Burt-Gerrans gave evidence about his engagement by West Face to preserve and maintain the desktop computer that Mr. Moyse used during his brief period of employment at West Face, as well as West Face's email traffic from the relevant period. Catalyst's counsel cross-examined Mr. Burt-Gerrans on May 19, 2015. Catalyst did not ask to cross-examine him at trial;

(c) **the Affidavit of Asser El-Shanawany sworn March 9, 2015**. Mr. El-Shanawany was the Corporate Planning & Control Officer for WIND. He gave evidence about his involvement in the due diligence efforts of both West Face and Catalyst regarding the acquisition of WIND. Catalyst did not ask to cross-examine him at trial; and

(d) **the Affidavit of Chap Chau sworn May 14, 2015**. Mr. Chau is the Head of Technology for West Face. He gave evidence concerning West Face's efforts to preserve Mr. Moyse's West Face desktop computer in response to an allegation of spoliation made against him by Catalyst during the cross-examination of another witness. Catalyst promptly abandoned this allegation, and chose never to cross-examine Mr. Chau.

C. The Lack of Credibility of the Catalyst Witnesses

34. West Face respectfully requests that the Court make findings of credibility against all three of the Catalyst Partners – Newton Glassman, Gabriel De Alba, and James Riley. Where the evidence of these witnesses conflicts with the evidence of Mr. Moyse, of West Face's witnesses, or with the contemporaneous documentary record in this case, this Court should treat their evidence with considerable caution.

35. There are, in fact, numerous examples of Catalyst's witnesses making questionable assertions, giving contradictory accounts both of significant and of relatively mundane events, and concocting a narrative that is impossible to reconcile with a host of contemporaneous documents. These examples are discussed throughout these closing submissions, but include:

(a) the evidence of Messrs. Glassman and De Alba concerning Catalyst's "non-hierarchical" "flat, flat" and "empowering" work structure;[22]

(b) representations made by Messrs. Glassman and Riley to the Government of Canada during Catalyst's "Canada Wireless Presentations" of March 27

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[22] Glassman Chief, June 7 at p. 312:13-16.

and May 12, 2014, including that Catalyst was in "advanced negotiations" with VimpelCom, and concerning the purchase price Catalyst was allegedly about to pay for WIND;

(c) the conduct of Catalyst in negotiating with VimpelCom, and accepting an explicit contractual prohibition against Catalyst having discussions and negotiations with the Government of Canada concerning the future sale of wireless spectrum of WIND to one or more incumbents that Catalyst had every intention of dishonouring the moment its proposed Share Purchase Agreement with VimpelCom was executed;

(d) Mr. Glassman's repeated disavowal of Catalyst's own contemporaneous documents and discovery evidence, including important statements made in Mr. Glassman's own Affidavit sworn only eleven days before his testimony at trial;

(e) Mr. Riley's numerous concessions regarding incorrect and misleading statements made in his pre-trial Affidavits in this proceeding;

(f) Mr. Riley's cross-examination transcript and answers to undertaking regarding VimpelCom's request for a break fee from Catalyst;

(g) contradictions between Catalyst witnesses on key points, including:

(i) the decision making structure at Catalyst;

(ii) the creation of the March 27 "Canada Wireless Presentation";

(iii) the destruction of the March 27 "Canada Wireless Presentation", as well as notes of Glassman, De Alba and Riley that were used to prepare that Presentation; and

(iv) the importance of the various concessions Catalyst insisted on receiving from the Government of Canada.

36. Throughout their cross-examinations, each of Catalyst's three Partners was contradicted or impeached by their own or their Partners' prior testimony, the contemporaneous documents, or in some cases their counsel's representations to West Face. Their testimony on a number of disputed matters is, at best, highly questionable and lacks the ring of truth.

37. Furthermore, Catalyst and its founder, Mr. Glassman, are no strangers to hardball, tactical litigation. Indeed, they have been chastised, rebuked or rejected by courts throughout Canada for taking unwarranted or tactical positions and using litigation as a strategic weapon in a variety of CCAA, Plan of Arrangement and oppression proceedings, including proceedings involving companies such as Pacifica Papers,[23] Hemosol Corp.,[24] Calpine Canada Energy Ltd.,[25] IMAX Corporation,[26] Canwest Global Communications Corp.,[27] Hollinger Inc.,[28] Mobilicity,[29] and WIND Mobile.[30]

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23 *Pacifica Papers Inc. v. Johnstone*, 2001 BCSC 1069, at paras. 15, 118, 131, 133-135, 150, 155-157.
24 *Hemosol Corp., Re*, 2007 CarswellOnt 6511 (S.C.J. (Comm. List)) at paras. 18-19, 22.
25 *Calpine Canada Energy Ltd., Re*, 2007 ABQB 49 at paras. 44-46, 55, with further reasons at 2008 ABQB 537.
26 *Catalyst Fund Ltd. Partnership II v. IMAX Corp.*, 2008 CarswellOnt 1252 at para. 17 (S.C.J. (Comm. List).
27 *Canwest Global Communications Corp., Re*, 2010 ONSC 1176 at paras. 3-4, 11-13, 16, 31-32 (Comm. List).
28 *Hollinger Inc., Re*, 2013 ONSC 5431 at paras. 13, 26, 36, 41-43 (Comm. List).

PART III - THE FACTS RELEVANT TO WEST FACE'S HIRING OF BRANDON MOYSE

A. Overview: the Hiring by West Face of Brandon Moyse

38. West Face hired Brandon Moyse in May 2014 to work on prospective debt deals for its Alternative Credit Fund, which was launched on December 31, 2013. Mr. Dea testified that, at the time, West Face had a "critical need" for assistance,[31] and that Mr. Moyse's hiring had nothing whatsoever to do with his previous involvement in a potential transaction with VimpelCom or WIND while at Catalyst. Nor was his hiring motivated in any way by a desire to obtain from Mr. Moyse confidential information of Catalyst concerning WIND.[32] Instead, the simple but important fact of the matter is that: (i) West Face was pursuing a potential transaction involving VimpelCom and WIND from as early as November 2013, substantially before Mr. Moyse knocked on the firm's door seeking employment in mid-March 2014; and (ii) neither Mr. Dea nor others at West Face had any knowledge of Mr. Moyse's involvement in a transaction involving WIND at Catalyst before he was hired at West Face on May 26, 2014. In fact, West Face did not learn of Catalyst's pursuit of a "telecom" transaction until its counsel advised counsel for West Face on June 18, 2014, more than a month after West Face had offered Mr. Moyse a job.

39. Upon learning of Catalyst's concerns about a "telecom file", West Face immediately took all conceivable measures to exclude Mr. Moyse from West Face's ongoing efforts to acquire WIND. Its Chief Compliance Officer, Supriya Kapoor, erected

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29 *The Catalyst Capital Group Inc. v. Data & Audio-Visual Enterprises Wireless*, 2013 ONSC 2170, (Comm. List); *8440522 Canada Inc., Re*, 2013 ONSC 2509 at para. 46 (Comm. List); and *8440522 Canada Inc., Re*, 2013 ONSC 6167 at paras. 43 and 47.

30 *Mid-Bowline Group Corp., Re*, 2016 ONSC 6691 at paras. 33 and 59.

31 Dea Chief, June 10, at p. 1221:13-17.

32 Dea Chief, June 10, at pp. 1221:23-1222:1.

an impenetrable Confidentiality Wall between Mr. Moyse and the WIND deal team, and called Mr. Moyse to make sure that he understood and would abide by his confidentiality obligations to Catalyst. Mr. Dea specifically instructed the WIND deal team to have no communications with Mr. Moyse about the matter. West Face's IT team blocked Mr. Moyse's access to computer files concerning WIND. There is simply no evidence that these safeguards were in any way ineffective. Rather, all of the evidence is directly to the contrary.

40. This part sets out the facts relating to West Face's hiring of Mr. Moyse, and demonstrates that his hiring was entirely unrelated both to Mr. Moyse's involvement in or knowledge of Catalyst's strategies or negotiations for WIND, and to West Face's participation in the acquisition of WIND several months later.

B. Mr. Moyse Had Limited Knowledge of Catalyst's Confidential Regulatory Strategy and Negotiations

i. Introduction

41. The flaws associated with Catalyst's claims against West Face are almost too numerous to mention. They begin with the first essential building block underlying those claims, namely the state of knowledge of Mr. Moyse during the relevant period. Put simply, Catalyst's case hinges on Mr. Moyse having knowledge or possession of specific information or documents regarding Catalyst's confidential regulatory strategy concerning its proposed acquisition of WIND that Mr. Moyse *could* have passed on to West Face.

42. Catalyst does not seriously contend that Mr. Moyse had possession of relevant documents concerning its proposed acquisition of WIND – its own evidence is that the

only two documents that even came close to describing Catalyst's confidential regulatory strategy (namely, Catalyst's "Canada Wireless Presentations", dated March 27 and May 12, 2014) were destroyed by everyone at Catalyst shortly after they were created (except, apparently, for a single copy kept in the "master file" known only to Mr. Glassman and not disclosed during the injunction proceeding before Justice Glustein).[33] Furthermore, Messrs. De Alba and Riley both conceded in cross-examination that Catalyst has no evidence that **any** Catalyst document regarding WIND was ever provided by Mr. Moyse to West Face.[34]

43. Thus, Catalyst is forced to contend that Mr. Moyse had *knowledge* of Catalyst's confidential regulatory strategy that he *could* have conveyed to West Face. Catalyst put forward meagre evidence of actual, distinct discussions that occurred on identifiable occasions in which Mr. Moyse was informed of Catalyst's confidential regulatory strategy during the period that he was employed by Catalyst. Moreover, the evidence establishes that: (i) Mr. Moyse was sent home from Catalyst by Mr. Riley on May 26, 2014; (ii) Catalyst had ongoing discussions and negotiations with the Government of Canada throughout the period from May to August 2014; and (iii) no one at Catalyst kept Mr. Moyse apprised of these discussions or negotiations in the period after May 26, including concerning modifications that may have been made to Catalyst's strategy or approach.[35]

44. For this reason, Catalyst now attempts to impute knowledge to Mr. Moyse of Catalyst's allegedly confidential regulatory strategy based on three amorphous factors:

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33 Glassman Cross, June 7 at pp. 448:18-454:25.
34 De Alba Cross, June 7 at pp. 233:2-234:3; Riley Cross, June 8 at p. 580:6-18.
35 Glassman Cross, June 7 at pp. 357:13-360:25.

(i) Catalyst's allegedly flat, team-oriented structure; (ii) Catalyst's weekly Monday meetings; and (iii) Mr. Moyse's involvement in the creation of the March 27 and May 12 "Canada Wireless Presentations". Catalyst's evidence regarding these three potential sources of Mr. Moyse's knowledge is insufficient to overcome Mr. Moyse's direct evidence that he had no specific knowledge of Mr. Glassman's speculative and convoluted regulatory strategy, and certainly no knowledge of that strategy as it evolved in the period after Mr. Moyse departed from Catalyst on May 26, 2014.

ii. Catalyst's Alleged "Flat, Flat" Structure

45. In their evidence, each of Messrs. De Alba, Glassman, and Riley made much of the allegedly "flat, flat",[36] "transparent" and "empower[ing]"[37] structure of Catalyst.[38] It is a key part of Catalyst's case that, as Mr. Glassman insisted, "everybody knew everything".[39] Through this alleged total transparency of information through all levels at Catalyst, Catalyst seeks to impute to Mr. Moyse every piece of knowledge held by the Catalyst Partners, consultants, and advisors regarding Catalyst's regulatory strategy for WIND.

46. Their evidence in this regard suffers from considerable embellishment, is flatly inconsistent with Catalyst's contemporaneous internal documents and offends common sense. In fact, the evidence demonstrates that, far from a flat, team-oriented and transparent structure, Catalyst operates in a hierarchical, top-down fashion that excludes its "junior people" from important information, meetings and decisions. In his

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36 Glassman Examination, p. 361;1-6.
37 Glassman Examination, p. 139;5-9.
38 De Alba Chief, June 6 at pp. 138:7-140:5 and pp. 143:1-144:1.
39 Glassman Cross, June 7 at p. 479:10-14.

cross-examination, Mr. Glassman made a number of concessions and slips that highlight the real state of affairs at Catalyst:

(a) *first*, Mr. Glassman conceded that Mr. Moyse was not invited to attend the meeting with the Government of Canada on March 27, 2014. He added that although he thought Mr. De Alba was invited, Mr. Glassman chose not to take him. When asked whether Mr. Michaud, the Vice-President on the WIND file, was invited, Mr. Glassman's answer was telling: "[He] might have been invited but we **for sure** chose not to take him";[40]

(b) *second*, Mr. Glassman denied that it was Catalyst's intention to destroy every copy of the March 27 PowerPoint (as discussed below), stating, "I think the intention was to destroy any copies in the hands of *junior people*";[41]

(c) *third*, when asked if he was being dishonest with his deal team, Mr. Glassman's response was that he was "**clearly manipulating** [his] deal team and managing [his team]";[42]

(d) *fourth*, within twenty-four hours of the Court having heard Mr. De Alba's testimony that Mr. Glassman's approach was to be considerate of his analysts' time, and to make sure that they were not put under too much pressure,[43] Mr. Glassman referred to himself as "the instigator of

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40 Glassman Cross, June 7 at pp. 386:25-387:3 (emphasis added).
41 Glassman Examination, pp. 448:18-451:10 (emphasis added).
42 Glassman Cross, June 7 at pp. 528:3–529:11; Quotation at 528:14-15.
43 De Alba Cross, June 6 at pp. 223:1-226:14.

pressure",[44] and testified that he would "keep the pressure up on…any member of the team to the very last second, as I should";[45]

(e) *fifth*, junior members of Catalyst's WIND deal team *were consistently not copied* on important emails, even though they easily could have been. Mr. Glassman picked and chose who to share important information with, and made the deliberate choice to exclude lowly analysts like Mr. Moyse when sharing important information concerning his dealings with the Government of Canada with others at Catalyst. For example, after being taken through a number of key emails regarding VimpelCom's efforts to obtain approval from its Board, and the status of the proposed Catalyst transaction in the crucial August 2014 time period, Mr. Glassman was forced to admit that none of these emails were sent or copied to either Lorne Creighton, the analyst who stepped into the shoes of Mr. Moyse after Mr. Moyse left Catalyst in May 2014, or Mr. Michaud, the Catalyst Vice President who was involved throughout the WIND transaction as a member of the "core" deal team.[46] Mr. Glassman conceded that he could easily have sent these emails to every investment professional at Catalyst, or at least to the entire core deal team at Catalyst, but that he "clearly" chose not to do so;[47] and

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44 Glassman Cross, June 7 at p. 479:10-20.
45 Glassman Cross, June 7 at pp. 499:21-500:5.
46 Glassman Examination, pp. 535:16-536:9.
47 Glassman Examination, p. 536:15-19.

(f) *finally*, in an email dated May 21, 2014, with his friend and fellow Catalyst analyst, Lorne Creighton, Mr. Moyse asked Mr. Creighton for an update on WIND. Mr. Creighton's response was telling: that he had "no real idea what's going on or if we're actually going to do the deal".[48] This reflects the reality of life at Catalyst during the relevant period, and is impossible to reconcile with Mr. Glassman's unsubstantiated and self-serving assertions.

47. Catalyst's contentions regarding the decision-making process and structure at the firm are similarly unconvincing. Although Mr. Glassman maintained repeatedly in his argumentative testimony that he would "not approve something until the entire deal team and everybody agrees with it",[49] this evidence is not credible. As put to him in cross-examination, in view of Mr. Glassman's remarkably arrogant and petulant approach in dealing with others, including his subordinates at Catalyst, it is impossible to imagine that a 26-year old analyst such as Mr. Moyse, the newest member of the Catalyst team and with little to no background, knowledge or experience, could scuttle a deal that Mr. Glassman was intent on proceeding with merely by voicing disagreement. Mr. Glassman claimed under oath, however, that any such disagreement "would have either been the end of the deal, or it would have caused increased analysis **until Mr. Moyse and the others agreed**".[50]

48. The contention that Mr. Moyse had veto power over every transaction contemplated by Mr. Glassman, Mr. De Alba or others at Catalyst during his tenure

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48 BM0004981.
49 Glassman Cross, June 7 at pp. 346:21-350:8.
50 Glassman Cross, June 7 at pp. 351:17-352:15 (emphasis added).

there was also inconsistent with the evidence given by Mr. Riley twice on cross-examination leading up to this trial. It was Mr. Riley's testimony that although others at Catalyst could express their views, the "final say" on any new investment opportunity was "Newton Glassman's as the chief investment officer".[51] It is clear from this testimony that it was Mr. Glassman at Catalyst who was making the decisions, not Brandon Moyse or Lorne Creighton. The suggestion that he would have allowed Mr. Moyse to veto unilaterally any of his proposed investments strains credulity.

49. Catalyst's contention that the firm was characterized by a "flat, flat" structure is consistent with Mr. De Alba's claim that Catalyst analysts were "most likely to…become partners at Catalyst".[52] In cross-examination, Mr. De Alba admitted that in its fourteen years, Catalyst had not promoted a single analyst or associate to partner.[53]

50. Even if this Court were somehow to accept the evidence of Messrs. De Alba, Glassman and Riley regarding Catalyst's "flat, flat" structure, the logical extension of this premise is not that Mr. Moyse knew "everything" the Partners or other investment professionals at Catalyst knew about the WIND file. Mr. Riley testified that at Catalyst, even key members of deal teams were sometimes not advised of key pieces of information through oversight or because of tight timeframes. For example, if this Court accepts the evidence of Mr. Riley that even he, one of three Partners and the Chief Operating Officer of Catalyst, did not know about VimpelCom's request for a break fee

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51 TRAN000397 at qq. 206-20; TRAN000920 at qq. 68-70; Glassman Cross, June 7 at pp. 346:21-350:8.
52 De Alba Chief, June 6 at p. 138:18-23.
53 De Alba Cross, June 6 at pp. 170:10-171:21.

in August 2014, the Court must necessarily disbelieve Catalyst's evidence that everyone at Catalyst was always well-informed about everything.[54]

51. Even if Catalyst did operate using a transparent and flat model, the Court cannot find on that basis that Mr. Moyse had knowledge of all of Catalyst's regulatory strategy or knowledge regarding WIND, especially in the absence of specific evidence from Catalyst as to what Mr. Moyse allegedly was told and when. This is particularly so given Catalyst's failure to produce important documents that have a direct bearing on this contention.

iii. Catalyst's Monday meetings

52. Without any specificity, both Messrs. Glassman and De Alba professed that Catalyst's Monday meetings would necessarily have instilled in Mr. Moyse knowledge of Catalyst's confidential regulatory strategy.

53. This evidence is simply not credible. While Messrs. De Alba and Glassman stressed the importance of Catalyst's Monday meetings, they did so in irreconcilable fashions. The end result was that the testimony given by Messrs. Glassman and De Alba in respect of this issue was inconsistent and entirely uncorroborated by contemporaneous documentary evidence, as follows:

(a) *first*, Catalyst did not produce a single document relating to any Monday meeting, including not one single information "package", "agenda", memo, note, attendance list, electronic calendar appointment, or scrap of paper. There are quite simply **no** contemporaneous documents evidencing that

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[54] Riley Cross, June 8 at p. 594:1-7; Glassman Affidavit, sworn May 27, 2016 at para. 46.

WIND in general, or Catalyst's confidential regulatory strategy in particular, were ever discussed at a Monday meeting, let alone that Mr. Moyse was present at such a meeting. This is so even though Mr. Glassman contended that Catalyst's proprietary $14 million software program enabled Catalyst to generate meeting packages for every one of these Monday meetings, that were then made available to everyone who attended each of these meetings.[55] Mr. Glassman was unable to explain in cross-examination why none of these packages has been produced in this proceeding by Catalyst;

(b) *second*, Catalyst acknowledged in its "revised" answers to undertakings and advisements from the examination for discovery of Mr. De Alba conducted several weeks ago, on May 11, 2016, that "Catalyst's investment team has reviewed all notebooks and notes and cannot locate **any** existing notebooks or notes concerning WIND".[56] In short, if Catalyst's investment professionals were taking notes at these allegedly "mandatory" and informative Monday meetings, none of them deigned to take a note at any time concerning WIND or the notes were disposed of or destroyed by Catalyst within the very short time period before Catalyst commenced this litigation in June 2014 (while the WIND transaction was ongoing at Catalyst);

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55 Glassman Chief, June 7, at pp. 314:15-315:25.

56 Catalyst Revised Answers to Undertakings and Advisements from the Examination of De Alba, held May 11, 2016 at U/A No. 15.

(c) *third*, as set out above, the evidence of Messrs. De Alba and Glassman in respect of this issue cannot be reconciled. When Mr. De Alba was cross-examined about what kinds of documents are created by Catalyst in relation to Monday meetings, he referred only to one-page "agendas" (none of which has ever been produced). He was then asked the following questions and gave the following answers:[57]

> *Q. Beyond the one-page agenda that we discussed, no one prepared any other written material to be reviewed at Monday morning meetings?*
>
> *A. Usually not. The discussions are verbal. I mean, people might prepare for those meetings with their own notes, but there is no formal materials.*
>
> Q. And no one at Catalyst prepares formal minutes of what is discussed at those meetings?
>
> A. That's correct.
>
> Q. No one at Catalyst prepares a to-do list following those meetings?
>
> A. That's a – responsibilities are assigned.
>
> Q. But there's no formal "here's what we discussed at today's Monday morning meeting", "here are the assignments coming out of the Monday meeting?"
>
> A. A verbal discussion and assignment of task, I would consider that formal.
>
> Q. But not in writing?
>
> A. Correct.
>
> *Q. And no one at Catalyst ever took and retained any notes from a Monday morning meeting that relate to Wind?*
>
> *A. Not that I'm aware of.*

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[57] De Alba Cross, June 6 at pp. 175:5-176:11.

Q. And no one at Catalyst prepared any presentations regarding Wind for use at a Monday morning meeting as a Word document or a PowerPoint or an Excel spreadsheet?

A. That would not be the practice.

By contrast, Mr. Glassman boasted during his evidence in chief about Catalyst's "14 million dollar proprietary software" which, he claimed, generates a comprehensive information package in advance of each and every Monday meeting. Mr. Glassman described in considerable detail the various "sections" of this package, including sections on Catalyst's deal pipeline, live deals, everything in Catalyst's portfolio, and allocation of staffing. To bolster his claims about these missing, non-produced "packages", Mr. Glassman stated that "in every [Monday] meeting we intentionally go through all three sections". He further testified that at each Monday meeting, printed copies of the package are made available for everyone.[58] When cross-examined on the subject, Mr. Glassman had no explanation for why none of these comprehensive "packages" was produced by Catalyst. His first ventured explanation was that the packages contained not only information about WIND, but also other confidential information. When he apparently realized that this would have called into question Catalyst's fulfillment of its production obligations, he attempted to distance himself from Catalyst's decision not to produce the packages by stating: "I have no idea whether it was discussed with Mr. Riley or whether it was a decision of counsel based on privilege or confidentiality. I have no idea why that decision was made, but it wasn't

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[58] Glassman Chief, June 7 at p. 314:15-22.

made by me".[59] Both of these guesses were unfortunate, given that Catalyst could simply have redacted any irrelevant confidential information the packages may have contained. Moreover, Catalyst's Schedule B lists only six documents, none of which is a Monday meeting package. When it was suggested to Mr. Glassman that he was just guessing at possible explanations for why no Monday meeting packages were produced, he stated: "I'm not guessing. I'm not even providing you with a guess. I have no idea";[60] and

(d) *finally*, neither Mr. Glassman or 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. Instead, they asserted generically that, in general, the WIND deal was discussed. Self-serving and non-specific evidence of this nature is probative of nothing, and more dangerous than helpful.

54. In summary, the evidence of Catalyst's witnesses regarding the nature and significance of the Monday meetings is vague, contradictory, and simply cannot be relied upon.

55. On the other hand, Mr. Moyse has given plausible evidence about the nature and extent of Catalyst's Monday meetings. He readily admitted to attending them regularly,

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[59] Glassman Cross, June 7 at p. 356:10-357:6
[60] Glassman Cross, June 7 at p. 357: 7-12.

but noted that the bulk of those meetings were spent discussing general macro-economic issues as opposed to specific transactions that Catalyst was actively pursuing.[61] Importantly, Mr. Moyse expressly denied having had a sophisticated level of knowledge or understanding with respect to Catalyst's regulatory strategy concerning WIND, and gave specific responses to vague statements made by Messrs. De Alba and Glassman regarding what was discussed regarding WIND at Monday meetings. To Mr. Moyse's recollection many of these discussions simply did not occur.[62]

56. In summary, Catalyst has been unable to establish that Mr. Moyse learned *anything* about Catalyst's confidential regulatory strategy for WIND at the Monday meetings.

iv. Mr. Moyse Had Limited Involvement in the Creation of Catalyst's March 27 and May 12 "Canada Wireless Presentations"

57. Much has been made by Catalyst concerning Mr. Moyse's involvement in the creation of the March 27 and May 12 "Canada Wireless Presentations".[63] This narrow focus is necessary because these two presentations comprise the sum total of all of Catalyst's contemporaneous documentary evidence that Mr. Moyse knew or worked on anything regarding Catalyst's allegedly confidential regulatory strategy on the WIND transaction.

58. Despite the importance of these two presentations to Catalyst's case, Mr. Moyse's involvement in their creation appears to have been limited to largely administrative or clerical tasks.

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61 Moyse Affidavit affirmed June 2, 2016, at para. 18.
62 Moyse Affidavit affirmed June 2, 2016, at para. 32.
63 CCG0011564 and CCG0009517.

59. Although Messrs. De Alba and Glassman asserted repeatedly that Mr. Moyse "led" the creation of the March 27 Canada Wireless Presentation, their self-serving statements in this regard are undermined by the objective evidence, as well as by Catalyst's inexplicable destruction of highly relevant evidence:

(a) the only document produced in this litigation by Catalyst that demonstrated *any* involvement by Mr. Moyse in the preparation of the March 27 PowerPoint was the email he sent attaching the presentation.[64] There was no corroborating documentary evidence of the numerous drafts over many weeks about which Mr. Glassman testified. Furthermore, Catalyst appears to have disposed of or destroyed the "notes" of Glassman, Riley and De Alba that were used to prepare the presentation. Those notes are the best evidence of the role that Mr. Moyse actually played in preparing the presentation, and Catalyst should be held accountable for their destruction. An adverse inference should be drawn that if those notes had been produced, they would have undermined the position of Catalyst in respect of this issue. The complete lack of associated contemporaneous documentation supports Mr. Moyse's evidence that the presentation was not "based on extensive internal prior discussions" as Mr. Glassman now claims.[65] Furthermore, the late hour

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64 CCG0011564.
65 CCG0011564.

when Mr. Moyse's email was sent also supports Mr. Moyse's evidence that "the workplace was frantic" while he was putting together the slides;[66]

(b) other than Mr. Moyse's basic, *pro-forma* analysis (discussed further below) which was incorporated into the March 27 presentation, Mr. De Alba conceded in cross-examination that there are no emails assigning Mr. Moyse any research tasks to be incorporated into the March 27 presentation.[67]

(c) Mr. Moyse was not a longstanding member of Catalyst's "core" WIND deal team when he was asked to assist with preparing or editing the March 27 presentation. Rather, he only became involved in Catalyst's telecommunications team in or around March 2014, due to the departure of Andrew Yeh, a Catalyst associate on the telecommunications team who resigned in or around February 2014. He was wholly incapable of compiling a presentation of this nature as its author;[68]

(d) the one fact agreed upon by both Mr. Moyse and the Catalyst witnesses is that Mr. Glassman, rather than Mr. Moyse, was the architect of Catalyst's regulatory strategy. Indisputably, when Mr. Moyse was formatting the presentation, he did so based on notes that were given to him by at least some sub-group of the three Catalyst Partners. Although Mr. Glassman attempted to disavow in cross-examination his sworn Affidavit testimony

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66 Moyse Affidavit affirmed June 2, 2016 at para. 41.
67 De Alba Cross, June 6 at p. 215:8-22.
68 Moyse Affidavit affirmed June 2, 2016 at para. 29.

from eleven days earlier concerning his role in the preparation of this presentation, and equivocated on whether or not he provided notes to Mr. Moyse,[69] the unavoidable fact remains that Mr. Moyse was relying on the work product of his superiors in formatting the March 27 presentation; and

(e) Mr. Moyse was not invited to attend the Government meetings on March 27 or May 12, despite Catalyst's contention that he "led" the creation of the PowerPoint. And there is no record whatsoever of anyone from Catalyst having reported back to Mr. Moyse concerning what transpired during either of these meetings with the Government of Canada.[70]

60. Similarly, despite contending that Mr. Moyse "led" the creation of the May 12, 2014 Canada Wireless Presentation, Catalyst once again produced **zero** documents surrounding the creation of the presentation, with the notable exception of an email chain between Mr. Glassman and Mr. De Alba on May 12, 2014.[71] In this email chain, Mr. Glassman sent Mr. De Alba and Mr. Michaud an email at 9:41 am asking whether there were any "analysis/docs avail for today's mtngs?". This was a reference to the May 12 Canada Wireless Presentation. Mr. De Alba responded at 10:56 am: "Fasken will give you the presentation in Ottawa. We are finishing it now".[72]

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69 Glassman Cross, June 7 at pp. 380:24-383:4.
70 De Alba Cross, June 6 at pp. 214:1-215:7.
71 CCG0009509.
72 CCG0009509.

61. This contemporaneous email exchange is completely at odds with Catalyst's repeated contention that Mr. Moyse "led" the creation of the May 12 presentation. Mr. Glassman did not send his first email asking for documents to Mr. Moyse, most likely because he did not know Mr. Moyse was involved. Mr. De Alba's reply did not copy Mr. Moyse, and stated that "we" are finishing it. Mr. De Alba's explanation that Mr. Glassman "might not have wanted to overwhelm Mr. Moyse with more pressure at that point in time"[73] is simply not credible, especially in light of Mr. Glassman's references to himself as "the instigator of pressure," [74] and his testimony that he would "keep the pressure up on… any member of the team to the very last second, as I should".[75] This suggestion that Mr. Glassman fretted about the feelings of junior analysts borders on being risible, given his abrasive and uncalled for treatment of much more senior people at Catalyst.

62. Quite to the contrary, this email exchange suggests that Mr. Moyse's role in preparing the May 12, 2014 Canada Wireless Presentation has been vastly overstated by Catalyst. If Mr. Moyse truly "led" the creation of the presentation, Mr. Glassman would have emailed him and asked for it.

63. Furthermore, Mr. Glassman's evidence was that all of the Catalyst Partners played a role in preparing the PowerPoint.[76] Given this high-level input into the presentation, it is more likely that the key ideas and strategies outlined came from one or more of Catalyst's Partners. They most certainly did not emanate from Mr. Moyse.

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[73] De Alba Cross, June 6 at p. 225:4-21.
[74] Glassman Cross, June 7 at p. 479:10-20.
[75] Glassman Cross, June 7 at pp. 499:21-500:5.
[76] Glassman Cross, June 7 at pp. 461:21-462:5.

v. Mr. Moyse's Express Denials of Intimate Knowledge or Understanding of Catalyst's Allegedly Confidential Regulatory Strategy are Credible and Consistent

64. Mr. Moyse denied awareness, knowledge, or understanding of Catalyst's confidential regulatory strategy in at least five different ways:

(a) while Mr. Moyse concedes that he was aware that Catalyst was considering the possibility of building out a fourth wireless carrier, he had no specific recollection of being made aware of Catalyst's internal opinion that a fourth wireless carrier could not survive without changes to the existing regulatory structure as described at paragraph 15 of the De Alba Affidavit or paragraph 10 of the Glassman Affidavit;[77]

(b) Mr. Moyse expressly denied awareness of the detailed analysis set out in paragraphs 20-28 of the Glassman Affidavit, and denied involvement in the specific analysis and conclusions found in paragraph 27 of the Glassman Affidavit;[78]

(c) Mr. Moyse testified that the only regulatory risks related to WIND of which he was aware were: (i) whether or not the federal government would allow a new wireless entrant to sell its spectrum and/or be purchased by an incumbent; and (ii) the requirement for government approval of a sale;[79]

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77 Moyse Affidavit affirmed June 2, 2016, at paras. 25(b) and 26.
78 Moyse Affidavit affirmed June 2, 2016, at para. 48.
79 Moyse Affidavit affirmed June 2, 2016, at para. 70.

(d) Mr. Moyse testified that he "did not analyze the subject of regulatory risk, or any other regulatory issues facing WIND, and if anyone at Catalyst did such an analysis before I left, I was not aware of it";[80] and

(e) Mr. Moyse testified that at the time he resigned from Catalyst on May 24, 2014, Catalyst had not yet decided on the issues of structure, price, or regulatory risk mitigation, and given the preliminary status of Catalyst's diligence at the time, it could not have meaningfully ascertained or resolved those issues by that date.[81]

65. These denials by Mr. Moyse are entirely consistent with his junior position at Catalyst, with his limited involvement in the telecommunications deal team, and with the contemporaneous documents.

66. Even if none of this were true, Catalyst's claims against West Face would still be doomed to failure. That is so because *all of the evidence* establishes that notwithstanding whatsoever Mr. Moyse may have known or understood concerning Catalyst's regulatory strategy, *he conveyed no information pertaining to that strategy to representatives of West Face at any time*, either prior to, during or following his brief period of employment with West Face in June and July 2014. At the very beginning of his testimony, Mr. Moyse explicitly denied providing, verbally or in writing, any confidential Catalyst information regarding WIND, Mobilicity, Catalyst's regulatory strategy or its telecommunications strategy to:

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80 Moyse Affidavit affirmed June 2, 2016, at para. 71.
81 Moyse Affidavit affirmed June 2, 2016, at para. 72.

(a) Greg Boland;

(b) Anthony Griffin;

(c) Thomas Dea;

(d) Peter Fraser;

(e) Yu-Jia Zhu;

(f) Alex Singh;

(g) Supria Kapoor;

(h) Anyone else at West Face;

(i) Lawrence Guffey;

(j) Hamish Burt;

(k) anyone else affiliated with LG Capital Investors LLC or its special purpose investment vehicles;

(l) Michael Leitner; and

(m) anyone else affiliated with Tennenbaum Capital Partners LLC.

67. Similarly, Mr. Moyse explicitly denied giving Tony Lacavera, Simon Lockie, or anyone else at any of the Globalive entities any Catalyst confidential information

regarding WIND, Mobilicity or Catalyst's regulatory strategy with the possible exception of during his due diligence duties at Catalyst, and certainly not since leaving Catalyst.[82]

68. All of Mr. Moyse's evidence in these respects was consistent with the evidence of every previous witness (including Catalyst's).[83] Indeed, there is no evidence that Messrs. Leitner, Burt or any representative of Tennenbaum or LG Capital or 64NM have ever met or spoken to Mr. Moyse.

C. March 2014: First Relevant Contact Between Mr. Moyse and West Face

i. Mr. Moyse Begins Looking for Alternative Employment Due to Job Dissatisfaction and the Hostile Work Environment at Catalyst

69. By late 2013, Mr. Moyse was dissatisfied with the work environment and his future prospects at Catalyst, and he began looking for alternative employment.

70. In particular, Mr. Moyse testified that his work at Catalyst between the fall of 2013 and the end of April 2014 was focussed almost exclusively on helping with the management of two Catalyst portfolio companies owned by Catalyst. He was surprised by how much of his time was consumed by his work on these portfolio companies, and was disappointed by the fact that he had no real power or responsibility when he was working at these companies on the ground.[84] This evidence is corroborated by Mr. Dea's email to his partners in March 26, 2014, in which he notes that Mr. Moyse is "[l]ooking around because focus shifting from new business to current ops. Deal pipeline 'not great'".[85]

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82 Moyse Chief, June 13 at pp. 1358:1 – 1359:23.
83 Burt Chief, June 9, at p. 833:5-12; Leitner Chief, June 9, at p. 872:6-16.
84 Moyse Chief, June 13 at pp. 1361:11 – 1362:21.
85 WFC0079574.

71. Mr. Moyse was also dissatisfied with the hostile and toxic work environment at Catalyst.[86] In his Affidavit, affirmed July 7, 2014, Mr. Moyse deposed that while he was employed by Catalyst, Mr. Glassman would often have outbursts in the office – yelling, screaming, cursing profusely, and even making threats of violence directed at Catalyst's employees.[87]

72. This evidence should be accepted in its entirety. Catalyst made no effort to respond to or refute Mr. Moyse's testimony in this regard. Rather, its only reply was Mr. Riley's statement in his Affidavit sworn July 14, 2014 that he "[did] not intend to dignify those comments with a response".[88] Moreover, Mr. Moyse's evidence regarding Catalyst's hostile work environment was essentially corroborated by: (i) Mr. Glassman's conduct and testimony at trial, including his remarkable statement in open Court that he would "kill" Mr. De Alba if he ever took pressure off Catalyst's advisors; and (ii) Andrew Yeh's comments to Tom Dea about the Catalyst work environment while Mr. Dea was checking Mr. Moyse's references.[89]

73. Mr. Moyse also elaborated on the work culture at Catalyst in his testimony at trial. He told the Court that although he knew beforehand that Catalyst had a reputation for being an intense, difficult place to work, he was surprised by "how much on a daily basis it lacked … respect and common decency".[90]

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86 Moyse Affidavit affirmed July 7, 2014 at para. 23 (BM003688). See also Moyse Affidavit affirmed June 2, 2016, at para. 113.

87 Affidavit of Brandon Moyse sworn July 4, 2014, at paras. 23-25.

88 Affidavit of James Riley sworn July 14, 2014, at para. 7.

89 Glassman Cross, June 7 at p. 478:1-10.

90 Moyse Chief, June 13, at pp. 1363:8 – 1364:17.

ii. Mr. Moyse Reaches Out to Mr. Dea Looking for a Job at West Face

74. 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.[91] As is evident from the face of this email,[92] the communication between Mr. Moyse and West Face was initiated by Mr. Moyse, rather than by West Face.

75. As Mr. Griffin explained at trial, West Face was looking to hire someone because it had just launched the Alternative Credit Fund, and so West Face "needed someone who had particular experience in all terms of credit". It was Mr. Dea's evidence in the court that there was a **critical** need for new analysts at West Face because of this Alternative Credit Fund: "[s]o we had a critical need for some additional analytical work to assist us in reviewing opportunities for the alternative credit fund, and we -- that is the only way I can put it, we had a critical need for that function".[93]

76. At the same time, West Face "needed additional analyst resources generally, and so the intention was to hire individuals who would be able to assist with the analysis or in investments for this alternative credit fund".[94]

77. As Mr. Dea noted in a later email, West Face saw Mr. Moyse as someone who could fill West Face's need for an analyst who could "grind out possible debt deals".[95] For this reason, Mr. Dea agreed to meet with Mr. Moyse.[96]

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91 Dea Affidavit sworn June 3, 2016, at para. 8. As an aside, Mr. Moyse had Mr. Dea's contact information because Mr. Moyse had previously submitted a job application to West Face in 2012; see Dea Affidavit sworn June 3, 2016, at paras. 5-7. See also Dea Chief, June 10, at pp. 1203:19-1205:11.

92 WFC0031084.

93 Dea Chief, June 10, p. 1221:6-17.

94 Griffin Chief, June 8, p. 767:10-22.

95 Dea Affidavit sworn June 3, 2016, at para. 20; see also WFC0109161.

96 Dea Affidavit sworn June 3, 2016, at para. 9; see also Moyse Affidavit affirmed June 2, 2016, at para. 114.

78. This meeting took place at an Aroma coffee shop on March 26, 2014. Mr. Dea and Mr. Moyse both testified concerning what transpired during this meeting, and Mr. Dea's evidence was corroborated by his contemporaneous note of this meeting, sent to his partners that same afternoon. At no point during this brief interaction did Mr. Dea and Mr. Moyse discuss WIND. Rather, they discussed the financial industry generally, and Mr. Moyse explained what his career goals were as well as his reasons for wanting to move on from Catalyst. Mr. Dea asked Mr. Moyse run-of-the-mill interview questions to get a sense of what kind of experience Mr. Moyse had gained at Catalyst and in his previous employment at RBC and Credit Suisse.[97]

iii. Mr. Moyse Sends Mr. Dea Four Writing Samples That Have Nothing to Do With WIND

79. During the March 26 interview, 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's request for writing samples was not out of the ordinary in the industry and was consistent with West Face's standard hiring practices.[98]

80. Mr. Dea's request that Mr. Moyse provide writing samples was **not** an attempt by West Face to solicit Catalyst confidential information as alleged by Catalyst. Instead, it was exactly the opposite: Mr. Dea and Mr. Moyse both testified that Mr. Dea explicitly instructed Mr. Moyse to redact any confidential information as necessary.[99] Specifically, Mr. Dea testified that he "made it excruciatingly clear when I was speaking to

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[97] Dea Affidavit sworn June 3, 2016, at para. 11; see also Moyse Affidavit affirmed June 2, 2016, at para. 115. See Also Dea Chief, June 10, at pp. 1206:9-1207:18.

[98] Dea Affidavit sworn June 3, 2016, at para. 12; Griffin Chief, June 8, at pp. 770:10-771:2. See also Dea Chief, June 10, at pp. 1209:16-1210:12.

[99] Dea Chief, June 10, at p. 1210:16-23.

[Mr. Moyse] to redact if necessary or re-characterise".[100] Mr. Dea proceeded on the firm expectation that Mr. Moyse would abide strictly by his confidentiality obligations to Catalyst.[101] Mr. Moyse agreed that Mr. Dea had specifically asked that he not provide West Face with confidential information of Catalyst.[102]

81. The next day, March 27, 2014, Mr. Moyse sent Mr. Dea an email (the "**March 27 Email**") attaching his resume, a deal sheet, and four investment memos as writing samples.[103] Mr. Moyse expressly stated in his covering email to Mr. Dea that at least three of the investment memos contained only compilations of public information.[104]

82. Catalyst faults West Face for not disclosing the existence of the March 27 Email to Catalyst either immediately upon receipt of the March 27 Email and/or upon receiving Catalyst's threats of litigation alleging that Mr. Moyse had breached his employment agreement with Catalyst. These complaints are misplaced. As Mr. Moyse's contemporaneous emails reveal, he approached Mr. Dea in confidence, while he was still employed by Catalyst. It would hardly have been appropriate for Mr. Dea or West Face to break that confidence by "reporting" Mr. Moyse to Catalyst. Doing so would almost certainly have resulted in his termination by Catalyst well before West Face had made any decision to make Mr. Moyse an offer of employment. Moreover, West Face disclosed the existence of the March 27 Email in its initial July 7, 2014 responding motion record. These were, of course, the very first materials that West Face delivered

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100 Dea Cross, June 10 at 1238:3-16.
101 Dea Chief, June 10, at p. 1211:11-19.
102 Moyse Affidavit affirmed June 2, 2016, at para. 116.
103 Dea Affidavit sworn June 3, 2016, at para. 14; WFC0075126.
104 Moyse Affidavit affirmed June 2, 2016, at para. 116.

in this proceeding, and they were filed only six business days after Catalyst commenced its motion for interim relief on June 26, 2014.[105]

83. Fortunately, the March 27 Email is a complete **red herring**, for at least six reasons:

(a) the four writing samples have nothing whatsoever to do with WIND. Rather, they relate to companies called Homburg, NSI, Rona, and Arcan;[106]

(b) Catalyst has never pursued an investment in any of NSI, Rona, or Arcan;[107]

(c) West Face never made any investments in Homburg, NSI, or Rona;[108]

(d) West Face made no use of the writing samples other than to evaluate Mr. Moyse's writing skills;[109]

(e) Catalyst has never alleged any "misuse" of the writing samples by West Face, and has never claimed any loss or damage as a result of the disclosure of these samples to West Face; and

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105 Dea Affidavit sworn June 3, 2016, at para. 16.
106 Riley Cross, June 8 at pp. 581:19-582:1.
107 Riley Cross, June 8 at p. 582:2 - 10.
108 Riley Cross, June 8 at pp. 582:11-585:8.
109 Dea Affidavit sworn June 3, 2016, at para. 18 and Dea Chief, June 10, at pp. 1214:25-1215:3. It should give Catalyst some comfort to know that none of the West Face recipients of the March 27 Email paid much attention to the contents of the writing samples. See, for example: Griffin Chief, June 8, at p. 772:14-24; Griffin Affidavit sworn March 7, 2015, at para. 49; and Transcript of Cross-Examination of Thomas Dea held July 31, 2014, qq. 23-28; Dea Chief, June 10, at p. 1214:10-24.

(f) in January 2015 (now sixteen months ago), the Court file containing the writing samples was unsealed. From at least that point onward, Catalyst has not considered the content of any of these writing samples to be confidential.[110]

84. With regards to West Face's interest in Arcan, Mr. Griffin testified that he was the person at West Face directly responsible for this investment on June 23, 2014. Mr. Griffin testified that he made that decision based on an unsolicited proposal made for Arcan by AspenLeaf Financial on June 23, 2014. At this time, Mr. Griffin did not know that Mr. Moyse had ever looked at Arcan. Because Mr. Griffin thought this would be a good opportunity, Mr. Griffin copied Mr. Moyse on an email regarding Arcan on the evening of June 23, at 10:41 pm.[111]

85. The following morning, before markets opened, Mr. Singh flagged the issue for Mr. Griffin. Mr. Singh informed Mr. Griffin that any correspondence or discussion with Mr. Moyse on the Arcan file was not to go any further. Mr. Griffin ultimately testified that he never gave any work to Mr. Moyse on the Arcan file.[112] Furthermore, it was Mr. Griffin's testimony that he never saw any of Mr. Moyse's work product on Arcan.[113]

86. In short, the only actual foundation of Catalyst's case against West Face is no foundation at all, and has lost virtually all significance. To this day, the March 27 Email remains the **only** evidence of Mr. Moyse **ever** having communicated to anyone at West

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110 Riley Cross, June 8 at pp. 588:7-589:22.
111 Griffin Cross, June 8 at pp. 802-805.
112 Griffin Cross, June 8 at pp. 805-807.
113 Griffin Cross, June 8 at p. 810.

Face any potentially confidential information of Catalyst. That information has nothing whatsoever to do with WIND.

87. Furthermore, Mr. Griffin expressed significant concern at the time regarding Mr. Moyse's conduct in sending the writing samples attached to the March 27 Email. At the time, Mr. Griffin sent an email to Mr. Dea expressing these concerns. Ultimately, Mr. Griffin decided to support Mr. Moyse's hiring because he did not think there was any malicious intent but rather that Mr. Moyse had made an honest mistake. Mr. Griffin asked Mr. Dea and Mr. Singh to speak with Mr. Moyse about this issue.[114]

A. April and Early May, 2014: West Face Interviews Mr. Moyse and Checks His References

i. Mr. Moyse Attends West Face's Office for Interviews

88. Following Mr. Dea's initial meeting with Mr. Moyse on March 26, 2014, Mr. Dea arranged for Mr. Moyse to meet with several of his colleagues. Mr. Moyse attended at West Face's office for two rounds of interviews: the first on April 15 (when he met with Messrs. Griffin, Fraser, and Zhu), and the second on April 28 (when he met with Mr. Boland).[115]

89. Both West Face and Mr. Moyse produced **all** documents relating to these interviews, including all emails with Mr. Moyse scheduling the interviews, internal emails relating to the interviews, Mr. Zhu's notes of his interview with Mr. Moyse,[116] electronic calendar invitations and appointments for these interviews, as well as Mr. Moyse's emails to the Partners following the interviews thanking them for their time and

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114 Griffin Chief, June 8, at pp. 769-771; WFC0109149.
115 Dea Affidavit sworn June 3, 2016, para. 19.
116 The other interviewers did not take notes of their interviews with Mr. Moyse.

expressing an interest in working at West Face.[117] Similarly, Mr. Moyse produced all emails relating to his job search in general, including his private emails with his girlfriend expressing his understandable desire to leave Catalyst and his frustration with the slow pace of West Face's hiring process. **None** of these contemporaneous documents provide even a whiff of evidence that WIND was ever mentioned at any point during this hiring process.[118]

90. Catalyst's propensity to cast aspersions on perfectly innocuous events of this nature was typified by its stated intention, revealed on the eve of trial, to allege that Mr. Moyse discussed WIND during his interview with Mr. Zhu on April 15, 2014. Catalyst indicated that it intended to make that assertion based on nothing more than Mr. Zhu's handwritten notes of his interview with Mr. Moyse. Those notes say nothing about WIND. In response, Mr. Zhu gave uncontroverted evidence, unshaken at trial, that this allegation was categorically false.[119] Instead, WIND was never mentioned during his interview with Mr. Moyse. Mr. Griffin gave similar evidence and specifically testified that he did not discuss WIND with Mr. Moyse because "the subject never came up!" Mr. Griffin noted in his testimony that he did open one of the writing samples attached to the March 27 email, namely the memo regarding Homburg. Mr. Griffin's evidence was that he saw the confidential marker in the heading of the document and didn't get much further before emailing Mr. Dea regarding his concerns.[120]

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117 Dea Affidavit sworn June 3, 2016, at para. 19.
118 Dea Chief, June 10, at p. 1215:15-19.
119 Zhu Affidavit sworn June 3, 2016, at paras. 1-5; see also WFC0109978; on Zhu Cross, June 10 at pp. 1295:3-1296:9 and Zhu Chief, June 10, at pp. 1287:22-1288:2.
120 Griffin Chief, June 8, at p. 769:23–769:2 and 772:14-24.

ii. Mr. Dea Checks Mr. Moyse's References

91. As in a typical hiring process, Mr. Dea contacted some of Mr. Moyse's references. These references were outstanding:[121]

(a) Andrew Yeh, a former junior employee of Catalyst, had only positive things to say about Mr. Moyse;[122]

(b) Thomas Mercein, a personal friend of Mr. Dea's and the Global Head of Debt Capital Markets at Credit Suisse, described Mr. Moyse as a "Great kid, very smart and hard-working" and as someone who he was "consistently impressed" with;[123] and

(c) another reference of Mr. Moyse's from Credit Suisse described him as "among the very best analysts we've had".[124]

92. Mr. Dea summarized the overall "gist" of what Mr. Moyse's references had to say about him in an email to his Partners on May 16, 2014. As set out therein, Mr. Moyse's references described him as: "very hard working", "driven", as someone able to "get in the weeds" and "take a position / develop a view", and who "had the capacity to develop into more than a processor".[125] Mr. Dea's recommendation had nothing to do with WIND.[126]

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121 Dea Chief, June 10, at p. 1215: 20-25.
122 Dea Affidavit sworn June 3, 2016, at para. 20.
123 Dea Affidavit sworn June 3, 2016, at para. 21. See also WFC0109171. See also Dea Chief, June 9 at p. 1216:13-22. Mr. Dea stated in testimony that he placed a great deal of weight on Mr. Mercein's recommendation – see Dea Chief, June 9 at p. 1217:5-18.
124 Dea Affidavit sworn June 3, 2016, at para. 21. See also WFC0109186.
125 Dea Affidavit sworn June 3, 2016, at para. 25. See also WFC0109181.
126 Dea Chief, June 9 at pp. 1221:18-1222:1.

iii. Mr. Moyse's Knowledge of WIND at the Time of His Job Interviews

93. With the benefit of the comprehensive documentary record produced in this case, it is perhaps unsurprising that the subject of WIND did not come up during the course of Mr. Moyse's hiring process. This is so for at least two reasons. *First*, as Mr. Dea made clear in his evidence at trial, discussions concerning live but undisclosed transactions of this nature simply do not occur during interviews of this nature. *Second*, even if this were not the case, "at the time of [Mr. Moyse's] interviews with [Messrs.] Boland, Fraser, Griffin and Zhu, [he] was not aware that Catalyst was actively pursuing WIND, or would soon be".[127]

94. At the time of Mr. Moyse's April interviews at West Face, he had only worked on two basic tasks on the WIND file: a *pro-forma* analysis regarding a combination of several financial metrics concerning WIND and Mobilicity, completed March 8, and the March 27 PowerPoint presentation. Neither of these tasks gave Mr. Moyse any particular insight into Catalyst's "confidential" regulatory strategy:

(a) although Catalyst made much of the *pro-forma* analysis put together by Mr. Moyse, going so far as to call it "critical", the total sum of Mr. Moyse's analysis was pulling a few numbers for both WIND and Mobilicity from a handful of publicly available sources. He then used simple addition to add the WIND and Mobilicity figures together and calculated what percentage

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[127] Moyse Affidavit affirmed June 2, 2016, at para. 120. See also Dea Chief, June 10, at p. 1215:15-19.

each company represented of the total. There was no special analysis or insight into either company needed;[128] and

(b) as set out in more detail above, Mr. Moyse's involvement in the creation of the March 27 PowerPoint was limited to an essentially secretarial role of transcribing notes and formatting the presentation, which he completed within a 24-hour period. Although Mr. Moyse technically "saw" Catalyst's allegedly confidential regulatory strategy as it was contained in the March 27 PowerPoint while he was transcribing the notes given to him, he had neither the context nor the background to understand the strategies outlined, especially in the short, rushed timeframe he had to put the presentation together.

95. Further, as Mr. Glassman himself testified at trial, the "presentation was intended to provide a framework for a discussion. The presentation itself wasn't the discussion. It was the framework for a discussion".[129] Transcribing an eleven-page presentation is clearly not equivalent to attending a full day of meetings with Government officials, which Mr. Moyse was not invited to participate in. Furthermore, there is literally no contemporaneous documentary evidence showing that Mr. Moyse knew anything about what occurred during the March 27 meetings, or indeed in any subsequent meetings or discussions that may have occurred between representatives of Catalyst and the Government of Canada.

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[128] Mr. Moyse goes into specific detail about how he put this *pro-forma* together in his Affidavit, affirmed June 2, 2016 at paras. 34-38.

[129] Glassman Cross, June 7 at p 331:9-20.

B. May 6 to 26, 2014: Mr. Moyse's Involvement on the Catalyst WIND Deal Team

i. May 6 to 16, 2014: Mr. Moyse Conducts Due Diligence on WIND for 10 Days Before Going on Vacation

96. While Mr. Moyse had previously been told that he was going to become a member of Catalyst's telecommunications team, for the month of April he was primarily occupied with working on Catalyst's portfolio companies, National Markets Food Group and Advantage Rent-a-Car. He was only involved on Catalyst's WIND deal team in an active and significant way for approximately 10 days, between May 6 and May 16, 2014.[130] Most of his work related to Catalyst's due diligence of information from the WIND data room that was equally available to West Face or any other bidder.[131]

97. During this time period, Mr. Moyse was not privy to any high level strategic discussions. He had no particular understanding of Catalyst's confidential regulatory strategy.[132] He did not analyze the subject of regulatory risk, or any other regulatory issues facing WIND.

98. Mr. Moyse's only connection to Catalyst's confidential regulatory strategy during this time period was with respect to Catalyst's second presentation to Industry Canada, which Catalyst delivered on May 12, 2014. As with the presentation of March 27, 2014, and as discussed more fully above, Mr. Moyse's role was limited to transcribing handwritten mark-ups from his superiors (including Messrs. De Alba, Riley, and Michaud) into a new PowerPoint presentation.[133] Mr. Moyse's two contributions to this

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130 Moyse Affidavit affirmed June 2, 2016, at paras. 61-63.
131 Moyse Affidavit affirmed June 2, 2016, at para. 64; Affidavit of El-Shanawany sworn March 9, 2015 at para. 7.
132 Moyse Affidavit affirmed June 2, 2016, at para. 68.
133 Moyse Affidavit affirmed June 2, 2016, at paras. 79-85.

presentation were the bar diagram on slide three, which he likely compiled from information obtained in the WIND data room, and the simple *pro-forma* analysis that he had put together in early March.[134]

ii. May 16 to 25, 2014: Mr. Moyse Goes on Vacation to Southeast Asia and is Mentally "Checked Out"

99. From May 16 to 25, 2014, Mr. Moyse was on vacation in Southeast Asia and had almost no direct involvement with Catalyst's WIND deal team. While Mr. Moyse continued to be copied on emails, he basically skimmed these messages to see if he was being asked to do anything while he was away. There was only one such email relevant to the WIND file that warranted a response from Mr. Moyse, and it related to Catalyst's preliminary operating model, not its confidential regulatory strategy.[135]

100. Mr. Moyse's ignorance of what was going on at Catalyst during this time period is best demonstrated by his contemporaneous emails with his colleague and fellow Catalyst WIND deal team analyst Lorne Creighton. In one of those emails, Mr. Moyse asked Mr. Creighton for an update on WIND. Mr. Creighton responded by telling Mr. Moyse that he had "no real idea what's going on or if we're actually going to do the deal".[136] As Mr. Moyse stated in his Affidavit affirmed June 2, 2014, Mr. Creighton's reply reflected the "reality" that Catalyst's analysts were not directly involved in strategic or high level discussions, even while they were in Catalyst's office and not on vacation.[137]

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134 Moyse Affidavit affirmed June 2, 2016, at para. 83.
135 Moyse Affidavit affirmed June 2, 2016, at paras. 98-103.
136 BM0004981.
137 Moyse Affidavit affirmed June 2, 2016, at para. 102.

iii. Mr. Moyse is Copied on the May 24, 2014 Draft of the VimpelCom / Catalyst Share Purchase Agreement

101. On May 24, while he was on vacation, Mr. Moyse was copied on an email sent by Daniel Batista of the Faskens firm to members of Catalyst's WIND deal team and its advisors. This email attached clean and blackline versions of a very early draft of the Catalyst/VimpelCom share purchase agreement. The blackline of this draft showed Catalyst (and its counsel's) proposed amendments to the share purchase agreement provided to Catalyst (and West Face) by VimpelCom.[138]

102. This blackline showed the following proposed amendments to section 6.3(d):

> (d) ~~Subject to Section 6.4, the obligations of the Purchaser under this Section 6.3 shall include committing to any and all undertakings, divestitures, licenses or hold separate or similar arrangements with respect to its assets or the assets of the Globalive Entities and committing to any undertakings or other arrangements relating to conduct of its business or the business of the Globalive Entities as a condition to obtaining any and all approvals or clearances from any Governmental Authority or Person necessary to consummate the transactions contemplated hereby, including taking any and all actions necessary in order to ensure the receipt of the necessary consents, approvals, clearances or forbearances, or the termination, waiver or expiration of the necessary waiting periods, under applicable Law. In addition, subject to Section 6.4, the Purchaser shall not knowingly take or cause to be taken any action which would be expected to prevent or delay the obtaining of any consent or approval required hereunder, including entering into any timing or other agreements with any Governmental Authority without the express written consent of the Seller, for the consummation of the transactions contemplated hereby. No action taken under the Section 6.3 shall entitle the Purchaser to any reduction to the Purchase Price.~~ Notwithstanding anything in this Agreement, the Purchaser is not obligated to provide Seller with commercially or competitively sensitive information in relation to, the Purchaser, unless the Purchaser is satisfied that the confidential nature of such information can be

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138 CCG0011364.

> preserved through redaction or the sharing of such information only to the Seller's outside counsel.[139]

103. In short, Catalyst (or its counsel) proposed to delete the entire clause drafted by VimpelCom and to replace it with a provision that limited VimpelCom's ability to receive Catalyst's confidential information. During his cross-examination, Mr. De Alba was forced to concede that Catalyst's motivation in making this change was to reserve the right to seek concessions from the Government of Canada during the Interim Period between when the Catalyst/VimpelCom Share Purchase Agreement was to be signed and the closing of the contemplated transaction.[140]

104. On the other hand, Catalyst's proposed blackline made no material amendments to the general conditions regarding regulatory approval that had originally been proposed by VimpelCom:

> **7.3 General Conditions**
>
> The obligation of the ~~Parties~~ Purchaser and the Seller to complete the Transaction is subject to the following conditions, which are for the benefit of ~~all of~~ the ~~Parties~~ Purchaser and the Seller:
>
> (a) Competition Act Approval. Without limiting the Purchaser's obligations herein, including in Section 6.4, the Purchaser having obtained Competition Act Approval.
>
> (b) Industry Canada Approval. Without limiting the Purchaser's obligations herein, including in Section 6.5, the Purchaser having obtained Industry Canada Approval.
>
> (c) Escrow Agreement. Each of the Purchaser, the Seller, GWMC and the Escrow Agent shall have executed and delivered the Escrow Agreement.

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139 CCG0011364/38.

140 De Alba Cross, June 6, at pp. 257:17 – 259:2.

> (d) Pre-Closing Reorganization. All of the Pre-Closing Reorganization steps set out in Schedule 6.6 shall have been completed prior to the Closing.[141]

105. Mr. De Alba conceded in cross-examination that a condition of regulatory approval was never a matter of controversy or negotiation, as both Catalyst and VimpelCom had "always agreed" that for the contemplated transaction to close, regulatory approval was required.[142] That is so because the proposed transaction of Catalyst would have triggered a change of control of WIND in a single stage transaction. An acquisition of that nature could not be completed without regulatory approval, as a matter of law.

106. In any event, Mr. Moyse's uncontroverted evidence is that he did not read this draft of the Catalyst/VimpelCom Share Purchase Agreement. Mr. Moyse's evidence is perfectly credible given the circumstances: Mr. Moyse had already decided to quit Catalyst (he tendered his resignation later that day), and he was simply not interested in reading through a dense, lengthy agreement while on vacation where he had not been specifically asked or instructed to do so.[143]

iv. West Face Offers Mr. Moyse a Job Without Any Knowledge of His Involvement on the Catalyst WIND Deal Team

107. Mr. Dea verbally offered Mr. Moyse a position with West Face on May 16, 2014.[144] As set out above, this was the first day of Mr. Moyse's vacation and approximately 10 days into his active involvement on the Catalyst WIND deal team.

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141 CCG0011364/45.

142 De Alba Cross, June 6 at pp. 255:13 – 256:4.

143 Moyse Affidavit affirmed June 2, 2016, at para. 103; see also De Alba Examination for Discovery, May 11, 2016 at qq. 321-330; and Answers to Undertakings and Advisements to the De Alba Examination for Discovery, held May 11, 2016, at U/T Nos. 18-19.

144 Moyse Affidavit affirmed June 2, 2016, at para. 122; see also Dea Affidavit sworn June 3, 2016, at para. 27.

108. That same day (May 16), Mr. Moyse emailed his colleague, Catalyst Vice-President Zach Michaud, and informed him that he had received an offer from West Face. Despite being Mr. Moyse's superior and the individual who Mr. Moyse directly reported to on the Catalyst WIND deal team, Mr. Michaud did not react by expressing any kind of concern that Mr. Moyse had "intimate" knowledge of Mr. Glassman's top-secret regulatory strategy for WIND. Instead, Mr. Michaud put Mr. Moyse in touch with one of his connections who had previously worked at West Face.[145]

109. As an aside, Catalyst dropped Mr. Michaud from its witness list very shortly before delivering its (late) trial Affidavits.

110. West Face provided Mr. Moyse with a written employment offer on May 22, 2014.[146] That very day, West Face's general counsel Alex Singh spoke with Mr. Moyse and advised him that West Face took matters of confidentiality very seriously and that he was not to disclose any information belonging to Catalyst.[147] Indeed, this obligation was expressly incorporated into the West Face Employment Agreement.[148] Mr. Moyse assured Mr. Singh that he understood and would abide by the obligations he owed to both Catalyst and West Face.[149] On or around the same day, Mr. Moyse had a similar conversation with Mr. Dea. Both were serious in tone, and very direct.[150]

111. Mr. Moyse accepted the terms of West Face's written employment offer and sent back the executed version to West Face on Monday, May 26, 2014 following his return

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145 Moyse Affidavit affirmed June 2, 2016, at para. 99.
146 Dea Affidavit sworn June 3, 2016, at para. 28; see also Moyse Affidavit affirmed June 2, 2016, at para. 122.
147 Dea Chief, June 10, at pp. 1225:16-1227:24.
148 Dea Affidavit, sworn June 3, 2016 at para. 25; Singh Affidavit, sworn July 7, 2014 at para. 3. See also WFC0075090.
149 Singh Affidavit sworn July 7, 2014 at para. 5. See also Dea Affidavit sworn June 3, 2016, at para. 30.
150 Moyse Chief, June 13 at p. 1376:2-1377:20.

to Canada from vacation (the "**West Face Employment Agreement**").[151] That Agreement specifically obligated Mr. Moyse to respect and abide by his confidentiality obligations to Catalyst.

112. At the time West Face made this job offer to Mr. Moyse, it had no knowledge of his (limited) involvement on the Catalyst WIND deal team.

v. Mr. Moyse Resigns From Catalyst and Is Immediately Shut Out

113. Mr. Moyse formally notified Mr. De Alba that he was resigning from Catalyst on Saturday, May 24, 2014.[152] Mr. Moyse returned from Southeast Asia on Sunday, May 25, and then went to work on Monday, May 26, 2014 to begin serving his 30-day notice of termination period.

114. On that Monday, Mr. Moyse informed Catalyst that he was going to work for West Face. Catalyst immediately instructed Mr. Moyse to stay home for the balance of his 30-day notice period.[153]

115. Mr. Riley agreed in cross-examination that he sent Mr. Moyse home "in order to ensure that Mr. Moyse played no role in and was kept isolated from any future discussions regarding upcoming investment opportunities at Catalyst".[154] He further agreed that Mr. Moyse did, in fact, stay home for the remainder of the 30-day notice

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151 Dea Affidavit sworn June 23, 2016, at para. 28.

152 See Moyse Affidavit affirmed June 2, 2016, at para. 124; CCG0018691; Glassman Cross, June 7 at p. 357:13–18.

153 Moyse Affidavit affirmed June 2, 2016, at para. 107.

154 Riley Cross, June 8 at pp. 576:6-577:5; see also Riley Affidavit sworn June 26, 2014, at para. 36.

period, and no longer participated in Catalyst's Monday meetings either in person or by phone.[155]

116. Catalyst also immediately contacted its IT provider and asked that Mr. Moyse's permission to access the Catalyst server be revoked.[156]

117. Mr. Riley readily admitted that May 26 was the last day Mr. Moyse could have learned anything relevant to Catalyst's pursuit of WIND:

> Q. Now, let me deal with Mr. Moyse's resignation. Can you pull up tab 9, please. And, sir, you'll see here Mr. Moyse's email to Mr. de Alba of May 24th of 2014 telling Mr. de Alba that he was resigning from Catalyst?
>
> A. Yes.
>
> Q. I take it that Mr. Moyse's resignation was brought to your attention shortly after it was given?
>
> A. Yes.
>
> *Q. And am I correct that you met with Mr. Moyse two days later on Monday, May 26th, 2014?*
>
> *A. I did.*
>
> *Q. During that meeting, Mr. Moyse told you that he intended to join West Face?*
>
> *A. Yes.*
>
> *Q. And am I correct that as a result you sent Mr. Moyse home?*
>
> *A. Yes.*
>
> *Q. You did so at least in part in order to ensure that Mr. Moyse played no role in and was kept isolated from any future discussions regarding upcoming investment opportunities at Catalyst?*
>
> *A. Correct.*

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155 Riley Cross, June 8 at p. 577:6-13.

156 Riley Cross, June 8 at pp. 577:22-578:1.

Q. And am I right that Mr. Moyse did in fact stay home for the remainder of the 30-day notice period? He did not rejoin Catalyst?

A. He did not come back to the office.

Q. He no longer attended Catalyst Monday meetings either in person or by phone?

A. No.

Q. He no longer performed work for or on behalf of Catalyst?

A. I don't know for sure because there were some continuing matters that he might have to give help -- help in the transition.

Q. You're not aware of any significant matters?

A. No.

Q. Am I right that on May 26th of 2014 Catalyst also contacted its IT provider and asked that Mr. Moyse -- Moyse's permission to access the Catalyst servers be revoked?

A. Yes.

Q. In the period after Monday, May 26th of 2014, you shared no information whatsoever with Mr. Moyse concerning Catalyst's discussions and negotiations with VimpelCom?

A. Are you asking me personally?

Q. Yes.

A. No.

Q. Nor to your knowledge did Mr. Glassman or Mr. de Alba?

A. To my knowledge, no.

Q. In the period after Monday, May 26th, 2014 you shared no information whatsoever with Mr. Moyse concerning Catalyst's discussions and negotiations with the Government of Canada, correct?

A. No.

Q. Nor to your knowledge did Mr. Glassman or Mr. de Alba?

A. To my knowledge, no.[157]

118. Similarly, Mr. Glassman agreed that he had no contact whatsoever with Mr. Moyse following May 26, and did not keep him advised of either Catalyst's negotiations with VimpelCom or its discussions with the Government of Canada.[158] Mr. Glassman confirmed that to his knowledge, the same could be said for Messrs. De Alba and Riley, as well as Catalyst's advisers at Faskens and Morgan Stanley.

vi. The State of Play and "Confidential Information" Known to Mr. Moyse as at May 26, 2014 – the Day he was Cut Off from Catalyst

119. A key consideration in this litigation concerns the state of Catalyst's WIND deal as at May 26, 2014, the last day Mr. Moyse *could have* received any Catalyst confidential information about WIND. As of May 26, 2014:

(a) Catalyst's "Canada Wireless Presentations" of March 27 and May 12 to the Government of Canada had apparently been destroyed (except, apparently, for a classified "master file" containing these presentations that only Mr. Glassman knew about and had access to despite Catalyst's flat, flat non-hierarchical structure that promoted the free-flow of information and ideas);

(b) Catalyst had only had access to the data room for approximately two weeks (since on or around Friday May 9);

(c) Catalyst did not yet have a working financial model for WIND, a complete investment memorandum, nor had it decided on structure, price, or

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157 Riley Cross, June 8 at pp. 576:6-578:20.
158 Glassman Cross, June 7 at p. 360:9-25.

regulatory risk mitigation, and its diligence was not sufficiently advanced to have ascertained or resolved those issues;[159]

(d) Catalyst had received a detailed memo from its counsel at Faskens on May 19 on the subject of regulatory issues and sharing of spectrum that opined "the current government has made it clear that any proposed transfer of commercial mobile spectrum to an incumbent will be subject to very close scrutiny and, in the current climate, most unlikely to succeed";[160]

(e) Mr. De Alba's own evidence was that he informed Catalyst's WIND deal team, including Mr. Moyse, that Catalyst "could not likely do a deal by May 23, as originally planned" and that Catalyst was therefore discussing strategies to purposefully slow down the negotiation process with VimpelCom:

(i) as an aside, Mr. De Alba's stated reason for having to slow down the negotiation process was because Catalyst "still needed a condition of government approval in the share purchase agreement". This evidence was incorrect, given that the first draft of the Catalyst/VimpelCom share purchase agreement provided by VimpelCom **did** include a condition of government approval (which Mr. De Alba admitted and then further conceded was never a point of controversy or negotiation with VimpelCom);

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159 Moyse Affidavit affirmed June 2, 2016, at para. 72.

160 CCG0026600; see also Glassman Cross, June 7 at pp. 469:4-473:4.

(f) Catalyst's share purchase agreement did **not** restrict Catalyst's ability to seek regulatory concessions;[161] and was at least eight versions away from the "substantially complete" version ultimately sent to the VimpelCom board;[162] and

(g) Catalyst had received feedback from Mr. Drysdale on May 7 that the Government would not give Catalyst the right to sell spectrum in five years.[163]

120. Given this state of affairs, Mr. Moyse did not and could not have known, at the time he left Catalyst, what Catalyst's diligence would ultimately conclude about the WIND business, its wireless network, operating and financial information, tax attributes, spectrum holdings and requirements, working capital needs, branding, marketing, customer service, sales, distribution, or key performance indicators. He did not know and could not have known how Catalyst would view such disclosure, or what conclusions Catalyst would reach regarding (as Mr. Leitner put it), WIND's "value proposition". Mr. Moyse also did not know and could not have known how Catalyst's negotiations with VimpelCom would progress – including with respect to the general structure of the transaction and its terms, conditions, warranties, representations, and so on. This specifically includes, any knowledge respecting any regulatory approval conditions or limitations on Catalyst's ability to seek regulatory concessions from the Government of Canada. Mr. Moyse certainly did not know and could not have known

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161 CCG0011364.

162 See CCG0009636; CCG0009738; CCG0024199; CCG0009833: CCG0009859; CCG0012087; CCG0026606; and CCG0026610.

163 CCG0009482.

how Catalyst's "dialogue" with Industry Canada would progress, and whether or not it would yield on the regulatory concessions sought by Catalyst.

121. Furthermore, and as revealed in the testimony of Messrs. De Alba and Glassman, Catalyst's ultimate strategy was to agree to terms prohibiting it from seeking the right during the interim period between executing the agreement and closing to obtain regulatory concessions allowing Catalyst to sell WIND's spectrum to an incumbent after five years; and to immediately thereafter pursue such concessions, and to only close the transaction if they could be obtained.[164] There was no way for Mr. Moyse to predict such an audacious and ill-conceived strategy.

122. As set out above, after Mr. Moyse left Catalyst on May 26, the uncontroverted evidence in this case is that he was completely cut off from Catalyst and had no way to know how the Catalyst/VimpelCom negotiations were proceeding.[165] Mr. Moyse was left with, at most, an outdated point-in-time understanding of the WIND deal as outlined above.

C. West Face Implements a Confidentiality Wall in Response to Catalyst's Concerns

123. On May 30, 2014, Catalyst's counsel (Lax O'Sullivan) sent a letter to West Face expressing concerns about West Face's hiring of Mr. Moyse. At the time West Face received this letter, Mr. Griffin had already identified the concern raised by the March 27

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164 De Alba Cross, June 7 at pp. 253:15-254:14 and pp. 275:24-278:24.
165 Riley Cross, June 8 at pp. 576:6-578:20.

email,[166] and Mr. Singh had already emphasized to Mr. Moyse the importance of honouring his confidentiality obligations to Catalyst.[167]

124. Additionally, at the time that West Face received this letter from counsel to Catalyst on May 30, 2014, West Face honestly and in good faith believed that the non-competition clause in Mr. Moyse's employment contract with Catalyst was unenforceable. West Face communicated that opinion to counsel for West Face on June 3, 2014.[168]

125. During the course of communications between counsel in advance of Mr. Moyse's employment at West Face, on June 18, 2014, Catalyst's counsel advised employment counsel to West Face (Dentons Canada LLP) that Catalyst was particularly concerned about Mr. Moyse's work at Catalyst on a "telecom deal".[169]

126. As an aside, West Face's interest in WIND and the fact that it was engaged in negotiations with VimpelCom for WIND was not public knowledge at the time Catalyst expressed concern about the "telecom deal". This issue is discussed further below.

127. Regardless of how Catalyst found out that West Face was involved in negotiations with VimpelCom, West Face reacted before Mr. Moyse began his employment by taking proactive steps to protect Catalyst's confidential information.

128. 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 on June 23, Supriya

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166 Griffin Chief, June 8, at p. 769:2 – 772:2.

167 Dea Affidavit sworn June 3 at para. 33; Singh Affidavit sworn July 7 at para. 3. See also Dea Chief, June 10, at pp. 1225:24–1227:21.

168 CCG0018693.

169 Griffin Chief, June 8, at p. 772:25-773:7. See also Griffin Chief, June 8, at p. 773:8-775:3.

Kapoor, the Chief Compliance Officer at West Face, erected a confidentiality wall with respect to WIND and Mr. Moyse (the "**Confidentiality Wall**").[170] The terms of this Confidentiality Wall were disclosed to counsel for Catalyst the same day, in Dentons' letter dated June 19, 2014 to Lax O'Sullivan.[171]

129. Pursuant to this Confidentiality Wall: (1) Mr. Moyse was forbidden from communicating with anyone at West Face about the ongoing WIND negotiations, and vice-versa; and (2) West Face's IT group restricted access to all WIND-related documents so that Mr. Moyse could not access them.[172]

130. On June 19, the same day Ms Kapoor erected the Confidentiality Wall, she circulated a memo detailing its terms to Mr. Moyse as well as everyone at West Face who was working on the WIND transaction and others, namely:

(a) the four West Face Partners (Messrs. Boland, Fraser, Dea, and Griffin);

(b) Yu-Jia Zhu (a Vice-President);

(c) Nora Nestor (Tax Controller);

(d) Chap Chau (Head of Technology);

(e) other investment professionals; and

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170 Kapoor Chief, June 10 at pp. 1279:23-1281:1.
171 CCG0018653**.** See also Dea Chief, June 10, at pp. 1228:13–1230:2.
172 WFC0000049 and attachment WFC0000050.

(f) West Face's Chief Financial Officer, the Chief Financial Officer of West Face's funds, West Face's General Counsel and some support staff.[173]

131. That evening, Ms Kapoor personally phoned Mr. Moyse to discuss the terms of restrictions he would be under. The call was brief, cordial, and to the point. In the call, Ms Kapoor explicitly instructed Mr. Moyse in abundantly clear terms 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 understood and would comply.[174]

132. The day after the Confidentiality Wall memo was circulated, and three days before Mr. Moyse began work, West Face's head of Technology, Chap Chau, confirmed that Mr. Moyse had been excluded from the computer directory containing the WIND-related documents.[175]

133. In addition to the Confidentiality Wall memo, Mr. Dea verbally informed the entire investment team at West Face that Mr. Moyse was not to be told anything about the WIND transaction.[176] Further, once Mr. Moyse began working at West Face (on June 23), the West Face WIND deal team (the Partners and Yu-Jia) only met in private, behind closed doors, and away from the trading floor area where Mr. Moyse was seated. As Mr. Dea testified at trial this was not unusual, as the West Face common

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173 Kapoor Affidavit sworn June 2, 2016 at para. 3; Kapoor Chief, June 10 at pp. 1281:2-1282:25; Griffin Chief, June 8 at pp. 773:15-13.

174 Kapoor Affidavit sworn June 2, 2016 at para. 4; Kapoor Chief, June 10 at pp. 1283:1 – 1284:5.

175 WFC0000054. See also Kapoor Affidavit, Sworn June 2, 2016 at para. 5.

176 Dea Cross, June 10, at p. 1264:14-17.

work area is actually a very, very quiet place, and people generally take phone calls in one of the number of breakout rooms to keep it quiet.[177]

134. These numerous precautions were taken for the specific purpose of safeguarding Catalyst's confidential information and avoiding this lawsuit. Mr. Griffin confirmed that the Confidentiality Wall was complied with, and there is simply no evidence that it was ever breached.[178]

D. Mr. Moyse Played No Role in West Face's WIND Negotiations During his Brief Period of Employment at West Face

135. Mr. Moyse began working at West Face on Monday, June 23, 2014. Three and a half weeks later, on July 16, 2014, 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.[179]

136. During his brief 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). As such, 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.

137. 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

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177 Dea Chief, June 10 at p. 1231:6-13.
178 Griffin Chief, June 8 at pp. 774:11-775:3. See also Dea Chief, June 10, at p. 1230:12-15.
179 Griffin Cross, June 10 at p.1133:5-18.

environment. Mr. Moyse's substantive work was limited to performing some preliminary analyses on several potential investments **that had nothing to do with WIND**. More detail on the work Mr. Moyse performed while at West Face is set out in Appendix "A" to the Affidavit of Anthony Griffin sworn March 7, 2015.[180]

138. After Mr. Moyse departed from West Face pursuant to the Consent Order of Justice Firestone, it was Mr. Dea's evidence at trial that Mr. Dea had no further contact with Mr. Moyse, nor did others on West Face's WIND Deal team.[181]

139. For the purposes of this case, more important than the work Mr. Moyse did do while at West Face is the work he did **not** do. **Mr. Moyse did not work on anything related to WIND** (which was subject to the Confidentiality Wall described above).

140. In the course of this proceeding, West Face produced to Catalyst:

(a) all of its email communications with, involving, or concerning Mr. Moyse (more than 1,500 emails); and

(b) Mr. Moyse's West Face notebook, redacted only for West Face active investments unrelated to WIND.

141. The vast majority of these documents were produced in March 2015, at the time West Face filed its materials responding to Catalyst's motion for: (i) an interlocutory injunction restraining West Face from participating in the management and/or strategic direction of WIND; (ii) an interlocutory order authorizing an Independent Supervising

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180 Griffin Affidavit sworn March 7, 2015 at Appendix "A".
181 Dea Chief, June 10 at pp. 1231:24-1232:17.

Solicitor to forensically image, review, and analyze all of West Face's electronic devices; and (iii) an order jailing Mr. Moyse, for contempt of a previous interim consent order.

142. Catalyst does not rely on **any** of these materials because **none** of them provide even a shred of evidence that Mr. Moyse was involved in West Face's negotiations for WIND, or that he ever communicated Catalyst confidential information concerning WIND to West Face.

143. Moreover, in March 2015 and then again in January 2016, West Face offered to produce every electronic document on West Face's computer system ever accessed by Mr. Moyse.[182] Catalyst never responded to either of these offers. As Mr. Moyse had been excluded from the computer directory containing the WIND-related documents as a part of the precautions put in place before he arrived, these documents would have shown that Mr. Moyse did not access any WIND related documents while at West Face (which is presumably why Catalyst did not care to see them).[183]

E. Conclusion: West Face Never Received Any Confidential Information of Catalyst From Mr. Moyse

144. All of the above evidence regarding West Face's hiring of Mr. Moyse leads to only one possible conclusion: Mr. Moyse never transmitted, and West Face never received, any confidential information of Catalyst relating to WIND. Catalyst has no evidence whatsoever to substantiate this allegation.

145. This is perhaps best demonstrated by the following passage from the cross-examination of Mr. De Alba within the first few hours of trial:

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[182] CCG0018715 and WFC0075855; see also Griffin Affidavit, sworn June 4, 2016 at paras. 75-76.
[183] See WFC0000054.

Q. Mr. de Alba, after all of the extensive productions in this case, you cannot identify a single confidential Catalyst document relating to Wind that ended up in the possession of West Face, can you?

A. I can't.

Q. Mr. de Alba, you cannot identify a single email received by West Face from Mr. Moyse that contained any confidential Catalyst information about Wind, can you?

A. No, I can't.

Q. Mr. De Alba, you cannot identify a single email sent by Mr. Moyse to West Face that contained any confidential Catalyst information about Wind?

A. Correct.

Q. Mr. Moyse never told you that he had provided confidential Catalyst information about Wind to West Face, did he?

A. I never asked.

Q. No one at West Face has ever told you that Mr. Moyse provided confidential Catalyst information about Wind to West Face?

A. No, I have not asked.

Q. Not that you didn't ask. No one has told you that either, correct?

A. Correct.

…

Q. You have no direct evidence, I'm not asking about inference drawing, you have no direct evidence that Mr. Moyse provided any confidential Catalyst information about Wind to West Face, do you?

A. No, I don't.

MR. CENTA: Those are my questions. Thank you very much.[184]

146. Similarly, Mr. Riley, as the person at Catalyst primarily responsible for managing this lawsuit since it was commenced in June 2014, readily admitted that he has spent a

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[184] De Alba Cross, June 7 at pp. 233:2-234:3; 234:16-21.

considerable amount of time reviewing the parties' extensive productions, including particularly relevant or important documents that were brought to his attention from time to time by Catalyst's counsel.[185] Despite this, **Mr. Riley also could not identify any documentary evidence of Mr. Moyse giving West Face confidential Catalyst information about WIND**:

> Q. Now, am I right that you have been the person at Catalyst primarily responsible for managing what I'll call the Moyse litigation in the period since it was commenced in June of 2014?
>
> A. That is correct.
>
> Q. We've already established that in the course of the litigation, you have prepared and sworn five affidavits?
>
> A. Yes.
>
> Q. And you spent a considerable amount of time reviewing Mr. Moyse's documents as well as productions of Catalyst and West Face?
>
> A. Yes.
>
> Q. And am I right in saying this, Mr. Riley, you've certainly reviewed all of the particularly relevant or important documents that have been brought to your attention from time to time by Catalyst counsel?
>
> A. Yes.
>
> Q. Now, can we agree that you were not present during any meetings or discussions Mr. Moyse may have had with representatives of West Face?
>
> A. No.
>
> Q. And that is so either before he joined West Face on June 23, 2014 or after, correct?
>
> A. That is correct.

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[185] Riley Cross, June 8 at p. 579:1-14.

> Q. And therefore you can't testify under oath as to what happened during any of those meetings or discussions, correct? You weren't there?
>
> A. No, I wasn't there. Sorry, I'm just trying to think of what I learned through affidavits.
>
> Q. Now, am I correct as well, having read in some detail all of your five affidavits, that you have not attached to any of your five affidavits even one document in which Mr. Moyse conveys to West Face confidential information of Catalyst concerning either Wind or VimpelCom?
>
> A. No.
>
> THE COURT:
>
> I think the answer is yes. These questions that Mr. Thomson asks, "now am I correct that," that's his modus operandi. So I think he meant the answer to be yes.
>
> THE WITNESS:
>
> The answer is yes. Thank you for that.[186]

147. Mr. Glassman simply dodged the question repeatedly, even though **he attached a total of five documents to his affidavit**:

> Q. You have not attached to your affidavit even one document in which Mr. Moyse conveyed to West Face the confidential information of Catalyst concerning either Wind Mobile or VimpelCom; correct?
>
> A. No, but we have evidence of other confidential information that he passed on and conveniently wiped electronic devices, contrary to a Court order. I'm allowed to make an inference from that.
>
> Q. No, will you come back and answer my question.
>
> A. I think I did.
>
> Q. Let me put it to you again simply. Just try to follow the questions. You have not attached to your affidavit a single document in which Mr. Moyse conveyed to West Face confidential information of Catalyst concerning either Wind Mobile or VimpelCom? That was the question.

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[186] Riley Cross, June 8 at pp. 578:20 – 580:12.

A. We believe he has destroyed that evidence.

Q. I'm going to put it to you for the third time. Mr. Glassman, this is your last chance. You have not attached to your affidavit a single document in which Mr. Moyse conveys to West Face confidential information of Catalyst concerning either Wind Mobile or VimpelCom, have you?

A. I stand by my answers.[187]

PART IV - THE FACTS RELEVANT TO WEST FACE'S PARTICIPATION IN THE ACQUISITION OF WIND

A. Introduction: Catalyst's Allegations of Misuse of Confidential Information by West Face

148. In its Amended Amended Amended Statement of Claim, Catalyst alleges that West Face solicited and obtained Catalyst's confidential information from Mr. Moyse, and that "**but for**" this transmission of information, West Face would not have successfully negotiated a purchase of WIND. As set out above, West Face did **not** solicit, and **never** obtained, any of Catalyst's confidential information about WIND from Mr. Moyse. This section of the submissions explains how West Face successfully negotiated the purchase of WIND – and how this was accomplished without ever having received any information about Catalyst's efforts to acquire WIND from Mr. Moyse.

B. 2008-2013: Background to the WIND Opportunity

i. Introduction: the Relevant Background Facts Are Not in Dispute

149. The background to the WIND opportunity was generally common ground as between the Parties and is not in dispute on any material point. That is, Mr. De Alba agreed with all of the material points made by Mr. Griffin in his Affidavit, and both Parties had a common understanding as to what led to VimpelCom's desire to exit its billion-dollar investment in WIND in late 2013. The fact that there was no substantive

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[187] Glassman Cross, June 7, 2016 at pp. 354:10-355:13.

disagreement between the Parties does **not** mean, however, that the background facts are not important. On the contrary, and as set out in more detail below, Mr. De Alba's admissions were significant because they support the reliability of West Face's evidence regarding which information the Investors used (and which information the Investors **did not** use) in crafting the Investors' ultimately successful proposal to buy WIND from VimpelCom.

ii. The Formation of WIND, its Capital Structure, and the Public Struggles of its Foreign Owners (Orascom and VimpelCom) in the Canadian Regulatory Environment

150. 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**").[188]

151. 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

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[188] Griffin Affidavit sworn June 4, 2016, at para. 21. At the time WIND was the public name for Globalive Wireless Management Corp.

spectrum WIND acquired licenses to use at that time was known as AWS-1 (AWS stands for "advanced wireless services").[189]

152. WIND's AWS-1 wireless spectrum was acquired in a "set aside" auction from which incumbent wireless carriers were excluded, and were therefore subject to a *per se* restriction on transfer to incumbents for at least five years. In addition to this *per se* restriction, WIND's AWS-1 spectrum was at all times subject to numerous restrictions on transfer:

(a) the Minister of Industry's unilateral discretion whether to permit transfer pursuant to the terms of license;

(b) *Competition Act* approval;

(c) *Investment Canada Act* approval; and

(d) CRTC approval.

Contrary to Mr. Glassman's assertion, WIND's terms of license were never amended.[190]

153. 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

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189 Griffin Affidavit sworn June 4, 2016, at para. 22.
190 Lockie Chief, June 10 at p. 1155:11-14.

and parts of southern Ontario, as well as Edmonton, Alberta, and Vancouver, Abbotsford, and Whistler, British Columbia.[191]

154. In 2011, VimpelCom 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.[192]

155. 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 (and remains to this day) heavily regulated. Indeed, regulatory concerns had already prevented VimpelCom from carrying out a reorganization of WIND ownership in 2013 that would have bought out AAL and given VimpelCom total control of WIND (through Orascom). VimpelCom's attempt to buy out AAL was reported in the press.[193]

156. Given this history, West Face was well aware by late 2013 (when Mr. Lacavera first reached out to West Face regarding this specific opportunity) that VimpelCom was frustrated by the regulatory hurdles it faced in Canada, and that this frustration drove its decision to divest its ownership of WIND.[194]

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191 Griffin Affidavit sworn June 4, 2016, at para. 23.
192 Griffin Affidavit sworn June 4, 2016, at para. 24.
193 Griffin Affidavit sworn June 4, 2016, at para. 25.
194 Griffin Affidavit sworn June 4, 2016, at para. 25.

157. Another important factor for WIND's capital structure was that, over the years, Orascom, and later VimpelCom, had made numerous substantial shareholder loans totalling approximately $1.5 billion to WIND to finance, among other things, the aforementioned $442 million acquisition of AWS-1 wireless spectrum in 2008, the build-out of WIND's network, and general operating needs. This debt allowed VimpelCom to control the sale process, notwithstanding that it had a minority voting interest in GIHC and WIND, because VimpelCom could seek to force an insolvency if it was not satisfied with the sale process (and in doing so wipe out Globalive's equity).[195]

158. Given VimpelCom's first-hand experiences with the challenges in Canada of obtaining regulatory approval for changes in ownership in WIND, West Face understood (and was also repeatedly, explicitly, told by VimpelCom and its advisors) that minimizing or eliminating any such risk would be crucial to a successful bid for VimpelCom's interests in WIND.[196]

iii. West Face's Longstanding Interest in Telecom / WIND

159. At various points along this proceeding, Catalyst has suggested that West Face appeared out of the blue and "scooped" the WIND opportunity from Catalyst once Catalyst's exclusivity period expired toward the end of August, 2014, and that West Face could only have done so with access to Catalyst's confidential information. For example, in his Affidavit sworn February 18, 2015, one of Mr. Riley's stated grounds for "believing" that Mr. Moyse communicated Catalyst's confidential information to West Face was as follows:

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[195] Griffin Affidavit sworn June 4, 2016, at para. 26; Lockie Cross, June 10 at pp. 1189:7 – 1191:15**;** Griffin Chief, June 8 at p. 171:9-16.

[196] Griffin Chief, June 8, at p. 712:6 – 713: 2; Griffin Affidavit sworn June 4, 2016, at para. 27.

> **If** West Face had been **starting from scratch**, without the benefit of inside information, it would not have been able to negotiate a deal with VimpelCom **that easily**.[197]

160. The suggestions that West Face (and necessarily its co-Investors) were "starting from scratch" or that its negotiations with VimpelCom were "easy" were absurd, and evidence of nothing more than Mr. Riley's past willingness to hazard guesses supportive of Catalyst's theories, so long as he could do so out of Court.

161. In response to these allegations, West Face led unchallenged evidence regarding its longstanding interest and expertise in the telecom sector,[198] as well as evidence that it had previously explored a specific investment in debt securities in WIND in 2009.[199] Mr. Griffin testified that West Face has begun following WIND as early as the 2008 AWS-1 spectrum auctions.[200]

162. Moreover, and as set out in the next section, the contemporaneous documents demonstrate that West Face actually had an early lead over Catalyst in negotiations with VimpelCom, and that West Face's pursuit of the specific WIND opportunity began months before Mr. Moyse reached out for a job in March 2014.

C. November 2013 – July 2014: West Face's Early and Repeated Efforts to Acquire WIND

i. November-December 2013: Mr. Lacavera Advises West Face that VimpelCom Wants Out, and West Face Gets an Early Lead in the Race for WIND

163. West Face learned of the WIND opportunity from WIND's founder and then-Chairman and CEO, Anthony Lacavera. Specifically, on November 4, 2013,

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197 Riley Affidavit sworn February 18, 2015, at para. 47(d), (emphasis added).
198 Griffin Affidavit sworn June 4, 2016, at para. 28; Griffin Chief, June 8 at p. 710:6-713:2.
199 Dea Affidavit sworn June 3, 2016, at para. 46.
200 Griffin Chief, June 8, at p. 711:6 - 712:5.

Mr. Lacavera called West Face and spoke to Messrs. Griffin and Zhu. He 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.[201]

164. Among other things, Mr. Lacavera gave West Face some of the above background information on the existing regulatory environment, and how the Canadian Government had been steadfast in its policy to promote a fourth national wireless carrier. Mr. Lacavera also explained VimpelCom's apprehensiveness of both the Government and potential purchasers as a result of previous failures to exit the investment (such as its public failures to sell WIND to US carrier Verizon or private equity firm Birch Hill in 2013).[202]

165. Mr. Griffin summarized the call as follows:

> Effectively what had been communicated to us was that VimpelCom was no longer interested in continuing to fund the Wind Mobile business indirectly through its interest in Orascom. Up this that point in time, it had been a series of shareholder loans that had funded the capital requirements insofar as capital expenditures and operating losses were concerned.
>
> And I think after a series of efforts to try to change the relationship that VimpelCom had with this company into a position where its voting control of the business reflected its true economic interest, with those efforts having been frustrated by the decisions of the federal government, they were effectively going to make a last attempt to either sell the business on a very expedited basis and exit entirely, cleanly and conclusively, or the company was likely going to fall into CCAA proceeding sometime in the future.[203]

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201 Griffin Affidavit sworn June 4, 2016, at para. 29. Mr. Zhu's notes from the November 4, 2013 phone call with Mr. Lacavera were produced as WFC0108177.

202 Griffin Affidavit sworn June 4, 2016, at para. 29. Copies of articles reporting these stories were produced as WFC0109538, WFC0109540, and WFC0109542. See also Griffin Chief, June 8 at p. 714:19 - 717:24.

203 Griffin Chief, June 8 at pp. 714:25 – 715:19.

166. West Face's interest was immediately piqued. 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 (by then known as Global Telecom Holdings S.A.E.). West Face gained access to the WIND data room the next day (December 10), and then participated in a management presentation from WIND on December 18 (all dates in 2013).[204] For the next few months, West Face carried out due diligence and financial modelling, prepared business forecasts, assessed capital requirements for the business, determined its wireless spectrum requirements, and analyzed potential debt or equity financing requirements.[205]

167. In contrast, Catalyst did not deliver an expression of interest to VimpelCom until January 2, 2014,[206] did not enter into a confidentiality agreement until March 21, 2014,[207] and did not gain access to the WIND data room or receive a management presentation from WIND until May 9, 2014.[208]

ii. January-April, 2014: VimpelCom Withdraws its Financial Support for WIND, and Lets WIND Default on its Third-Party Vendor Debts

168. Two significant and public events occurred from January to April, 2014, both of which signalled that VimpelCom had no interest in further supporting WIND's business.

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204 Griffin Affidavit sworn June 4, 2016, at paras. 30-31. See also WFC0080889 and WFC0107228. See also Griffin Cross, June 9, at pp. 956:9- 959:8.

205 Griffin Affidavit sworn June 4, 2016, at para. 33.

206 De Alba Affidavit sworn May 27, 2016 at para. 26; CCG0025176; CCG0025117.

207 De Alba Affidavit sworn May 27, 2016 at paras. 38-39. See also De Alba cross, June 6 at p. 148:10-22. See also Glassman cross, June 7 at pp. 365:23-366:2. See also CCG-0023894.

208 De Alba cross, June 6 at p. 245:1-4.

169. The first of those events occurred in mid-January, when VimpelCom withdrew its financial support for WIND's bid in the 700 MHz spectrum auction.[209] This left WIND with a shortfall in spectrum and jeopardized its ability to "re-farm" its 3G (third generation) network and build-out a new LTE ("long term evolution" or fourth generation) network. As set out in an article published in the *Financial Post* on January 13, 2014:

> Mr. Lacavera said the fact that Wind will not secure additional airwaves in this year's auction will not affect its ability to operate its network or serve its customers **in the immediate term**.
>
> "Wind has emerged as the fourth carrier in Ontario, B.C. and Alberta, **but we still have need of additional spectrum for LTE**," he said in an emailed statement. "**Today's development leaves us with a spectrum shortfall we must still address**".
>
> Wind built a third-generation [3G] network on its existing spectrum, which is what is known as the AWS band of spectrum.
>
> In order to update to a more advanced LTE (long-term evolution or fourth-generation) network, it must either reallocate part of its existing spectrum and carefully migrate its customers to the faster network **or acquire more airwaves**.

170. The second event was VimpelCom writing its investment in WIND down to zero and letting WIND default on its vendor debt. Specifically, by March 2014, WIND had approximately $150 million (US) in outstanding third party vendor debt (not to mention significantly more debt owed to VimpelCom). In addition to the debt acquired by Providence Equity Partners and Tennenbaum back in 2012, this third party debt was held by Huawei and Alcatel-Lucent. Tennenbaum continued to hold the approximately $25 million (US) in debt that it had acquired in May 2012.[210]

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209 Griffin Affidavit sworn June 4, 2016, at para. 33; Leitner Affidavit sworn June 1, 2016, at para. 16; De Alba Affidavit sworn May 27, 2016, at para. 28.

210 Leitner Affidavit sworn June 1, 2016, at para. 14.

171. WIND's third party vendor debt (including that held by Tennenbaum) came due on April 30, 2014. In March and April 2013, VimpelCom reached out to the third party lenders, including Tennenbaum, to seek an extension and/or refinancing of these instruments. No such agreements were made prior to the debts' maturity on April 30. Thus, as of May 1, WIND was in default on its debts to third party lenders, including Tennenbaum.[211]

iii. April-May, 2014: West Face Makes Early Proposals to Acquire WIND, and Receives Feedback that VimpelCom Wants a Complete Exit

172. On April 14, 2014 (the day *before* Mr. Moyse had ever set foot in West Face's office for his job interviews), Mr. Lacavera reached out to West Face to resume discussions about the WIND opportunity.[212] At that point in time, there was some urgency for West Face to put a proposal together due to the outstanding third-party vendor debt that was coming due on April 30, 2014 as set out above.[213] For this reason, West Face worked hard and moved quickly to develop a proposal to submit to VimpelCom.[214] Within days, West Face was provided with an updated investor presentation and retained corporate counsel (Davies).[215]

173. At the time (late April, 2014), West Face believed that VimpelCom's main priority was to refinance the vendor debt before the expiration of the 30-day forbearance period expiring at the end of May 2014.[216] For this reason, when West Face submitted its first proposals for WIND on April 23, its bid proposed a combination of debt refinancing and

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211 Leitner Affidavit sworn June 1, 2016, at para. 15.
212 Griffin Affidavit sworn June 4, 2016, at para. 34. See also WFC0061108.
213 Griffin Affidavit sworn June 4, 2016, at para. 34.
214 Griffin Affidavit sworn June 4, 2016, at para. 35.
215 Griffin Affidavit sworn June 4, 2016, at para. 36.
216 Griffin Affidavit sworn June 4, 2016, at para. 35.

equity that would allow VimpelCom to retain minority ownership of WIND.[217] On April 25, VimpelCom's advisors gave West Face feedback that confirmed that speed of closing was a significant issue to VimpelCom.[218]

174. However, the deal was ultimately not acceptable to VimpelCom,[219] and VimpelCom's advisors very quickly dispelled West Face's misunderstanding of VimpelCom's priorities. Specifically, on May 1, UBS advised West Face that VimpelCom was interested only in an outright sale of VimpelCom's debt and equity interests in WIND. As Mr. Griffin stated in his contemporaneous email of May 2 sent to everyone on West Face's WIND deal team and West Face's internal and external counsel:[220]

> VimpelCom provided feedback on our proposal yesterday and has asked that we amend our offer letter to simply contemplate a purchase of 100% of their equity interest for cash. They do not wish to have any rollover equity participation in the business.[221]

175. In response to this feedback, West Face promptly adapted its proposal to suit VimpelCom's stated desires (as discussed in more detail below, this reaction reflected West Face's overall fluidity and willingness to work within the paradigm being established by VimpelCom, to and adapt and evolve its strategies as the deal progressed).

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217 Griffin Affidavit sworn June 4, 2016, at para. 36. A copy an email West Face received attaching the updated investor presentation was produced as WFC0060563, and the presentation itself was attached as WFC0060565. Copies of West Face's late April proposals were produced as WFC0066640 and WFC0066644. See also Griffin Cross, June 9, pp. 962:8 – 967:4. See also Griffin Cross, June 8, pp. 721:18-723:3.

218 Griffin Affidavit sworn June 4, 2016, at para. 37. See also WFC0109155 and WFC0041076.

219 Griffin Cross, June 9, p. 976:12-17.

220 Griffin Affidavit sworn June 4, 2016, at para. 38.

221 WFC0109163. See also Griffin Cross, June 8, p. 724:8-19.

176. Thus, on May 4, 2014, West Face sent VimpelCom a revised proposal that included a purchase of 100% of WIND's equity, based on a $300 million enterprise value that had been communicated by VimpelCom and its agents,[222] with 90 days exclusionary and a break fee if VimpelCom completed a different transaction prior to December 31, 2015.[223] Griffin described the second proposal as "trying to tailor our initial investment with $200 million of first lien debt financing in the company, … and then we could make a follow-on investment contingent on certain outcomes occurring in the future.[224] The second proposal was conditional on regulatory approvals – including Industry Canada Approval, Competition Bureau approval and shareholder approval.[225] Mr. Lacavera's only comment on West Face's May 4 proposal was to make it clear that there would be no significant issues regarding the time it would take West Face to gain regulatory approval.[226] West Face understood Mr. Lacavera's reason for giving this advice was because of VimpelCom's apprehensiveness of the regulatory approval process and its desire for an extremely low-risk transaction. West Face made sure to address this issue as the first agenda item in its next meeting with UBS.[227]

177. While VimpelCom did not accept West Face's May 4 proposal, West Face continued to actively pursue WIND, and invested significant time and expense in doing so in the May time period. For example, West Face requested that its corporate counsel also be given access to the data room in order to conduct legal due diligence. West Face also hired a number of consultants to advise West Face regarding WIND's

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222 Griffin Affidavit sworn June 4, 2016, at para. 42. A copy of West Face's May 4, 2014 proposal was produced as WFC0106772. See also Griffin Cross, June 8 at pp. 726:9-727:22; 976:18-979:3.
223 Griffin Cross, June 9 at pp. 979:18-980:5.
224 Griffin Chief, June 8 at p. 736:15-23.
225 Griffin Chief, June 8 at pp. 728:13 - 728
226 Griffin Affidavit sworn June 4, 2016, at para. 43.
227 Griffin Affidavit sworn June 4, 2016, at para. 44.

business, including Peter Rhamey and George Horhota, two consultants in the Canadian wireless market, and Altman Vilandrie & Company ("**AV&Co**"), a well-known US consultancy firm specializing in the telecom, media, and technology industry.[228] West Face ultimately paid these advisors hundreds of thousands of dollars for their expertise, industry specific advice, and with respect to AV&Co, technical diligence on WIND. By May 2014, VimpelCom had made clear that it had engaged UBS Securities as its financial advisor, and that it was looking for a price of $300 million on an enterprise value basis. It was fairly unique for VimpelCom to stipulate the price, and further, the price was far below the cumulative amount of investment that had gone into WIND.[229] Mr. Griffin described the work and these consultants as "quite expensive".[230]

iv. May 4, 2014: West Face Makes a Proposal Based on a $300 Million Enterprise Value Before Catalyst Even Learns of this Ultimately Public Asking Price

178. West Face's May 4 proposal based on a $300 million enterprise value for WIND is a particularly notable event in this litigation for at least three reasons:

(a) first, this offer was made almost two weeks **before** West Face offered Mr. Moyse a job and almost two months **before** Mr. Moyse actually began working at West Face;

(b) second, this offer was made **before** Mr. Moyse became involved on Catalyst's WIND deal team in any kind of active and significant way

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228 Griffin Affidavit sworn June 4, 2016, at para. 45.
229 Griffin Chief, June 8, pp. 719:20 – 720-6.
230 Griffin Chief, June 8, at p. 731.

(Mr. Moyse's active involvement on the Catalyst WIND deal team began on May 6, as set out above); and

(c) third, this offer was made **before** Mr. De Alba's meeting with UBS on May 6, 2014, during which Mr. De Alba alleges that it was **he** (and not UBS) who proposed the WIND transaction be valued at $300 million on an enterprise value basis earlier that day.[231]

179. Mr. De Alba's evidence (and one of the obvious insinuations of Catalyst's counsel's line of cross-examination of various West Face witnesses) that VimpelCom's $300 million asking price was somehow confidential information of Catalyst is patently absurd. First, VimpelCom communicated the $300 million enterprise value to West Face, and presumably all bidders, *before* Mr. De Alba "proposed" it to UBS. Second, a seller's asking price could never be the confidential information of one of the prospective purchasers. Third, by the end of July 2014, VimpelCom's asking price was public knowledge in any event, as it was reported in *The Globe and Mail*.[232] This article stated, among other things:

> **Quebecor among potential buyers circling Wind Mobile**
>
> **Wind Mobile's foreign owner has put a $300-million price tag on the startup wireless carrier**, but with a number of players circling the asset, the ultimate outcome may depend on Ottawa's efforts to encourage consolidation of new entrants in the cellular industry.
> …
> A bid from Quebecor might not arrive soon enough for Wind's foreign owner, Amsterdam-based VimpelCom Ltd., however. **VimpelCom has long wanted to sell its Canadian asset and**

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231 De Alba Affidavit sworn May 27, 2016, at para. 74.

232 Griffin Affidavit sworn June 4, 2016, at para. 40. The July 31, 2014 article from *The Globe and Mail* was produced as WFC0080891.

> **has now set a reserve price of just $300-million to purchase the company, including both its debt and equity, sources with knowledge of the matter said**.[233]

180. In any event, VimpelCom did not accept West Face's May 4 offer for reasons wholly unrelated to price, but indicated that it was willing to negotiate further.

v. May 21, 2014: West Face Delivers a Presentation to Industry Canada, and Does Not Ask for Any of the Regulatory Concessions Required by Catalyst

181. On May 21, 2014, West Face delivered a presentation to Industry Canada.[234] Mr. Griffin testified that one of the principal objectives of this meeting was to convince Industry Canada that West Face had the necessary expertise and wherewithal to act as a "suitable counterparty" to own WIND. This presentation is relevant in two respects: (i) what West Face asked for from the Government of Canada; and (ii) what West Face **did not** ask for.

182. The only thing West Face asked for from Industry Canada was additional "certainty" regarding when, how, and at what cost WIND would be able to acquire additional spectrum to upgrade its network from a 3G wireless network to a 4G LTE network.[235]

183. WIND's urgent need for additional spectrum to transition to LTE is common ground between West Face and Catalyst.[236] That this issue is not in dispute is, of course, not surprising given that WIND's need for additional spectrum was entirely public knowledge, and had been reported in the press (including, specifically, in the

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233 WFC0080891 (emphasis added).
234 WFC0106480. Griffin Chief, June 8 at pp. 729-730.
235 Griffin Cross, June 9 at pp. 988:6-989:25.
236 See, for example, De Alba Affidavit sworn May 27, 2016, at para. 102; and Glassman Affidavit sworn May 27, 2016, at para. 36.

context of WIND's withdrawal from the 700 MHz auction in January 2014, as set out above).[237] In short, WIND's need for spectrum was not an issue specific to West Face, Catalyst, or any other particular bidder. It was simply a fundamental going-forward issue that WIND faced as a business, and which had been disclosed in the press.[238]

184. West Face did **not** ask Industry Canada for **any** concessions regarding roaming costs, tower sharing, or spectrum swapping, and it certainly did not demand the "ability to exit the investment with no restrictions in five years" as Catalyst had.[239] Mr. Griffin explained that West Face's investment was simply never predicated on concessions at any point.[240] In particular, Mr. Griffin confirmed that West Face did not believe that WIND or purchasers of WIND would need the ability to sell spectrum after five years.[241]

185. On the contrary, West Face indicated to Industry Canada that it was willing to **accept** a number of business and regulatory risks, including:

(a) WIND's ability to solidify its position in the Canadian market and achieve self-funding status;

(b) WIND's ability to improve the quality and reach of its network;

(c) navigating and responding to competitive actions by incumbents;

(d) assuming the financing risk associated with future funding needs including operating losses and network requirements; and

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237 Griffin Affidavit sworn June 4, 2016, at para. 49. The January 13, 2014 *Financial Post* article reporting on this story was produced as WFC0109480.

238 Griffin Affidavit sworn June 4, 2016, at para. 53.

239 Leitner Cross, June 9 at pp. 909:5–910:1.

240 Griffin Chief, June 8, at p. 739; Griffin Cross, June 9 at p. 991:11-24.

241 Griffin Chief, June 8, at pp. 740-741.

(e) assuming the risk that final rulings regarding wholesale roaming and tower sharing would not be as favourable to WIND as then currently expected.[242]

186. As Mr. Leitner testified at trial: "Our whole thesis was never predicated on regulatory concessions, we never needed regulatory concessions. The business model, as I highlighted, was really based upon the value proposition that we could provide into the Canadian marketplace".[243]

187. While West Face was alive to the other regulatory issues affecting WIND such as wholesale roaming and tower sharing, it was expected in the industry that the Government and CRTC would implement changes that would be beneficial to WIND.[244] Thus, unlike Catalyst, West Face was willing to assume the risk that these issues would be resolved in a manner favourable to WIND given the Government's longstanding commitment to encouraging the development of a fourth wireless carrier in every region of Canada.[245]

188. Hindsight, of course, has shown that West Face was justified in assuming this risk. As Mr. Griffin set out at trial, WIND actually turned into a position of profitability for the first time in the first 12 months under the new ownership. It was a material swing in the performance of the business.[246]

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242 WFC0106480. See also Griffin Affidavit sworn June 4, 2016, at para. 50.

243 Leitner Chief, June 9 at p. 866:11-22 and Leitner Cross, June 9 at pp. 885:3-886:6; see also Griffin Cross, June 10 at pp. 1121:17-1123:25; and Burt Chief, June 9, at pp. 833:24-834:2.

244 Griffin Affidavit sworn June 4, 2016, at para. 52. See also the article published by the Bank of Merrill Lynch on July 6, 2014 outlining its expectations on roaming rates, produced as WFC0107350.

245 Griffin Affidavit sworn June 4, 2016, at para. 52. See also Burt Chief, June 9 at p. 832:12-21 and Leitner Cross, June 9 at pp. 888:3-5, 909:18-20 and pp. 904:16-905:5

246 Griffin Chief, June 8 at p. 740:2-17.

189. In sum, there was only one significant regulatory hurdle on which West Face had yet to gain sufficient comfort, as at May 21, 2014: WIND's path to obtaining spectrum for the build-out of its LTE network.[247] This was a matter that would have been well known to all bidders.

vi. June 2014: West Face Continues to Adapt to Meet VimpelCom's Demands and Concerns in Order to Acquire WIND

190. West Face made a further proposal to VimpelCom on June 3, 2014. To provide a frame of reference, at this point in time, West Face and Mr. Moyse had executed the West Face Employment Contract (on May 26), Mr. Moyse had been shut out of Catalyst's office and computer network (as of May 26), and Catalyst's counsel had sent a shot across the bow of West Face and Mr. Moyse via its May 30, 2014 letter arguing that Mr. Moyse's acceptance of West Face's job offer constituted a "clear and deliberate" breach of the non-competition covenant in Mr. Moyse's Catalyst Employment Contract.

191. West Face's June 3, 2014 bid proposed that West Face would: (1) provide $160 million in bridge financing to fund the repayment of WIND's existing third party vendor debt; (2) enter in 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; and (3) be responsible for funding the company's working capital. Because this proposal involved a change of control at WIND, it was necessarily contingent on regulatory approval. However, West Face attempted to allay any possible VimpelCom

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247 Griffin Affidavit sworn June 4, 2016, at para. 53.

concerns regarding the risk of such approval not being obtained by noting that it "did not anticipate any significant regulatory issues in connection with our proposal".[248]

192. In response to this offer, VimpelCom again made it clear that it was looking for a "clean exit". In that regard, Mr. Turgeon of UBS emailed Mr. Griffin on June 10, saying:

> Tony,
>
> The delayed settlement feature you proposed does not work for VimpelCom has **the objective is still a clean exit at a $300 million EV** [*sic*].
>
> **My client is not prepared to have any portion of the proceeds contingent on a future event**, in this case the acquisition of spectrum.
>
> I am happy to discuss if required
>
> Francois[249]

193. VimpelCom was steadfast in its demand for a clear exit, and Mr. Griffin explained, "We finally got the message [after June 10] and they never wavered in that desire in either value nor the terms of the exit".[250]

194. Faced with this consistent feedback, by June 12, 2014, West Face was considering two possible options for financing an acquisition of WIND. One of those options was to join a syndicate of investors led by Tennenbaum (and specifically Mr. Leitner as the Managing Partner of Tennenbaum's telecommunications group), which at that time included two other prominent U.S. private equity firms, Blackstone

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248 Griffin Affidavit sworn June 4, 2016, at para. 54. A copy of the June 3, 2014 proposal was produced as WFC0106765. See also Griffin Chief, June 8 at pp. 745:8-746:15 and Griffin Cross, June 9 at pp. 995: 20-998:1.

249 WFC0058252. See also Griffin Chief, June 8 at p. 748:4-20 and Lockie Chief, June 10 at p. 1157:1-3.

250 Griffin Chief, June 8, pp. 747:21-748:20; p. 753:20-22; see also Griffin re-exam, June 10, pp. 1140:20-25.

and Oak Hill (the "**Tennenbaum Syndicate**").[251] After considering its options, West Face determined that it did not, at that time, want to become a fourth member of the Tennenbaum Syndicate and instead continued to pursue WIND on its own.

195. On June 19, 2014, West Face made yet another proposal to VimpelCom for the acquisition of 100% of WIND's equity. Again, because this proposal involved a change of control transaction, it was conditional on regulatory approval, and West Face included the same language as its previous proposal that it "did not anticipate any significant regulatory issues in connection with our proposal".[252]

196. Finally, during the period of June 20-22, 2014 West Face's counsel prepared a share purchase agreement for delivery to UBS. Mr. Griffin emailed the draft agreement to Mr. Turgeon of UBS on the morning of Monday, June 23, 2014. What followed was a series of emails exchanged between Messrs. Griffin and Turgeon in which Mr. Turgeon expressed disappointment that West Face and its counsel had drafted their own share purchase agreement from scratch instead of using VimpelCom's counsel's draft.

197. Two of these June 23 emails from Mr. Turgeon are particularly notable. The first of these provided:[253]

> Tony,
>
> We realized that the SPA you sent us is not a mark-up of the SPA we sent you. **Given the competitive nature of this process**, we would ask that you send us a mark-up of the form we [sent] you a month ago (please let me know if you don't have it). Can you

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251 Griffin Affidavit sworn June 4, 2016, at para. 59. An email from Mr. Griffin to Mr. Lacavera outlining what West Face then considered to be its two "paths" was produced as WFC0050393.

252 Griffin Affidavit sworn June 4, 2016, at para. 62. A copy of West Face's June 19, 2016 proposal was produced as WFC0059316.

253 WFC0073246.

> please ask your lawyers to proceed and get back to us with a mark-up **as soon as possible**.
>
> Thanks
>
> Francois

198. The second particularly notable email of Mr. Turgeon's on June 23 stated:[254]

> This mark-up is really not helpful as [it] seems to be completely redoing the SPA or starting with the [form] your lawyers have put together. **As discussed on Friday** [June 20], our client is looking for a **clean exit on [an] "as-is-basis"** [with] a SPA very [close] to what we have sent you. As we told you, **this is a competitive process and others are further advanced on their due diligence and have provided much lighter mark-up to our form of SPA.**
>
> Having our lawyers review and mark-up the SPA will likely take more than a week and place you at [a] strong disadvantage as other are much closer and **as we discussed speed of execution is very important** to our client.
>
> Can you ask your lawyers to start with our form and limit their mark-up to substance as opposed to form?
>
> See you tomorrow
>
> Francois

199. This episode drove home for West Face VimpelCom's desire for a simple, "clean exit". This philosophy – and not any non-existent information from Mr. Moyse – ultimately drove the Investors' winning strategy to acquire WIND.[255]

vii. Summary of West Face's Efforts to Acquire WIND Before Mr. Moyse Started Working at West Face

200. While none of West Face's many early proposals detailed above resulted in a deal for WIND, the combination of relationships with Globalive and Tennenbaum, the strategies to meet the conditions for a successful acquisition imposed by VimpelCom,

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254 WFC0067814. See also Griffin Chief, June 8, p. 754:4-18.

255 Griffin Affidavit sworn June 4, 2016, at para. 63. See also Burt Cross, June 9, at p. 850:23-25 and p. 851:22-25.

the outlines of the agreements developed, and the significant due diligence conducted by that date, including the engagement of third party consultants such as AV&Co, all proved critical in completing the transaction several months later.[256]

201. All of this was accomplished before Mr. Moyse even started working at West Face, and without any involvement by or information from him at any time.[257]

D. June 23-August 7, 2014: West Face Teams Up With the Other New Investors

i. Late June to mid-July, 2014: West Face Pursues a Partnership with a Strategic Party that Proves to be a Dead End

202. As set out above, during the three and a half weeks Mr. Moyse was working at West Face as a junior associate (June 23 to July 16, 2014), West Face was working with a strategic partner to acquire WIND. During this limited time frame, Mr. Moyse was walled off pursuant to the Confidentiality Wall and had no involvement in West Face's pursuit of WIND with this party or in any other way whatsoever.[258]

203. On July 18, 2014, two days after Mr. Moyse stopped working for West Face, the strategic partner that West Face had been negotiating with advised that it would be withdrawing from the transaction. This left West Face no closer to a WIND transaction than when Mr. Moyse joined the firm.[259]

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256 Griffin Affidavit sworn June 4, 2016, at para. 61.
257 Griffin Affidavit sworn June 4, 2016, at para. 61.
258 Griffin Affidavit, sworn June 4, 2016, at paras. 80-82.
259 Griffin Affidavit sworn June 4, 2016 at paras. 81-82.

ii. Late July, 2014: West Face Revives its Former Discussions with Tennenbaum, and the "New Investors" Syndicate is Formed

204. Given the withdrawal of West Face's potential strategic partner, West Face had to again act nimbly and re-adjust its strategy in order to stay in the race for WIND.[260] For this reason, in late July 2014, West Face revived its former discussions with the Tennenbaum Syndicate.[261] Larry Guffey had a connection to Mr. Lacavera, who connected the parties.[262] Michael Leitner had reached out to West Face in June 2014. In his view the process was crystal clear. The price was the price. It was $300 million and there was $150 million dollars of vendor debt that had to be refinanced.[263]

205. Tennenbaum, in turn, was equally motivated to resume its discussions with West Face, given that around the same time period (late July), Blackstone and Oak Hill's interests in pursuing WIND were waning.[264] In fact, both Blackstone and Oak Hill ultimately declined to participate.[265]

206. Given these coinciding interests, West Face and Tennenbaum joined together in their efforts to acquire WIND. After obtaining VimpelCom's permission to collaborate, Tennenbaum shared its financial modelling information and its third party network and technology diligence with West Face, and in return West Face shared its third party diligence on the Canadian wireless market with Tennenbaum.[266] Mr. Leitner confirmed that at no point did Tennenbaum's discussions with West Face concern Catalyst's negotiating position or its confidential regulatory strategy as described by

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260 Griffin Affidavit sworn June 4, 2016, at para. 83.
261 Griffin Affidavit sworn June 4, 2016, at para. 84.
262 Burt Chief, June 9 at p. 831:16-19.
263 Leitner Chief, June 9 at p. 868: 4-14. See also Griffin Cross, June 9 at pp. 1027-1029.
264 Leitner Affidavit sworn June 1, 2016, at para. 21.
265 Burt Affidavit sworn June 1, 2016 at para. 18. See also Leitner Cross, June 9 at pp. 891:3-892:11.
266 Leitner Affidavit sworn June 1, 2016, at para. 21.

Mr. Glassman.[267] Nor could they have, because, as set above, West Face had no such information, including from Mr. Moyse.

207. At trial, Mr. Leitner described Tennenbaum's very good reasons for wanting to partner with West Face as follows:

> Q. Why was West Face an acceptable partner to Tennenbaum?
>
> A. A number of reasons. Number one, they are very knowledgeable about the telecom sector, and when you are putting together equity consortiums, you put together consortiums with firms that have common vision, they see the operating plan in a very similar fashion, so they had a lot of sophistication about the space. They were very well-known in Canada. They were a Canadian citizen, which was obvious from us from day one that that's an important part of any equity syndicate, which we didn't have. So they, you know, for those reasons, became – were a valuable part of what we saw as putting together a good team of equity investors.[268]

208. It was also the evidence of Mr. Burt that West Face offered certain benefits such as its familiarity with the Canadian telecommunications industry and the fact that it could act as a source of Canadian financing.[269]

209. In short, the relationship was a symbiotic one. West Face could not afford to purchase and finance WIND alone, and Tennenbaum needed some Canadian content in order to reduce its risk of failing to obtain regulatory approval. More importantly, however, both firms are sophisticated, top-tier investment management firms with

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267 Leitner Affidavit sworn June 1, 2016, at para. 21.
268 Leitner Chief, June 9 at pp. 868:22-869:12.
269 Burt Affidavit sworn June 1, 2016, at para. 15.

expertise in the telecom sector, and they both saw WIND as both a viable business (without any regulatory concessions)[270] and a potentially very profitable investment.

iii. Views of the New Investor Consortium

210. Unlike Catalyst, the members of West Face's consortium held favourable views regarding the prospects and viability of the WIND business.

211. For example, Mr. Griffin, on behalf of West Face, testified that the business was at a positive inflection point and within "striking distance of having enough subscribers, as one indicia of success, to turn from years of cumulative operating losses to a position of profitability". Mr. Griffin felt that the signs were particularly positive because of the recent developments in terms of roaming and tower sharing that had been announced by the CRTC. Furthermore, with the demise of Public Mobile and Mobilicity, WIND was enjoying what Mr. Griffin described as a much more "rational pricing environment".[271]

212. The Government had also provided some much needed clarity on the terms of the AWS-3 auction. As Mr. Griffin noted, this was something that West Face had been waiting for. As it turned out, a large portion of the AWS-3 spectrum licenses were set aside for small carriers, and WIND was one of the few remaining participants with the financial wherewithal to participate as a bidder.[272]

213. Mr. Griffin summarized all of these positive factors as follows:

> So you had this confluence of factors all converging at once, and yet through the piece the vendor never adjusted their price expectations, and yet the certainty and our conviction in the ability

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270 Burt Chief, June 9 at pp. 833:24-834:2.
271 Griffin Chief, June 8 at pp. 733-735.
272 Griffin Chief, June 8 at p. 735.

> of this business to survive on its own as a fourth market entrant just increased through the period.[273]

214. Mr. Burt agreed that 64NM's view was that, given the AWS-3 auction, WIND was a viable stand-alone business.[274]

215. Mr. Leitner gave evidence with respect to Tennenbaum's views regarding the business.[275] As touched on above, Mr. Leitner had been investing and operating in the telecom industry for almost 25 years. He had spent his career as an investment banker and then senior executive in a number of technology and telecom companies. Mr. Leitner had worked at three different telecom companies in various roles. He worked for 360 Network (a Canadian company), was the CEO of GlobeNet Communications, and was the head of strategy, corporate development and effectively chief restructuring officer at WilTel Communications. He had been with Tennenbaum for twelve years and had led several billion dollars of investments in the communications, technology and media space.[276]

216. Mr. Leitner also had a long history with WIND. As touched on above, Tennenbaum had been a WIND debt holder since 2012, and held approximately $25 million of the $150 million in outstanding vendor debt that came due in April 2014. Tennenbaum's longstanding holdings in WIND gave it a "diligence advantage", with "very strong knowledge of the company". Despite that, Mr. Leitner described how Tennenbaum nevertheless engaged in a thorough diligence process, including by

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273 Griffin Chief, June 8 at p. 735.
274 Burt Chief, June 9 at pp. 832:22-833:4.
275 Leitner Chief, June 9 at pp. 867:17-868:16.
276 Leitner Chief, June 9 at pp. 860-861.

"bringing on board" a set of advisors that included ex-CEOs of both Public Mobile and Leap Wireless (a telecom firm in the U.S. with a similar model to WIND).[277]

217. Mr. Leitner spoke throughout the trial with great experience, great conviction, and gravitas.

iv. July 23, 2014: VimpelCom Enters Exclusivity with Catalyst and Shuts Down Negotiations with West Face and the other New Investors

218. On July 23, 2014 (a week after Mr. Moyse went on leave from West Face pursuant to the Interim Consent Order), from which he never returned, VimpelCom granted Catalyst an exclusive negotiating period to conclude a binding agreement for the acquisition of WIND.[278]

219. West Face, Tennenbaum, and LG Capital all learned that VimpelCom had granted an unnamed bidder exclusivity on July 23 from UBS, VimpelCom's financial advisor.[279] Despite the fact that UBS did not disclose the identity of this other party, Tennenbaum was fairly confident that this party was Catalyst, given that Catalyst had been actively seeking financing in the market.[280] As Mr. Griffin testified, West Face had heard a considerable amount of press speculation about other bidders for WIND, including Verizon Telecommunications, Tennenbaum Group, Birch Hill, and Catalyst. West Face had heard press discussion of Catalyst's potential involvement with both Mobilicity and WIND as far back as 2013.[281]

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277 Leitner Chief, June 9 at pp. 463:18-866:10.

278 Griffin Affidavit sworn June 4, 2016, at para. 84. See also Leitner Affidavit sworn June 1, 2016, at para. 22.

279 Griffin Affidavit sworn June 4, 2016 at para. 84; Leitner Affidavit sworn June 1, 2016 at para. 21; Burt Affidavit sworn June 1, 2016 at para. 19; WFC0048724. See also Leitner Cross, June 9 at pp. 919:13-920:9.

280 Leitner Affidavit sworn June 1, 2016, at para. 22.

281 Griffin Chief, June 8 at p. 749:3-24. See also Leitner Cross, June 9 at pp. 913:7-915:5.

220. Despite this educated guess, each of Messrs. Burt, Leitner and Griffin testified repeatedly that they **did not know** for certain that it was Catalyst that was in exclusivity with VimpelCom.[282] In any event, this information could not have come from Mr. Moyse, who had been shut out of Catalyst for two months. West Face's view that Catalyst was involved as a potential bidder for WIND was based on speculation and rumour rather than any hard information. Mr. Griffin communicated this to Mr. Lacavera in a June 4th, 2014 email, where he said that "Catalyst seems to be a lot of air":

> Q. What did you mean by that, "Catalyst seems to be a lot of air"?
>
> A. Well, I guess to put it in layman's terms, for all the smoke and discussion about their potential involvement, we had nothing to substantiate that they were there, that they were serious or credible. I didn't know.[283]

221. Mr. Griffin further testified that while West Face was guessing as to who the party in exclusivity with VimpelCom was and, while West Face never knew this definitively, their "supposition was, though, that Catalyst was the party in exclusivity with VimpelCom".[284]

222. During its cross-examinations of West Face's witnesses, Catalyst's counsel implied that something improper was disclosed by the New Investors' knowledge that VimpelCom was in exclusivity and their suspicion that Catalyst was the bidder. Counsel also put to Messrs. Griffin and Leitner that the use of the word "Catalyst" in its internal

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[282] Burt Cross, June 9 at pp. 852:1-853:2; Leitner Cross, June 9 at p. 911:14-25; Leitner Cross, June 9 at p. 918:13-17; Griffin Cross, June 9 at pp. 1024:22-1025:16.

[283] Griffin Chief, June 8 at p. 752:2-8.

[284] Griffin Chief, June 8 at p. 758:5-10.

emails about the other bidder with whom VimpelCom had entered exclusivity meant that the New Investors **knew** that the other bidder was Catalyst.[285]

223. Catalyst's criticisms and implications in this respect are baseless. There are any number of reasons why the New Investors were fairly confident that this other bidder was Catalyst. **None** of these reasons involve information provided by Mr. Moyse, who, of course, would have had no clue about the status or substance of Catalyst's negotiations with VimpelCom at the time of Catalyst's exclusivity on July 23, because he had been shut out of Catalyst since May 26. Rather, the reasons of the New Investors include:

(a) *first*, and as Mr. De Alba admitted, Catalyst's interest in combining WIND and Mobilicity was in the news by the end of 2013;[286]

(b) *second*, Catalyst's counsel had told West Face's counsel over a month before that Catalyst was concerned about Mr. Moyse's involvement in a "telecom file", and West Face had, for that very reason, established the Confidentiality Wall regarding WIND.[287] In short, Catalyst *itself* gave West Face enough information to speculate that Catalyst was actively pursuing WIND;

(c) *third*, Mr. Leitner testified that there had been "market chatter" that Catalyst had been actively seeking financing in the market. As Mr. Leitner explained:

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285 Leitner Cross, June 9 at pp. 912:4-918:19; Griffin Cross, June 9 at pp. 1032:3-1033:5.
286 De Alba Cross, June 6 at p. 235:8-20.
287 Griffin Affidavit sworn June 4, 2016, at para. 13.

> I heard another party was seeking exclusivity, and I wrote "Catalyst" because of all of the inferences and other chatter which I just described, my presumption was that it was Catalyst that was in this process;[288]

(d) *fourth*, Mr. Leitner's answer was not materially different than the answers Mr. Riley gave on behalf of Catalyst almost two years ago to questions asked during his first cross-examination in this case on July 29, 2014. Specifically, West Face's counsel asked Mr. Riley how Catalyst *knew* West Face was involved in the WIND file (given that a month previously Catalyst's counsel had advised West Face's counsel on the phone call of June 18, 2014 that Catalyst was concerned about Mr. Moyse's previous involvement on a "telecom file" at Catalyst). Mr. Riley answered these questions by referring to "market intel":

> Q. So there were two telecom deals, Mobilicity and Wind that were discussed on that call. How did, or did you know, or was it just a guess that West Face was involved in those at this point in time?
>
> A. In those two?
>
> Q. Yes
>
> A. Based on market.· Market intel. I mean unless someone – to use the term we use, unless someone surfaces you don't know 100 percent for sure, but you can tell from market intel that there's a high likelihood.
>
> Q. So it was generally known in the marketplace that there was a high likelihood?
>
> A. I don't know what our source was. I don't know our particular source for that, whether it was sort of well-known in the

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[288] Leitner Cross, June 9 at p. 914:16-20.

> marketplace or whether there was some well-placed sources that informed us. It could be one of the two.[289]

(e) *Similarly*, throughout this litigation, Catalyst has alleged that Mr. Moyse *knew* that West Face was a competitor to Catalyst with respect to the WIND opportunity at a very early stage.[290] When asked on discovery, three weeks before trial on May 11, 2016, how Mr. Moyse could possibly have known West Face was pursuing WIND before he accepted a job offer, Mr. De Alba explained:

> Q. I'm asking a different question. I'm not asking how [Mr. Moyse] knew about what Catalyst was pursuing. How did Mr. Moyse, when he was at Catalyst, know what West Face was doing? Did you know that at Catalyst?
>
> A. In those discussions we analyze who could be the competitors on a certain deal.
>
> Q. Okay.
>
> A. And it's natural that in Canadian situations, West Face is a common competitor.

These answers clearly disclose that Catalyst was keeping an eye on West Face, just as West Face was keeping an eye on Catalyst.

v. Catalyst's Improper Questions Regarding Breach of Exclusivity

224. Catalyst's counsel, in breach of its repeated assurances and undertakings,[291] has attempted to raise issues concerning an alleged breach of Catalyst's exclusivity period with VimpelCom, purportedly to: (i) test the assertion in Mr. Griffin's Affidavit, sworn

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289 Riley Cross, July 29, 2014 at qq. 656-658. Mr. De Alba also gave evidence that Catalyst knew West Face was a competing bidder for WIND: see De Alba Chief, June 6 at pp. 163:18-164:4 and De Alba Cross, June 6 at p. 236:4-17.

290 See, for example, Riley Affidavit sworn February 18, 2015, at paras. 15, 18.

291 See, for example, De Alba's Examination for Discovery held May 11, 2016 at qq. 503-505; Answers to Undertakings and Advisements from the Examination for Discovery for De Alba, held May 11, 2016, at U/T 34.

June 4, 2016, that "there was no confidential information";[292] and (ii) to support an inference that the New Investors "were going to use every single tool at their disposal, including confidential information from a number of sources including Moyse in order to get themselves to the finish line".[293]

225. These allegations are of course entirely un-pleaded and are, therefore, not properly before this Court.[294] In any event, the members of the consortium did not negotiate with VimpelCom during Catalyst's period of exclusivity.[295] In fact, Mr. Griffin testified that Mr. Saratovsky would not return his calls.[296]

vi. August 7, 2014: WIND in Doubt - the New Investors Make an Unsolicited, Hail Mary Proposal to Acquire WIND

226. By early August, 2014, West Face and the New Investors knew that their chances of acquiring WIND were low, for rather obvious reasons. VimpelCom had rejected all of their previous requests to engage in exclusive negotiations, had agreed to enter into exclusive negotiations with another party, and by August had already been in such negotiations for a week.[297] As noted by Mr. Leitner, this exclusivity, which Mr. Leitner presumed was with Catalyst, "signalled that VimpelCom and UBS felt that Catalyst had made a more advanced proposal that provided a clearer path to closing a deal at that time".[298]

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292 Counsel submissions, June 9, 2016 at p. 1046:3-9; this is presumably in reference to Mr. Griffin's evidence at para. 87 of his Affidavit sworn June 4, 2016.
293 Counsel submissions, June 9, 2016 at p. 1046:10-20.
294 Counsel submissions, June 9 at pp. 1036:8-1047:14.
295 Burt Cross, June 9 at p. 843:7-25. See also De Alba Cross, June 7 at pp 304:9–305:11.
296 Griffin Cross, June 9 at p. 1102:6-10.
297 Griffin Affidavit sworn June 4, 2016, at para. 113.
298 Leitner Affidavit sworn June 1, 2016, at para. 22.

227. There is no evidence in this case that West Face or any of the other New Investors knew anything about the transaction structure or terms being negotiated between Catalyst and VimpelCom, or that they knew anything about Catalyst's then-current (albeit irrelevant) regulatory strategies regarding WIND. Despite being questioned on this point in their cross-examinations, each of Messrs. Leitner, Burt and Griffin testified that they had no knowledge of Catalyst's plans in this regard.[299]

228. It is also impossible to believe that Mr. Moyse, who had been shut out of Catalyst since May 26 – and, indeed, had been shut out of West Face since July 16 – could have had any relevant knowledge to impart to West Face during Catalyst's period of exclusivity leading up to August 7. Nor is there any indication that he had any opportunity to share any information with West Face at this time.

229. What West Face and the New Investors did know, however, was that VimpelCom's regulatory risk tolerance was extremely low. VimpelCom had grown suspicious and mistrustful of the Canadian Government, given its experiences with the challenges in Canada of obtaining regulatory approval for changes in ownership in WIND.[300] VimpelCom and its advisors repeatedly and explicitly made this point clear to the New Investors,[301] and continually expressed a preference for "speed and certainty of closing".[302]

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299 Leitner Cross, June 9 at pp. 901:18-906:2. Burt Cross, June 9 at p. 853:3-7; Griffin Cross, June 9 at p. 1060:3-20; p. 1092:9-21.

300 Leitner Affidavit sworn June 1, 2016, at para. 17; Griffin Affidavit, sworn June 4, 2016 at para. 27.

301 Griffin Affidavit sworn June 4, 2016, at paras. 11, 27 and 113.

302 Leitner Affidavit sworn June 1, 2016, at para. 23.

230. At the same time, the New Investors knew and understood that they were not perceived by VimpelCom as a credible potential purchaser, for at least two reasons:[303]

(a) first, each of the New Investors had made a number of proposals in the past that had not been acceptable to VimpelCom for various reasons; and

(b) second, a number of the New Investors' other potential syndicate members had initially expressed interest, only to drop out at a later date. These drop-outs included the two former members of the Tennenbaum Syndicate – U.S. private equity firms Blackstone and Oak Hill – as well as the strategic party West Face had been working with for the duration of Mr. Moyse's brief employment at West Face.

231. Although the New Investors understood that they were not being taken seriously by VimpelCom, they were not yet ready to abandon a potential acquisition of WIND. Despite this resolve, they knew that their window of opportunity was rapidly closing,[304] and knew that the only way that they would be successful in their attempt to acquire WIND was if they could present a pragmatic, credible, and extremely low-risk proposal to VimpelCom that could close quickly in the event that VimpelCom was unable to reach an agreement with the bidder they presumed to be Catalyst.[305]

232. In this context, on or around the very end of July or the first days of August, the New Investors engaged in discussions regarding a new, streamlined transaction

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303 Griffin Affidavit sworn June 4, 2016, at para. 114. See also Leitner Affidavit sworn June 1, 2016, at para. 22.
304 Leitner Affidavit sworn June 1, 2016, at paras. 23 and 25; Griffin Affidavit sworn June 4, 2016, at para. 115.
305 Griffin Affidavit sworn June 4, 2016, at para. 115. See also Leitner Cross, June 9 at p. 882:3-7.

structure whereby Globalive's equity would be left in place and the New Investors would simply step into the shoes of VimpelCom.[306]

233. This transaction structure, which ultimately proved to be successful, was one that Globalive had socialized in the past, and which was (or should have been) apparent to any potential bidder, including Catalyst.[307] While the concept behind this transaction structure was not new to the New Investors, they had not previously seriously considered putting forward such an aggressive proposal.[308]

234. All three of West Face's witnesses involved in the development of this transaction structure (Messrs. Griffin, Leitner, and Burt) described it in detail.[309] However, perhaps the best way to explain it is in the words of Mr. Leitner;

> Q. Can you please describe at a high level the structure of the proposal that you put forth?
>
> A. Sure. So the approach with this proposal was we would -- step one would be the purchase via a very simple securities purchase agreement, similar to how a capital markets trade effectively might be designed, where we simply bought the debt instruments from VimpelCom and their minority equity interests from VimpelCom.
>
> And in lieu of doing a purchase of 100 percent of the company and going through a lengthy exercise of a full share purchase agreement, we concluded that the value of the reps, the warranties, the indemnities didn't really amount to a whole lot of value for us as a buyer, and we just simply concluded that step one, the mechanical exercise of purchasing the securities, was simpler, it was easier, and that it had the benefit that by leaving the existing equity control group in place, it did not require regulatory approval or consent on that

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306 Leitner Affidavit sworn June 1, 2016, at para. 24.

307 Leitner Affidavit sworn June 1, 2016, at para. 7. See also Leitner Chief, June 9 at pp. 869:13-870:15 and p. 876:11-23, and Griffin Chief, June 8 at p. 764:12-17, and Burt Chief, June 9 at p. 832:12-21.

308 Leitner Affidavit sworn June 1, 2016, at para. 24. See also Leitner Cross, June 9, p. 895:18-25.

309 Griffin Affidavit sworn June 4, 2016, at para. 117; Leitner Affidavit, sworn June 1, 2016, at para. 24; Burt Affidavit, sworn June 1, 2016, at para. 20.

> step one and we were able to sign a transaction and fund a transaction in, you know, a day or so.
>
> Step two was that we would effectively reorganize the entities that funded step one and at that point we would require regulatory approval because it would then go to its, you know, respective owners, which would effectively have been a change of control.[310]

235. The elegance of this structure,[311] as explained, was that by leaving Globalive in place and avoiding a change of control in step one, the New Investors' proposal permitted VimpelCom's interests in WIND to be bought out upon signing of the purchase agreement, rather than having to wait until regulatory approval was obtained.[312] In short, because there was no change of control in step one, there was no need for Government approval, and because there was no need for Government approval, there was no risk to VimpelCom.[313] Mr. Griffin emphasized that this proposal did not reduce the purchase price payable to VimpelCom because the consortium offer also committed to funding working capital while alleviating the burden to VimpelCom associated with regulatory approval.[314]

236. With the window on the WIND opportunity still closing, the New Investors quickly put together a proposal incorporating the above transaction structure. Mr. Leitner, on behalf of the New Investors, submitted this proposal to VimpelCom close to midnight on August 6, 2014.[315] This proposal was **entirely blind**. The New Investors had no substantive communications with VimpelCom after VimpelCom entered into exclusivity

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310 Leitner Chief, June 9 at pp. 871:1-872:5. See also Griffin Chief, June 8 at pp. 760:17-761:25.
311 Griffin Chief, June 8, at p. 762:11-18.
312 Leitner Affidavit sworn June 1, 2016, at para. 26. See also Griffin Cross, June 10 at pp. 193-198 for a discussion for the deal structure and the risks assumed.
313 Leitner Cross, June 9, at pp. 900:2-901:17.
314 Griffin Cross, June 10 at pp. 1089-1091.
315 Leitner Affidavit sworn June 1, 2016, at para. 28; WFC0075054. See also Leitner Chief, June 9 at p. 870:5-15.

on July 23, 2014. The New Investors had no way of telling the nature of the negotiations between VimpelCom and the bidder they assumed to be Catalyst.[316] West Face has no basis to think that there was anything precluding them from making an unsolicited proposal to VimpelCom. As Mr. Griffin testified, West Face "had seen it done frequently".[317]

237. The next day, the New Investors submitted a more formal proposal, setting out the terms proposed in greater detail (the "**Unsolicited Proposal**").[318] One of the crucial terms of the Unsolicited Proposal was that it was conditional on the participation of Globalive.[319] Given the structure proposed, this participation from Globalive was absolutely necessary because once VimpelCom's interest in WIND had been purchased by the New Investors, the New Investors would be required to negotiate a new ownership structure with Globalive.[320] This reorganization and transfer of ownership involved a level of risk to the New Investors, as Globalive would have full voting control of WIND until regulatory approval for the equity reorganization was obtained.[321] Quite simply, under this proposed structure, the regulatory risk in the transaction would shift from VimpelCom to the New Investors, and the only way to appropriately manage that risk was to have Globalive on board.

238. Unfortunately for the New Investors, and as set out more fully below, on August 7, the same day that the New Investors submitted the Unsolicited Proposal,

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316 Leitner Affidavit sworn June 1, 2016, at para. 28.
317 Griffin Chief, June 8 at p. 759:12-15.
318 WFC0040932.
319 Leitner Affidavit sworn June 1, 2016, at para. 28.
320 Griffin Affidavit sworn June 4, 2016, at para. 119.
321 Griffin Affidavit sworn June 4, 2016, at para. 119.

Globalive entered into a support agreement with VimpelCom.[322] Mr. Lacavera informed the New Investors of this support agreement by email that afternoon.[323] Given the crucial nature of Globalive's participation in the Unsolicited Proposal, this support agreement put a hard stop (at least temporarily) to the New Investors' plans.

239. VimpelCom did not respond to the New Investors' offer as set out in the Unsolicited Proposal, and indeed there is no evidence that VimpelCom's board was even aware of it.[324] Instead, and as set out in more detail below, VimpelCom took the exact opposite course of action and the very next day chose to extend Catalyst's period of exclusivity to August 18, 2014. For the remainder of Catalyst's exclusivity period with VimpelCom, between August 7 to August 18, 2014, neither VimpelCom nor Globalive resumed or engaged in any negotiations whatsoever with any of the New Investors. In turn, the New Investors made no further proposals to VimpelCom during this time period.[325]

vii. West Face Had No Knowledge of Catalyst's Confidential Regulatory Strategy at the Time the August 7, 2014 Proposal Was Made

240. The Unsolicited Proposal made by the New Investors was completely blind. It was not put together with the use or knowledge of confidential Catalyst regulatory strategies, and **could not have been**, because none of the New Investors knew anything about Catalyst's regulatory strategies regarding WIND.[326] The New Investors

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322 WFC0063562. See also Leitner Affidavit sworn June 1, 2016, at para. 29; and Griffin Affidavit sworn June 4, 2016, at para. 121.

323 WFC0063562.

324 Griffin Affidavit sworn June 4, 2016, at para. 122.

325 Leitner Affidavit sworn June 1, 2016, at para. 29; Griffin Affidavit sworn June 4, at para. 122.

326 Griffin Affidavit sworn June 4, 2016, at para. 113. See also Burt Cross, June 9 at p. 851:22-25, p. 853:3-7 and p. 855:18-23; and Griffin Cross, June 10 at p. 1092:9-21.

admitted they believed Catalyst to be the other bidder,[327] but never discussed its regulatory strategy.[328] Indeed, not even Mr. Moyse could have predicted two months in advance that Catalyst would agree with VimpelCom not to seek the right to sell spectrum to incumbents, or pursue such concessions in the face of the government's insistence in July and August that no such concession would be granted.

241. Each of the representatives of West Face's co-Investors testified to the same effect: that West Face never communicated any confidential information concerning Catalyst's regulatory strategy to the Investors,[329] and that no such information was used (or misused) by the Investors in developing the transaction structure that the Investors put forward to VimpelCom in the Unsolicited Proposal.[330] As Mr. Burt put it in his Affidavit: "[t]his structure was not based on and had nothing to do with any Catalyst confidential information".[331]

viii. August 7-18, 2014: Globalive Enters into a Support Agreement with VimpelCom, and West Face Remains Shut Out of Negotiations

242. From the date VimpelCom granted Catalyst exclusive negotiating rights on July 23, 2014, VimpelCom began negotiating with Globalive to secure Globalive's support for the proposed sale to Catalyst.[332] It was the evidence of Mr. Lockie that during this time, he was unaware of VimpelCom engaging in negotiations with any other party but Catalyst, and that Mr. Saratovsky of VimpelCom regularly told Mr. Lockie that

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327 Burt Cross, June 9 at p. 844:4-6.
328 Burt Cross, June 9 at p. 857:5-8 and p. 844:1-15.
329 Leitner Affidavit sworn June 1, 2016 at para. 30.
330 Leitner Affidavit sworn June 1, 2016, at para. 25.
331 Burt Affidavit sworn June 1, 2016, at para. 4.
332 Lockie Affidavit sworn June 6, 2016, at para. 22.

Catalyst was the only party that VimpelCom was in negotiations with and that VimpelCom was optimistic that an agreement with Catalyst would be reached.[333]

243. At the time, however, Globalive was not yet committed to any deal with Catalyst.[334] Indeed, Globalive had reached out to Catalyst several times in 2014 expressing its desire to stay invested in WIND and to invest additional capital alongside Catalyst. However, prior to August 7, Mr. Glassman would not even confirm to Mr. Lacavera that Catalyst was in discussions with VimpelCom.[335]

244. Despite the fact that Catalyst had rebuffed Globalive's previous advances, and despite the Unsolicited Proposal from the New Investors, on August 7, 2014, Globalive agreed to enter into a Support Agreement with VimpelCom. This Support Agreement gave Globalive an economic participation in the sale of WIND, in exchange for Globalive's agreement to either sell its interest in GIHC and WIND to Catalyst as part of any VimpelCom transaction with Catalyst. In the alternative, the Support Agreement provided that Globalive would support VimpelCom in putting WIND into insolvency since, at that time, VimpelCom considered insolvency to be the next best alternative to a transaction with Catalyst.[336]

245. On August 7, 2014, and at VimpelCom's request, Mr. Lacavera informed the New Investors that Globalive had signed the Support Agreement and was no longer in a

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333 Lockie Affidavit sworn June 6, 2016, at para. 22.
334 Lockie Affidavit sworn June 6, 2016, at para. 23.
335 Lockie Affidavit sworn June 6, 2016, at para. 28; CCG0025823.
336 Lockie Affidavit sworn June 6, 2016, at para. 25.

position to have any discussions or consider any proposals from the New Investors (or any other group).[337]

246. From August 7 until the expiry of Catalyst's exclusive negotiating rights on August 18, Globalive honoured its obligation to support a potential deal with Catalyst. In fact, given Globalive's belief that the Catalyst transaction was the only realistic alternative to the insolvency process it had agreed to support (and which Globalive believed would be destructive to WIND's value), Globalive actively assisted VimpelCom in seeking to advance negotiations with Catalyst.[338]

247. In addition to assisting VimpelCom in its negotiations with Catalyst, Globalive also expressed to Catalyst its desire to invest alongside Catalyst in its acquisition of WIND.[339] Consistent with Mr. Lacavera's efforts to participate in Catalyst's bid for WIND all along, Globalive insisted that the terms of the Support Agreement permitted Globalive to seek to participate in the proposed Catalyst transaction. However, at this point Catalyst made it clear that Catalyst was not interested in Globalive participating in the transaction to acquire WIND. Catalyst was open to a subsequent investment by Globalive only.[340]

248. Mr. Lockie's evidence was that during this period VimpelCom had no interest in pursuing any alternatives to Catalyst before the end of Catalyst's period of exclusivity, and that VimpelCom did not in fact provide any information, or offer any encouragement

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337 Lockie Affidavit sworn June 6, 2016, at para. 28; WFC0063562.
338 Lockie Affidavit sworn June 6, 2016, at para. 26.
339 Lockie Affidavit sworn June 6, 2016, at para. 26.
340 Locke Affidavit sworn June 6, 2016, at para. 28.

or support, to any other potentially interested party.[341] It was also Mr. Lockie's evidence, based on his discussions with Mr. Saratovsky, that VimpelCom remained confident that any outstanding issues with Catalyst would be resolved.[342]

249. During the period of Catalyst's exclusivity with VimpelCom, and especially after the Unsolicited Proposal failed to garner any response, the New Investors believed that their chance of proceeding with the transaction were essentially nil.[343] The contemporaneous documents reflect this. For example, on August 12, Mr. Leitner posited that the only reason the Catalyst deal had not yet been announced was "internal VimpelCom shuffling of papers and getting internal approvals [rather] than a positive sign".[344] Mr. Boland had a similar email exchange with Mr. Guffey on August 13, in which Mr. Guffey stated that it was "too bad we [the New Investors] weren't all better organized on this [WIND] deal", and Mr. Boland agreed and expressed frustration that we "got our act together way too late".[345]

250. Had the New Investors been given any indication by VimpelCom that their August 7 proposal was even being considered, the principals of the New Investors would not have expressed these sentiments in their contemporaneous emails of August 12 and 13.

251. Counsel for Catalyst made reference several times during the trial to an email chain that was sent between members of the New Investors on August 14.[346] In this

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341 Lockie Affidavit sworn June 6, 2016, at para. 26.
342 Lockie Affidavit sworn June 6, 2016, at para. 27.
343 Griffin Affidavit sworn June 4, 2016, at para. 122.
344 WFC0056380; see also Griffin Affidavit sworn June 4, 2016, at para. 122.
345 WFC0061144; see also Griffin Affidavit sworn June 4, 2016, at para. 122.
346 Leitner Cross, June 9 at pp. 929:12-932:7; Griffin Cross, June 10 at pp. 1002:24-1004:15.

chain, Mr. Leitner sent other members of the New Investor group the message that UBS had told Mr. Leitner "don't burn the file yet".[347] To put it bluntly, this passage, which was twice read into the record, is not relevant to the case at hand. It does not show Mr. Moyse transmitting any confidential information to West Face or to any of the New Investors. Moreover, Mr. Leitner confirmed that much of this email was pure conjecture, on his part, coupled with process updates. Mr. Leitner noted that UBS's guidance "from day one" was to not burn the file. Notably, the words immediately following "don't burn the file yet" are: "I don't have any insights as to what the holdup is or what the issues are…".[348]

ix. August 18-September 16, 2014: VimpelCom Resumes Negotiations with the New Investors, and the Parties Ultimately Reach an Agreement for the Purchase and Sale of WIND

252. After its period of exclusivity with Catalyst expired, Globalive and the New Investors tried to convince VimpelCom to resume negotiations with the New Investors. This did not mean that Catalyst had already lost the deal and/or that it had no further opportunity to acquire WIND. On the contrary, the expiration of Catalyst's exclusivity rights simply meant that VimpelCom had the right to negotiate with all bidders, as opposed to having to negotiate with Catalyst only. VimpelCom would not immediately enter into exclusivity with the New Investors.[349]

253. As set out further below, Catalyst could have, and apparently did, continue negotiating with VimpelCom.[350] However, Catalyst refused to produce any of its

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347 WFC0051186.
348 Leitner Cross, June 9 at pp. 929:25-932:4.
349 Griffin Affidavit sworn June 4, 2016, at para. 124.
350 De Alba Cross, June 7 at p. 306:4-14.

documents dated later than August 18, 2014, and the parties have no way of determining the content or extent of these post-exclusivity Catalyst negotiations.[351]

254. In any event, as of August 18, it was apparent to West Face that VimpelCom was considering all of its options. Indeed, the New Investors still faced a credibility problem, and they needed to convince VimpelCom that they were serious bidders.[352] During this period, the New Investors worked hard to present themselves to VimpelCom as a real alternative to VimpelCom's other options, which included putting WIND into insolvency proceedings or reaching an agreement with Catalyst or any other bidder.[353]

255. VimpelCom would not initially grant the New Investors exclusivity, but on August 21, 2014, it agreed that it would not enter into another exclusivity arrangement with any party until August 25, 2014. West Face's understanding was that the New Investors needed to present an acceptable deal structure by that time if they wanted to be considered for exclusive negotiations.[354]

256. On August 23, 2014, West Face's counsel delivered a revised proposal on behalf of the New Investors that addressed certain concerns raised by VimpelCom with the transaction structure in the New Investors' proposal from August 7, 2014.[355]

257. On August 25, 2014, West Face's counsel delivered to VimpelCom's counsel an executed conditional financing commitment letter on behalf of the New Investors, Globalive, and two other investors who would be co-investing with Globalive.[356]

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351 De Alba Cross, June 7 at p. 305:6-11.
352 Griffin Affidavit sworn June 4, 2016, at para. 124.
353 Griffin Affidavit sworn June 4, 2016, at para. 124.
354 Griffin Affidavit sworn June 4, 2016, at para. 124.
355 Griffin Affidavit sworn June 4, 2016, at para. 125.

258. On August 27, 2014, VimpelCom granted exclusive negotiating rights to the New Investors, 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 Investors 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 proved to be inaccurate.[357]

259. Ultimately, as a result of the New Investors' persistence, acceptable deal structure, willingness to negotiate with VimpelCom, and tolerance for specific risks, the New Investors were successful and the New Investors and VimpelCom executed a definitive purchase agreement for WIND. This transaction for WIND closed on September 16, 2014.[358]

260. After the acquisition, the business of WIND performed very, very well. It performed exactly how [the consortium] thought that product offering would do in the marketplace. There was substantial growth among net subscribers and revenues grew successfully. They were able to put a new management team in place with a new business plan. EBITDA turned around, and WIND went from losing money to making a substantial amount. They over-achieved every expectation.[359]

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356 Griffin Affidavit sworn June 4, 2016, at para. 125.
357 Griffin Affidavit sworn June 4, 2016, at para. 126.
358 Griffin Affidavit sworn June 4, 2016, at para. 126.
359 Leitner Chief, June 9 at p. 874:12-25; Griffin Chief, June 8 at pp. 739:23-730:17.

261. By 2014 management of WIND felt that the mistakes were behind it and that they were on a very strong path. They also believed that some of the shortcomings in the regulatory regime were now clear to the government and that the government was still very committed to the success of its "fourth carrier" strategy. They saw a tremendous investment opportunity.[360]

x. In Summary: West Face's Acquisition of an Interest in WIND in September 2014 Had Nothing to Do With Mr. Moyse

262. In conclusion, West Face's acquisition of an interest in WIND in September 2014 had nothing to do with Mr. Moyse or with Catalyst's "regulatory strategies". As set out above, Mr. Moyse's hiring had nothing to do with WIND. He was, in any event, never aware of the details of Catalyst's regulatory strategy, or of how Catalyst's negotiations regarding this strategy progressed after he was cut off from Catalyst on May 26. Crucially, and most importantly, Mr. Moyse quite simply never communicated **any** Catalyst information regarding WIND to West Face. There is absolutely **no** evidence that West Face was ever aware of Catalyst's strategy (and, as set out in more detail below, Catalyst's regulatory strategy would have been irrelevant to West Face even if West Face had been informed of it).

263. As explained in detail in this submission, the only information that West Face and the other New Investors "used" to develop the New Investors' ultimately winning strategy to acquire WIND was information that the New Investors had learned **from VimpelCom and its advisors** through the course of a 10-month long sale process which predated Catalyst's period of exclusivity. Specifically, the three essential deal

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[360] Lockie Chief, June 10 at pp. 1157:17-1158:4.

elements, which had been repeatedly communicated by VimpelCom and its advisors from very early on in the process and on which the New Investors focused, were:

(a) a deal that could close quickly without material representations and warranties by the vendor;

(b) a purchase price targeting an enterprise value of $300 million; and

(c) a transaction structure that allowed for the full exit of VimpelCom that minimized any risk related to regulatory approval.

264. None of this information came from Catalyst via Mr. Moyse, nor could it have come from Catalyst via Mr. Moyse. These deal elements were communicated repeatedly and consistently to West Face from very early on in the sale process, and are evidenced by the contemporaneous communications between West Face and VimpelCom, and between West Face and UBS.

265. In short, West Face and the other New Investors acquired WIND because they made an acceptable offer based on their assessment of VimpelCom's needs. West Face was able to make this assessment of VimpelCom's needs merely **by listening to VimpelCom**.

266. As set out in more detail below, the idea of listening to a clear message given by a party across the table seems to have confounded Catalyst (and particularly Mr. Glassman) in both its negotiations with VimpelCom and with the Government. Catalyst's failure to close the WIND deal was entirely due to its unresponsive and

inflexible negotiating position, and not due to any use by West Face of any confidential information belonging to Catalyst.

PART V - THE FACTS RELEVANT TO CATALYST'S FAILURE TO ACQUIRE WIND

A. Introduction: Catalyst Would Not Have Acquired WIND Regardless of What West Face Did

267. Catalyst alleges that as a result of West Face's alleged misuse of confidential information, Catalyst has suffered damages. Catalyst specifically alleges that "**but for**" West Face's conduct, Catalyst "**would have**" acquired Wind.

268. This submission sets out the factual background demonstrating that Catalyst would **not** have acquired WIND "but for" West Face's conduct. To the contrary, the evidence demonstrates that West Face's conduct in acquiring an interest in WIND (which was not wrongful, as it was not based on any misuse of confidential information provided by Mr. Moyse, as set out above) did not play **any** material role in Catalyst's failure to acquire WIND. Catalyst lost the WIND opportunity entirely on its own.

B. Catalyst's Alleged Confidential Regulatory Strategy

i. Introduction: Catalyst Knew VimpelCom Wanted a Clear Path to Regulatory Approval

269. As touched on above, the series of events leading up to VimpelCom's decision to sell WIND was common information known by all Parties. In particular, Mr. De Alba agreed that Catalyst was aware that VimpelCom had experienced numerous regulatory difficulties with the Government of Canada in the past, and that, as a result, obtaining the requisite regulatory approvals for any sale of WIND was a key concern for VimpelCom. As Mr. De Alba put it: "[VimpelCom] wanted the deal that would give the

most certainty to obtain [the necessary regulatory] approvals according to the options available".[361]

270. Instead of listening to VimpelCom's concerns and attempting to address them, Catalyst adopted a high-risk regulatory strategy engineered by Mr. Glassman. Catalyst's regulatory strategy was contingent on:

(a) relying on the success of hypothetical litigation against the Government which Catalyst did not even plan to bring itself;

(b) using the threat of this litigation to pressure the Government into granting concessions that the Government had repeatedly said would not be granted; and

(c) seeking and obtaining such concessions after signing an agreement with VimpelCom that explicitly disallowed Catalyst from pursuing these concessions before the close of the transaction.

271. While this strategy may have been intended to provide Catalyst with the requisite regulatory concessions it sought from Industry Canada, it was not designed, and indeed flew in the face of, the known priorities of VimpelCom and the stated policies of the Canadian Government, both of whom had more control over the outcome of the WIND transaction than Catalyst ever did.

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361 De Alba Cross, June 6, at p. 243:11-244:6.

ii. Mr. Glassman, the Architect of Catalyst's Regulatory Strategy, Did Not Have the Experience Necessary to Design a Winning Approach

272. At trial, it was Mr. Glassman's evidence that he was the chief architect of Catalyst's regulatory strategy.[362] Unfortunately for Catalyst, this may have been what doomed its strategy from the start.

273. Quite rightly, at the outset of his cross-examination, Mr. Glassman admitted that while he has a law degree, he has never practised law. He conceded that he is not a specialist in communications law in Canada, nor a specialist in the area of law concerning the management of wireless spectrum in Canada. He admitted that he has never been employed by the Government of Canada, has never been a member of the staff of a Federal or Provincial Cabinet Minister, and has never been employed by Industry Canada or the CRTC.[363] Mr. Glassman later admitted that the March 27 presentation, discussed further below, was the "first presentation [Catalyst] had ever actually made formally to any government official".[364] In short, Mr. Glassman had a dearth of experience in dealing with the Canadian Government, and specifically with respect to Industry Canada and the wireless industry.

274. In an attempt to make up for Mr. Glassman's lack of experience in this field, Catalyst retained Bruce Drysdale as a government relations consultant. Mr. Drysdale is one of the founders of the public affairs firm Drysdale Forstner and Hamilton,[365] and has a wealth of experience advising companies on strategic, public policy, and positioning issues in various industries, including the telecom sector. Mr. Glassman admitted early

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362 Glassman Cross, June 7 at p. 386:6.
363 Glassman Cross, June 7 at pp. 345:14-346:20.
364 Glassman Cross, June 8 at p. 556:13-20.
365 WFC0110505.

on in his cross-examination that one of the reasons that Catalyst retained Mr. Drysdale was because Mr. Drysdale had a great deal of experience both in dealing with the Government of Canada and in telecommunications issues more generally. Mr. Glassman initially conceded (quite properly) that Mr. Drysdale had a depth of experience dealing with the Government of Canada that neither Mr. Glassman nor his partners at Catalyst possessed.[366]

275. Despite these admissions, and as the contemporaneous documents and Mr. Glassman's attitude and statements made at trial demonstrate, Mr. Glassman simply chose to ignore virtually every message and piece of advice that he received from Mr. Drysdale, the Government of Canada, and his own lawyers and advisors that was contradictory to his own beliefs.

276. Mr. Glassman's willingness to ignore professional external advice was best demonstrated when he was referred in cross examination to a written opinion that Catalyst obtained from its counsel at Faskens concerning transfers of wireless spectrum, on May 19, 2014, one week after Catalyst's second presentation to Industry Canada. In this opinion, Faskens stated, among other things, that Government support "would likely **not** extend to any comfort as to the government's willingness to ultimately approve a transfer of spectrum licenses [from WIND] in due course to any of Bell, Telus or Rogers". Faskens' opinion continued:

> It is important to note that as the transfer framework and government policy introduced in DGSO-003-13 is recent and relatively untested, it is difficult to predict how it will be applied or even what the Government intends by "undue concentration".

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366 Glassman Cross, June 7 at pp. 387:20-391:6.

> However, the current Government **has made it clear that any proposed transfer of commercial mobile spectrum to an incumbent will be subject to very close scrutiny and, in the current climate, most unlikely to succeed**. Indeed, since the introduction of CPC-2-1-23, the Government has only approved of transfers arising out of internal corporate reorganizations where no change in spectrum concentration occurs".[367]

277. When confronted with this opinion from Catalyst's own law firm, Mr. Glassman was dismissive. His exact words were that: "[t]he rest is opinion by the writer, and I had more experience in this than the writer did".[368]

278. In fact, the "writer" of this opinion was Steve Acker, an experienced communications and public law lawyer who was called to the bar in 1989 and practised with Johnston & Buchan, Canada's leading telecommunications firm, from that time until it merged with Faskens in 2007. Mr. Glassman's lack of understanding and blunt dismissal of his own lawyer's expertise, and his apparently unlimited confidence in his own abilities, was best displayed by the following questions and answers immediately following Mr. Glassman's bald assertion that he had "more experience" than Mr. Acker with respect to the subject matter of the May 19, 2014 memo:

> Q. Did you know that several years ago Faskens merged with a firm called Johnston & Buchan in Ottawa?
>
> A. No, but I'll take your word for it.
>
> Q. Have you ever even heard of Johnston & Buchan?
>
> A. Vaguely.
>
> Q. Would you have known that Johnston & Buchan were the leading communications firm in Canada before merging with Faskens?

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367 CCG0026600. (Emphasis added).

368 Glassman Cross, June 7 at p. 472:4-6. Note also that Mr. Drysdale made similar comments relating to the government's support of a Telus/Mobilicity transfer – that "the Harper government remains clear it will not approve this deal or transfer". See Glassman Cross, June 7 at pp. 455:6-457:11; CCG0009114.

A. Okay.

Q. And do you know the depth of experience that Johnston & Buchan had dealing with wireless spectrum dating back 10, 20, 30 years?

A. So?

Q. But you claim to have more experience in matters of this sort than the Faskens firm did?

A. On this issue. On this issue.[369]

279. Even when directly faced with information that should have made Mr. Glassman stop and think, Mr. Glassman's immediate reaction was not to stop and consider this information, but rather to entrench himself in his pre-existing position.

iii. Catalyst's Confidential Regulatory Strategy

280. Catalyst's regulatory strategy – and the many underlying assumptions on which it was based – were first explained by Mr. Glassman in his Affidavit sworn May 27, 2016. Prior to receiving Mr. Glassman's Affidavit, none of Mr. Moyse, West Face, or any of their witnesses was aware of or understood what Catalyst's regulatory strategy for WIND was. Crucially, Mr. Moyse was not aware of Catalyst's regulatory strategy at the relevant time (as set out above), and Mr. Moyse did not communicate this strategy to West Face (as set out above). Furthermore, and as set out further below, the relevant contemporaneous documents (most of which were authored by Catalyst or its government relations consultant, Mr. Drysdale) make clear that Catalyst's approach was unlikely to succeed.

281. Once understood, however, Catalyst's allegedly "confidential" regulatory strategy can be summarized quite simply. Catalyst's strategy was:

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[369] Glassman Cross, June 7 at p. 472:10-25.

(a) to persuade VimpelCom to enter into a share purchase agreement with Catalyst that gave Catalyst time (but not permission) to seek regulatory concessions before closing, and imposed no consequence on Catalyst if it failed to achieve them; and

(b) to then immediately turn around and attempt to pressure Industry Canada and the Federal Government into granting Catalyst regulatory concessions that Catalyst believed were necessary for the WIND business to succeed, notwithstanding any prohibitions on doing so in the share purchase agreement.

282. Neither aspect of this strategy was confidential. First, it was well-known and publicly reported at the time that Catalyst was interested in WIND and would therefore be negotiating a share purchase agreement.[370] As described above, West Face believed Catalyst was interested based on information it received from UBS, from Mr. Leitner, **and from Catalyst itself**.

283. Second, the mere fact that Catalyst may have been seeking "regulatory concessions" from Industry Canada was not particularly sensitive, valuable, or even confidential information. As Mr. Glassman admitted to this Court, there was nothing particularly innovative or unique about a prospective buyer of WIND seeking regulatory concessions from the Government:

> THE COURT: But you assume that another bidder – would you assume that another bidder would think you were trying to do something so you wouldn't have to face that risk?

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[370] De Alba Cross, June 6 at p. 235:8-12 and 18-20.

THE WITNESS: So VimpelCom itself was terrified of the regulatory risk and they said that because – and we've seen the testimony where they said that because of their own experience with the government, the government had turned down other deals, the environment had gotten worse, so for example, the original founder of Orascom, and Orascom was sold to VimpelCom, was turned down on his attempt to purchase ManitobaTel, so here is somebody who in the past who was acceptable, now wasn't acceptable.

The business was losing a lot of money. I suspect people that we had talked to, plus common sense, would tell one that it would be expected, notwithstanding the posturing and the positioning by the seller, who didn't want to accept the risk, that no one would take that risk, which is one of the reasons why we were talking about the lawsuit with the government, because the government had a problem.

THE COURT: All right. So –

THE WITNESS: And that was the way out.

THE COURT: Would it be fair to assume that another bidder such as West Face or the consortium, would it be fair to assume that they would think that you were putting some condition to the government or putting some position to the government that they had to waive your position?

THE WITNESS: It's my view that they were told.

THE COURT: That's what you had –

THE WITNESS: It's my personal view.

THE COURT: I understand that. But apart from your personal view, would it be fair to assume that in view of what the industry knew, they would think you were doing something like that with the government?

THE WITNESS: Well, as you can see from the testimony about Quebecor, they also had conditions. So I think **anybody in the business would have thought about what conditions they want.**

They may not all be the same, but there would have been some regulatory conditions around what they were doing unless somebody understood the legal ramifications of the lawsuit.

THE COURT: What I was asking you was, would it be fair to assume that they would think that you, Catalyst –

THE WITNESS: I think so.

> THE COURT: – was making that kind of presentation to the government?
>
> THE WITNESS: **Yeah, they either would assume or know.**
>
> THE COURT: Thanks.[371]

284. Mr. Glassman's testimony above was a rare unguarded moment, and indeed is **fatal** to Catalyst's entire case. If anyone in the industry would "assume or know" that "Catalyst…was making that kind of presentation to the government", then Catalyst's "regulatory strategy" was not "confidential information" that should attract the protection of this Court. By Mr. Glassman's evidence it was the only logical course of action.

285. Furthermore, this is one of the few portions of Mr. Glassman's testimony that can be supported by the contemporaneous documents. The only bidder other than Catalyst and the West Face consortium about which any evidence was led is Quebecor. In an email dated August 3, 2014, Catalyst's government relations consultant Bruce Drysdale stated that Quebecor also sought concessions. In that email, Mr. Drysdale stated (among other significant statements discussed further below):

> [James] Nicholson [of Industry Canada] and [the Privy Council Office] both told me that Quebecor (both prior to [Pierre Karl Peladeau] running for office as a separatist and since) has lobbied hard in Ottawa at all levels for concessions to build out a fourth carrier and have been told Ottawa will not be providing them with any concessions (beyond what regulatory changes are being rolled out by the CRTC in coming months). Nicholson said Minister [of Industry] Moore and [Prime Minister Stephen] Harper are entrenched and there will be no flip flop.[372]

286. Moreover, some of the precise regulatory concessions that Catalyst sought were already being sought by WIND and/or had been publicly proposed by the Government

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371 Glassman Cross, June 8 at pp. 561:8-565:5, quotation at 562:23-565-5 (emphasis added).

372 CCG0025843.

and the relevant regulatory agencies. For example, both the CRTC and the Government had publicly announced changes to roaming costs, including a legislative cap on roaming. Thus, while Catalyst may have considered the fact that it had requested these concessions from Industry Canada as a pre-condition to purchasing WIND to be "confidential", such requests were not unique to Catalyst and, indeed, as Mr. Glassman himself admitted, other industry players would "assume" Catalyst was making such regulatory requests.[373]

iv. Catalyst's First False Premise

287. Catalyst's regulatory strategy was based on two false premises. This section discusses the first premise which was that some unnamed litigant other than Catalyst would commence an action against the Federal Government over regulatory restrictions that limited transferability of the AWS-1 2008 spectrum licenses, and that such litigation would ultimately be successful. The second false premise, discussed in the next section, was that WIND was not viable without changes to the existing regulatory environment.

288. Mr. Glassman's first premise was based on the theory that some unidentified plaintiff would commence a lawsuit against the Federal Government for what Mr. Glassman described incorrectly in his Affidavit as "the retroactive and unilateral changes to historical [2008 AWS-1] spectrum licenses".[374] The licenses to which Mr. Glassman is referring are the licenses for bands within the 40 MHz of wireless spectrum that were set aside in the 2008 AWS-1 spectrum auction for "new entrants". Mr.

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373 Griffin Affidavit sworn June 4, 2016, at paras. 32, 52, and 103. See also WFC0109981 and WFC0107350.

374 Glassman Affidavit sworn May 27, 2016, at para. 13. See also para. 9.

Glassman believed at the time of the WIND opportunity in 2014 that the Government's introduction of a new policy framework in 2012-2013 had "retroactively" altered these existing licenses.

289. Contrary to Mr. Glassman's Affidavit, the "terms under the 2008 auction rules" did **not** "specifically allow" sales of such "set-aside" spectrum from new entrants to incumbents after an initial five year period. Rather, all that the Government's 2008 spectrum auction policy framework had provided was that transfers of set-aside spectrum from new entrants to incumbents was **not** allowed **within** the first five years following the auction.[375] The 2008 policy framework **never** stated that the converse was also true – namely that **after** five years such sales would be allowed with no questions asked.

290. As WIND's Chief Regulatory Officer, Mr. Lockie was uniquely qualified to testify that no changes were ever made to the actual 2008 spectrum licenses at the time the Government introduced its new spectrum transfer policy in 2012/13. In addition to the five year *per se* ban on sales of set-aside spectrum to incumbents, the 2008 AWS-1 spectrum licenses had also always been subject to a more "general restriction" on transfer, namely "that any transfer would have to be approved" by the Minister of Industry following a written application.[376] As Mr. Lockie explained, all that Industry Canada had done in 2012/13 was introduce more formal spectrum transfer guidelines – the "gist" of which were that the Government would not permit transfers of spectrum that

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375 WFC0111642.
376 Lockie Chief, June 10 at p. 1153:11-22.

would lead to an undue restriction of spectrum in the hands of any one party.[377] Mr. Glassman agreed that the transfer of wireless spectrum has *always* been subject to the approval of the Government of Canada.

291. When the above explanation was provided to Mr. Glassman during cross-examination, he had to pause and think, but then asserted that despite the fact that the 2008 auction rules had never provided that the licenses for AWS-1 set aside spectrum could be freely transferred after five years, there was "an understanding that the government would allow reasonable [*sic*] and that it would act reasonably after five years, otherwise there is no point in having a five-year moratorium".[378] Mr. Glassman asserted that this "understanding" was shared by "everybody in the industry…including the lenders that lent hundreds of millions of dollars against the collateral of the spectrum".[379]

292. If Mr. Glassman's speculation in this regard were true, there is nothing confidential about his position. If it is incorrect, his strategy was worthless. Instead, even if this "industry understanding" were somehow legally binding on the Government of Canada, there is no evidence in this case to suggest that the Government's 2012/13 transfer policy guidelines – which seek to prevent undue concentration of spectrum – are not reasonable.

293. In short, it is difficult to guess which unidentified potential plaintiff Mr. Glassman believed (in 2014) had the alleged cause of action against the Government of Canada

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377 Lockie Chief, June 10 at p. 1154:9-1155:2.
378 Glassman Cross, June 7 at pp. 442:25-443:12.
379 Glassman Cross, June 7 at p. 443:12-16.

that Mr. Glassman believes existed over the mere changes to the spectrum transfer policy.

294. West Face notes that while the founders of Mobilicity have commenced litigation against the Government, this litigation is based not on supposed retroactive amendments to its spectrum licenses, as asserted by Mr. Glassman, but on oral misrepresentations that named representatives of the Government allegedly made to induce Quadrangle to participate in the AWS-1 auction and purchase the 2008 set-aside spectrum. The Quadrangle case is not a breach of contract or even a breach of license case, and necessarily depends on the specific alleged misrepresentations pleaded in that case.

295. Furthermore, Mr. Glassman's regulatory strategy necessarily required that the likelihood of success against the Government would have been high enough that the Government of Canada would feel sufficient pressure to accede to Catalyst's request for regulatory concessions, despite the fact that Catalyst would not be the one to launch such a claim.

296. Mr. Glassman had no reasonable basis in 2014 for his opinion that such litigation (which appears ill-conceived for the reasons set out above) would be successful. On cross-examination, Mr. Glassman was forced to admit that Catalyst never sought a legal opinion from Faskens or from any other law firm concerning the merits of the projected litigation against the Government. When asked whether Catalyst sought or obtained such an opinion, Mr. Glassman stated: "To the best of my knowledge, we never sought

a formal opinion, no, **nor did we think we had to**".[380] This comment was characteristic of Mr. Glassman's unshakeable confidence in his own expertise in matters notwithstanding all evidence to the contrary.

297. In any event, there is also no evidence supporting Mr. Glassman's opinion that the hypothesized litigation would have caused the Government to feel pressure to reverse its policies and accede to Catalyst's demands for concessions. There is certainly no evidence that the Government of Canada has capitulated in the litigation brought by Quadrangle. On the contrary, the Government appears to be vigorously defending the claim.

298. The only "evidence" of the likelihood of this alleged inevitable litigation was Mr. Glassman's own belief, coupled with hearsay statements that some unidentified internal counsel at Industry Canada "ultimately agreed" with Mr. Glassman's conclusions. When it was put to Mr. Glassman in cross-examination that this evidence was self-serving, unattributed hearsay, Mr. Glassman stated that that suggestion was "unequivocally wrong and factually incorrect" – but he still did not and could not name the person who allegedly made this statement. Catalyst called no Industry Canada witnesses. Mr. Glassman also cannot point to a single contemporaneous document in the record that points to any such statement ever having been made by Industry Canada to Catalyst.[381] While Mr. Glassman referred vaguely to an "email" documenting his beliefs regarding the likelihood of success of this litigation, this email was never put to Mr. Glassman in re-examination and does not exist in the record.

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380 Glassman Cross, June 7 at pp. 443:23 – 444:17.
381 Glassman Cross, June 7 at pp. 445:12 – 447:13.

299. In short, Mr. Glassman's suggestion that some unnamed lawyer at Industry Canada conceded that the above-described lawsuit would ultimately succeed cannot be believed. However, even if this statement were true, Mr. Glassman essentially admitted that the opinion of one representative of Industry Canada would not amount to much at all:

> Q. Now, can we agree on this much, Mr. Glassman, that even if we were to take you at your word and assume that some unidentified lawyer at Industry Canada made such a statement in a meeting you attended, that others at the Government of Canada and the Department of Justice might well have had a different view about the strengths and weaknesses of this hypothetical claim you refer to at length in your affidavit? Is that fair enough to say?
>
> A. People could have all kinds of opinions. I had the most experience with the most closely related set of facts.[382]

300. Finally, it bears repeating that there is no contemporaneous evidence that Mr. Moyse understood the rationale behind Catalyst's convoluted strategy to rely on hypothetical litigation to extract regulatory concessions from Industry Canada.

v. Catalyst's Second False Premise

301. The second false premise on which Catalyst's regulatory strategy was based was the assumption that WIND was not viable as an independent fourth wireless carrier without changes to the existing regulatory structure. Mr. Glassman repeated this assumption multiple times throughout his testimony, and this was a linchpin of Catalyst's presentations to the Government of Canada on March 27 and May 12, 2014.[383] If Catalyst **had** believed that WIND was viable as an ongoing business without the

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382 Glassman Cross, June 7 at p. 448:5-17.

383 Glassman Affidavit, sworn May 27, 2016, at para. 4; Glassman Chief, June 7 at pp. 332:15-333:14; Glassman Cross, June 7 at pp. 412:12-16, 466:6-467:7.

concessions they repeatedly asked for, then the concessions would have become less important to the fulfillment of Catalyst's regulatory strategy.

302. However, and as both Messrs. Glassman and Riley admitted in testimony, different companies and organizations as sophisticated as West Face, Tennenbaum, LG Capital, Globalive and the Government of Canada could have had different views than Mr. Glassman did in 2014 concerning the prospects of WIND in 2014.[384]

303. And the Investors did have a different view as to the prospects of WIND. As Mr. Leitner, an undeniably sophisticated investor with a profound depth of experience in the telecommunications industry, testified:

> And for our analysis, it was clear to us that **a fourth carrier would be viable**. In the United States, we had markets that were smaller than Toronto, smaller than Vancouver, that had six carriers operating profitably, two of which were subsequently sold for several billions of dollars, employing the same exact business model as what we saw that we would be able to undertake with Wind.
>
> And in the Canadian marketplace, which is a very, very unique mobile market with the highest wireless rates in the world, we **saw a very, very good opportunity for Wind to create a substantial amount of value based on its product offering.**
>
> So our diligence was predicated on the value proposition that they were offering and whether we would have enough wireless spectrum to be **able to conduct our business for the foreseeable future.**[385]

304. Given that the Investors were coming from a completely different starting point from Catalyst vis-à-vis the viability of WIND as an independent fourth wireless carrier in Canada, even if West Face somehow had received Catalyst's "confidential information",

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384 Riley Cross, June 8 at pp. 609:6-610:21; Glassman Cross, June 7 at pp. 421:3-422:23.

385 Leitner Chief, June 9 at pp. 864:21-865:14 (emphasis added).

given the insight and experience offered by West Face's partners, such as Mr. Leitner, West Face would have continued to pursue its own strategy.

vi. The March 27, 2014 Canada Wireless Presentation

305. On March 27, 2014, Mr. Glassman and Mr. Riley met with representatives of the Government of Canada, including representatives of Industry Canada, the Privy Council Office, and the Prime Minister's Office. Mr. De Alba did not attend these meetings.[386]

306. Mr. Glassman testified that the March 27 presentation was the very first presentation Catalyst had ever made to any government official.[387] The purpose of this meeting was to convince the Government to grant Catalyst regulatory concessions that Catalyst believed were vital to the viability of the WIND business and to Catalyst's investment in it.

307. Catalyst presented the Government with three options. Option 1 provided for a combination of WIND and Mobilicity to create a fourth national carrier focused on the retail market. After representing to the Government of Canada that its negotiations with VimpelCom were "well advanced" – despite the fact that Catalyst had not commenced due diligence or received a draft share purchase agreement (as described below) – Catalyst set out several "requirements" for Option 1 to be viable. These "regulation concessions" included:

(a) guaranteed regulated wholesale cost and roaming contracts;

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386 De Alba Chief, June 6 at pp. 154:24-155:2.

387 Glassman Cross, June 8 at p. 556:13-20.

(b) the potential to transfer spectrum from and to incumbents ("subordinate licencing") to fill spectrum requirements to operate competitive LTE network;

(c) the ability to operate as a retail-only business using incumbents' networks outside license areas to accelerate subscriber growth and move to breakeven quicker; and

(d) the ability to exit the investment with no restrictions after five years.[388]

308. Option 2 identified in Catalyst's presentation provided for a combination of WIND and Mobilicity to create a fourth national carrier on the "Wholesale Market". Catalyst outlined two "requirements" (*i.e.*, concessions) that would have to be met before Option 2 was viable:

(a) the potential to transfer spectrum from and to incumbents ("subordinate licensing") to fill spectrum requirements for nationwide communications; **and**

(b) the ability to exit the investment with no restrictions (*i.e.*, including by sale to an incumbent after give years).[389]

309. The third "Option" was no "Option" at all, but rather a consequence that Catalyst alleged the Government would suffer if the Government did not establish a "viable regulatory and economic framework" for an "alternative transaction" (as described in

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388 CCG0011565, "Canada Wireless Presentation" at p. 7.

389 CCG0011565, "Canada Wireless Presentation" at p. 8. See also Glassman Cross, June 7 at pp. 415:5-416:22.

either Option 1 or Option 2). Catalyst told the Government that if the Government did not establish such a framework, they would likely end up in public, embarrassing litigation in CCAA proceedings involving Mobilicity (rather than WIND) that would be on the "front page" and characterized as a policy failure.[390]

310. As described above, this third Option essentially amounted to a pressure tactic to try and intimidate the Government of Canada into granting the concessions that were so important to Catalyst.

C. Catalyst's Negotiations with VimpelCom

i. The Nascent Status of Catalyst's Negotiations with VimpelCom at the Time of Catalyst's March 27, 2014 Meeting with the Government of Canada

311. Catalyst's statement that it was in "advanced negotiations" with VimpelCom, as at March 27, 2014, was a misrepresentation to the Government of Canada and is representative of Catalyst's willingness to engage in "positioning" when favourable to its interests.[391] In his Affidavit, Mr. De Alba attempted to backfill the nature, extent, and importance of Catalyst's pre-March 27 communications with VimpelCom in an effort to bring them within the ordinary meaning of the words "advanced negotiations". However, the evidence of these alleged "advanced negotiations" that Mr. De Alba managed to stretch into almost twenty paragraphs of his Affidavit amounts to nothing more than a handful of phone calls of indeterminate length, one in-person meeting, and three emails.[392] Ironically, one of these three emails was from VimpelCom's Director of Business Control and Mergers & Acquisitions advising Catalyst that VimpelCom could

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390 CCG0011565, "Canada Wireless Presentation" at p. 9.
391 Glassman Cross, June 7 at pp. 393:25-394:11.
392 See De Alba Affidavit sworn May 27, 2016, at paras. 25-27, 30-31, 33, 35-36, 38-39, and 44.

not discuss a possible transaction with Catalyst during the 700 MHz spectrum auction that was ongoing in the Winter of 2014.[393]

312. At trial, Mr. De Alba maintained that Catalyst's negotiations with VimpelCom were "advanced" as at March 27, 2014 because there had been "multiple discussions" in 2013. However, he also agreed that Catalyst had "instructed [its] counsel to produce all records of those negotiations",[394] and no records of any negotiations with VimpelCom in 2013 were produced by Catalyst in this case.

313. The true, nascent, status of Catalyst's negotiations with VimpelCom at the time of Catalyst's March 27 meeting with the Canadian Government is best demonstrated by the following objective facts, which had to be wrestled from both Messrs. Glassman and De Alba in cross-examination despite the undisputed nature of these facts, given the clear content of Catalyst's contemporaneous documents:[395]

(a) Catalyst had only just delivered an executed confidentiality agreement to VimpelCom five days before the March 27 meeting, on March 22, 2014. In other words, Catalyst had yet to receive any confidential information from VimpelCom, and vice-versa;

(b) Catalyst had not yet retained Morgan Stanley as its financial advisors, which did not occur until May 6, 2014;

(c) Catalyst had not yet gained access to the WIND data room. That did not occur until on or around May 9, 2014. Mr. De Alba was forced to agree

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393 De Alba Affidavit sworn May 27, 2016, at para. 27.
394 De Alba Cross, June 6 at p. 245.
395 De Alba Cross, June 6 at pp. 244:7-245:10 and 249:5-15. Glassman Cross, June 7, at pp. 364:13-374:23.

that the necessary consequence of this fact was that Catalyst had not yet begun the due diligence process;

(d) Catalyst had not yet received a management presentation from WIND. This did not occur until Catalyst's "due diligence kickoff meeting" on May 9, 2014;

(e) Catalyst had not yet retained its technical expert. This did not occur until mid-May, 2014;

(f) Catalyst had not yet received or exchanged with VimpelCom a first draft of the share purchase agreement. Catalyst was not provided with VimpelCom's initial draft until May 12, 2014;

(g) VimpelCom had not yet communicated its $300 million asking price to Catalyst, which only happened on May 6, 2014; and

(h) finally, Catalyst was still four months away from convincing VimpelCom to enter into exclusive negotiations with Catalyst. By any realistic meaning of the words "advanced negotiations", it was on that date, July 23, 2014, that Catalyst's negotiations with VimpelCom could be legitimately described as "advanced" (and, of course, Catalyst could not have known on March 27 that its negotiations with VimpelCom would ever reach that stage).

ii. The Unsolved Mystery Regarding the Destruction of the March 27 and May 12 Presentations by Catalyst

314. To this day, none of Mr. Moyse, West Face, or this Court has been provided with a coherent or logical explanation surrounding the destruction of the March 27 and May

12 presentations and (almost) all of the drafts, notes, emails, and other contemporaneous documents that were allegedly destroyed along with them. This is concerning because Catalyst relies on Mr. Moyse's involvement in "leading" the creation of these presentations as the foundation for his supposedly sophisticated and "intimate" knowledge of Catalyst's confidential regulatory strategy.

315. Mr. Glassman's evidence was that the Government asked that all of Catalyst's drafts of the presentations be destroyed, but that the Government had no problem with Catalyst keeping the final copy of the presentation.[396] Specifically, Mr. Glassman testified that Industry Canada representatives asked him to "please make sure that you live with what you only showed us since we haven't seen anything else, we would prefer that only this exists".[397] Mr. Glassman could not identify who allegedly made this request, nor are there any contemporaneous documents verifying that such a request was made.[398]

316. Why the Federal Government of Canada would care about Catalyst's internal drafts of a presentation, which by definition the Government had never seen, was never adequately explained.

317. In any event, during his examination in chief, Mr. Glassman explained that "in his experience," such requests (*i.e.* requests by government officials that private parties destroy their internal work product) are made often and frequently.[399] Of course, Mr. Glassman also conceded in cross-examination that this was the first presentation he

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396 Glassman Cross, June 7 at pp. 322:18-324:13; 384:6-385:24.
397 Glassman Cross, June 7 at p. 385:4-13.
398 Glassman Cross, June 7 at pp. 384:6-385:24.
399 Glassman Chief, June 7 at p. 323:2-11.

had ever made to Government. Specifically, Mr. Glassman refused to agree with Mr. De Alba's evidence (discussed below) that Catalyst had a policy or practice of destroying presentations to the Government because the March 27 PowerPoint was the first presentation that Catalyst had "ever actually made formally to any government official".

318. According to Mr. Glassman, a copy of the final version of the presentation was kept in Catalyst's "master file".[400] Mr. Glassman denied that it was Catalyst's intention to destroy every copy of the presentation, stating, "I think the intention was to destroy any copies in the hands of junior people".[401]

319. Mr. Glassman's evidence about the destruction of the March 27 PowerPoint is in direct contrast to the evidence given by Mr. Riley. At his cross-examination on May 13, 2015, Mr. Riley testified that the PowerPoint presentation had been destroyed shortly after it was given, and that no records had been maintained. Catalyst relied on this evidence to justify its failure to produce the presentation in its unsuccessful motion for serious injunctive relief against West Face and a contempt finding (and jail term) against Mr. Moyse. Mr. Riley's evidence at trial was that it was he, Mr. Glassman or Mr. De Alba (and not Industry Canada officials) who had asked everyone at Catalyst who had copies of the March 27 PowerPoint to destroy and delete them, because he believed that given the sensitivity of the information enclosed, it was best to not maintain copies.[402]

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400 Glassman Cross, June 8 at pp. 555:22-556:1.
401 Glassman Cross June 7 at pp. 448:18-451:10.
402 Riley Chief, June 8 at pp. 574:12-575:

320. Mr. De Alba's evidence on examination for discovery held May 11, 2016 (three weeks before trial) was that as the information was "critical", "it was advised" that the presentations were destroyed so that the information would not be "floating around". In his Affidavit, Mr. De Alba's evidence was that Catalyst went to "extreme measures to ensure that the contents of the presentation would not be leaded [*sic – presumably should be "leaked"*]", and that it was **Mr. Riley** who had instructed all of the Catalyst team members to destroy all copies of the presentation, including notes and drafts.

321. During Mr. De Alba's examination for discovery, Catalyst's counsel advised that his understanding was that after the presentation was delivered to Industry Canada, Catalyst requested copies of the PowerPoint back from the Government officials who had attended the meeting, and took them back and destroyed them. According to counsel, an order went out from either Mr. Glassman, Mr. De Alba, or Mr. Riley to destroy the presentation and all copies from their records as well. Neither Mr. De Alba nor Catalyst corrected this evidence in advance of trial.

322. The Catalyst witnesses gave dramatically different evidence regarding the destruction of this important evidence. Their inability to tell a consistent story with respect to this critical event seriously undermines the credibility of their evidence.

iii. Catalyst Begins Negotiations with VimpelCom

323. Despite Catalyst's assertion that negotiations were "advanced" by March 27, Catalyst's negotiations with VimpelCom did not truly begin until May 6. On that day, VimpelCom and Catalyst agreed to the most basic concepts of the transaction (including the $300 million price), and scheduled a "due diligence kickoff meeting" for Friday May 9 or Monday May 12, around the same time that Catalyst engaged Morgan

Stanley as financial advisors. Mr. De Alba was forced to agree that due diligence had not begun by May 6, 2014.[403]

iv. Catalyst's Negotiations with VimpelCom on Issues Surrounding "Regulatory Risk" (Extensive Negotiations re: 6.3(d))

324. VimpelCom sent Catalyst a first draft of a share purchase agreement on May 12, 2014. From the very outset of the negotiations between Catalyst and VimpelCom, they were at odds with respect to regulatory risk.

325. Given its history of regulatory setbacks, VimpelCom wanted to minimize the risk of regulatory approval not being obtained.[404] Conversely, Catalyst wanted to preserve its ability to seek the regulatory concessions that it believed were necessary in order for WIND to succeed. Mr. De Alba conceded that Catalyst's seeking of the regulatory concessions set out in the March 27, 2014 presentation could potentially prevent or delay the obtaining of regulatory approval to the transaction.[405]

326. The challenge for Catalyst was that seeking regulatory concessions that could delay or prevent obtaining regulatory approval was contrary to section 6.3(d) in VimpelCom's first May 9, 2014 draft of the share purchase agreement. Mr. De Alba agreed that VimpelCom's inclusion of this provision, which Mr. Locke described as a "hell or high water" clause, in this first draft was consistent with VimpelCom's known desire to minimize the risk of any purchaser, including Catalyst, not obtaining such regulatory approval.[406]

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403 De Alba, June 6 at pp. 246-247; Glassman, June 7 at pp. 369-370.
404 See, for example, Griffin Chief, June 8 at p. 716:4-13.
405 De Alba Cross, June 6 at p. 254.
406 De Alba, Cross, June 6 at p. 254.

327. In its subsequent negotiations with VimpelCom over the terms of the share purchase agreement, Catalyst repeatedly attempted to reserve the right to seek government concessions during the interim period between signing the agreement and closing the deal, by deleting or amending portions of section 6.3(d) that would have limited Catalyst's ability to seek such concessions.[407]

328. This clause was a point of extensive negotiation between Catalyst and VimpelCom. Mr. De Alba, as the lead negotiator, recalled going back and forth on this clause.[408] He testified that VimpelCom repeatedly and consistently tried to restrict or limit Catalyst's ability to seek regulatory concessions in the interim period and that Catalyst, on the other hand, repeatedly tried to ease these restrictions. As it turned out, VimpelCom ultimately "won" on this point of negotiation.[409]

329. It is important to note that the negotiations concerned Catalyst's right or ability to seek concessions – no draft of the share purchase agreement exchanged between Catalyst and VimpelCom contained a condition that Catalyst must have obtained the regulatory concessions before the transaction could close.[410]

330. In the last draft of the share purchase agreement that was sent to Mr. Moyse on May 24, 2014 (the day he tendered his resignation to Catalyst near the end of his vacation in Asia), Catalyst had deleted section 6.3(d).[411]

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407 De Alba, Cross, June 6 at p. 258.

408 De Alba Cross, June 7 at p. 281:1-10.

409 De Alba Cross, June 7 at pp. 279:13-280:21; De Alba Cross, June 7 at pp. 281:11-283:21; De Alba Cross, June 7 at pp. 283:21-285:19; CCG0009636; CCG0009636; CCG0009738; CCG0024199; CCG0009833; CCG0009859; CCG0012087; CCG0026606; CCG0026610.

410 De Alba Cross, June 6 at pp. 260:1-262:19.

411 De Alba Cross, June 6 at pp. 257:10-25. CCG0011364.

v. Catalyst is Informed that the Share Purchase Agreement under Negotiation is Subject to Approval by VimpelCom's Board

331. By mid-July at the latest, Catalyst was informed that the terms of the share purchase agreement then being negotiated between Catalyst and VimpelCom were ultimately going to be subject to approval by VimpelCom's board of directors.[412]

332. Specifically, in an email dated July 13, Faaiz Hasan of VimpelCom attached the latest version of the draft Catalyst/VimpelCom share purchase agreement, blacklined against the previous version provided by Catalyst, and then flagged some of the key provisions in that draft, including the provisions that: (i) it would be VimpelCom, and not Catalyst, who would provide funding to WIND between signing the agreement and closing the transaction; and (ii) as a result, VimpelCom felt that it was "taking the risk on all the interim funding so [VimpelCom did] not want the approval process to extend longer than necessary". Mr. Hasan concluded his email with the following explicit statement: "Please note that the above terms / SPA is subject to VimpelCom board approval".[413]

333. As discussed further below, despite never having previously dealt with VimpelCom or its board, Catalyst apparently did not read much into Mr. Hasan's email. Instead, Catalyst made the erroneous assumption that VimpelCom's board approval process would be a rubber stamp.[414] As set out further below, this presumption was baseless to begin with, and ultimately turned out to be incorrect.

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412 See, for example, CCG0024196.
413 CCG0024196.
414 Glassman Cross, June 7 at pp. 504:14-511:2.

vi. July 23, 2014: Catalyst Enters Exclusive Negotiations with VimpelCom, and the Exclusivity is Repeatedly Extended to August 18, 2014

334. On July 23, 2014, Catalyst entered into exclusive negotiations with VimpelCom.[415] This exclusivity agreement precluded VimpelCom from negotiating with other parties for the duration of the specified period.[416] This exclusivity period was subsequently extended several times, and ultimately ran until August 18, 2014.[417]

vii. Catalyst and VimpelCom Reach a "Substantially Settled" Agreement on the Terms of the Share Purchase Agreement which Expressly Precluded Catalyst from Seeking the Regulatory Concessions

335. On Friday, August 1, 2013, Mr. Saratovsky of VimpelCom sent Mr. De Alba an email attaching a draft of the share purchase agreement that VimpelCom considered to be substantially settled.[418] Mr. Saratovsky advised that his email constituted written confirmation by VimpelCom that the share purchase agreement was substantially settled from its perspective, and that therefore, pursuant to the terms of the Catalyst/VimpelCom Exclusivity Agreement, the exclusivity period would be extended automatically for five business days once Catalyst confirmed the same.[419] On Sunday, August 3, Mr. De Alba responded to Mr. Saratovsky's email and agreed that the August 1 draft was substantially settled.[420]

336. Notably, section 6.3(d) of this "substantially settled" version of the Catalyst/VimpelCom share purchase agreement expressly precluded Catalyst from

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415 Leitner Affidavit sworn on June 6, 2016, at para. 22. See also CCG0024320.
416 CCG0024320.
417 Leitner Affidavit sworn on June 6, 2016, at para. 29. See also CCG0024634.
418 CCG0026616 and attachment CCG0026625.
419 CCG0026616; De Alba Cross, June 7 at pp. 287:9-287:23.
420 De Alba Cross, June 7 at p. 285:21-28. CCG0024442; De Alba Cross, June 7 at pp. 287:24-288:20.

seeking regulatory concessions likely to prevent or delay obtaining regulatory approvals, or to even develop plans for the sale of spectrum to an incumbent:

> Subject to Section 6.4, **the Purchaser shall not knowingly take or cause to be taken any action which would be expected to prevent or delay the obtaining of any consent or approval required hereunder**, **including** (a) without the written consent of the Seller, not to be unreasonably withheld, **seeking approval from any Governmental Authority** for a transaction other than the transactions contemplated hereby; or (b) without the written consent of the Seller, entering into any timing or other agreements with any Government Authority for the consummation of the transactions contemplated hereby. **For greater certainty**, for the duration of the Interim Period, **the Purchaser shall 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**; provided that nothing in clause (i) or (ii) shall preclude the Purchaser from doing any act or thing requested by any Governmental Authority or necessary or desirable in connection with or for purposes of obtaining either such approval…

337. Mr. De Alba attempted to debate the meaning of this provision during his cross-examination, but he was ultimately forced to admit that clause 6.3(d) limited Catalyst's ability to seek permission to sell WIND's spectrum to an incumbent, which was, of course, the essence of Catalyst's exit strategy and the "crucial" concession sought by Catalyst from the Government of Canada.[421]

338. Clause 6.3(e) of this "substantially settled" draft share purchase agreement permitted Catalyst to continue to pursue concessions from the Government that WIND was *already pursuing*. **These concessions** had been disclosed to all bidders by WIND and **did not include the right to sell spectrum to an incumbent**.[422] Therefore, s.

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421 De Alba Cross, June 7 at p. 291:6-19; CCG0026616.
422 De Alba Cross, June 7 at pp. 292:12-294:11.

6.3(e) could not have assisted Catalyst in their pursuit of this crucial concession from the Government.

339. Mr. De Alba ultimately admitted during his cross-examination that, had Catalyst signed the share purchase agreement, it would **not** have been allowed during the interim period to seek from the Government the crucial concession that Catalyst be given the unrestricted right to sell WIND and/or its spectrum to an incumbent after five years.[423] Mr. De Alba initially argued that Catalyst's inability to seek this concession would only take "Option One" off the table, and that the other two options were "still alive and [could] be pursued".[424] However, after being directed to answer the question by the Court, he admitted that Catalyst, as "part of the negotiation" had previously told the Government of Canada that Catalyst required the ability to exit the investment with no restriction in five years as part of Option Two as well.[425]

340. In short, Mr. De Alba conceded that sections 6.3(d) and 6.3(e) of the August 1 "substantially settled" share purchase agreement, effectively prohibited Catalyst from seeking from the Government the right to sell WIND's spectrum to an incumbent after five years.[426]

341. Notably, Mr. De Alba's admissions regarding section 6.3(d), although consistent with the actual wording of the "substantially settled" share purchase agreement, were inconsistent with the position taken by Catalyst as recently as six business days before trial. Up until this point, Catalyst claimed that – far from prohibiting the seeking of

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423 De Alba Cross, June 7 at pp. 297:23-298:2. See also De Alba Cross, June 7 at p. 291:6-19; CCG0026616.
424 De Alba Cross, June 7 at p. 298:8-14.
425 De Alba Cross, June 7 at p. 300:24-3.
426 De Alba Cross, June 7 at pp. 301:16-302:16.

regulatory concessions – the Catalyst/VimpelCom deal was *conditional* on Catalyst obtaining regulatory concessions from Industry Canada.

342. Catalyst had maintained this incorrect assertion since the delivery of Mr. Riley's Affidavit of February 18, 2015 in support of injunctive and contempt orders, where he stated:

> During the Exclusivity Period, Catalyst and VimpelCom were able to negotiate almost all of the terms of the potential sale of Wind Mobile to Catalyst. The only point over which the parties could not agree was regulatory risk – Catalyst wanted to ensure that its purchase was conditional on receiving certain regulatory concessions from Industry Canada, but VimpelCom would not agree on the conditions Catalyst sought.[427]

343. Mr. Riley did not attach any documents evidencing Catalyst's negotiations with VimpelCom nor the alleged "terms of the potential sale" over which the parties "could not agree". Catalyst refused to produce evidence of its negotiations with VimpelCom on the basis that they were not relevant and/or were confidential. We now know the contemporaneous documents flatly refuted Mr. Riley's evidence.

344. Mr. Riley chose to "double-down" on the above-quoted evidence in his Supplementary Affidavit sworn May 1, 2015. In that Affidavit, he stated:

> At the time [August 11, 2014], **the anticipated deal with VimpelCom was conditional on** Industry Canada approval and the **granting of certain regulatory concessions to a Catalyst-owned Wind that in Catalyst's mind would make it easier for a fourth national carrier to succeed**. These concessions were essentially the same regulatory concessions summarized in the PowerPoint presentation Moyse helped create in early 2014.[428]

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427 Riley Affidavit sworn February 18, 2015, at para. 45.

428 Riley Affidavit sworn May 1, 2015, at para. 42.

345. Again, Mr. Riley did not attach any documents (such as the terms of the "anticipated deal") substantiating this incorrect allegation.

346. Mr. Riley gave this evidence, twice, at a time when Catalyst was seeking drastic and extraordinary injunctive relief against West Face and a contempt order against Mr. Moyse. Specifically, these Affidavits were sworn and filed in support of Catalyst's motion for: (i) an interlocutory injunction restraining "[West Face], its officers, directors, employees agents, or any persons acting under its direction or on its behalf" from "[p]articipating in the management and/or strategic direction of [WIND] and any affiliated or related corporations"; and (ii) an interlocutory 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 any confidential information belonging to Catalyst.

347. Moreover, because Catalyst had not produced the relevant drafts of the share purchase agreement in advance of Mr. Riley's cross-examination on these affidavits held May 13, 2015, Mr. Riley was effectively shielded from cross-examination on this point. As a result, at the time Catalyst's motion was argued before Justice Glustein, the details of why Catalyst had failed to close its deal with VimpelCom were unknown.

348. These statements given by Mr. Riley under oath were simply not true. In its revised answers to undertakings from the examination for discovery of Mr. De Alba, which were delivered in the final days before trial, Catalyst confirmed that **no draft** of the Catalyst/VimpelCom share purchase agreement was expressly predicated on

Catalyst obtaining the regulatory concessions.[429] This includes, of course, mark-ups of the share purchase agreement that Catalyst had sent back to VimpelCom – meaning that at no point did Catalyst even ask VimpelCom that the obligation to close the transaction be conditional on Catalyst obtaining the regulatory concessions.[430]

349. Mr. Riley's pre-trial Affidavits are the only place Catalyst actually alleges that Mr. Moyse transmitted confidential information to West Face. Neither Messrs. De Alba's nor Glassman's Affidavits makes such an allegation. They focus, respectively, on Mr. Moyse's knowledge and Catalyst's strategy. It is therefore extremely significant that Mr. Riley's Affidavit evidence was entirely unreliable, and at no time did he make any effort to correct it. His evidence simply cannot be relied upon in any way.

viii. Catalyst was Conclusively and Repeatedly Told It Would Not Get Regulatory Concessions

350. Concurrent with the negotiations with VimpelCom, Catalyst had been lobbying the Government for the regulatory concessions set out in the March 27 PowerPoint. Catalyst was repeatedly told by the Government of Canada that the regulatory concessions would **not** be granted.[431] These messages from the Government were consistent, repeated, and became more and more unequivocal as time passed – not less. Catalyst was told by the Government that the concessions were not forthcoming on at least five occasions:

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429 See Catalyst's answer to U/T 14 from the examination for discovery of Gabriel De Alba held May 11, 2016 (CCG0028722). See also Riley Transcript, pp. 610:22-615:5. See also Glassman Chief, June 7 at pp. 355:19-336:3.

430 De Alba Cross, June 6 at p. 262:8-19.

431 Glassman Cross, June 7 at pp. 409:17-410:6; p. 411:15-20; pp. 434:25-436:3.

(a) on March 27, when the Government's "explicit reaction" was not to grant the concessions;

(b) on May 7, when the Government told Catalyst's public-relations consultant, Mr. Drysdale, that it would **not** give Catalyst in writing the right to sell spectrum in five years;

(c) on May 12, when Catalyst had a second (and final) in-person meeting with representatives of Industry Canada, and they again refused to commit to providing Catalyst with the right to sell WIND's spectrum in five years;

(d) on July 25, when Industry Canada representatives reached out to Mr. Drysdale again and "implied that Catalyst seeking **any concessions was a dead end**" as Catalyst had already "gone down that road twice before" and Industry Canada was unlikely to be flexible; and

(e) on August 3, Mr. Drysdale advised Catalyst that he had met with senior Industry Canada officials who gave him unequivocal, unmistakeable, and explicit feedback that Catalyst would not be granted the regulatory concessions.

351. Catalyst's first communication from the Government following its March 27 meeting was delivered to Mr. Glassman by Mr. Drysdale on May 7, 2014. Mr. Glassman circulated the following email to the Catalyst core deal team (and he copied Mr. Drysdale) relaying this message:

> Govt has told us today via bruce d that they will **not** give us in writing the right to sell spectrum in 5 yrs. My response is that

> such takes 'option 1' off the table and we would only be willing to build a 'wholesale/leasing business' specifically w incumbents as the customers. They know this. We r going to ottawa early next wk. They also asked for our help to understand who really is controlling v-com's decision making and to get or input prior to next wk's mobilicity mediation.[432]

352. At trial, Mr. Glassman asserted that the Government's message that it would not give Catalyst the right to sell spectrum in five years was "what [he] had expected the government to say and do at that stage of the negotiation".[433] As will be seen as each relevant document is discussed in turn, there is no evidence that there was **any** "negotiation" between Catalyst and the Government on this point. All of the evidence suggests it was simply non-negotiable.

353. There is not a single contemporaneous document evidencing what Mr. Glassman refers to as the "unofficial position" or "softening body language" of Industry Canada and other Government representatives, let alone evidence that Mr. Moyse was aware of (or conveyed to West Face) Mr. Glassman's idiosyncratic interpretation of the Government's repeated blunt objections to Catalyst's requests. On the contrary, the contemporaneous documents prove that the Government never strayed from its hard-line position that it would not grant Catalyst the right to sell WIND's spectrum in five years.

354. In any event, that Mr. Glassman allegedly "expected" the Government to take this stance is not reflected in his contemporaneous email. Clearly, his response was that "Option 1" (namely, for Catalyst to combine WIND and Mobilicity into a fourth wireless carrier focussed on the retail market) was "off the table".

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[432] CCG0009482.

[433] Glassman Cross, June 7 at pp. 457:24-459:9. See also Glassman Chief, June 7 at pp. 331:5-332:14.

355. Catalyst's next meaningful interaction with the Government was at its meeting with Industry Canada on May 12. Again, Catalyst prepared a PowerPoint similar to the March 27 presentation. Catalyst conveyed to the Government that, in the period since March 27, the circumstances surrounding Catalyst's pursuit of building-out a national fourth wireless carrier had gotten worse.[434] Catalyst continued to represent to the Government of Canada that "no deal could be completed with VimpelCom" unless the Government established a viable regulatory and economic framework.[435] Specifically, Catalyst made it absolutely clear to the Government that in the absence of the regulatory concessions outlined in the March 27 and May 12 presentations, it would be (in Catalyst's opinion) virtually impossible to finance WIND's operations, including a proper build-out of its wireless network.[436]

356. When the proposition was put to Mr. Glassman that "once again, representatives of the Government of Canada … did **not** agree to grant to Catalyst any of the regulatory concessions [Catalyst] had asked for", Mr. Glassman again indicated that Catalyst had not "expected" the Government to grant such concessions.[437]

357. When it was also put to Mr. Glassman that the Government also did not support Catalyst's "Option 2" to build out a wholesale carrier, Mr. Glassman responded: "They weren't quite as adamant as I think you are suggesting, or at least their body language undermined their language, so they may have said it, but we didn't believe them

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434 Glassman Cross, June 7 at p. 463:8-13.
435 Glassman Cross, June 7 at p. 466:13-17.
436 Glassman Cross, June 7 at pp. 466:18-467:4.
437 Glassman Cross, June 7 at p. 467:16-20.

completely".[438] Mr. Glassman's wishful thinking finds no support in the evidence nor can Catalyst prove that anyone ever conveyed this view to Mr. Moyse.

358. Shortly after this meeting, Catalyst received the negative opinion from Faskens dated May 19 referred to above. This, apparently, had no sway on Mr. Glassman, because he viewed himself as having more experience on spectrum transfer law than the very counsel Catalyst had retained to provide advice on that specific issue.

359. Catalyst did not have any meaningful communications with the Government from May 12 for over two months, until July 25 – after it had already entered into exclusivity with VimpelCom and mere days before it was to agree to the "substantially settled" draft of the share purchase agreement (as discussed above).

360. On July 25, 2014, Mr. Drysdale sent Messrs. De Alba and Riley an email stating that while Industry Canada would likely not have an issue with a "straight up purchase" of WIND by Catalyst, and would approve the transfer of spectrum associated with that transaction, Industry Canada also "implied that Catalyst seeking **any concessions was a dead end**" as it had "gone down that road twice before" (namely, on March 27 and May 12).[439]

361. Later on in his email exchanges with Mr. De Alba, Mr. Drysdale also expressed "worry" that if Catalyst bought WIND without the requested concessions, it would "end

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438 Glassman Cross, June 7 at p. 468:2-13.
439 CCG0025815.

up with a stranded asset" and that he wanted Catalyst to "go into this with [its] eyes wide open".[440]

362. Mr. Glassman has obstinately refused to accept his own expert's advice. Instead of acknowledging that Mr. Drysdale meant what he said in his email, Mr. Glassman stated that this email gave him "incredible insight" into what was going on at Industry Canada, which Mr. Glassman suggested was "all posturing" – even though Mr. Glassman had no contact with Industry Canada officials in over a month, and on that previous occasion, the answer to Catalyst's request for concessions had been an unequivocal "no". Instead, Mr. Glassman's interpretation of Mr. Drysdale's email was that nothing that the Government of Canada had told Mr. Drysdale would mean anything once Catalyst presented the Government with a "live deal" (in other words, a signed share purchase agreement with VimpelCom).[441]

363. When he was asked why Mr. Drysdale's email did not convey the message that Catalyst's request for concessions would be back on the table once Catalyst presented the Government with a "live deal", Mr. Glassman announced that this was because Mr. Drysdale simply did not have the qualifications and experience that Mr. Glassman had in interpreting the Government's message (which Mr. Glassman never heard directly but only through the email from Mr. Drysdale):

> Q. And the warning you were given was that your request for concessions might well be at a dead end, right?
>
> A. Right, until we deliver them a live deal. It is at a dead end until you give them a live deal.

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440 CCG0025815. See also Glassman Cross, June 7 at p. 477:6-13.

441 Glassman Cross, June 7 at pp. 473:20-476:6.

> Q. And of course that is not what Mr. Drysdale says in the email, does he?
>
> A. Mr. Drysdale is not in the business of investing. Mr. Drysdale is advising purely on government relations.
>
> Q. And he had more --
>
> A. He says what he is worried about.
>
> Q. And he had more experience in matters of this sort than you did; correct?
>
> A. Generally; not on this issue, neither in telecom nor on a specific issue where here was a transferability issue as to whether it was property, whether the government had the right to do it or not. No one in Canada had that experience, no one. **Only people in the U.S. did, and me**.[442]

364. Catalyst's final communication from the Government was the last nail in the coffin. On August 3, 2014, Bruce Drysdale sent Catalyst the following email:

> Newton/Gabriel,
>
> I was in Ottawa late last week and met with James Nicholson in Minister Moore's office for 45 minutes. I also had coffee with a senior PCO official. I was able to have frank conversations with both, while also pushing the Catalyst position.
>
> Below please see some of the feedback and insights from Nicholson and PCO. We will want to factor these into your negotiations/discussions with Wind.
>
> - **Both Industry Canada and PCO/PMO are adamant that the current federal policy will not change.**
>
> - **Nicholson clarified the federal position saying Minister Moore and IC officials would not be opposed to Catalyst buying Wind but Ottawa would not provide concessions Catalyst outlined in its May presentation for building out a fourth carrier nor would Ottawa allow Catalyst or anyone else to become a re-seller.**
>
> - **Nicholson said that if Catalyst signs an Sale and Purchase Agreement with Wind it should do so with a clear understanding it would have to build out a fourth**

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442 Glassman Cross, June 7 at p. 476:1-22 (emphasis added).

> **carrier without concessions and without ability to sell to an incumbent after 5 years.**
>
> - **Nicholson and PCO both told me that Quebecor** (both prior to PKP running for office as a separatist and since) has lobbied hard in Ottawa at all levels for concessions to build out a fourth carrier and have been told Ottawa **will not be providing them with any concessions** (beyond what regulatory changes are being rolled out by the CRTC in coming months). **Nicholson said Minister Moore and PM Harper are entrenched and there will be no flip flop**.
>
> - Nicholson said that if nobody steps forward to build out a fourth carrier as a straight-up proposition (no concessions, no ability to sell to incumbents after 5 years, etc.) then the Harper government has 'mitigating strategies' in place to deal with that scenario.[443]

365. Mr. Glassman refused to concede the unequivocal message that Catalyst had received via Mr. Drysdale – namely, that the Government would not grant Catalyst the requisite concessions.[444] Instead, Mr. Glassman stated that this email "confirmed" to him that the Government was "trying desperately to set the table for future discussions about regulatory concessions".[445] Mr. Glassman subsequently suggested that the "average reader" might not understand that this was simply an effort by the Government to pit Catalyst in a "horse race" against Quebecor.[446]

366. This was remarkable testimony. At that point during his cross-examination, one was left wondering what message from Mr. Drysdale, if any, could have convinced Mr. Glassman that he had misread the situation. Mr. Glassman simply does not believe that people in this world mean what they say when what they say contradicts his preconceived notions:

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443 CCG0025843 (emphasis added).
444 Glassman Cross, June 7 at pp. 487:13-490:24.
445 Glassman Cross, June 7 at p. 486:11-19.
446 Glassman Cross, June 7 at p. 488:9-20.

> Q. What you were being told by the government, clearly and unequivocally through Mr. Drysdale, was this had reached the very highest levels of government, it reached the Minister of Industry and the Prime Minister of Canada, take it one step at a time. You were told that, were you not?
>
> A. Sir, 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.[447]

367. Unfortunately for Mr. Glassman, there is no evidence that the Government of Canada did not mean exactly what it said, explicitly, unequivocally, and repeatedly.

368. At the end of the day, there is no evidence beyond Mr. Glassman's hearsay statements and his own idiosyncratic interpretations of meetings and communications with the Government (some of which he was not a party to) that the Government's position that it would not grant Catalyst the regulatory concessions was even negotiable. Even if this Court accepts that Catalyst had at one point managed to open the door to the negotiations (which is simply not credible), the Government clearly shut that door very firmly in Catalyst's face before Catalyst could ever get a foot in.

369. Catalyst had no further relevant communications with Mr. Drysdale or any representative of Industry Canada, the Privy Council Officer, or the Prime Minister's Officer, directly or indirectly, regarding the concessions sought by Catalyst. The only further communication Catalyst had with Industry Canada was on August 11, and this call did not relate to regulatory concessions.

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[447] Glassman Cross, June 7 at p. 489:1-12.

ix. Catalyst Has Admitted That it Would Not Have Completed its Proposed Acquisition of WIND Without the Regulatory Concessions

370. Mr. De Alba stated in cross-examination that if Catalyst had not obtained any of the concessions outlined to the Government of Canada in the March 27 or May 12 presentations, Catalyst would not have proceeded to close a deal to acquire WIND.[448] This was consistent with Mr. Glassman's many statements in both his Affidavit and live testimony indicating that, to Catalyst, the regulatory concessions truly were prerequisites to Catalyst purchasing WIND.[449]

371. This was because, as set out above, Catalyst's view was that such concessions were required in order to make WIND viable. Indeed, Mr. Glassman's view was that "no bank" would lend against WIND's collateral (the spectrum) unless it were saleable to an incumbent.[450]

372. Given this position, it is perhaps a little less surprising that both Messrs. De Alba and Glassman also admitted on the stand that it was Catalyst's plan to sign the share purchase agreement and then, **in violation of that agreement** with VimpelCom, continue to pursue regulatory concessions from the Government of Canada. As admitted by Mr. Glassman:

> **Q. You intended to continue to negotiate with the government for the concessions Catalyst was seeking in the interim period between the signing of the agreement with VimpelCom and the closing of the transaction?**

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448 De Alba Cross, June 7, at pp. 275:24-278:24.

449 Glassman Affidavit sworn May 27, 2016, at paras. 4-5, 20. See also Glassman Cross, June 7 at pp. 387:4-19; pp. 500:21-503:21; p. 406:16-22.

450 Glassman Cross, June 7 at pp. 412:12-414:22.

> **A. <u>Well, of course</u>, by definition we would have to continue discussions with them.**[451]

373. Mr. De Alba gave the same evidence, although only after being impeached on the transcript from his examination for discovery:

> Q. But that doesn't quite answer my question, sir. Your plan was to sign the SPA and even though the government said they wouldn't give you concessions, you were going to try and get concessions before the deal closed; correct?
>
> A. The SPA allowed us to have a discussion in relationship to concessions.
>
> Q. Well, again, that doesn't answer my question. Mr. de Alba, again, you recall giving examination for discovery evidence on May 11th, 2016?
>
> A. Yes.
>
> Q. And you gave that evidence under oath and it was truthful?
>
> A. Correct.
>
> Q. And let me just read to you from the transcript.
>
> THE COURT: Just wait a second.
>
> MR. MILNE-SMITH: It is tab 2, page 177.
>
> THE COURT: Go ahead. Which question?
>
> MR. MILNE-SMITH:
> Question 654. Do you have that, Your Honour?
>
> THE COURT: Yes.
>
> BY MR. MILNE-SMITH:
>
> **Q. Okay. "Question: Meaning your plan was to sign the SPA and even though the government said they wouldn't give you concessions, you were going to try and get concessions before the deal closed? Answer: We were going to try". Did I ask you that question and did you give that answer?**
>
> **A. That's correct.**

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[451] Glassman Cross, June 7 at p. 503:15-21 (emphasis added).

Q. And you did so truthfully; correct?

A. Yes.[452]

x. VimpelCom Agrees to Extend Catalyst's Exclusivity to August 18, 2014, After the New Investors' August 7 Proposal was Made

374. On August 8, VimpelCom chose to extend Catalyst's exclusivity period to August 18, 2014.[453] VimpelCom did so despite having received the New Investors' proposal the day before, on August 7, 2014.[454] The fact that VimpelCom extended Catalyst's exclusivity period in spite of already having received an alternative offer from the New Investors seriously undermines Catalyst's argument that the August 7 proposal somehow impacted VimpelCom's negotiations with Catalyst in a material way. Presumably, had VimpelCom seen the August 7 proposal as a superior alternative to Catalyst's offer at that time, it would have simply let exclusivity expire. The fact that it did exactly the opposite suggests that VimpelCom was entirely committed to closing the deal with Catalyst, its "only credible bidder".[455] This was consistent with both Mr. Lockie's understanding and with the contemporaneous emails between Catalyst and VimpelCom, in which VimpelCom continued to express a willingness to work towards reaching an agreement with Catalyst, even after the Chairman of VimpelCom's board raised a concern over the regulatory risk to VimpelCom should the transaction not be approved (as discussed in the next section).

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452 De Alba cross, June 7 at pp. 276:9-277:22 (emphasis added).

453 CCG0024634. See also CCG0027224.

454 WFC0040932.

455 Lockie Affidavit sworn June 6, 2016, at para. 38. See also Lockie Chief, June 10 at pp. 1175:23-1176:3. Mr. De Alba also confirmed on cross that he had no direct knowledge of any communication by VimpelCom to West Face or any member of its consortium during the exclusivity period. See De Alba Cross, June 7 at pp. 303:15-304:25.

xi. VimpelCom's Chairman Raises Concerns About Regulatory Risk, and Requests a Break Fee to Protect VimpelCom in the Event Regulatory Approval is Not Obtained

375. As set out above, Catalyst knew that the proposed WIND transaction it had negotiated with VimpelCom was subject to approval by the VimpelCom board.[456] Although it was Mr. Glassman's evidence that, in his experience, a board of directors will not typically try to alter key deal points negotiated by management,[457] VimpelCom board approval was not, and should never have been, considered by Catalyst to be a rubber stamp.[458]

376. Mr. Glassman admitted on cross-examination that no one from VimpelCom had ever told him that VimpelCom board approval would be a rubber stamp. Despite Mr. Glassman's evidence that "numerous people on the deal team, some of the lawyers involved, Gabriel, others" told him that it would be a rubber stamp,[459] the contemporaneous documents show otherwise. For example, Mr. De Alba was explicitly told by Mr. Babcock of Morgan Stanley that all Mr. Babcock's experience with the VimpelCom board showed that there was nothing normal about it – that there was "a lot of complexity between management and the board… all of which frustrate outsiders".[460] Mr. Glassman had never negotiated a transaction with VimpelCom prior to the WIND deal, and had no previous experience dealing with the board of VimpelCom.[461] He had no reason not to take Mr. Babcock's advice seriously.

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456 See, for example, CCG0024196.
457 Glassman Affidavit sworn May 27, 2016, at para. 43.
458 Glassman Examination, at p. 519:10-15.
459 Glassman Cross, June 7 at p. 505:4-19.
460 CCG0024567.
461 Glassman Cross, June 7 at p. 506:5-12.

377. On August 11, 2014, Mr. Glassman and others at Catalyst experienced the very same "frustration" that Mr. Babcock warned it about. Early in the morning on August 11, Mr. Saratovsky indicated that the Financial Committee of VimpelCom had broadly supported the Catalyst WIND deal, but that it had raised two points on the share purchase agreement that Mr. Saratovsky needed to discuss with Mr. De Alba. In response to prompting by Mr. De Alba, Mr. Saratovsky set out that the Board members were concerned with, in part, the Government's behaviour, and that the Board members wanted to "seek protection in case the government does not approve". Mr. Saratovsky further clarified that "[t]hey view the interim funding as the amount at risk so we need to discuss the point".[462] The substance of this message is that VimpelCom wanted a break fee to cover the costs of operating WIND should the deal with Catalyst ultimately fall through because of lack of government approval.

378. Specifically, Messrs. Glassman and De Alba testify in their Affidavits that the Chairman sought a $5 to $20 million break fee in the event the transaction did not close in 60 days.[463]

379. This concern by the VimpelCom board was entirely consistent with the concerns expressed by VimpelCom throughout its negotiations with both Catalyst and the New Investors. Regulatory risk had always been one of the main concerns of VimpelCom, given its previous experiences with the Government of Canada.[464] Their concerns provided prescient given Catalyst's undisclosed (at the time) but admitted (at trial)

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462 CCG0027248. See also Glassman Cross, June 7, at pp. 511:14-516:16. On cross, Mr. Glassman admitted that WIND was burning roughly $10 to $15 million a month in operating cost (see Glassman Cross, June 7 at p. 464:16-19).

463 Glassman Cross, June 7 at p. 517:3-25.

464 CCG0024774.

intention to seek regulatory concessions that Catalyst knew were likely to prevent or delay closing in breach of section 6.3(d).

380. On August 15, Mr. Saratovsky reiterated to Mr. Levin of Faskens that the position of the Chairman of VimpelCom had not changed, and that VimpelCom needed a way to manage the regulatory risk. In clear evidence of good faith, Mr. Saratovsky told Mr. Levin that VimpelCom was "open to other ideas on how this may be achieved".[465]

xii. As of the Evening of August 11, the Deal was Not Done

381. On August 11, 2014, there was a call involving Industry Canada during which, Catalyst claims, VimpelCom told Industry Canada that the "deal was done".[466] Mr. Glassman did not participate in the call and conceded that he did not know what the precise words of the call were.[467] Nor can Catalyst point to a single contemporaneous document demonstrating that VimpelCom or Catalyst told Industry Canada that the deal was done on the August 11, 2014 call.[468]

382. In fact, in cross-examination when confronted with an email chain from August 11-12, 2014 describing the call, Mr. Riley conceded that rather than stating that the "deal was done", the message to Industry Canada was that the parties were "**close to signing**".[469] Mr. Riley's admission reveals that there is no legitimate basis for Mr. Glassman's expectation that "the deal was done".

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465 CCG0024774.
466 Glassman Examination, June 7 at p. 509:7-16.
467 Glassman Examination, June 7 at p. 531:5-21; p. 533:17-20.
468 Glassman Examination, June 7 at p. 533:21-23.
469 Riley Cross, June 8 at p. 608:12-13. See also CCG0024726.

xiii. Catalyst Chooses Not To Accept the Chairman's Terms, and Instead Makes the Tactical Decision to Shut Down Communications with VimpelCom and Let Exclusivity Expire

383. As Mr. Babcock predicted in his email of August 8, Mr. Glassman was "frustrated" by what he perceived as VimpelCom's "delay".[470] This "frustration" is clearly expressed in a series of emails sent between Mr. Glassman and his team on August 11.[471] These emails show Mr. Glassman's temper rapidly deteriorating along with the possibility of Catalyst completing the WIND deal. Mr. Glassman told his team he was "furious" with them.[472]

384. Still in the early morning of August 11, Mr. Glassman began demanding that the WIND deal be press released that day, or else:

(a) in an email at 8:45 am on August 11, Mr. Glassman wrote: "ALL bad from my perspective and MY job is to identify the worst scenario and then mitigate/eliminate risk related to such. That is EXACTLY what I am doing and am now demanding this deal be publicly disclosed/press released TODAY if they want it to continue/remain alive. That's no longer negotiable for me. I DONT TRUST THEM and their behavior makes even less sense in the larger scheme of what is going on btwn the big personalities (harper/frydman-putin) on a much bigger stage";[473]

(b) in an email at 10:33 am on August 11, Mr. Glassman wrote: "I will not allow us to 'own' their process issue(s). I have my own problems related to

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470 Glassman Affidavit sworn May 27, 2016, at para. 44.
471 See: CCG0024632; CCG0024640; CCG0027262; and CCG0024802.
472 Glassman cross, June 7 at pp. 520:16-523:7; CCG0024640.
473 CCG0024640.

this timing, not the least of which is a call w harvard today and a complicated AP mtng tomorrow. I have to have this in the public domain TODAY";[474] and

(c) in an email at 10:57 am on August 11, Mr. Glassman wrote: **"I expect this to be press released TODAY. Otherwise, no deal. I am fed up. I do not want to hear a single more excuse from them"**.[475]

385. Early the next morning on August 12, Mr. De Alba communicated these sentiments to Mr. Saratovsky. Mr. De Alba wrote:

> Felix:
>
> This is now going beyond a press release. The fact that there is no clarity on approvals on your side after such were first thought to be in place on Friday puts the whole deal in jeopardy. On the points below, certainly you can draw on the Catalyst line. However, we are not providing an automatic extension. Remember that even the fact there is a line was an extraordinary concession to support you on the deal against the threat of acceleration/ noise by the lenders. We are now basically ready to fund more than half the deal even before it is approved by the government. You directly heard from the government that they want to approve the deal on an accelerated basis. There are no more rabbits out of the Catalyst hat. To the contrary it is now becoming troublesome to me professional and **unless there is a clear approach on approving the deal on your side by 1030am ET we will be walking away**.[476]

386. By August 14, 2014, Mr. Glassman told his Partners, Messrs. De Alba and Riley, that even though Catalyst continued to have exclusivity, the deal was "technically

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474 CCG0024640.
475 CCG0024632.
476 (Emphasis added). CCG0027262.

dead".[477] In his testimony, Mr. Glassman reiterated that, as of August 14, Catalyst's transaction with VimpelCom was "either dead or deeply in trouble".[478]

387. Although Mr. Glassman had given up on the WIND deal as of August 14, VimpelCom had not. After August 11 and before the end of exclusivity, Mr. Saratovsky made significant efforts to try and bridge the gap between Catalyst and the VimpelCom board. For example, on August 15, the day after Mr. Glassman had told his Partners that the deal was "dead", Mr. Saratovsky and Mr. Levin engaged in an email exchange in which Mr. Saratovsky:

(a) stated that he was open to other ideas on how to manage regulatory risk;

(b) noted that he had made the same arguments that Mr. Levin made to him internally to VimpelCom "in the strongest possible terms"; and

(c) asked Mr. Levin if a compromise would be acceptable whereby Catalyst and VimpelCom signed the share purchase agreement with a two month outside date, and then, if the government did not move quickly, both Catalyst and VimpelCom could both decide if they wanted to give the Government more time.[479]

388. These efforts and suggestions by Mr. Saratovsky clearly show that VimpelCom was still negotiating in good faith with Catalyst, and that Mr. Saratovsky was still working towards finding a mutual solution between Catalyst and VimpelCom whereby the transaction could be completed.

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477 CCG0028615.
478 Glassman cross, June 7 at pp. 533:24-534:3.
479 CCG0024802.

389. Catalyst, on the other hand, decided that it did not want to compromise. In the same email chain, with Mr. Saratovsky excluded from the recipients, the real state of Catalyst's internal opinion about the deal became clear:

(a) at 2:37 p.m., Mr. Levin wrote to Mr. Babcock and Mr. De Alba that: "[t]hey are out to lunch and I think we should tell them;

(b) one minute later, at 2:38 p.m., Mr. De Alba responded: "ABSOLUTELY!"; and

(c) two minutes later, at 2:40 p.m., Mr. Babcock advised that Catalyst shut VimpelCom out entirely: "[t]ell them and then shut down communication. This needs to go past the exclusivity time and Alksey needs to see his alternatives and their terms. If we keep talking we look anxious to Aleksey".[480]

390. It was Mr. Glassman's evidence at trial that Catalyst did in fact follow the advice given to it by Faskens and by Morgan Stanley, that it did tell VimpelCom that this term was unacceptable, shut down communications, and allowed its period of exclusivity to come to an end.[481]

391. In short, Catalyst was unwilling to engage with Mr. Saratovsky, and believed Catalyst could play hardball with the VimpelCom board by letting exclusivity expire, and showing the board that Catalyst was not "anxious," in order to avoid making a

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480 CCG0024802. Alexey Reznikovich, to whom Mr. Babcock refers, was the chair of the VimpelCom. See Glassman Cross, June 7 at p. 539:3-6.

481 Glassman Cross, June 7 at pp. 538:18-539:24.

compromise with VimpelCom. This was a tactical choice taken by Catalyst, and a decision that proved fatal to Catalyst's efforts to acquire WIND.

392. Ultimately, Mr. Glassman's evidence was that the reason that the Catalyst/VimpelCom transaction fell through was because of this $5-$20 million break fee requested by VimpelCom if the regulatory approval was not granted within 60 days.[482] Given the $300 million price tag on the WIND transaction, this was a very small amount of risk that Catalyst was being asked to take on to give the board of VimpelCom comfort. Catalyst's unwillingness to negotiate, borne perhaps of its undisclosed intention to jeopardize closing by seeking regulatory concessions in breach of section 6.3(d), was fatal to Catalyst's bid for WIND. It was this positional negotiating and its view that VimpelCom had no alternatives, and not any non-existent "confidential information" supposedly passed by Mr. Moyse to West Face, that caused Catalyst to lose the WIND deal.

xiv. Catalyst Misleads West Face Regarding the Break Fee throughout the Course of this Litigation

393. Despite the fact that, according to Mr. Glassman, the break fee asked for by VimpelCom was the reason that the Catalyst/VimpelCom WIND deal broke down, Catalyst did not confirm that a break fee was discussed until the examination for discovery of Mr. De Alba on **May 11, 2016**, mere weeks before the beginning of this trial.

394. This ignorance on the part of West Face was not for lack of inquiry. As his cross-examination on May 13, 2015, Mr. Riley was asked whether VimpelCom had ever

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[482] Glassman Affidavit sworn May 27, 2016, at para. 46. Glassman Cross, June 7 at pp. 536:20-538:6.

asked Catalyst for a break fee and for the details of any such request. In answers to undertakings, Catalyst's response to the question of whether VimpelCom ever **asked** for a break fee was the misleading statement that "[t]he parties never **negotiated** a break fee".[483] In hindsight, this answer was carefully crafted to avoid answering the question asked. However, this answer was the state of the record at the time that the motion against West Face in front of Justice Glustein was argued.[484]

395. Catalyst only confirmed that there **was** a break fee requested by VimpelCom **almost a year later**, when Mr. De Alba was examined for discovery on May 11, 2016. Mr. De Alba admitted in this examination that Catalyst had in fact been asked for a break fee and that Mr. De Alba had **not** been consulted when Catalyst was responding to the undertaking given at the cross-examination of Mr. Riley on May 13, 2015. This is so even though Mr. De Alba had been the lead negotiator with VimpelCom.[485]

396. On June 3, 2016, mere days before trial, Catalyst's counsel revised a previous answer to undertaking regarding who was consulted with respect to the response given to Mr. Riley's May 13, 2015 undertakings. In that answer, Catalyst indicated that Mr. Riley, in determining his answer to his original undertaking given in May 2015, had asked Mr. Michaud whether **there was** a break fee in the transaction, not whether VimpelCom **asked** for a break fee.[486] Mr. Riley conceded on cross-examination at trial

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483 UTS000020 at U/T 15 and 16.

484 Riley Cross, June 8 at p. 597:6-20.

485 Examination for Discovery of De Alba, May 11, 2016 at pp. 747-755; see also Riley Cross, June 8 at p. 602:11-19.

486 WFC0112220 at p. 2.

that he either asked Mr. Michaud the wrong question, or Mr. Michaud gave him the wrong answer.[487]

397. Mr. Riley's evidence that he did not know that there was a break fee in this transaction was at direct odds with the evidence given by Mr. Glassman regarding what Mr. Riley would have known. Mr. Glassman testified that he would not have kept Mr. Riley in the dark with regards to significant developments along the way as the WIND transaction proceeded.[488] When questioned specifically about Mr. Riley's knowledge of the break fee requested by VimpelCom in mid-August 2014, Mr. Glassman stated that "he would have known by the end of the transaction, for sure".[489]

398. Given this incompatible evidence between Mr. Riley and Mr. Glassman, the Court can come to one of two conclusions:

(a) that Mr. Riley was cavalier in answering his undertaking given in May 2015, and Mr. Glassman was misleading the Court in respect of the clear, flat and transparent structure at Catalyst; or

(b) that Mr. Glassman was right about Mr. Riley's knowledge, and Mr. Riley gave an incorrect answer to this crucial undertaking.

399. Either way, Catalyst's shifting position on this crucial piece of evidence as to why the deal collapsed casts significant doubt on the credibility of the Catalyst witnesses.

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487 Riley Cross, June 8 at p. 604:7-12. See also Riley Cross, June 8 at pp. 594:21-604:12.
488 Glassman Cross, June 7 at pp. 361:1–362:20.
489 Glassman Cross, June 7 at p. 362:5-20.

xv. There is No Evidence that the New Investors' August 7 Proposal Was Even Considered by VimpelCom's Board Until After Catalyst Let Exclusivity Expire

400. Not only is Catalyst's case contingent on proving that West Face possessed and misused Catalyst's confidential information in making the August 7 proposal, Catalyst's case also necessarily hinges its assertion that the August 7 proposal must have somehow caused VimpelCom to change its course in a way that resulted in Catalyst not acquiring WIND when it otherwise would have. Catalyst's present theory is that the demands made by VimpelCom's Chairman of the board beginning on or around August 11, were a direct result of having received and considered the New Investors' August 7 proposal.

401. Despite being put on notice of this issue during Mr. De Alba's examination for discovery on May 11, 2016, Catalyst led no evidence in this case suggesting that the New Investors' August 7 proposal was received or considered by VimpelCom's board until after Catalyst let its exclusivity period expire on August 18, 2014. Mr. De Alba (Catalyst's lead negotiator with VimpelCom) readily admitted this during his cross-examination:

> Q. And, in fact, you can't point to a document that reflects that Mr. Leitner's offer of August the 7th was provided to the VimpelCom board or finance committee?
>
> A. Not from the record.[490]

402. This is simply another hole in Catalyst's case that it hopes the Court will fill with yet another inference. Drawing such an inference would not be reasonable in the

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[490] De Alba Cross, June 7 at p. 305:1-5.

circumstances given that, as set out above, VimpelCom agreed to extend Catalyst's exclusivity period *after* the New Investors' submitted their unsolicited offer.

xvi. Catalyst's Refusal to Provide Evidence of Its Negotiations with VimpelCom After the Expiration of its Exclusivity Period on August 18, 2014

403. At trial, Mr. Glassman confirmed that Catalyst did, in fact, continue to pursue its acquisition of WIND in the period after exclusivity expired on August 18, 2014. However, Catalyst refused to produce any documents concerning its efforts to acquire WIND in the crucial time period after August 18, 2014.[491]

404. This is further grounds for the Court to draw an adverse inference that Catalyst could have, but chose not to, enter into a share purchase agreement with VimpelCom. Moreover, given that West Face and the Investors were in exclusivity with VimpelCom from August 25 onwards, an adverse inference should also be drawn that Catalyst was engaging in the very same conduct that it criticizes West Face of engaging in – namely, attempting to engage with VimpelCom during another party's exclusive negotiating period.

xvii. Conclusion: Catalyst Has Only Itself to Blame for its Failure to Acquire WIND

405. A necessary element of Catalyst's claim is proving that it was harmed by \West Face's alleged misuse of confidential information provided to it by Mr. Moyse.

406. This allegation was proven false at trial. This Court heard straight from the mouths of Messrs. Glassman and De Alba that Catalyst made the tactical decision to

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[491] Glassman Cross, June 7 at pp. 539:25–540:10.

cease negotiations with VimpelCom when the Chairman of VimpelCom asked Catalyst to agree to a $5 to $20 million break fee if regulatory approval was not granted within 60 days. Catalyst deliberately shut down communications with VimpelCom because it did not want to agree to that term and it mistakenly believed that VimpelCom had no real alternatives.

407. Moreover, even if Catalyst had agreed to the Chairman's request, Catalyst's own evidence is that it **would not** have closed the transaction with VimpelCom without obtaining the requisite regulatory concessions from the Government of Canada. However, the Canadian Government gave Catalyst no indication that it was willing to grant Catalyst these regulatory concessions. Instead, the Government could not have been more clear that the concessions Catalyst sought would **not** be forthcoming. Catalyst's theory that it "would have" obtained the requisite regulatory concessions (including the unrestricted right to transfer WIND's spectrum in five years) is based on nothing more than Mr. Glassman's alleged belief that he could and would have succeeded in pressuring the Government of Canada, including then-Prime Minister Stephen Harper, to back down on the Government's longstanding and clearly articulated policies.

408. Catalyst's stated intention was to sign the share purchase agreement with VimpelCom and then engage in a course of conduct that the agreement specifically precluded (namely, to seek the concessions that Catalyst thought were necessary for WIND to succeed). Catalyst cannot establish on a balance of probabilities that it would have closed a transaction after breaching a critical protection for which VimpelCom had negotiated.

409. Catalyst has only itself to blame for its failure to acquire WIND. Catalyst did not do its homework, and did not believe WIND could survive without drastic changes to the regulatory environment. Catalyst was incorrect and lost to the companies who believed in WIND as a standalone entity, did not seek regulatory concessions, and took seriously VimpelCom's demand to minimize regulatory risk.

PART VI - ISSUES

410. The current proceeding raises the following issues which must be determined by this Honourable Court:

(a) Did Mr. Moyse share with West Face any confidential information belonging to Catalyst which related to Catalyst's plans and strategies for acquiring WIND?

(b) If such information was shared with West Face by Mr. Moyse, did West Face misuse that information to acquire the WIND shares, to the detriment of Catalyst?

(c) If any such misuse of the confidential Catalyst information was committed by West Face, what is the most appropriate remedy?

411. If either or both of Issue "(a)" or "(b)" is answered in the negative, West Face submits that there is no need for this Court to consider Issue "(c)".

PART VII - LAW & ARGUMENT

A. Catalyst has Failed to Prove its Claim for Breach of Confidence

i. The Three Elements of Breach of Confidence

412. A party asserting a claim for breach of confidence must satisfy a three-part test. As explained by Justice La Forest in *Lac Minerals*, such a claim requires proof "that the information conveyed *was confidential*, that it *was communicated in confidence*, and that it *was misused by the party* to whom it was communicated".[492] All three elements must be proven in order to make out the cause of action.[493]

413. In the context of the third branch of the test, "misuse" is any use of the information which is not authorized by the party who originally communicated it.[494] Under this third branch, it is also necessary that the defendant's "misuse" of the information caused "detriment" to the plaintiff.[495]

414. Catalyst cannot prove any element of the test for breach of confidence. Specifically: (a) Mr. Moyse was aware of no genuinely confidential information relating to Catalyst's proposed acquisition of WIND; (b) Mr. Moyse did not share anything he knew about WIND with West Face; (c) West Face did not use any of Catalyst's

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492 See, *inter alia, Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, *per* La Forest J. at para. 129 (and at para. 135) (emphasis added), and *per* Sopinka J. at paras. 54 & 55 (QL).

493 See, *inter alia, Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, *per* La Forest J. at para. 135 (QL); and *Nufort Resources Inc. v. Eustace*, [1985] O.J. No. 1024 (H.C.J.), *per* Catzman J. (as he then was) at para. 86, quoting *Ridgewood Resources Ltd. v. Henuset*, [1982] A.J. No. 641 (C.A.), *per* Laycraft J.A. at para. 24, *leave to appeal refused,* [1982] S.C.C.A. No. 283.

494 As explained by the Supreme Court, the proper question is not "what is the defendant forbidden to do with the information?", but rather "what is the defendant authorized to do?" See *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, *per* Sopinka J. at paras. 55, 66 & 68 and *per* La Forest J. at paras. 135, 137 & 139 (QL).

495 As discussed in greater detail below, the dominant judicial view is that such "detriment" is a mandatory component of the "misuse" element of the cause of action. It is also well established that proof of "detriment" is a key factor in assessing the plaintiff's entitlement to financial compensation. See, *inter alia, Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, *per* Sopinka J. at para. 86, and *per* La Forest J. at paras. 161 & 182 (QL); *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142, *per* Binnie J. at paras. 53-54; and *Lysko v. Braley*, [2006] O.J. No. 1137 (C.A.), *per* Rosenberg J.A. at paras. 17-20.

regulatory strategy in acquiring WIND; and (d) West Face's conduct could not have caused detriment to Catalyst, which failed to acquire WIND solely because of its own intransigence.

415. Catalyst bears the onus of convincing this Court, on a balance of probabilities, that all three elements of breach of confidence have been satisfied – *i.e.*, it must prove the existence of confidential information, that such information was initially conveyed in confidence, and that it was subsequently misused,[496] with detriment suffered as a result.[497]

416. Applying these principles to the facts of the current proceeding, Catalyst is required to satisfy the successive onuses of proving: (a) that Mr. Moyse received clearly identified information that was genuinely confidential in nature;[498] (b) that such information was improperly shared by Mr. Moyse with West Face;[499] and (c) that this information was thereafter misused by West Face in acquiring the WIND shares, to the detriment of Catalyst.[500]

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496 See *Stonetile (Canada) Ltd. v. Castcon Ltd.*, 2010 ABQB 392, *per* Nation J. at para. 5; and *Techform Products Ltd. v. Wolda*, [2000] O.J. No. 5676 (S.C.J.), *per* Sachs J. at para. 77 ("[T]he onus was on [the plaintiff] to establish all of the necessary elements of breach of confidence"), *varied on other grounds*, [2001] O.J. No. 3822 (C.A.), *leave to appeal refused,* [2001] S.C.C.A. No. 603.

497 See *Mancha Consultants Ltd. v. Canada Square Development Corp.*, [1994] O.J. No. 1231 (Gen. Div.), *per* Van Camp J. at para. 56 ("The plaintiffs have not satisfied the onus of proving that the misuse was to their detriment"), *reversed on unrelated grounds*, [1998] O.J. No. 2000 (C.A), *leave to appeal refused,* [1998] S.C.C.A. No. 396 (emphasis added).

498 See, *inter alia, R.L. Crain Inc. v. Ashton*, [1949] O.J. No. 500 (C.A.), *per* Hogg J.A. at para. 32; and *Robin Nodwell Manufacturing Ltd. v. Foremost Dev. Ltd.*, [1966] A.J. No. 228 (S.C.T.D.), *per* Milvain J. at para. 8.

499 See, *inter alia, Chevron Standard Ltd. v. Home Oil Co.*, [1980] A.J. No. 656 (Q.B.), *per* Moore J. (as he then was) at para. 119 ("The onus is on [the plaintiff]…to establish…that the secret or confidential information was used by [the former employee] and or [by the new employer] to the disadvantage of Chevron"), *affirmed* [1982] A.J. No. 744 (C.A.), *leave to appeal refused*, [1982] S.C.C.A. No. 112.

500 See, *inter alia, Ridgewood Resources Ltd. v. Henuset*, [1981] A.J. No. 747 (Q.B..), *per* Quigley J. at para. 17 ("[T]he plaintiff has failed to discharge the onus of establishing that whatever information it gave to the plaintiff, confidential or not, was used by the defendant to the detriment of the plaintiff"), *affirmed*, [1982] A.J. No. 641 (C.A.), *leave to appeal refused,* [1982] S.C.C.A. No. 283; and see also *Standard Ltd. v. Home Oil Co.*, [1980] A.J. No. 656 (Q.B.), *per* Moore J. (as he then was) at paras. 117 & 119, *affirmed* [1982] A.J. No. 744 (C.A.), *leave to appeal refused*, [1982] S.C.C.A. No. 112.

417. West Face submits that Catalyst has failed to establish the existence of *any* of the required elements of its claim, and has certainly not proven *all* of them. For this reason, the current action must be dismissed.

ii. Identifying the Supposedly "Confidential" Information said to have been Misused by West Face

418. In order for this Honourable Court to assess Catalyst's claim in a principled manner, it is of course necessary to identify, and focus on, the precise "confidential" information which Catalyst has claimed was misused by West Face. As was recently observed by Justice Newbould: "[I]t is important not just to *plead* with particularity, but at trial to *prove the case with particularity*".[501]

419. While entirely lacking in the requisite "particularity", it is clear that Catalyst's Statement of Claim restricts its allegations to West Face's "misuse" of "confidential" information that was (supposedly) learned by Mr. Moyse during his employment at Catalyst, and that he (purportedly) passed on to West Face after his hiring.[502]

420. Given that Catalyst framed its claim from the outset by focusing on the alleged misuse of the information supposedly possessed by Mr. Moyse, it is *not now permitted*, at the close of trial, to fundamentally alter the nature of its claim. It cannot now assert, for example, that West Face received and improperly used information originating from *other entities* (*e.g.*, from UBS, VimpelCom, Globalive, *etc*.); or that West Face improperly participated in an unsolicited offer while Catalyst had exclusive rights to

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501 See *Husky Injection Moulding Systems Ltd. v. Schad*, 2016 ONSC 2297, *per* Newbould J. at para. 225 (emphasis added).

502 Amended Amended Amended Statement of Claim dated February 25, 2016 at paras. 23-27, 34.6.

negotiate with VimpelCom. Indeed, as described above, Catalyst expressly disavowed any such claim, both on discovery and again at trial.

421. The law of Ontario has firmly and consistently required parties to resolve their disputes within the parameters of the claim as pleaded. As was famously noted by Justice Finlayson in the leading ruling of *Kalkinis v. Allstate*:

> 11. The parties, certainly the appellant, were proceeding on the basis that this was an action in contract on an insurance policy. The record had been developed within the confines of the cause of action as pleaded. Accordingly, it was impermissible for the trial judge to entertain an argument founded on totally different legal principles.
>
> 12 It has long been established that **the parties to a legal suit are entitled to have a resolution of their differences on the basis of the issues joined in the pleadings**.... The trial judge cannot make a finding of liability and award damages against a defendant on **a basis that was not pleaded in the statement of claim because it deprives the defendant of the opportunity to address that issue in the evidence presented at trial**.[503]

422. It is thus far too late for Catalyst to ask this Honourable Court to consider, let alone to rule upon, such a profoundly altered claim. West Face has, from the outset, framed its defence as a focused and principled response to the allegations originally pled by Catalyst. It cannot now be required, at or after the "eleventh hour", to address and rebut an entirely separate set of allegations for which no evidentiary record has been placed before this Court.

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503 See *Kalkinis (Litigation Guardian of) v. Allstate Insurance Co. of Canada*, [1998] O.J. No. 4466 (C.A.), *per* Finlayson J.A. at paras. 11 and12 (emphasis added), *leave to appeal refused*, [1999] S.C.C.A. No. 253. To the same effect, on slightly different facts, see also *Rodaro v. Royal Bank of Canada*, [2002] O.J. No. 1365 (C.A.), *per* Doherty J.A. at para. 60; *Husky Injection Molding Systems Ltd. v. Schad*, 2016 ONSC 2297 at para. 119.

iii. Much of the Supposedly "Confidential" Information cited by Catalyst was Not, in fact, Confidential

423. Restricting the scope of Catalyst's claim to the "confidential" information which allegedly originated from Mr. Moyse, as this Court must, imposes on Catalyst a fundamental (and, indeed, insurmountable) hurdle: the information that Catalyst claims was misused by West Face was either not, in fact, confidential, or was not known to Mr. Moyse.

424. As noted above, the first mandatory prerequisite for a finding of breach of confidence is the requirement that the information in question must be genuinely "confidential".[504] Indeed, even if the second and third elements of the cause of action are present – *i.e.*, even if information was "conveyed in confidence" and was subsequently used without the confidor's permission – such "misuse" is not actionable if the relevant information is not itself confidential.[505]

425. As noted, this common-sense principle creates a significant threshold difficulty for Catalyst, given that much of the information that it claims was misused is not, and was not, "confidential". Canadian law has long accepted that information that is "public" cannot be "confidential".[506] This rubric of "public" information includes information which

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504 See, *inter alia, Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, *per* La Forest J. at para. 129 (and at para. 135) (emphasis added) (QL), and *per* Sopinka J. at paras. 54 & 55 (QL).

505 See, *inter alia, Ridgewood Resources Ltd. v. Henuset*, [1982] A.J. No. 641 (C.A.), *per* Laycraft J.A. at paras. 24-27, *leave to appeal refused,* [1982] S.C.C.A. No. 283; and *Nufort Resources Inc. v. Eustace*, [1985] O.J. No. 1024 (H.C.J.), *per* Catzman J. (as he then was) at para. 86.

506 See, *inter alia, Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, *per* La Forest J. at para. 130 (QL); and *Precious Metal Capital Corp. v. Smith*, 2011 ONSC 2962, *per* Cumming J. at para. 116, *affirmed* 2012 ONCA 298, *leave to appeal refused*, [2012] S.C.C.A. No. 256.

is *known to*[507] – or which is simply *available to*[508] – members of the relevant industry (in this case, the domestic wireless industry).

426. Much of the supposedly confidential information alleged by Catalyst to have been misused by West Face in acquiring WIND was thus not confidential at all. Clearly, Catalyst can claim no proprietary right over the following categories of "public" information:

(a) the fact that WIND was for sale;

(b) the fact that Catalyst was interested in acquiring WIND;

(c) the fact that regulatory approval would be required in order for any acquisition of WIND to be effected;

(d) the fact that it would be beneficial to the owners of WIND if its spectrum could be sold without restriction to incumbents;

(e) the fact that Industry Canada opposed the granting of any regulatory concessions to permit the sale of WIND's AWS-1 spectrum to an incumbent;

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507 See *Precious Metal Capital Corp. v. Smith*, 2011 ONSC 2962, *per* Cumming J. at paras. 118, *affirmed* 2012 ONCA 298, *leave to appeal refused*, [2012] S.C.C.A. No. 256; *Visagie v. TVX Gold Inc.*, [1998] O.J. No. 4032 (Gen. Div.), *per* Feldman J. (as she then was) at paras. 240-241, *affirmed,* [2000] O.J. No. 1992 (C.A.); *Edac Inc. v. Tullo*, [1999] O.J. No. 4837 (S.C.J.), *per* Nordheimer J. at para. 47; and *Ridgewood Resources Ltd. v. Henuset*, [1982] A.J. No. 641 (C.A.), *per* Laycraft J.A. at paras. 8 & 24-27, *leave to appeal refused,* [1982] S.C.C.A. No. 283.

508 See *Visagie v. TVX Gold Inc.*, [1998] O.J. No. 4032 (Gen. Div.), *per* Feldman J. (as she then was) at para. 241, *affirmed,* [2000] O.J. No. 1992 (C.A.); *Booty Camp Fitness Inc. v. Jackson*, [2009] O.J. No. 3083 (S.C.J.), *per* Thorburn J. at paras. 12, 34-36 & 40; *Edac Inc. v. Tullo*, [1999] O.J. No. 4837 (S.C.J.), *per* Nordheimer J. at para. 54; and *ERSS Equity Retirement Savings Systems Corp. v. Canadian Imperial Bank Of Commerce*, 2002 BCSC 1462, *per* Wedge J. at paras. 14, 150 & 161.

(f) the fact that VimpelCom was only interested in receiving offers that valued WIND at $300 million;

(g) the fact that the avoidance of regulatory uncertainty was a crucial consideration for VimpelCom and that, for this reason, VimpelCom was unalterably opposed to any efforts by a potential purchaser to seek such regulatory concessions that could delay or prevent closing; and

(h) the related facts that amendments to the roaming and tower sharing regimes would be beneficial to any acquirer of WIND, that WIND itself had previously sought such changes, and that the federal government had already announced that such changes were in process.

427. A further "public" fact – known to every participant in the Canadian wireless industry[509] – is that, under Canadian law, the powers of a "regulatory body" like Industry Canada may be affected by the insolvency of a regulated entity.[510] As will be discussed below (under a separate heading), the existence of this general knowledge fatally undermines Catalyst's claim that its "unique" familiarity with a ten year old U.S. Supreme Court ruling (which merely *confirmed* a similar proposition under the laws of *that* country),[511] somehow represented an invaluable and confidential element of Catalyst's so-called "regulatory strategy".

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509 At a minimum, this is a matter that is deemed to be known to all industry participants. See, *inter alia, Commercial Union Life Assurance Co. of Canada v. John Ingle Insurance Group Inc.*, [2002] O.J. No. 3200 (C.A.), *per* Weiler J.A. at para, 74 ("[The defendant]…is deemed to have knowledge of the law"); and *Campbell v. Maytown Inc.*, [2005] O.J. No. 5948 (Div. Ct.), *per* O'Driscoll J. at para. 27 ("Everyone is deemed to know the law") (emphasis added).

510 On this point, see *inter alia* section 11.1 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

511 Namely, *Federal Communications Commission v. NextWave Personal Communications Inc.*, 537 U.S. 293 (2003), discussed below.

428. In fact, the only aspect of Catalyst's regulatory strategy that was not public knowledge was its fanciful speculation that Industry Canada would yield to Catalyst's demands for regulatory concessions in the Interim Period. Mere "wishful fantasy" of this nature cannot form the basis of an action for breach of confidence.[512] It is not information that could bear an onus of confidentiality; it was mere baseless speculation.

429. The only confidential information about Catalyst's pursuit of WIND was the status of Catalyst's negotiations with VimpelCom. Mr. Moyse had no such information after May 26 at the latest, and his information in that regard, even taking Catalyst's case at its highest, was quickly out-of-date. For example, even assuming Mr. Glassman conveyed to Mr. Moyse his confidence that the government would yield on regulatory concessions, that hope was quashed in July and August as conveyed by Mr. Drysdale's communications with the government (to which Mr. Glassman was not a party). Similarly, even assuming Mr. Moyse read the draft SPA dated May 24, 2014, it would have given him the false impression that Catalyst could pursue regulatory concessions without restriction during the Interim Period. Catalyst soon yielded on that point and the negotiations from June and July concerned the extent of such restrictions, not their existence.

430. Catalyst's claim rests entirely on information that is public, speculative or unknown to Mr. Moyse. Catalyst therefore cannot meet the first element of the *Lac Minerals* test and the case must be dismissed for that reason alone.

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512 *Precious Metal Capital Corp. v. Smith*, 2011 ONSC 2962, *per* Cumming J. at paras. 44, 119-120, *affirmed* 2012 ONCA 298, *leave to appeal refused*, [2012] S.C.C.A. No. 256.

iv. There is No Basis to Conclude that Any of Catalyst's Information Concerning WIND was Communicated to West Face by Mr. Moyse

431. Catalyst has offered no evidence that Mr. Moyse ever shared with anyone at West Face *any* information belonging to Catalyst that addressed the acquisition of WIND. This gap in its case is fatal to Catalyst's claim that a breach of confidence was committed.

432. Indeed, as a threshold matter it is entirely unclear that Mr. Moyse *ever learned* any "confidential information" regarding WIND while employed at Catalyst. In the absence of substantive evidence supporting its assertion that Mr. Moyse "knew" key confidential information regarding the WIND acquisition, Catalyst asks this Court to draw an *inference* that Mr. Moyse, as a Catalyst employee, was aware of *all information* that circulated within the company during his period of employment, and that this included all of the elements of Catalyst's strategy for acquiring WIND. (The impropriety of asking this Honourable Court to draw such an "inference" – in the absence of an appropriate evidentiary foundation – is discussed in greater detail under a subsequent heading.)

433. In essence, Catalyst asks this Court to accept that – because Catalyst is said to be a "transparent" organization with a "flat hierarchy" – every aspect of the strategic information known to, and developed by, more senior members of the firm is knowledge that should be *imputed* to an entry-level employee like Mr. Moyse. With respect, this assertion is absurd. In appropriate circumstances, the knowledge of an employee can be imputed to his or her employer,[513] but *there is no legal support for the reverse*

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[513] See *Chemicals Inc. v. Shanahan's Ltd*., [1951] B.C.J. No. 120 (C.A.), *per* Sidney Smith J.A. at para. 27.

proposition – i.e., nothing in the law suggests that the knowledge of the directing minds of a corporation is properly imputed to employees within the organization.[514]

434. More fundamentally, even if Mr. Moyse is shown to have learned confidential information regarding WIND while employed by Catalyst (*which is denied*), Catalyst bears the further onus of proving that Mr. Moyse improperly transmitted that information to West Face.[515] Catalyst has offered no evidence in this regard. By contrast, Mr. Moyse and every West Face witness has categorically denied any communications about WIND with Mr. Moyse, confidential or otherwise. The law is clear that Catalyst cannot avoid its evidentiary burden by simply asserting that it was "inevitable" that Mr. Moyse would share this information with West Face because of their employment relationship; nor can Catalyst satisfy its burden in this regard by citing the "beliefs" (*i.e.*, the unsubstantiated suspicions) of Messrs. Glassman and De Alba.

435. Similar arguments have been roundly rejected by Ontario courts, most notably in the context of motions for interlocutory relief: "While [the plaintiff] has suggested that [the former employee] will *inevitably disclose* confidential information to [the new employer], *Canadian courts have rejected the doctrine of 'inevitable disclosure'*. [The plaintiff] has *the onus of leading evidence that* [*the employee*] *has misused or will*

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514 Many examples could be cited of situations in which Canadian courts have refused to impute to a particular employee information known by other employees, or by senior management. For example, while a senior municipal official was aware of an "unwritten policy" governing how work was to be carried out, the court refused to find that "this knowledge can be imputed to all of the other employees involved" (see *E. Carpenter Inc. v. Clarenville*, [2001] N.J. No. 162 (S.C.T.D.) at para. 24). Likewise, in applying the subjective branch of the test for constructive dismissal, the courts do not impute to the employee information which is known to his employer, but not to him personally: "Mr. Potter neither knew about nor could reasonably have been expected to know about the letter recommending the termination of his employment" (see *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10, *per* Wagner J. (for the majority) at para. 104, as well as paras. 63, 66 & 105).

515 See, *inter alia, Chevron Standard Ltd. v. Home Oil Co.*, [1980] A.J. No. 656 (Q.B.), *per* Moore J. (as he then was) at para. 119 ("The onus is on [the plaintiff]…to establish…that the secret or confidential information was used by [the former employee] and or [by the new employer] to the disadvantage of [the plaintiff]"), *affirmed* [1982] A.J. No. 744 (C.A.), *leave to appeal refused*, [1982] S.C.C.A. No. 112.

misuse confidential information".[516] In the current proceeding, this onus remains entirely unsatisfied.

436. Catalyst's failure to prove that confidential information was ever *conveyed to* West Face is necessarily fatal to its allegation that such information was thereafter *misused* by West Face to Catalyst's detriment. On this basis alone, again, the current claim must be dismissed.

437. Before leaving this point, a final point is worthy of mention. Catalyst has alleged that the hiring of Mr. Moyse, while he remained *prima facie* bound by a non-competition covenant, was an indication of West Face's bad faith and malign intentions towards Catalyst. Such an allegation is entirely unwarranted. As the record has established, West Face was prepared to hire Mr. Moyse, despite the non-competition covenant, because of its *bona fide* belief that the overly aggressive terms of that covenant were contrary to Canadian public policy, and thus unenforceable.[517]

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516 See *IMS Health Canada Inc. v. Harbin*, 2014 ONSC 4350, *per* Sanderson J. at para. 94 (emphasis added). See also *Trapeze Software Inc. v. Bryans*, [2007] O.J. No. 276 (S.C.J.), *per* Newbould J. at paras. 53 & 62 ("[The plaintiff] asserts…that given the nature of [the] software products and services, and the marketplace, misuse of confidential information by the defendants is inevitable. That statement amounts to speculation. In my view an injunction ought not to be granted without an evidentiary base that it is likely that a breach of the confidentiality provisions will occur") (emphasis added).

517 There is no dispute that Canadian law and public policy view contractual provisions purporting to restrain trade and impede free competition with suspicion, and indeed with hostility. This is particularly true where such restrictions are imposed in the context of an employment relationship, such as the one between Catalyst and Mr. Moyse: "The principles to be applied in considering restrictive covenants of employment are well-established…. A covenant in restraint of trade is enforceable *only* if it is *reasonable* between the parties and with reference to the public interest" (see *Elsley v. J.G. Collins Ins. Agencies*, 1978 CarswellOnt 1235 (S.C.C.), *per* Dickson J. (as he then was) at para. 13 (emphasis added), as well as paras. 14-16 & 19-22). See also *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, *per* Rothstein at paras. 15-18 & 26-28; and *Trapeze Software Inc. v. Bryans*, [2007] O.J. No. 276 (S.C.J.), *per* Newbould J. at paras. 32-33. Catalyst appears to have prevailed before Lederer J. largely because West Face did not disclose the March 27, 2014 email – now acknowledged to be irrelevant – until six business days after Catalyst served its original Statement of Claim. See *Catalyst Capital Group Inc. v. Moyse*, 2014 ONSC 6442.

v. West Face's Effective and Timely "Ethical Wall" Precluded Any Sharing or Misuse of Confidential Catalyst Information

438. Not only is there no evidence that Mr. Moyse conveyed any confidential information to West Face, there is a robust factual record that no such conveyance could have occurred. Having been forewarned of Catalyst's concerns about a "telecom deal", West Face put into place the Confidentiality Wall (and took other related prophylactic measures) specifically designed to preclude any possibility of Mr. Moyse sharing with West Face (either consciously or inadvertently) any Catalyst confidential information concerning WIND:

(a) on May 22nd, the same day that West Face extended to Mr. Moyse a written offer of employment, West Face's general counsel, Mr. Singh, explicitly advised Mr. Moyse that he was forbidden to make any use of confidential or proprietary information belonging to Catalyst. In response, Mr. Moyse confirmed his understanding of, and agreement with, this prohibition;

(b) this bar on the use of confidential information belonging to any other party was formally reflected in Mr. Moyse's written employment contract, which he executed on May 26, 2014, nearly one month before he joined West Face;

(c) although Catalyst was alerted to these prophylactic measures on or about May 30, 2014, its counsel expressed continuing concern about the potential misuse of its information, and on June 18 specifically raised concerns about a "telecom deal". Accordingly, on June 19, 2014 – four

days before Mr. Moyse arrived at West Face's office to commence work – the company implemented a formal Confidentiality Wall. Under the terms of this Wall, Mr. Moyse was forbidden from communicating with anyone at West Face regarding the WIND transaction. Individuals at West Face who were working on the WIND matter were similarly forbidden from communicating with Mr. Moyse about that transaction;

(d) as part of the implementation of this Confidentiality Wall, the West Face IT group, led by Mr. Chau, the Head of Technology, put in place barriers preventing Mr. Moyse from gaining access to any West Face electronic documents relating to the WIND transaction;

(e) a formal memorandum outlining the substance and purpose of the Confidentiality Wall was sent to Mr. Moyse by West Face's Chief Compliance Office, Ms Kapoor. The same memorandum was circulated throughout West Face, including to all individuals working on the WIND transaction;

(f) furthermore, West Face partner Thomas Dea reinforced the message contained in the memorandum by verbally warning the entire West Face deal team that they were not to discuss any aspect of the WIND transaction with Mr. Moyse; and

(g) following Mr. Moyse's arrival on June 23, 2014, in order to ensure that there was no possible "tainting" of the WIND deal team, that team met in

private, behind closed doors, away from the trading floor area where Mr. Moyse worked.

439. The existence of these protective steps is fatal to Catalyst's claims that confidential information was conveyed to and then misused by West Face. The implementation of a timely and effective Confidentiality Wall will preclude an inference that information was improperly transmitted within an organization.

440. The leading case addressing "inferences" of the misuse of confidential information is, of course, the seminal ruling in *MacDonald Estate v. Martin*.[518] While that case famously addressed the *factually and doctrinally distinguishable* duties of loyalty and confidentiality owed by solicitors to their clients, the majority's decision established two important principles: *First*, once it is confirmed that a lawyer is in possession of relevant confidential information belonging to a client or former client, it will be inferred that the lawyer will share that information with his or her colleagues; and, *Second*, this presumption or inference can be displaced if the lawyers can establish that appropriate institutional safeguards were put in place to preclude such sharing.[519]

441. In the context of law firms, courts have accepted that, when ethical walls and similar prophylactic measures have been installed within the firm in a timely and

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518 See *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235.

519 See *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, *per* Sopinka J. (for the majority), esp. at para. 49 (QL) ("Moreover, I am not convinced that a reasonable member of the public would necessarily conclude that confidences are likely to be disclosed in every case despite institutional efforts to prevent it. There is, however, a strong inference that lawyers who work together share confidences. In answering this question, the court should therefore draw the inference, unless satisfied on the basis of clear and convincing evidence, that all reasonable measures have been taken to ensure that no disclosure will occur by the 'tainted' lawyer to the member or members of the firm who are engaged against the former client. Such reasonable measures would include institutional mechanisms such as Chinese Walls and cones of silence") (emphasis added).

efficacious manner, the documented use of these devices will prevent the drawing of any inference of misuse of confidential information by lawyers or legal staff.[520]

442. More relevantly, the broader jurisprudence addressing breach of confidence (*i.e.*, caselaw *not* involving solicitors and their clients) has likewise embraced the use of these mechanisms as an effective means of rebutting allegations of misconduct. Cases falling into this latter category have accepted that the implementation of appropriate measures – *e.g.,* (i) the raising of "ethical walls", (ii) the circulation of memoranda to all appropriate staff alerting them to the requisite protocols, (iii) the restriction of access to electronic files, (iv) the creation of insulated "deal teams", *etc*. – will be sufficient to convince the court that there has been no misuse of such information. As set out above, West Face made use of *all* of these various safety measures. Most significantly, it erected a comprehensive Confidentiality Wall well before Mr. Moyse's arrival at West Face on June 23, 2014.

443. An important authority confirming the efficacy of similar measures is *379107 Ontario Ltd. v. Coinamatic Canada*. In that ruling, Justice Jennings (affirmed by the Court of Appeal)[521] found as uncontested facts that certain senior employees of the defendant had received the plaintiff's confidential information to evaluate a potential acquisition of the plaintiff. Sometime later, the defendant bid for a contract that the plaintiff had previously held. The question for the court was whether – in light of the

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[520] See, *inter alia, Davies, Ward & Beck v. Baker and McKenzie*, [1998] O.J. No. 3284 (C.A.), *per curiam* at paras. 6 & 16-18; *Hildinger v. Carroll*, [2004] O.J. No. 291 (C.A.), *per* Laskin J.A. at paras. 12-16; *Robertson v. Slater Vecchio,* 2008 BCCA 306, *per* Newbury J.A. at paras. 1-2, 4, 9, 15-16 & 25-28; *Rowett v. Rowett*, [2000] O.J. No. 1267 (Div. Ct.), *per* O'Leary J. at paras 5-6; and *Dwyer v. Mann*, 2011 ONSC 2163, *per* Cavarzan J. at paras. 23-33.

[521] See *379107 Ontario Ltd. v. Coinamatic Canada Inc.*, [2002] O.J. No. 2842 (S.C.J.), *affirmed,* [2003] O.J. No. 5170 (C.A.).

defendant's undisputed possession and use of the plaintiff's information for a permitted purpose – it could be shown that the information had been *misused* (to the plaintiff's detriment) by the defendant in preparing its successful bid.[522] The defendant established that it had created a clean bidding team by isolating those individuals possessing the confidential information,[523] had established a confidentiality wall between the two groups,[524] and its witnesses uniformly denied that there had been any misuse.[525] Based on this evidence, Justice Jennings refused to draw an inference of misuse.[526]

444. Likewise, in *Dataco Utility v. Olameter*,[527] there was no dispute that the defendant had received, and had properly used, confidential information belonging to the plaintiff in analyzing a potential acquisition of the plaintiff. Again, the parties became competing bidders for a large contract, which the defendant won.[528] As with the Ontario court in *379107 Ont. v. Coinamatic*, the Alberta judge in *Dataco* found that: (i) the defendant had segregated employees with knowledge of the confidential information from those bidding on the contract;[529] (ii) this division had been scrupulously respected

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522 For reasons discussed below, in circumstances where both *possession* and previous (legitimate) *use* of the confidential information has been established, the onus shifted to the defendant to demonstrate that it had not *misused* that information. See *379107 Ontario Ltd. v. Coinamatic Canada Inc.*, [2002] O.J. No. 2842 (S.C.J.), *per* Jennings J. at paras. 8 & 41, *affirmed,* [2003] O.J. No. 5170 (C.A.).

523 See *379107 Ontario Ltd. v. Coinamatic Canada Inc.*, [2002] O.J. No. 2842 (S.C.J.), *per* Jennings J. at paras. 33 & 43 *affirmed,* [2003] O.J. No. 5170 (C.A.).

524 See *379107 Ontario Ltd. v. Coinamatic Canada Inc.*, [2002] O.J. No. 2842 (S.C.J.), *per* Jennings J. at paras. 33 & 35, *affirmed,* [2003] O.J. No. 5170 (C.A.).

525 See *379107 Ontario Ltd. v. Coinamatic Canada Inc.*, [2002] O.J. No. 2842 (S.C.J.), *per* Jennings J. at para. 48, *affirmed,* [2003] O.J. No. 5170 (C.A.).

526 See *379107 Ontario Ltd. v. Coinamatic Canada Inc.*, [2002] O.J. No. 2842 (S.C.J.), *per* Jennings J. at para. 45, *affirmed,* [2003] O.J. No. 5170 (C.A.).

527 See *Dataco Utility Services Ltd. v. Olameter Inc*., 2009 ABQB 116, [2009] A.J. No. 224.

528 For reasons discussed above, in circumstances where both possession and previous (legitimate) use of the confidential information has been established, the onus shifted to the defendant to demonstrate that it had not misused that information. See *Dataco Utility Services Ltd. v. Olameter Inc*., 2009 ABQB 116, *per* Rawlins J. at paras. 42, 44 & 62.

529 See *Dataco Utility Services Ltd. v. Olameter Inc*., 2009 ABQB 116, *per* Rawlins J. at paras. 24-25 & 27-29.

by the employees;[530] (iii) the defendant had established an "ethical wall" and related procedures,[531] including the securing of all confidential documents in a locked cabinet;[532] and (iv) it had circulated to all employees a memorandum explaining the workings of these protocols.[533] While the court accepted that the establishment of an ethical wall was "by no means a panacea" (because the efficacy of such a device is always a contextual issue), "[e]ach case must be decided on its own facts".[534] At the end of the day, the court contrasted the defendant's solidly evidence-based denial that there had been misuse (on the one hand), with the plaintiff's purely speculative assertions of misuse (on the other hand). Based on this asymmetrical record, the Alberta court concluded that there had been no breach of confidence.[535]

445. The protective mechanisms implemented by West Face were every bit as robust, timely and effective as those used by the defendants in *379107 Ontario* and in *Dataco*. Catalyst, by contrast, offers nothing but speculative conjecture regarding misuse. In light of the unshaken evidence of West Face's witnesses denying that any misuse had occurred, West Face's implementation of these measures should convince this Court to reject the inference proposed by Catalyst and dismiss Catalyst's claim.

vi. West Face Did Not Use Any of Catalyst's "Regulatory Strategy" Information

446. Catalyst has utterly failed to prove that West Face misused any aspects of Catalyst's so-called "confidential regulatory strategy".

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530 See *Dataco Utility Services Ltd. v. Olameter Inc*., 2009 ABQB 116, *per* Rawlins J. at paras. 24-25, 28-29, 46, 50 & 53.
531 See *Dataco Utility Services Ltd. v. Olameter Inc*., 2009 ABQB 116, *per* Rawlins J. at paras. 26 & 47-48.
532 See *Dataco Utility Services Ltd. v. Olameter Inc*., 2009 ABQB 116, *per* Rawlins J. at para. 46.
533 See *Dataco Utility Services Ltd. v. Olameter Inc*., 2009 ABQB 116, *per* Rawlins J. at para. 26.
534 See *Dataco Utility Services Ltd. v. Olameter Inc*., 2009 ABQB 116, *per* Rawlins J. at para. 47.
535 See *Dataco Utility Services Ltd. v. Olameter Inc*., 2009 ABQB 116, *per* Rawlins J. at paras. 28, 43, 44, 48-50, 53-54 & 62.

447. The defendant's misuse of confidential information is, of course, the irreducible essence of breach of confidence. As succinctly stated by Justice Cumming: "[A] plaintiff cannot succeed in a claim for breach of confidence if the defendant has not misused the information in question to the plaintiff's detriment".[536]

448. The law is clear that mere assertions of misuse will not suffice, and that substantiating evidence is required. In a leading trial ruling addressing breach of confidence by both a "departing employee" and a successor employer, the court insisted on clear and confirmatory evidence of such misconduct: "*There must be more than a mere possibility of misuse to settle liability on a party. Suspicion of misuse of confidential information is insufficient – there must be real evidence*".[537]

449. As more recently explained by Justice Nordheimer in dismissing a claim against a departing employee: "*I am not satisfied on the evidence* that the defendant made use of any confidential information in terms of the activities he undertook on behalf of [his new employer] after leaving the plaintiff. [….] In my view, therefore, *the claim for breach of confidential information* regarding [the new employer] *is not made out*".[538]

450. Catalyst has failed to establish West Face's use of any confidential information as part of its acquisition of an interest in WIND. Catalyst's failure in this regard can be tellingly contrasted with the (interlocutory) rulings in such cases as *Certicom v. RIM*,[539]

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536 See *Precious Metal Capital Corp. v. Smith*, 2011 ONSC 2962, *per* Cumming J. at para. 120, *affirmed* 2012 ONCA 298, *leave to appeal refused*, [2012] S.C.C.A. No. 256.

537 See *Chevron Standard Ltd. v. Home Oil Co.*, [1980] A.J. No. 656 (Q.B.), *per* Moore J. (as he then was) at para. 153 (see also paras. 150-152) (emphasis added), *affirmed expressly on this point*, [1982] A.J. No. 744 (C.A.), *per curiam* at para. 32 (see also paras. 18 & 31), *leave to appeal refused*, [1982] S.C.C.A. No. 112.

538 See *Edac Inc. v. Tullo*, [1999] O.J. No. 4837 (S.C.J.), *per* Nordheimer J. at paras. 48-49 (emphasis added).

539 See *Certicom Corp. v. Research in Motion Ltd.*, [2009] O.J. No. 252 (S.C.J.).

and *Gold Reserve v. Rusoro*,[540] each of which involved the misuse of confidential information in the preparation of an acquisition bid:

(a) in contrast to the current proceeding, the individuals who were proven to possess the relevant confidential information – namely, senior executives in *Certicom*,[541] and external financial advisors in *Gold Reserve*[542] – were the very parties who were at the centre of preparing the respective acquisition proposals. As established at trial, and was discussed above, West Face took great care to isolate Mr. Moyse from the team that was preparing the WIND bid;

(b) given the overlapping personnel and absence of confidentiality walls, there was a clear basis in either of these cases for finding that confidential information has been used in preparing an acquisition bid. The defendant in *Certicom* conceded this point;[543] and, in *Gold Reserve*, the court held that the defendants' claim that individuals with confidential information could "compartmentalize their minds…lacks reality".[544] No similar evidence has been placed before this Court by Catalyst; and

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[540] See *Gold Reserve Inc. v. Rusoro Mining Ltd.*, [2009] O.J. No. 533 (S.C.J.) *leave to appeal refused,* [2009] O.J. No. 1442 (Div. Ct.).

[541] See *Certicom Corp. v. Research in Motion Ltd.*, [2009] O.J. No. 252 (S.C.J.), *per* Hoy J. (as she then was) at para. 35.

[542] See *Gold Reserve Inc. v. Rusoro Mining Ltd.*, [2009] O.J. No. 533 (S.C.J.), *per* Cumming J., esp. at paras. 11, 36, 59 & 66, *leave to appeal refused,* [2009] O.J. No. 1442 (Div. Ct.).

[543] See *Certicom Corp. v. Research in Motion Ltd.*, [2009] O.J. No. 252 (S.C.J.), *per* Hoy J. (as she then was) at para. 70.

[544] See *Gold Reserve Inc. v. Rusoro Mining Ltd.*, [2009] O.J. No. 533 (S.C.J.), *per* Cumming J., esp. at paras. 43, 61 & 65-70, *leave to appeal refused,* [2009] O.J. No. 1442 (Div. Ct.).

(c) finally, and also in contrast to the present case, the bidders in *Certicom*[545] and *Gold Reserve,*[546] made no efforts to establish "ethical walls" to prevent the internal dissemination of the confidential information. West Face, of course, used this and other such devices to ensure that no confidential information could possibly taint the WIND acquisition process.

451. Catalyst's failure to prove that any elements of its so-called "regulatory strategy" were ever "used" by West Face necessarily precludes a finding of actionable "misuse". In the pithy language of Justice Perell: "It seems trite to say it but a *misuse* of confidential information requires a *use* of confidential information".[547]

452. It is clear that "use" (as a necessary prerequisite to "misuse") requires more than mere possession of, or access to, confidential information. As recently observed by the Ontario Court of Appeal, if the plaintiff "did not use the information, mere possession of it cannot [constitute a breach]".[548] Even more recently, the Alberta Court of Appeal affirmed that: "Misappropriation of information obtained in confidence creates a cause of action *only where the respondent makes use of that property*. …'[*w*]*here* Party A gives confidential information to Party B but *Party B does nothing with it, there is no breach*'".[549]

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545 See *Certicom Corp. v. Research in Motion Ltd.*, [2009] O.J. No. 252 (S.C.J.), *per* Hoy J. (as she then was) at paras. 3, 35, 75 & 97.

546 See *Gold Reserve Inc. v. Rusoro Mining Ltd.*, [2009] O.J. No. 533 (S.C.J.), *per* Cumming J., esp. at paras. 11, 13, 36, 59, 61, 65, 66 & 83, *leave to appeal refused,* [2009] O.J. No. 1442 (Div. Ct.).

547 See *Maudore Minerals Ltd. v. Harbour Foundation*, 2012 ONSC 4255, *per* Perell J. at para. 90 (emphasis added). The court made this statement in the course of dismissing the plaintiff's request for an interlocutory injunction.

548 See *Veolia ES Industrial Services Inc. v. Brule*, 2012 ONCA 173, *per* Hoy J.A. (as she then was) at para. 39 (emphasis added), *leave to appeal refused,* [2012] S.C.C.A. No. 229. Note: The statement was made in the context of a broader claim for breach of fiduciary duty.

549 See *Seyedi v. Nexen Inc.*, 2016 ABCA 24, *per curiam* at paras. 13 & 14, quoting in part from *Geophysical Service Incorporated v Nwest Energy Corp*, 2014 ABQB 205 (Master).

453. West Face reiterates its submission that Catalyst has failed to show that any confidential information belonging to Catalyst was possessed by Mr. Moyse, or was passed by him to West Face. Catalyst has been equally unable to demonstrate that West Face received, possessed, or had access to such information. Most importantly, Catalyst has provided this Honourable Court with no compelling evidence that such information was "used" (let alone "misused") by West Face in the acquisition of the WIND shares.

454. While the issue does not arise in the current proceeding, West Face acknowledges that Ontario law recognizes a limited form of "shifting onus" in certain breach of confidence cases. More specifically, *after* a court has received evidence establishing (i) that confidential information was *received* by a defendant in confidential circumstances, *and* (ii) that the defendant has *actually used* that information, the onus shifts to the defendant to show that its use of the information did *not* constitute *misuse*.[550] Importantly, as confirmed by Charron J.A. (as she then was) in *Visagie v. TVX*,[551] this mechanism does *not* place a "reverse onus" on the defendant – *i.e.*, the defendant *never* faces the primary burden of disproving that it "used" the information. As Justice Charron explained: "[I]t is apparent that *the trial judge did not reverse the onus as alleged*. She made an affirmative finding, based on the evidence before her,

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[550] See, most famously, *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, *per* La Forest J. at para. 139 ("…When information is provided in confidence, the obligation is on the confidee to show that the use to which he put the information is not a prohibited use") (emphasis added).

[551] See *Visagie v. TVX Gold Inc.* [2000] O.J. No. 1992 (C.A).

that [the defendant] used the information….[*O*]*nce use is proven, the onus falls on the defendant to show that the use was permitted*".[552]

455. Justice Charron's guidance in this regard – *i.e.*, her confirmation that a true "reverse onus" is not what the law imposes – is important in understanding subsequent rulings that have applied this shifting onus in circumstances where the "use" (but *not* the "misuse") of confidential information has been established.[553]

456. As applied in Ontario, this "shifting onus" may be summarized as follows: *First*, the plaintiff must put forward evidence establishing that the defendant *possessed* and *actually used* the plaintiff's information; *Second*, the court may then use these established facts to draw a rebuttable inference that the defendant *misused* that information to the plaintiff's detriment;[554] and *Third*, the defendant is thereafter permitted to rebut such an inference by proffering its own contrary evidence, such as witnesses' testimony that no such misuse occurred or proof that a timely "ethical wall" was implemented.[555]

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552 See *Visagie v. TVX Gold Inc.* [2000] O.J. No. 1992 (C.A.), *per* Charron J.A. (as she then was) at para. 74 (emphasis added) (and see also para. 70).

553 See, for example, *379107 Ontario Ltd. v. Coinamatic Canada Inc.*, [2002] O.J. No. 2842 (S.C.J.), *per* Jennings J. at paras. 8 & 41 ("It is for the defendant to show that the use to which it put the information was not prohibited" and "[I]t is not for the plaintiff to lead direct evidence of a breach of the obligation of confidentiality; rather it is for the defendant to show that there was no improper use made of the information"), *affirmed without reference to this issue*, [2003] O.J. No. 5170 (C.A.) (emphasis added). Interestingly – and in direct contrast to Charron J.A.'s rejection of the phrase "reverse onus" – the Alberta court in *Dataco Utility Services Ltd. v. Olameter Inc*., 2009 ABQB 116, used this very language (see paras. 42, 44 & 62), while applying analytical principles very similar to those endorsed by Justice Charron (see paras. 42-62). It appears that the Alberta court's acceptance of the phrase "reverse onus" may have flowed from its (doctrinally dubious) conclusion that the context-specific principles in *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 might be applied *holus bolus* outside the a solicitor-client relationship (see para 42).

554 See, *inter alia, Gold Reserve Inc. v. Rusoro Mining Ltd.*, [2009] O.J. No. 533 (S.C.J.), *per* Cumming J., esp. at paras. 43, 61 & 66-69, *leave to appeal refused,* [2009] O.J. No. 1442 (Div. Ct.).

555 See, *inter alia*, *379107 Ontario Ltd. v. Coinamatic Canada Inc.*, [2002] O.J. No. 2842 (S.C.J.), *per* Jennings J. at paras. 33-35 & 45-49, *affirmed,* [2003] O.J. No. 5170 (C.A.); and *Dataco Utility Services Ltd. v. Olameter Inc*., 2009 ABQB 116, *per* Rawlins J. at paras. 24-29, 46-54 & 62. (Interestingly, Justice Rawlins found that – because of what he described as the "reverse onus" (see above), "inferences" should play no role in the analysis. See paras. 43-44.)

457. It is submitted that – while West Face could readily respond to, and rebut, this "shifting onus" *if it were found to apply* – the issue remains one of purely academic interest in the present circumstances. Given Catalyst's failure to satisfy its own preliminary onus of proving that West Face "possessed" and "used" confidential information relating to the WIND acquisition, the burden of rebutting an inference of "misuse" never passes to West Face.

vii. The "Confidential Information" Belatedly Identified by Catalyst was Incapable of being "Misused" by West Face in its Acquisition of WIND

458. Even if this Honourable Court were to conclude that Mr. Moyse *did* convey Catalyst's confidential information to West Face, Catalyst has been unable to prove that West Face thereafter misused that information. Indeed, at a more preliminary level, Catalyst has not even been able to explain *how* that information *could have been misused* by West Face.

459. Only in the weeks before trial did Catalyst belatedly identify the information which it claims was shared by Mr. Moyse with West Face. As discussed above, much of this supposedly confidential information was actually "public" (in the sense that it was known to, or available to, participants or investors in the wireless industry). As such, it was incapable of being actionably "misused" by West Face, even if it had been shared by Mr. Moyse.

460. Having now learned – for the first time – the actual substance of Catalyst's so-called "regulatory strategy", it is clear that West Face could not have benefited from that information, even if Mr. Moyse had understood it and improperly passed it on. The reality is that Catalyst's "strategy" was so deeply flawed that it could not possibly have

assisted West Face in framing its successful bid for WIND, even if that information had been known to West Face at the relevant time:

(a) **certain elements of Catalyst's thinking were entirely incompatible with West Face's own pre-existing views and, indeed, directly contradicted West Face's own carefully considered strategy:** Irrelevant and unhelpful aspects of Catalyst's "strategy" include its dubious opinion that WIND could never be commercially viable without significant regulatory changes, and its equally unwarranted belief that government concessions were required to facilitate a timely exit of a purchaser's investment in WIND. West Face held diametrically opposed ideas. Had it learned of Catalyst's divergent views, such knowledge would not have assisted West Face, nor would it have altered its approach, in preparing its ultimately successful bid for WIND;

(b) **other aspects of Catalyst's "confidential strategy" were, in fact, neither "confidential" nor "strategic":** Other elements of its "strategy" – *e.g.*, Catalyst's apparent intention to seek changes to the roaming rate regime within the wireless industry – cannot be characterized as "confidential", as the benefits of such changes were well known within the industry (and had already been publicly sought by WIND). Indeed, by the summer of 2014, the government had publicly announced that such changes would be implemented. Even if West Face had learned such non-confidential information from Mr. Moyse (*which it did not*), no such use of this information would have been actionable. More importantly,

such trite and obvious "information" would not have affected West Face's own strategy for acquiring WIND;

(c) **additional facets of Catalyst's plan were simply wrongheaded and, from West Face's perspective, were wholly irrelevant:** Catalyst's unfounded belief that the federal government would have been sufficiently "embarrassed" by unidentified future litigation by an unnamed third party that it would grant regulatory concessions to WIND would be laughable were the stakes of this litigation not so serious. Mr. Glassman relies heavily on the ruling of the United States Supreme Court in *Federal Communications Commission v. NextWave*. Mr. Glassman has cited his "personal" insights into the *NextWave* ruling as proof of the unique shrewdness that he claims characterized Catalyst's "regulatory strategy". With respect, this assertion is both baffling and bizarre: No reasonable reading of the *NextWave* ruling provides any meaningful support for Catalyst's stated "strategy", and there is certainly no basis for investing this foreign decision with the sweeping, cross-border precedential authority that Mr. Glassman attributes to it.[556] There is no evidence that

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556 The issues raised by *Federal Communications Commission v. NextWave Personal Communications Inc.*, 537 U.S. 293 (2003) are entirely irrelevant to Industry Canada's oversight of the wireless industry in general and its dealings with WIND in particular. The only issue determined by the *NextWave* case was that the F.C.C. was not permitted to exercise commercial powers (which it has given to itself, *qua* creditor, through both regulation and contract) *if* the exercise of such powers would directly violate a separate statutory prohibition. Without going into unnecessary detail, the *NextWave* case construed para. 525(a) of the U.S. *Bankruptcy Code*, which specifically forbids any "governmental unit" (*i.e.*, the F.C.C.) from "revok[ing]" any "licence" (*i.e.*, a wireless spectrum licence) belonging to a "debtor" (*i.e.*, belonging to NextWave, while it was reorganizing under Chapter 11) "solely because" that debtor "has not paid a debt" (*i.e.*, has failed to make installment payments owing to the F.C.C. for the purchase of the spectrum licences), where the unpaid debt is a "dischargeable" debt under the *Bankruptcy Code*. A strong majority of the Supreme Court confirmed that – in light of this express statutory prohibition – the F.C.C. was not permitted to revoke and re-sell spectrum licences it had previously sold to NextWave where that revocation was triggered by NextWave's failure to make the purchase payments it had promised to the F.C.C. The key issue for the Court was the

knowledge of Catalyst's speculative (at best) regulatory strategy would in any way have altered West Face's well-considered and straightforward strategy for acquiring WIND in conjunction with the other Investors; and

(d) **a final component of Catalyst's so-called "strategy" was wholly unviable:** Catalyst's "strategy" apparently included a proposal to enter into high-pressure negotiations with the government to force regulatory concessions, despite the fact that VimpelCom had already contractually forbade Catalyst from taking such steps. Such a mystifying and unethical strategy – *i.e.,* Catalyst's deliberate and premeditated "plan" to agree to a contractual restriction, while intending to breach it immediately thereafter – would not have been of interest or use to West Face, even had such a plan come to its attention.

461. Perhaps not surprisingly, Catalyst has struggled to explain *how* West Face could possibly have used this largely worthless information to develop or refine its successful bid for WIND. This inability to convincingly articulate the nature of West Face's alleged

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fact that the revocation of the spectrum licences was exercised by the F.C.C. *qua* creditor (even if it was also motivated in part in its capacity as a regulator). This is the *only principle* that emerges from the *NextWave* case. As noted above, the principle that a "regulatory body" can be constrained in certain ways – notably *qua* creditor – during the pendency of a bankruptcy proceeding is *a well-known element of Canadian law* (see s. 11.1 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36). As such, Mr. Glassman's allegedly "unique" knowledge of the *NextWave* ruling adds absolutely nothing inventive or valuable to the analysis surrounding the acquisition of WIND. Furthermore – and contrary to Catalyst's assertion – the *NextWave* case provides no support for the proposition that Industry Canada (exercising its *bona fide* authority as regulator of the wireless industry) would have felt pressured to grant concessions in the event that litigation challenging its decisions was commenced by one or more participant in that industry. On the contrary, the aggressive response of Industry Canada in defending the ongoing "Quadrangle litigation" (see *Quadrangle Group LLC v.* Canada, 2015 ONSC 1521, *leave to appeal refused,* 2015 ONSC 7346 (Div. Ct.)), and its refusal to permit the sale of spectrum to TELUS during the "Mobilicity Insolvency" (see *Re 8440522 Canada Inc.,* 2013 ONSC 6167), confirms that this senior branch of the federal government is immune to "intimidation" flowing from a court challenge. See Glassman Cross, June 7 at p. 425:12-22. The historical record thus demonstrates Catalyst's profound ignorance of the Canadian regulatory environment, as embodied in its "regulatory strategy", and confirms the worthlessness of that so-called "strategy".

"misuse" is sufficient to dismiss Catalyst's claim in its entirety. As was recently observed by Justice Newbould, quoting with approval from the following guidelines articulated by the British Columbia court: "[A]t trial…[the plaintiff] will be required *to identify the information it says is confidential and establish the proprietary nature of that information*", and "will also be required *to establish facts which prove that the…Defendants used the information*…, or facts from which that inference can reasonably be drawn".[557] (The drawing of "reasonable" inferences will be discussed under a separate heading, below.)

462. This represents yet another basis on which this Honourable Court can, and should, reject Catalyst's claim.

viii. Catalyst has not Proven that any "Misuse" of its Information Caused it "Detriment"

463. Finally, Catalyst has been unable to satisfy the onus of demonstrating that it suffered any "detriment" as a result of West Face's alleged misuse of its confidential information.[558] The concept of "detriment" plays two discrete but overlapping roles in the Canadian law of breach of confidence: (a) the dominant view among Canadian courts is that proof of "detriment" must be established in order to make out the third branch ("misuse") of the cause of action; and (b) in any event, the existence of "detriment" dictates the availability, form and quantum of remedial relief.

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[557] See *Husky Injection Moulding Systems Ltd. v. Schad*, 2016 ONSC 2297, *per* Newbould J. at para. 224, quoting from *Blue Line Hockey Acquisition Co. v. Orca Bay Hockey Ltd.*, 2007 BCSC 143, *per* Wedge J. at para. 80 (emphasis added).

[558] See *Mancha Consultants Ltd. v. Canada Square Development Corp.*, [1994] O.J. No. 1231 (Gen. Div.), at para. 56, *reversed on unrelated grounds*, [1998] O.J. No. 2000 (C.A), *leave to appeal refused,* [1998] S.C.C.A. No. 396.

464. In the seminal ruling in *Lac Minerals*, Justice La Forest made clear that "detriment" flowing from misuse was a mandatory element of breach of confidence: "A claim for breach of confidence *will only be made out*…when it is shown that the confidee has misused the information *to the detriment of the confidor*".[559] While Justice Sopinka (in partially dissenting reasons) did not expressly address the issue, both judges agreed that proof of detriment represented a key prerequisite to the selecting and awarding of *an appropriate remedy*.[560]

465. Ontario jurisprudence, building on these foundations, has accepted that detriment (which need not be strictly financial)[561] is a mandatory component of the "misuse" element of the cause of action: "A claim for breach of confidence requires proof…that the confidential information was misused by the party to whom it was communicated *to the detriment of the confider*".[562]

466. Catalyst had failed to demonstrate any "detriment" flowing from any alleged misuse by West Face of Catalyst's information, thus precluding this Honourable Court from finding that an actionable breach of confidence has been committed. There is no evidence that Catalyst's failure to acquire WIND had anything to do with West Face.

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559 See *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, *per* La Forest J. at para. 161 (and at paras. 129 & 134-135) (QL) (emphasis added).

560 See *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, *per* La Forest J. at para.182 ("[T]here is no doubt in my mind that but for the actions of Lac in misusing confidential information and thereby acquiring the Williams property, that property would have been acquired by Corona. That finding is fundamental to the determination of the appropriate remedy); and *per* Sopinka J. at para. 86 ("In applying this test it is necessary to consider what the wrong is and what the position of the plaintiff would have been if he had not sustained the wrong. To put it shortly, what loss was caused to the plaintiff by the defendant's wrong?") (QL) (emphasis added).

561 See, *inter alia, Lysko v. Braley*, [2006] O.J. No. 1137 (C.A.), *per* Rosenberg J.A. at paras. 18-20.

562 See *Lysko v. Braley*, [2006] O.J. No. 1137 (C.A.), *per* Rosenberg J.A. at para. 17. See also, *inter alia*, *Rodaro v. Royal Bank of Canada*, [2002] O.J. No. 1365 (C.A.), *per* Doherty J.A. at para. 48; *Barrick Gold Corp. v. Goldcorp Inc.,* 2011 ONSC 3725, *per* Wilton-Siegel J. at para. 738*; Precious Metal Capital Corp. v. Smith*, 2011 ONSC 2962, *per* Cumming J. at para. 120, *affirmed* 2012 ONCA 298, *leave to appeal refused*, [2012] S.C.C.A. No. 256; and *Edac Inc. v. Tullo*, [1999] O.J. No. 4837 (S.C.J.), *per* Nordheimer J. at paras. 52-53.

Rather, at the eleventh hour, VimpelCom's chairman appears to have suspected Catalyst's intended strategy to pursue regulatory concessions in breach of s. 6.3(d) of the SPA, and then engineer a dissolution of the transaction if such concessions could not be obtained. To protect VimpelCom against such an eventuality, he demanded a $5-20 million break fee, or at a minimum a two month Interim Period after which VimpelCom could pursue other options if the deal had not closed. Catalyst's refusal to agree to these terms – and not anything West Face did – is why Catalyst failed to acquire WIND.

467. Alternatively, even if Catalyst had signed the SPA, there is no evidence it could have obtained regulatory concessions permitting it to sell spectrum to an incumbent. As Catalyst was unwilling to acquire WIND without such assurances, again the preponderance of the evidence is that it could not have acquired WIND and therefore equally could not have suffered any detriment from West Face's conduct. The claim must, for that reason alone, be dismissed.

B. Catalyst Cannot Salvage its Foundering Breach of Confidence Claim by Asking this Court to Draw Unwarranted "Inferences" as to the Existence or the Misuse of Confidential Information, nor as to any Detriment Suffered by Catalyst

i. A proper "Inference" Requires an Evidentiary Foundation, Rather than Mere "Speculation" and "Conjecture"

468. Because of its failure (described above) to substantiate the elements of its breach of confidence claim, Catalyst has asked this Honourable Court to "infer" that Mr. Moyse possessed relevant confidential information, that he passed that information on to West Face, that West Face misused that information in acquiring its interest in WIND, and that Catalyst suffered compensable detriment as a result.

469. No such inferences are permissible or even possible in the circumstances. First, Catalyst has failed to establish the requisite evidentiary foundation necessary to ground any of the requested inferences. To reach the conclusions proposed by Catalyst, this Court would be required to make unsubstantiated and speculative "leaps" that cannot be justified on the record or under the applicable legal principles. More fundamentally, the unshaken testimony of the defendants' witnesses and the mountain of corroborative documentary evidence placed before this Court is entirely inconsistent with, and therefore precludes the drawing of, the inferences proposed by Catalyst.

470. West Face does not dispute that the drawing of inferences from established facts is a fundamental role of every trial judge. However, as explained by the Court of Appeal in the leading case on point, there is a crucial distinction between a proper "inference" and an impermissible "conjecture":

> [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**.[563]

471. As that same Court has more recently explained: "The process of drawing inferences from evidence is not… the same as speculating, even where the circumstances permit an educated guess…. [In drawing inferences,] the trier of fact will assess [the] evidence in the light of common sense and human experience, but neither

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563 See *R. v. Morrissey*, [1995] O.J. No. 639 (C.A.), *per* Doherty J.A. at para. 52 (emphasis added). See also *Toronto Party for a Better City v. Toronto*, 2013 ONCA 327, *per* Watt J.A. at para. 63 ("The inference the appellant seeks to draw from the foundational fact is not an inference, only impermissible speculation") (emphasis added) (and at paras. 61-62).

are a substitute for evidence".[564] For that reason, "if there is an evidentiary gap between the primary fact and the inference sought, the inference cannot be drawn".[565]

472. West Face submits that, in the current proceeding, there exists not merely an "evidentiary gap", but a yawning chasm between the factual record before this Court and the unsubstantiated "inferences" requested by Catalyst. Catalyst is, in fact, asking this Court to make a reversible error: "[*A*] *finding of fact based on speculation and not logical inference will be subject to appellate correction* not because the finding is unreasonable, although it clearly is, but because *a process of fact-finding based on speculation is clearly wrong* and, therefore, constitutes a palpable error".[566]

473. As affirmed by former Chief Justice Winkler, such an error will arise, *inter alia*, if a trial judge draws an inference (i) which lacks a sufficient evidentiary foundation, or (ii) which is contradicted by other evidence before the court.[567] It is submitted that, if it accedes to Catalyst's request, this Court runs the risk of falling prey to *both* of these traps.

ii. Justice Lederer's Interlocutory Acceptance of Inference-Drawing does not Assist Catalyst

474. In the context of requests for interlocutory injunctions, some courts have expressed a willingness to use factual inferences to assist the plaintiff in "fleshing out" allegations of breach of confidence.

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564 See *United States of America v. Huynh,* [2005] O.J. No. 4074 (C.A.), *per* Doherty J.A. at para. 7 (emphasis added).

565 See *R. v. Carter*, 2015 ONCA 287, *per* Sharpe J.A. at para. 57 (emphasis added).

566 See *Waxman v. Waxman,* [2004] O.J. No. 1765 (C.A.), *per curiam*, at para. 306, *leave to appeal refused*, [2004] S.C.C.A. No. 291 (emphasis added).

567 See *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2013 ONCA 279, *per* Winkler C.J.O. at paras. 64-69.

475. An example is found in a preliminary ruling issued in the current proceeding. In that decision, Lederer J. stated that: "It is not possible *on an interlocutory motion* to determine if…a [confidentiality] clause has been breached. The threshold is low". The learned motions judge added that "[i]t is necessary that the threshold be low in light of *the evidentiary challenges which face a moving party* in cases involving confidential business information".[568] In support of this approach, the motion judge quoted a passage from the *interlocutory* Quebec ruling, *Matrox Electronic Systems*, which had likewise accepted the legitimacy of inference-drawing in such circumstances.[569] This decision of course was made without the benefit of any evidence about WIND and indeed did not address that transaction, which had yet to occur when the motion was commenced.

476. It would be an error for this or any court to lose sight of the restrictions on permissible inference-drawing articulated so clearly by the Court of Appeal in the passages quoted above. The principled limitations thus placed on the scope of "reasonable" inferences apply with equal force to breach of confidence allegations.

477. If there is uncontested evidence that a defendant possesses confidential information, and if there is also "some evidence" that this information was actually used by the defendant, a motion judge considering an interlocutory motion is free to draw a "reasonable inference" that the information has been "misused". This was, in fact, the

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[568] See *Catalyst Capital Group Inc. v. Moyse*, 2014 ONSC 6442, *per* Lederer J. at paras. 48 & 49 (emphasis added).

[569] See *Catalyst Capital Group Inc. v. Moyse*, 2014 ONSC 6442, *per* Lederer J. at para. 49, quoting from *Matrox Electronic Systems Ltd. v. Gaudreau*, [1993] Q.J. No. 1228 (C.S.) at para. 94 ("In cases involving confidential business information, misuse can rarely be proved by convincing direct evidence. In most cases, employers must construct a web of perhaps ambiguous circumstantial evidence from which the Court may draw inferences which convinced it that it is more probable than not that what employers alleged happened did in fact take place. Against this often delicate construct of circumstantial evidence, there frequently must be balanced the testimony of the employees and their witnesses who directly deny everything").

basis on which Cumming J. was prepared to draw an inference of misuse in the (interlocutory) *Gold Reserve v. Rusoro* case based on extensive direct evidence that the defendants had used the plaintiff's confidential information, as discussed above.[570] Even if such an inference is found to be justified on the evidentiary record, it will, of course, be open to rebuttal by the defendant.[571]

478. In contrast with the facts of the *Gold Reserve* case, it will clearly *never* be permissible to draw an inference where the plaintiff bases its allegation of detrimental misuse of confidential information on "mere conjecture" or "mere assertion".[572] In such cases, no inference is permissible. As explained by Justice MacKenzie in a departing employee case: "[*N*]*o evidence has been put forward from which a reasonable inference could be drawn* that any…customers' accounts serviced by the defendant on behalf of the competitor were obtained through the use of confidential information obtained by the defendant in the course of his employment with the plaintiff".[573]

479. Furthermore, it is clearly "inappropriate" to draw an inference that confidential information has been misused based on a selective and incomplete consideration of the evidence before the court.[574] That is, effectively, what Catalyst asks this Honourable Court to do.

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570 See *Gold Reserve Inc. v. Rusoro Mining Ltd.*, [2009] O.J. No. 533 (S.C.J.), *per* Cumming J. at paras. 43, 61 & 65-69, *leave to appeal refused,* [2009] O.J. No. 1442 (Div. Ct.).

571 See, *inter alia*, *379107 Ontario Ltd. v. Coinamatic Canada Inc.*, [2002] O.J. No. 2842 (S.C.J.), *per* Jennings J. at paras. 33-35 & 45-49, *affirmed,* [2003] O.J. No. 5170 (C.A.); and *Dataco Utility Services Ltd. v. Olameter Inc*., 2009 ABQB 116, *per* Rawlins J. at paras. 24-29, 46-54 & 62. Note: Justice Rawlins resisted the propriety of drawing such inferences from the outset (see paras. 43-44).

572 See *FPH Group Inc. v. Gocher*, 2014 ONSC 2481, *per* Goodman J. at paras. 30 & 40 (and at paras. 25-47).

573 See *Poppa Corn Corp. v. Collins,* [2005] O.J. No. 1440 (S.C.J.), *per* MacKenzie J. at para. 22 (emphasis added).

574 *United Technologies Corp. v. Platform Computing Corp*, [1998] O.J. No. 883 (Gen. Div.), *per* Wilkins J. at para. 34, *varied on other grounds*, [1990] O.J. No. 4490 (C.A.).

iii. Unlike the Interlocutory Motion Judge, this Court has the Benefit of a Fully Developed Trial Record

480. Unlike the situation confronting Justice Lederer in October 2014, the current proceeding has, of course, long moved past the stage of interlocutory motions. As such, the drawing of inferences can no longer be justified (if it ever was) by Catalyst's putative inability to substantiate its claim.

481. Catalyst has now had the full benefit of the court's evidence-gathering processes to particularize and prove its claims of breach of confidence. It has also had an unfettered opportunity to test the Defendants' denials of these allegations through cross-examination.

482. In these circumstances, it is clearly not appropriate for this Honourable Court to draw unwarranted factual inferences in an effort to buttress a set of purely speculative allegations put forward by the plaintiff.

483. In numerous breach of confidence rulings, Ontario courts have *refused* to draw unsubstantiated "inferences", where such findings were requested by the plaintiff in order to make out the requisite elements of the cause of action. For example, on a key threshold question – namely, whether the information at issue is even "confidential" – the Court of Appeal recently reversed a trial judge for improperly drawing an inference characterizing the relevant information in that manner. Justice Hoy (as she then was)

concluded that no such inference of "confidentiality" could properly be drawn, given the absence of any foundational evidence to this effect.[575]

484. Likewise, on the crucial question of "detriment", the Court of Appeal reversed a trial judge for drawing an improper inference. As Doherty J.A. explained, where the matter "was not touched on at all in the evidence", the trial judge's "findings that [a commercial] opportunity existed and was lost [by the plaintiff] as a result of the improper disclosure of confidential information *amount to speculation and not inference*".[576]

485. More than twenty years ago, Justice Wright noted that, despite the litigation in question having "been in progress" for 15 months, the accusers "ha[d] failed to provide any concrete evidence that [their former employee] gave to [his new employer] confidential information". For this reason, the court was "*unable to infer* that [the employee had] breached the [contractual] confidentiality provision in any way…"[577] The claim was consequently dismissed on summary judgment.

486. More recently, Justice Wilton-Siegel refused to draw a requested inference that one mining company had misused the confidential information of a competitor in acquiring a valuable asset, noting simply that "[t]he record does not support such a conclusion".[578] On the contrary, when considering the defendants' denial that there had been any such misuse, Wilton-Siegel J. observed that "[t]here is no evidence that

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575 See *Veolia ES Industrial Services Inc. v. Brule,* 2012 ONCA 173, *per* Hoy J.A. (as she then was) at para. 40; *leave to appeal refused,* [2012] S.C.C.A. No. 229.

576 See *Rodaro v. Royal Bank of Canada*, [2002] O.J. No. 1365 (C.A.), *per* Doherty J.A. at para. 65 (emphasis added). Note: As is well known, this lack of evidence was caused by the trial judge's unilateral decision to raise the issue of a "lost opportunity" *ex proprio motu.*

577 See *French v. Trimel Corp.,* [1994] O.J. No. 1568 (Gen. Div.), *per* Wright J. at paras. 43, 45, 52 (emphasis added).

578 See *Barrick Gold Corp. v. Goldcorp Inc.,* 2011 ONSC 3725, *per* Wilton-Siegel J. at para. 820.

contradicts this [denial] and several considerations that support it".[579] At the end of the day, the court found no justification for drawing the requested inference of misuse: "[The plaintiff] has not demonstrated use by [the third-party recipient] of the confidential information…in any part of its decision to participate in the New Gold value maximization process. *Given the lack of any supporting evidence*…, *I decline to draw the inference that such use occurred*".[580] The claim was consequently dismissed.

487. In two very recent (and unrelated) rulings, Justice Myers granted summary dismissals of breach of confidence claims. In each case, the court considered the inability of the plaintiff to establish an evidentiary foundation supporting its allegation of breach of confidence and, in each case, refused to draw the inferences necessary to salvage the action.

488. In the first of these rulings, *ThyssenKrupp Elevator,* the plaintiff alleged that a former employee had shared confidential information with a new employer to assist the new employer in acquiring a commercial opportunity. Justice Myers noted the "glaring discrepancy between the evidence of the competing parties", and observed that the plaintiff had admitted on cross-examination "that *he had no basis in evidence* to support the vast bulk of the facts that he swore to be true" and that "*he had no evidenc*e that [the former employee] had solicited, contracted with, advised or otherwise performed services for any clients of the plaintiff".[581] Justice Myers contrasted these admissions with the cross-examination of the former employee, in which he had "expressly denie[d]"

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579 See *Barrick Gold Corp. v. Goldcorp Inc.,* 2011 ONSC 3725, *per* Wilton-Siegel J. at para. 821.

580 See *Barrick Gold Corp. v. Goldcorp Inc.,* 2011 ONSC 3725, *per* Wilton-Siegel J. at para. 833 (emphasis added).

581 See *ThyssenKrupp Elevator (Canada) Limited v. Amos*, 2014 ONSC 3910, *per* Myers J. at para. 19.

the allegation that he had "released confidential information to his new employer".[582] Appearing to endorse the defendant's characterization of the plaintiff's allegations as "*nothing more than supposition and speculation*",[583] Myers J. refused to draw the requested inference: "[The former employee's] involvement in the bid for Broadway Properties modernization work *does not lead to any natural inference that he released confidential information*…".[584] The claim was accordingly dismissed.

489. In his more recent ruling, *J. Jenkins & Son Landscaping*, Justice Myers adopted the same approach. In response to allegations that the plaintiff's former agent had shared information with a third party, the court noted that "[t]he plaintiff has *no evidence* of the allegation" of breach of confidence.[585] On the contrary, Justice Myers found that "the plaintiff leap[ed] to that conclusion on his own", and that his "allegations are *speculative*".[586] In contrast, both the original recipient of the confidential information and the third party to whom the information had allegedly been passed "plainly denied" that there had been any such disclosure, and Justice Myers noted that the former agent "was not shaken in his denial" of misuse during cross-examination.[587]

490. Conversely, the plaintiff had failed to substantiate his bald assertions: "*There is no evidence the other way to support an inference of misuse* of the plaintiff's confidential

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582 See *ThyssenKrupp Elevator (Canada) Limited v. Amos*, 2014 ONSC 3910, *per* Myers J. at paras. 19 & 33.

583 See *ThyssenKrupp Elevator (Canada) Limited v. Amos*, 2014 ONSC 3910, *per* Myers J. at para. 19 (emphasis added).

584 See *ThyssenKrupp Elevator (Canada) Limited v. Amos*, 2014 ONSC 3910, *per* Myers J. at para. 33 (emphasis added).

585 See *J. Jenkins & Son Landscaping v. SCS Consulting Group et al*., 2015 ONSC 1921, *per* Myers J. at para. 2 (emphasis added).

586 See *J. Jenkins & Son Landscaping v. SCS Consulting Group et al*., 2015 ONSC 1921, *per* Myers J. at paras. 7 & 10c (emphasis added).

587 See *J. Jenkins & Son Landscaping v. SCS Consulting Group et al*., 2015 ONSC 1921, *per* Myers J. at paras. 5 & 8.

information".[588] As the court concluded: "*Absent proven facts to support an inference* that the [confidant] and [the third party] are not being truthful, *the plaintiff is left with its own merest of supposition*. …[*G*]*iven the absence of evidence* to support findings of fact *that probatively lead to the inferences sought by the plaintiff*, there is no serious issue requiring a trial".[589] Summary judgment was accordingly granted, and the claim dismissed.

491. Outside this province, the Alberta Court of Appeal has very recently issued a ruling which affirmed the trial judge's refusal to draw inferences of misuse in a breach of confidence case. The court below had found that the plaintiff "had no personal knowledge of what [the defendant] did or did not do with [the plaintiff's] information", and could present only "*coincidental timing concerns, innuendo and suspicion*" in support of "what was, *at best, a thin, speculative argument*". This was contrasted with "the uncontroverted evidence" of the defendant's witnesses, who denied that there had been any misuse. On that record, the Court of Appeal expressly approved the lower court's "*refus*[*al*] *to draw inferences* that these witnesses were lying", as well as its unwillingness to draw broader inferences that there had been misuse of the information.[590]

492. It is submitted that the foregoing cases bear a marked resemblance to the proceeding before this Court. Catalyst has been able to tender nothing more that suspicions, speculation, and unconvincing innuendo in support of its allegations. The

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588 See *J. Jenkins & Son Landscaping v. SCS Consulting Group et al*., 2015 ONSC 1921, *per* Myers J. at paras. 5 & 8.

589 See *J. Jenkins & Son Landscaping v. SCS Consulting Group et al*., 2015 ONSC 1921, *per* Myers J. at paras. 9 & 11 (emphasis added).

590 See *Seyedi v. Nexen Inc.*, 2016 ABCA 24, *per curiam* at para. 15 (emphasis added).

fact that Catalyst may zealously believe the truth of its allegations does not alter their character. Catalyst has not provided evidence that its confidential information concerning WIND was ever in West Face's hands, or was ever misused to Catalyst's detriment.

493. In contrast, West Face has placed before this Court consistent and compelling evidence, unshaken on cross-examination, denying that any such misconduct occurred or was even possible. Unless this Court concludes that West Face's witnesses have been untruthful under oath, their unqualified denial of wrongdoing should be dispositive of the matter.

494. This precise issue was addressed by another Alberta court in the following manner: "The difficulty with [the plaintiff's assertions of misuse] is that they fly in the face of the testimony of [the defendant's] witnesses…. *The testimony given by* [*the defendant's*] *witnesses, in my view, refutes* [*the plaintiff's*] *claims and establishes that the Confidential Information was not misused*".[591] The court concluded by explicitly adopting a passage from the defendant's written submissions:

> [53] I can say it no better than the written argument of the Defendant: "**[The defendant's] witnesses expressly dealt with the allegations of misuse head on. Their testimony, individually and collectively demonstrates that the** [plaintiff's] information and indeed any **information** provided by [the plaintiff] **was only used for the [permitted] purpose**…To put it another way, resorting to a double negative, **the evidence establishes conclusively that information from [the plaintiff] was not used in the preparation of or the pricing of the [defendant's] Bid in response to the Aquila RFP so there is no misuse**. [The defendant] did everything that a defendant faced with an accusation of misuse can do to refute that serious allegation. **The**

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591 See *Dataco Utility Services Ltd. v. Olameter Inc.*, 2009 ABQB 116, *per* Rawlins J. at para. 50 (emphasis added).

> **Plaintiff…is necessarily asking this Honourable Court to simply disbelieve both the sworn evidence of five people and the certificates of three others. Again, there is no basis for doing so".**[592]

495. With respect, West Face submits that it would be a serious error, in these circumstances, for this Honourable Court to disregard the unshaken evidence put forward by West Face in order to draw the unsupported inferences requested by Catalyst.

iv. No Adverse Inference can be Drawn Merely Because West Face Opted not to Call Evidence from Messrs. Boland, Guffey or Lacavera

496. During evidence, Catalyst appeared to suggest that it would ask this Honourable Court to draw an adverse inference against West Face because Messrs. Boland, Guffey and Lacavera were not called to give evidence. Any such request should be refused as untenable and unjustified.

497. In *Parris v. Laidley,* the Court of Appeal provided a useful summary of the principles governing adverse inferences:

> [2] **Drawing adverse inferences** from failure to produce evidence **is discretionary**. The inference **should not be drawn unless it is warranted in all the circumstances. What is required is a case-specific inquiry** into the circumstances **including**, but not only, **whether there was a legitimate explanation for failing to call the witness**, whether **the witness was within the exclusive control of the party** against whom the adverse inference is sought to be drawn**, or equally available to both parties**, and whether **the witness has key evidence to provide or is the best person to provide the evidence in issue**.[593]

498. Such a "case-specific inquiry" yields no support for the imposition of an adverse inference against West Face in the context of the current proceeding.

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592 *Dataco Utility Services Ltd. v. Olameter Inc.*, 2009 ABQB 116, *per* Rawlins J. at para. 53 (emphasis added).

593 See *Parris v. Laidley*, 2012 ONCA 755, *per curiam* at para. 2 (emphasis added).

499. Dealing first with Messrs. Guffey and Lacavera, neither individual was – in the words of the Court of Appeal – "within the exclusive control" of West Face, and both were therefore "equally available to both parties". As was confirmed in an earlier ruling of the Court of Appeal: "*An inference may be drawn* against a party for failure to call a witness…*when that party alone could bring the witness before the court".* In contrast, where "[*n*]*one* of the witnesses *was*…*an employee of* [*the defendant*]….[*t*]*here is no reason to believe that they were not equally available to the plaintiffs*".[594]

500. Neither Mr. Guffey nor Mr. Lacavera was ever an employee of West Face. As such, either of them could have been called by Catalyst, if it believed that their evidence was crucial to establishing its case. As was noted by Justice Whitten in this regard, "if the plaintiff was not satisfied" with the witnesses called by the defendant, "*it could have called any of the individuals* who the [defendant] did not call *as witnesses*".[595]

501. West Face acknowledges that different principles apply to Mr. Boland. As a partner and senior officer of West Face, Mr. Boland could reasonably be described as being "within [its] exclusive control". This, of course, in no way "obligated" West Face to call Mr. Boland to testify, and its decision not to do so cannot be held against it.

502. In particular, West Face had every right to decide *against* calling Mr. Boland as a witness, given that any evidence he might have offered had *already* been placed before the Court by *other* (better-situated) witnesses. Mr. Griffin, not Mr. Boland, was leading West Face's efforts to acquire WIND from November 2013 into July 2014, which covers

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[594] See *Robb v. St. Joseph's Health Centre*, [2001] O.J. No. 4605 (C.A.), *per curiam* at paras. 161-162 (emphasis added).

[595] See *Herbert v. Brantford*, 2010 ONSC 2681, *per* Whitten J. at para. 156, *affirmed without references to this issue*, 2012 ONCA 98 (emphasis added). See also *Van Staveren v. Coachlite Roller Gardens Inc*., 2014 ONSC 2494 (Div. Ct.), *per curiam* at para. 23.

the time period of Mr. Moyse's hiring and employment by West Face. Mr. Dea, not Mr. Boland, was responsible for hiring Mr. Moyse. West Face produced the best witnesses, and after initially indicating it would ask that Mr. Boland be called, Catalyst declined to do so. The same observation applies to both Mr. Guffey and Mr. Lacavera, *neither* of whom was the *only* witness capable of addressing those issues which West Face readily established through other equally reliable sources.

503. It is uncontroversial that counsel enjoy a broad discretion in selecting the manner in which they choose to frame their case. As explained by Justice Binnie, in the leading modern ruling on point: "*The 'adverse inference' principle* is derived from ordinary logic and experience, and *is not intended to punish a party who exercises its right not to call the witness*…Experienced trial lawyers will often decide against calling an available witness *because the point has been adequately covered by another witness*…"[596]

504. Elaborating on this principle, former Associate Chief Justice O'Connor further explained that: "[*E*]*vidence may not be called* if it would be…*cumulative*…*to the evidence already available on the relevant point*…[and] calling [additional] witnesses…would *not likely have added anything beyond what had already been established in evidence*…".[597] For this reason, the Associate Chief Justice concluded that an adverse inference is <u>not</u> properly drawn merely because a party "fail[s] to call evidence to *confirm* parts of [another witness's] testimony".[598]

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596 See *R. v. Jolivet*, 2000 SCC 29, *per* Binnie J. at paras. 24 & 28 (emphasis added).
597 See *R. v Lapensee*, 2009 ONCA 646, *per* O'Connor A.C.J.O. at paras. 43 & 49 (emphasis added).
598 See *R. v Lapensee*, 2009 ONCA 646, *per* O'Connor A.C.J.O. at para. 52 (emphasis added).

505. This principle is well established. If the evidence of a potential witness can be "adduced in *another equally reliable way*", counsel cannot be faulted for electing *not* to call that witness.[599] Indeed, the contrary is true. In cases where the evidence of a particular witness "became *unnecessary* as a result of the evidence *given by another witness*…*the only inference* [to be drawn] is that [the party] *was seeking not to unnecessarily prolong* [*the*] *trial*".[600] This case was tried on an extremely aggressive schedule and Catalyst repeatedly and bitterly complained that: (a) the trial was too soon; and (b) the trial was too short. Calling additional duplicative witnesses would have just exacerbated these concerns. Counsel's restraint in this regard "reflect[s] a reasonable approach to the compromises that must be made" in conducting a trial, and certainly "*do*[*es*] *not warrant the drawing of an adverse inference*".[601]

506. In light of the foregoing, it is submitted that, should Catalyst ask this Court to draw an adverse inference against West Face, that request must be refused as entirely unwarranted and unnecessary.

C. Available Remedies: Catalyst is Entitled *Neither* to Compensatory Damages *nor* to a Restitutionary Disgorgement of West Face's Profits

507. West Face reiterates its overarching submission that Catalyst has failed to establish any of the mandatory elements of breach of confidence, thereby rendering the question of appropriate remedies academic. The following submissions should be read "in the alternative", on the assumption that Catalyst could somehow prove that West

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599 See *Herbert v. Brantford*, 2010 ONSC 2681, *per* Whitten J. at para. 156, *affirmed without references to this issue*, 2012 ONCA 98 (emphasis added).

600 See *Monarch Construction Ltd. v. Axidata Inc.*, [2007] O.J. No. 816 (S.C.J.), *per* Frank J. at para. 45, *affirmed without reference to this issue,* 2009 ONCA 166 (emphasis added).

601 See *Monarch Construction Ltd. v. Axidata Inc.*, [2007] O.J. No. 816 (S.C.J.), *per* Frank J. at para. 43, *affirmed without reference to this issue,* 2009 ONCA 166 (emphasis added).

Face committed an actionable breach of confidence. If there is no breach of confidence, these submissions on remedy can be disregarded.

i. This Honourable Court Enjoys a Very Broad Remedial Jurisdiction

508. The Supreme Court has confirmed that the "conventional remedies for breach of confidence" are (a) an award of damages, or (b) the ordering of an equitable accounting and disgorgement of profits.[602] In "appropriate circumstances", (c) a permanent injunction may also be awarded,[603] and, more rarely, (d) a constructive trust may be imposed.[604]

509. In these proceedings, Catalyst has withdrawn any request for a permanent injunction or a constructive trust. It has instead asked this Honourable Court to grant it either: (a) an award of compensatory damages, quantified to reflect the losses suffered by Catalyst as a result of West Face's (alleged) misuse of Catalyst's confidential information; or (b) an accounting of profits, requiring West Face to disgorge the gains that West Face earned from its (alleged) misuse of Catalyst's information.

510. West Face respectfully submits that neither an award of compensatory damages nor the disgorgement of profits is appropriate in this proceeding. Should this Honourable Court conclude that confidential information has, in fact, been misused, it should instead apply its discretion to craft a customized remedy that better conforms to the facts of the present case.

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602 See *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, *per* Sopinka J. (in partial dissent on the propriety of a constructive trust) at para. 81 (QL).

603 See *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, *per* Sopinka J. at para. 81.

604 See *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, *per* La Forest J. (affirming the propriety of a constructive trust) at para. 183 (QL). At para. 197, La Forest J. added that "[i]n the vast majority of cases a constructive trust will not be the appropriate remedy" (QL) (emphasis added).

511. As Justice Binnie explained in *Cadbury Schweppes*, the leading case addressing remedies for this cause of action: "[I]n a breach of confidence action", the courts possess the "jurisdiction…to grant a remedy *dictated by the facts of the case* rather than strict jurisdictional or doctrinal considerations".[605] This jurisdiction "provides the Court with *considerable flexibility in fashioning a remedy*" that responds to the unique facts of a given case, while doing justice between the parties.[606] It is therefore incumbent on this Honourable Court to exercise its broad discretion to (i) select a remedy that is available and appropriate in all of the circumstances, and to thereafter (ii) customize the specific elements of that remedy in a manner that best suits the current dispute.

ii. Because Compensatory Damages are Unavailable and an Accounting of Profits is Inappropriate, Catalyst is entitled (at most) to an Award of Nominal Damages

512. With this guidance in mind, by way of overview West Face will make the following submissions on remedy:

(a) **This Honourable Court *cannot* grant to Catalyst an award of compensatory damages:** Even if misuse of confidential information by West Face is established, Catalyst is unable to prove that it suffered any compensable losses caused by that misuse, thereby precluding the awarding of such damages;

(b) **Furthermore, this Honourable Court *should not* grant to Catalyst the purely discretionary equitable remedy of an accounting of profits:**

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605 See *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142, *per* Binnie J. at para. 24 (emphasis added).

606 See *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142, *per* Binnie J. at para. 22, quoting *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, *per* Sopinka J. at para. 74 (QL) (emphasis added).

The disgorgement remedy is an extraordinary one, which is justified only in exceptional cases. Such a remedial accounting is highly discretionary, and its availability is informed by principles of equity. In the current case, there exists no legal, equitable or policy justification for requiring West Face to disgorge all (or even some) of the profits that it earned for its fund investors as a result of the WIND transaction. As established by the leading cases, an accounting is not appropriately awarded in any of the following circumstances: *First,* where "nothing very special" information (*i.e.*, Catalyst's "regulatory strategy") was misused by a non-fiduciary commercial competitor (such as West Face); *Second*, where that low-value information thereafter played little or no role in the competitor's acquisition of the targeted property or its earning of the profits in question; *Third,* where the granting of such a remedy will confer on the plaintiff an unwarranted windfall, in a quantum grossly disproportionate to both the misconduct committed by the defendant and the detriment suffered by the plaintiff; *Fourth,* where the awarding of this remedy would inflict unjust deprivation on innocent third parties (*e.g.*, West Face's blameless fund investors); and, *Fifth,* where the plaintiff seeking the equitable remedy of an accounting comes before the court with "unclean hands" (as is the case with Catalyst);

(c) ***Instead*, this Honourable Court should award Catalyst nominal and symbolic damages of one dollar:** Such an award acknowledges the

plaintiff's technical success in proving its claim, but also recognizes the absence of any compensable loss suffered by Catalyst; and

(d) **In the *alternative*, this Honourable Court could, if necessary, order a nominal disgorgement of profits:** In lieu of nominal damages, it would be open to this Court to require West Face to disgorge only a very small (or, indeed, a nominal) portion of its profits, thereby reflecting a context-driven application of the discretionary factors (described above), which govern this equitable remedy.

513. For the reasons set out below, in circumstances where an award of compensatory damages is unavailable and the ordering of an accounting is inappropriate, the best use of this Court's broad remedial discretion is to grant an award of purely nominal damages (or, alternatively, a disgorgement of nominal profit), in the sum of one dollar, thereby reflecting both the *de minimis* nature of West Face's misconduct and the absence of any compensable loss suffered by Catalyst.

D. Compensatory Damages are Unavailable as Catalyst has Failed to Prove Financial Loss

514. Catalyst asserts a right to damages in an amount compensating it for its alleged "loss" of the WIND shares acquired by West Face. Catalyst argues that the value of those shares – and thus the damages it should receive – can be measured by reference to the quantum of proceeds received by West Face from its re-sale of those shares.

515. In support of this claim, Catalyst relies on a fundamentally misleading (and self-serving) re-creation of the events of 2014. Catalyst asserts that (i) West Face was able to acquire the WIND shares *only because* of its misuse of Catalyst's so-called

"regulatory strategy"; and that, (ii) but for this misuse, the WIND shares would instead have been acquired by Catalyst.

516. West Face rejects both of these propositions, and submits that Catalyst's claim for compensatory damages is fatally flawed in two key ways:

(a) *First*, Catalyst has been unable to satisfy the "causation onus" of proving that West Face's misuse of the confidential information was the direct "cause" of compensable harm suffered by Catalyst. As was explained by Justice Binnie in *Cadbury Schweppes*: "[*I*]*t is essential that the losses made good are only those which, on a common sense view of causation, were caused by the breach*".[607] Catalyst has failed to establish the requisite evidentiary foundation that "but for" the alleged misuse, Catalyst itself would have acquired the very shares otherwise purchased by West Face; and

(b) *Second*, Catalyst has been equally unable to satisfy the "detriment onus" – *i.e.*, it has not proven that the compensatory damages that it claims are a genuine reflection of identifiable and substantiated loss suffered by Catalyst as a result of West Face's supposed misuse of the "regulatory strategy". The words of Justice Binnie are again apposite: "[H]aving elected the remedy of financial compensation, *the* [*plaintiffs*] *will obviously have to demonstrate…the nature and extent of any detriment suffered to*

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607 See *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142, *per* Binnie J. at para. 93 (emphasis added), quoting *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, *per* McLachlin J. (as she then was) at para. 27 (QL). Note: While nothing turns on this point, the remedy sought by the plaintiff in *Cadbury* was "equitable compensation", rather than damages *per se*.

> *establish the basis for a monetary reward".*[608] Even if it is found that Catalyst suffered *some* "detriment" which was "caused" by West Face, Catalyst has failed to substantiate its assertion that the detriment in question is *equivalent* to the value of the proceeds received by West Face. On the contrary, the record before this Court confirms that an award of damages in such a quantum would be grossly disproportionate to any conceivable loss actually suffered by Catalyst as a result of the misuse of its information.

517. Each of these flaws in Catalyst's claim for compensatory damages will be addressed separately below.

i. Causation and Compensatory Damages: Catalyst has Not Proven that it was Prevented from Acquiring the WIND Shares by any Misuse of its Confidential Information

518. As noted above, Catalyst bears the onus of establishing that the alleged misuse of its confidential information demonstrably caused it to suffer the loss of the WIND shares. Put differently, Catalyst can only recover compensatory damages reflecting the value of the WIND shares to the extent that it can prove that "but for" the alleged misuse of its confidential information, it would have obtained those shares. As Justice Binnie explained in *Cadbury Schweppes*, "the mandate" of the court is to "to assess *the loss…if any*" which was "*attributable to the breach of confidence*".[609]

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608 See *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142, *per* Binnie J. at para. 54 (emphasis added).

609 See *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142, *per* Binnie J. at para. 94 (emphasis added).

519. In its earlier breach of confidence case, *Lac Minerals*, the Supreme Court likewise confirmed that proof of causation is a mandatory element of any claim for compensatory relief, regardless of whether the requested remedy is an award of compensatory damages (favoured by the minority) or the imposition of a constructive trust (preferred by the majority):

(a) Writing for the minority (on the issue of remedy), Justice Sopinka explained that: "In a breach of confidence case, the focus is on *the loss to the plaintiff … The object is to restore the plaintiff monetarily to the position he would have been in if no wrong had been committed*…"[610] As he continued: "In applying this test it is necessary to consider… *what the position of the plaintiff would have been if he had not sustained the wrong*. To put it shortly, *what loss was caused to the plaintiff by the defendant's wrong?*"[611] As Sopinka J. concluded, damages were appropriate in the *Lac Minerals* case only because the requisite "causal connection" had been established: "*But for Lac's breach*… Corona…*would have*…aquir[ed] an interest in the Williams property…",[612] and damages should be calculated in a quantum sufficient to compensate the plaintiff for this proven loss; and

(b) Writing for the majority (on the issue of remedy), Justice La Forest addressed the availability of a constructive trust, and provided guidance

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610 See *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, *per* Sopinka J. at para. 81 (QL) (emphasis added).

611 See *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, *per* Sopinka J. at para. 86 (QL) (emphasis added).

612 See *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, *per* Sopinka J. at para. 91 (QL) (emphasis added).

> that likewise highlighted the need for the plaintiff to establish the requisite causal connection: "[*B*]*ut for the actions of Lac in misusing confidential information* and thereby acquiring the Williams property, *that property would have been acquired by Corona*. *That finding is fundamental to the determination of the appropriate remedy*".[613] Justice La Forest proceeded to emphasize the foundational factual findings of the courts below, which had concluded that "*but for* its interception by Lac, *Corona would have acquired the property*".[614] Thus, consistent with the minority's approach to awarding damages, the proprietary remedy of a constructive trust was granted by the majority only because the requisite "causal link" between wrongdoing and detriment had been established.

520. In short, in order to justify its claim for compensatory damages, Catalyst must prove that, "but for" West Face's misuse of Catalyst's "regulatory strategy", Catalyst "would have acquired" the WIND shares. Such causation analysis requires Catalyst to demonstrate that, in the so-called "but for world" – *i.e.*, in a world in which both parties competed for the WIND shares, but in which West Face lacked the "benefit" of Catalyst's confidential information – Catalyst (rather than West Face or a third party) would have successfully negotiated the purchase of those shares from VimpelCom.

521. Such "counter-factual arguments" are a common theme in breach of confidence proceedings. Many plaintiffs have sought to convince the presiding judge that "but for"

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613 See *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, *per* La Forest J. at para. 182 (QL) (emphasis added).

614 See *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, *per* La Forest J. at para. 184 (QL) (emphasis added).

the defendant's misuse of the relevant information, the plaintiff would have been successful in acquiring the relevant property, winning the relevant contract, enjoying the relevant commercial benefit, or seizing the relevant opportunity. Such claims must be supported by evidence establishing on a balance of probabilities what would have happened in the "but for world". West Face submits that Catalyst has failed to satisfy this onus.

522. As was recently affirmed in a breach of confidence decision issued by the British Columbia court: "While the equitable principles upon which a claim for breach of confidence is based are flexible, *there still needs to be some evidence to support the remedy claimed*". More specifically, in order to make out such a claim, the plaintiff must provide "*the proper evidentiary support* on which to base a finding that [the misuse of confidential information] had a negative impact on the plaintiff's sales…or…market share". Since "[t]he plaintiffs…failed to prove their…allegation that they would have been *in a better position*…*but for the defendants' breach of confidence*", their request for damages was refused.[615]

523. In a similar ruling closer to home, Justice Newbould likewise concluded that the plaintiff in a breach of confidence action had failed to put forward an adequate evidentiary foundation to support its claim for compensatory damages representing its supposed lost sales and foregone profits. Because the plaintiff had sought to rely on unparticularized assertions and sweeping assumptions as to what would have

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[615] See *No Limits Sportswear Inc. v. 0912139 B.C. Ltd.*, 2015 BCSC 1698, *per* Griffin J. at paras. 133, 137 & 138 (emphasis added).

happened "but for" the alleged breach of confidence, no damages were ultimately awarded.[616]

524. The record before this Honourable Court provides no support for Catalyst's contention that it ever could have successfully acquired the WIND shares. On the contrary, the evidentiary record establishes that Catalyst would not have acquired the WIND shares, even if no such (alleged) misuse had occurred. This is because VimpelCom had adamantly insisted on several crucial terms – including the payment of a break fee; the incorporation of a tight timeline to close the deal; and a non-negotiable prohibition on Catalyst seeking regulatory concessions from Industry Canada – that were anathema to Catalyst. The record shows that Catalyst refused to accept the first two points and planned to breach the third. As a result, regardless of any action taken or not taken by West Face, VimpelCom and Catalyst would have been unable to reach a final agreement.

525. This conclusion mirrors the finding of the Saskatchewan Court of Appeal (affirmed by the Supreme Court of Canada) in *Guyer Oil v. Fulton*. The majority of the Court of Appeal rejected the claim that "but for" the defendant's misuse of confidential information allegedly passed on by the plaintiff's former employee, the plaintiff would have been the successful bidder for a valuable property. As Justice Hall concluded: "It

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616 See *Husky Injection Molding Systems Ltd. v. Schad,* 2016 ONSC 2297, *per* Newbould J. at paras. 369-399. Note: The Court in *Husky* ruled that, had damages been granted, they would have been limited to a nominal award of one dollar (see *ibid* at para. 399).

is clear from the evidence…that the [plaintiff's] bid *would not have succeeded in any event*".[617] This conclusion was reached for two reasons:

(a) *First*, it was clear from the evidence that the defendant's bid had been accepted by the third-party not because the defendant had used the plaintiff's confidential information, but rather because the defendant's offer was uniquely appealing to the vendor.[618] As the Court had previously noted: "This was not a situation…where the mere use of [confidential] information was all that was necessary to make an acquisition possible";[619] and

(b) *Second*, even if the defendant had never participated in the bidding process at all, the Court of Appeal found that the vendor would still have rejected the plaintiff's offer in favour of a more advantageous bid proffered by a third party.[620]

526. Like the fact scenario in *Guyer*, the record in the current proceeding makes clear that West Face's bid found favour with VimpelCom because it satisfied VimpelCom's fundamental need for a transaction that eliminated all regulatory uncertainty. West Face was willing to acquire the WIND shares "with no strings attached". It was this

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617 See *Guyer Oil Co. v. Fulton*, [1976] S.J. No. 432 (C.A.), *per* Hall J.A. (for the majority) at paras. 44-47 (quotation at para. 46), *affirmed without separate reasons,* [1977] S.C.J. No. 27, *per* Laskin C.J.C. at p. 2. Note: While nothing turns on this point, the remedy sought by the plaintiff was a constructive trust rather than damages.

618 See *Guyer Oil Co. v. Fulton*, [1976] S.J. No. 432 (C.A.), *per* Hall J.A. (for the majority) at para. 47, *affirmed without separate reasons,* [1977] S.C.J. No. 27, *per* Laskin C.J.C. at p. 2.

619 See *Guyer Oil Co. v. Fulton*, [1976] S.J. No. 432 (C.A.), *per* Hall J.A. (for the majority) at para. 44, *affirmed without separate reasons,* [1977] S.C.J. No. 27, *per* Laskin C.J.C. at p. 2.

620 See *Guyer Oil Co. v. Fulton*, [1976] S.J. No. 432 (C.A.), *per* Hall J.A. (for the majority) at para. 47, *affirmed without separate reasons,* [1977] S.C.J. No. 27, *per* Laskin C.J.C. at p. 2.

respect for VimpelCom's clearly stated wishes – and *not* any alleged misuse of Catalyst's so-called "regulatory strategy" – that allowed West Face to close the deal.

527. Conversely, it was Catalyst's apparent refusal to defer to VimpelCom's repeated demand for regulatory certainty – and not any misconduct by West Face – that doomed Catalyst's bid. Catalyst's intransigence in this regard meant that it had no real prospect of ever acquiring the WIND shares.

ii. Detriment and Compensatory Damages: Catalyst Has Not Substantiated a Damages Claim Reflecting the Value of the Shares

528. In the alternative, and in any event, it is submitted that Catalyst has failed to justify an award of damages approaching the value of the profits received by West Face from its re-sale of the WIND shares.

529. Assuming that Catalyst has proven that some form of "detriment" was "caused" by West Face, there remain a number of factors which this Court must consider in determining what quantum of compensatory damages is properly awarded. West Face submits that there exist at least two factors that cumulatively reduce the quantum of Catalyst's recoverable damages to nil or virtually nil: *First*, because Catalyst lost nothing more than a vague and dubious "opportunity" to negotiate for the WIND shares, the quantum of recoverable compensation must be reduced to reflect the likelihood that Catalyst would have failed to obtain the WIND shares in any event; and *Second*, any compensatory award must be reduced still further to reflect the reality that (a) Catalyst's so-called "regulatory strategy" constituted information that was "nothing very special", with the consequence that (b) such information played little-or-no role in West Face's acquisition of the shares.

530. Each of these important principles is briefly summarized in the paragraphs that follow.

*(a) Catalyst's Claim is Limited to the Value of its Loss of a Mere "*Opportunity*" to Negotiate for the WIND Shares*

531. A key factor which reduces the value of Catalyst's compensatory claim is the historical reality that Catalyst did not lose the "*right*" to acquire the WIND shares (since that "right" never existed), but merely lost the "*opportunity*" to negotiate towards achieving such an acquisition. West Face accepts that a plaintiff may seek compensation for an "opportunity" that is lost because of a defendant's breach of confidence. However, as was made clear by the Ontario Court of Appeal in the leading *Rodaro v. Royal Bank* ruling, (a) such a claim can only be established through solid supporting evidence, and (b) the quantum of compensation must be calibrated to reflect the true value of the foregone "opportunity". More specifically, Justice Doherty confirmed that:

> (a) A plaintiff is required "to lead evidence to show that the opportunity existed and that [the plaintiff] would have taken advantage of that opportunity…had [the defendant] not improperly disclosed the confidential information".[621] Without such an evidentiary foundation, "findings that the opportunity existed and was lost as a result of the improper disclosure of confidential information [would] amount to [impermissible] speculation…";[622]

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621 See *Rodaro v. Royal Bank of Canada*, [2002] O.J. No. 1365 (C.A.), *per* Doherty J.A. at para. 66.
622 See *Rodaro v. Royal Bank of Canada*, [2002] O.J. No. 1365 (C.A.), *per* Doherty J.A. at para. 65.

(b) A plaintiff must further prove that – "but for" the misuse of its confidential information – there existed a "reasonable probability" of the opportunity being successfully exploited. As explained by the Court of Appeal: "[While] a lost opportunity analysis can be used to determine whether the misuse of confidential information has caused detriment to the person whose information was improperly disclosed", the plaintiff must show that it has lost "*a reasonable probability* of realizing some economic benefit".[623] If this likelihood of success cannot be proven by the plaintiff (as was the case in *Rodaro*), no damages are recoverable; and

(c) A plaintiff's claim for a lost "opportunity" is worth less than the loss of a "right", given the uncertainty inherent in such an "opportunity". As Doherty J.A. affirmed in *Rodaro*: "The *quantification* of [the plaintiff's] loss *may have to take into account contingencies and variables* personal to the plaintiff", and this "will often prove difficult".[624] An illustration of this process is found in a pre-*Rodaro* breach of confidence ruling, *Gottcon v. Manzo*. In that case, both McRae J. and the Court of Appeal awarded damages – to a party who had lost a contractual opportunity because of the misuse of its confidential information by the defendant – in a quantum that reflected the possibility that the plaintiff would not have been awarded

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623 See *Rodaro v. Royal Bank of Canada*, [2002] O.J. No. 1365 (C.A.), *per* Doherty J.A. at paras. 55 & 56 (emphasis added).

624 See *Rodaro v. Royal Bank of Canada*, [2002] O.J. No. 1365 (C.A.), *per* Doherty J.A. at para. 55 (emphasis added).

> the contract in any event, except perhaps on significantly less favourable terms.[625]

532. The foregoing approach to quantifying the value of a lost "opportunity" is consistent with the general principle that compensatory relief is designed to remedy only a plaintiff's actual loss. As explained by the Supreme Court in the leading ruling, *Cadbury Schweppes*: "*Moral indignation is not a factor that is to be used to inflate the calculation of a compensatory award*. The respondents' entitlement is to *no more than restoration of the full benefit of* [*its*] *lost… opportunity*".[626]

533. In *Cadbury*, Justice Binnie applied a clear-eyed assessment of the true value of the plaintiff's lost "opportunity", and concluded that only a modest award of damages – representing a small portion of the losses claimed to have been suffered by the plaintiff – could be justified on the facts of the case.[627]

534. Thus, if this Court determines that an award of compensatory damages is appropriate, the true value of the so-called "opportunity" lost by Catalyst must be carefully assessed in quantifying such an award.

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625 See *Gottcon Contractors Ltd. v. Manzo*, [1996] O.J. No. 1773 (C.A.), *per curiam* at para. 5, *affirming* [1992] O.J. No. 24 (Gen. Div.), *per* McRae J. at pp. 5-6 (QL). In *Gottcon*, the impact of the relevant contingencies was to reduce the plaintiff's claim for its "lost" profits by more than 50%. See also *Husky Injection Molding Systems Ltd. v. Schad*, 2016 ONSC 2297, *per* Newbould J. at paras. 392-399.

626 See *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142, *per* Binnie J. at para. 64 (emphasis added).

627 The Supreme Court considered both the "nothing very special" nature of the misused confidential information and the ease with which the defendant could have formulated its own non-infringing recipe (had it not misused the plaintiff's information), and awarded damages reflecting one year's lost net profits. See *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142, *per* Binnie J. at paras. 90-100.

(b) Catalyst's so-called "Regulatory Strategy" Constituted "Nothing Very Special" and, Consequently, Played Little (if any) Role in West Face's Acquisition of the WIND Shares

535. Another significant factor used by Canadian courts to calibrate the quantum of damages for breach of confidence is the intrinsic value of the information itself. As a general rule, the misuse of "low value" information can lead only to "low value" compensation.

536. In *Cadbury Schweppes*, the Supreme Court explained that any compensation that is awarded for the use of such low value information must be quantified in a manner that avoids granting an unwarranted windfall to the plaintiff:[628]

> [76] While **equity** is thus quick to protect confidences, it **cannot be blind to the nature of the opportunity lost to the respondents, or the value of their information, when consideration turns to remedies. Equity will avoid unjustly enriching the confider by overcompensating for "nothing very special" information** just as it will avoid unjustly enriching the confidee by awarding less than realistic compensation for financial losses genuinely suffered….[629]

537. To borrow a phrase popularized by Lord Denning, and adopted by Justice Binnie, Catalyst's so-called "regulatory strategy" consisted of information that must be categorized as "nothing very special".[630]

538. As discussed above, Catalyst's "regulatory strategy" (which hardly deserves such an impressive label) consisted of a series of discrete ideas which – whether assessed

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628 As noted above, the generic and easily-copied nature of the plaintiff's "secret recipe" led the Supreme Court to award a tightly constrained compensatory award. See *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142, *per* Binnie J. at paras. 90-100.

629 See *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142, *per* Binnie J. at para. 75 (emphasis added).

630 See *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142, *per* Binnie J. at para. 65 (as well as paras. 48, 66, 74, 76, 78, 83-86, 96 & 102), quoting *Seager v Copydex (No. 2)*, [1969] 2 All E.R. 718 (C.A.), *per* Lord Denning M.R. at pp. 719-720. Lord Denning, of course, categorized misused confidential information into three categories in ascending order of value: (i) "*nothing very special*"; (ii) "*something special*"; and (iii) "*very special indeed*".

individually or cumulatively – possessed no value to West Face or to anyone else. The various elements of this "strategy" were, by turns: self-evident, trite and lacking any spark of inventiveness; ill-considered and contrary to existing and provable fact; and, in any event, entirely incompatible with West Face's own assessment of the situation and its own considered strategy *vis-à-vis* the acquisition and monetization of the WIND shares.

539. It necessarily follows that – even if this Court concludes that West Face somehow "misused" this collection of trite, non-confidential and wrongheaded ideas – such use can have played, at best, only a *de minimis* role in West Face's successful acquisition of the WIND shares. In a recent ruling – although Justice Newbould found that confidential information had been used[631] – he qualified this determination finding by further concluding: "[I]t is not at all clear that [such] use …*ever assisted* [*the defendant*] in the end. I agree… that it was a use of confidential information…, but *it is unlikely that it can be said to have been* detrimental to [the plaintiff] or *useful to* [*the defendant*]. …If [the expert witnesses] are right, *it was of no utility to* [*the defendant*]".[632] These findings led this Honourable Court to conclude, either: (i) that no actionable breach of confidence had been established; or (ii) that, alternatively, only nominal damages of one dollar should be awarded.[633] It is submitted that the identical analysis must be applied to any misuse of Catalyst's so-called "strategy".

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631 See *Husky Injection Molding Systems Ltd. v. Schad,* 2016 ONSC 2297, *per* Newbould J. at paras. 249 & 283.

632 See *Husky Injection Molding Systems Ltd. v. Schad,* 2016 ONSC 2297, *per* Newbould J. at para. 255 (emphasis added).

633 See *Husky Injection Molding Systems Ltd. v. Schad,* 2016 ONSC 2297, *per* Newbould J. at para. 399.

540. In summary, West Face submits that any compensatory damages which this Honourable Court decides to award to Catalyst must be materially reduced to reflect the facts: (a) that Catalyst lost nothing more than an unpromising "opportunity" to restart negotiations with VimpelCom, and (b) that Catalyst's "regulatory strategy" was of such low value that it was unlikely to have played even *a* marginal role in West Face's successful acquisition of the WIND shares.

541. For all of these reasons, it is submitted that Catalyst has failed to establish a justiciable claim to compensatory damages, even if this Court finds that West Face misused Catalyst's confidential information.

E. In Lieu of Compensatory Damages, if Misuse is Proven, an Award of Nominal Damages may be Appropriate

542. Given Catalyst's inability to prove that it has suffered compensable loss or that its so-called "regulatory strategy" had any substantive value (see above) – and further given that the extraordinary remedy of an accounting is inappropriate in the current proceeding (see below) – West Face submits that the most appropriate remedy is an award of nominal damages in the amount of one dollar.

543. Nominal damages are awarded where – despite a violation of a plaintiff's legal rights,[634] no meaningful damages are suffered. As explained by the Manitoba Court of Appeal – in the course of awarding one dollar in nominal damages – such a remedy is distinct from an award of compensatory damages: "Nominal damages do not

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[634] See, *inter alia, Pinnacle Millwork Inc. v. Kohler Canada Co. (c.o.b. Canac Kitchens)*, 2014 ONSC 5782, *per* Lederer J. at para. 19.

compensate for anything that could be bought with money, but instead mark symbolically the infringement of a right".[635]

544. In a recent Ontario ruling, *Husky v. Schad*, this Honourable Court accepted that although *de minimis* use of confidential information may have been committed by the defendant, no consequent detriment had been suffered by the plaintiff: "[I]f there was any use of…confidential information, which is very unclear, it was not much of a use and it is quite unclear that it was in any way detrimental to [the plaintiff] …I assume that the information was confidential…, but I cannot find that whatever use was made of it was materially detrimental to [the plaintiff]".[636]

545. On these facts, Justice Newbould concluded that – had any damages been ultimately awarded – the plaintiff would have been entitled only to a purely nominal award of one dollar:

> [399] **I find that [the plaintiff] has not proven any material damages for misuse of confidential information**. [The plaintiff] has failed to establish that any specific confidential information was used by [the defendant] that was material to the manufacture and development of its technology and has failed to establish the value of any such confidential information. **In the circumstances if there had been a breach entitling [the plaintiff] to damages, I would award nominal damages of one dollar.**[637]

546. It is submitted that the manifold failings of the plaintiff's claim in *Husky v. Schad* exist far more powerfully in the present proceeding. Adapting the words of Newbould J. from the foregoing quotation: Catalyst "has not proven any material damages for

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635 See *Métis National Council Secretariat Inc. v. Dumont*, 2008 MBCA 142, per Steel J.A. at para. 42 (and paras. 40 & 45).

636 See *Husky Injection Molding Systems Ltd. v. Schad,* 2016 ONSC 2297, *per* Newbould J. at paras. 249 & 283.

637 See *Husky Injection Molding Systems Ltd. v. Schad,* 2016 ONSC 2297, *per* Newbould J. at para. 399 (emphasis added).

misuse of confidential information"; it has "failed to establish that any specific confidential information was used" by West Face in a manner that "was material to the" acquisition of the WIND shares; and it "has failed to establish the value of any such confidential information".

547. In such circumstances, should a breach of confidence be found by this Honourable Court, a nominal award of damages would appear to be entirely appropriate.

F. The Purely Discretionary Remedy of Restitutionary Disgorgement is Inappropriate in the Present Circumstances

548. West Face submits that this Honourable Court should refuse to grant Catalyst's alternative relief – *i.e.*, its request for an equitable accounting of profits and the attendant disgorgement of a portion of the net proceeds received by West Face from its resale of the WIND shares. For the reasons set out below, such relief is entirely inappropriate in the current circumstances.

549. An accounting of profits is an equitable remedy that is used to identify that portion of the defendant's profits which was earned as a result of the defendant's misconduct.[638] As the majority of the Supreme Court explained in the leading fiduciary breach case, *Strother v. 3464920 Canada*, an accounting of profits serves a "restitutionary" function, in that the ordered disgorgement "restore[s] to the beneficiary

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[638] It is clear that there must be a direct "causal link" between the defendant's *misconduct* and that portion of its *profits* to be disgorged to the plaintiff. See *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, *per* Binnie J. (for the majority) at para. 77.

[the] profit which properly belongs to the beneficiary, but which has been wrongly appropriated by the [defendant] in breach of its duty".[639]

550. The majority in *Strother* noted that – in cases of fiduciary breach – an accounting of profits can also serve a "prophylactic" purpose, in that the mandatory (or virtually mandatory) disgorgement of a fiduciary's ill-gotten gains serves to discourage other fiduciaries from disregarding the sacrosanct duties they owe to their vulnerable beneficiaries: "[D]isgorgement…teaches *faithless fiduciaries* that conflicts of interest do not pay".[640]

551. In *Strother,* Justice Binnie's emphasis on an accounting as an appropriate remedy *for fiduciary breach* is consistent with the Supreme Court's earlier breach of confidence rulings: In each of *Cadbury Schweppes*[641] and *Lac Minerals,*[642] the Court confirmed that restitutionary remedies (either a constructive trust or, by extension, an accounting of profits) are generally reserved for fiduciary breach, rather than for "mere" breach of confidence.

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639 See *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, *per* Binnie J. (for the majority) at para. 76.

640 See *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, *per* Binnie J. (for the majority) at para. 77 (emphasis added). Underlining the Court's focus on fiduciary breach *per se*, it is significant that Justice Binnie introduced his discussion of remedial relief under the heading "Fiduciary Remedies" (see *ibid* at para. 74).

641 In *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142 at para. 32, Justice Binnie made clear that distinct remedial principles apply where the breach of confidence was elevated to the level of a fiduciary breach: "While the law will…[impose] a duty not to misuse confidential information, there is nothing special in this case to elevate the breached duty to one of a fiduciary character. The respondents' demand to have the appellants' sales treated as an asset 'pirated' from the respondents by analogy with a trust estate goes too far" (emphasis added).

642 In *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, both the minority and the majority accepted this point. As noted by Sopinka J. at para. 81 (QL): "A restitutionary remedy is appropriate in cases involving fiduciaries because they are required to disgorge any benefits derived from the breach of trust. In a breach of confidence case,…[t]he object [is compensation and] …this object is generally achieved by an award of damages, and a restitutionary remedy is inappropriate" (emphasis added). Although the majority (*per* La Forest J.) did impose a constructive trust, they noted (at para.197 (QL)) that this was justified only by the extraordinary facts of the case: "In the vast majority of cases a constructive trust will not be the appropriate remedy" (emphasis added).

552. This explicit linking of equitable disgorgement with breach of fiduciary duty is highly significant in the current proceedings, where West Face is (at worst) guilty of a breach of confidence *simpliciter*, as distinct from any breach of the more profound duties owed by a fiduciary.

553. In a very recent ruling of the English Court of Appeal, *Walsh v. Shanahan*, Lord Justice Rimer made clear that the granting of an accounting remedy will generally be *inappropriate* in cases of simple breach of confidence.[643] In so doing, the Court of Appeal specifically *rejected* the possibility that the disgorgement of profits was mandatory when dealing with non-fiduciary breaches of confidence. As Rimer L.J. explained: In the absence of a fiduciary breach, there exists no "general principle that wrongdoers…should always be stripped of their profits…Such a principle cannot co-exist with the recognition in the authorities that an account of profits is discretionary".[644]

554. This characterization of the accounting remedy as "discretionary" is very important. It is clear that this Honourable Court is under no obligation to grant Catalyst's request for a disgorgement order. In the succinct words of Lord Justice Rimer (italics in the original): "Whilst a successful claimant [in a breach of confidence case] can *ask* for an account of profits, he will not be entitled to an account as of right".[645] This is

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643 See *Walsh v. Shanahan,* [2013] EWCA Civ 411, *per* Rimer L.J. at paras. 55, 67-68 & 70.

644 See *Walsh v. Shanahan,* [2013] EWCA Civ 411, *per* Rimer L.J. at para. 73.

645 See *Walsh v. Shanahan,* [2013] EWCA Civ 411, *per* Rimer L.J. at para. 57. See also *Vercoe v. Rutland Fund Management Ltd*., [2010] EWHC 424 (Ch.), *per* Sales J. at para. 334; and *CF Partners (UK) LLP v Barclays Bank PLC,* [2014] EWHC 3049 (Ch.), *per* Hildyard J. at para. 1167.

because an accounting is an equitable remedy and, as observed by the Supreme Court in *Strother*, "[e]quitable remedies *are always subject to the discretion of the court*".[646]

555. As noted above, in breach of confidence proceedings, this Honourable Court enjoys a broad and flexible jurisdiction which allows it to select and fashion the remedy that best responds to the unique facts of the case.[647] For this reason, as noted by Justice Nordheimer: "Disgorgement is a remedy that *could* be awarded on a breach of confidence claim *but it is not the only remedy*. There are a variety of remedies available in response to such a claim".[648] As confirmed by the B.C. Court of Appeal: "[T]he misuse of confidential information for profit will *not* always give rise to an equitable remedy", and the plaintiff may be required to content itself with collecting whatever damages it can establish it suffered.[649]

556. For the foregoing reasons, when confronted with a request for an accounting of profits, this Honourable Court is obligated to consider carefully whether, in all of the circumstances, such an order is justified. As Justice Nordheimer dryly noted, in response to a plaintiff's statement that the only remedy it was prepared to pursue was an accounting: "While I accept that the plaintiffs have the right to elect the relief that they will seek in their claim, *in doing so they cannot constrain the defendants, or the*

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646 See *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, *per* Binnie J. (for the majority) at para. 74 (emphasis added). See also *GasTOPS Ltd. v. Forsyth*, 2012 ONCA 134, *per* Goudge J.A. at para. 45.

647 See *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142, *per* Binnie J. at paras. 22 & 24.

648 See *Air Canada v. WestJet Airlines Ltd.*, [2005] O.J. No. 5512 (S.C.J.), *per* Nordheimer J. at para. 24 (emphasis added).

649 See *Expert Travel Financial Security (E.T.F.S.) Inc. v. BMS Harris & Dixon Insurance Brokers Ltd.*, 2005 BCCA 5, *per* Smith J.A. (for the concurring majority) at para. 74 (emphasis added).

court for that matter, from engaging in an inquiry as to whether the remedy being sought is the appropriate remedy".[650]

557. It is respectfully submitted that Catalyst's request for an accounting is inappropriate for an array of reasons, including the following:

(a) *First,* the accounting remedy represents extraordinary relief, which is most appropriately granted where the defendant owes and has breached a fiduciary duty to the plaintiff or has infringed a patent or similar intellectual property right. It will generally not be available in circumstances where one competitor acquires and misuses commercial information to the detriment of another competitor;

(b) *Second,* the low value of the "nothing very special" "regulatory strategy" created by Catalyst (and allegedly misused by West Face) supports, at most, an award of damages rather than equitable relief;

(c) *Third,* an accounting is likewise not justifiable in circumstances where (i) West Face's successful acquisition of the WIND shares, and (ii) its subsequent re-sale of those shares at a significant profit, are attributable to a variety of factors *having nothing to do* with Catalyst's information;

(d) *Fourth,* the foregoing factors (coupled with Catalyst's inability to prove that West Face's conduct caused it any detriment) means that the disgorgement of West Face's profits will lead to a disproportionate

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650 See *Air Canada v. WestJet Airlines Ltd.*, [2005] O.J. No. 5512 (S.C.J.), *per* Nordheimer J. at para. 26 (emphasis added).

"windfall" to Catalyst. Except perhaps in cases of true fiduciary breach (which is not at issue in the present case), equity will not countenance a remedy that thus overcompensates a plaintiff;

(e) *Fifth,* such an unmerited windfall to Catalyst must also be rejected because it will come at the expense of innocent third parties (*i.e.*, West Face's blameless fund investors), who will be denied the fruits earned by the deployment of their capital; and

(f) *Sixth,* Catalyst comes before this Court with "unclean hands" and should therefore be denied this discretionary, equitable remedy.

558. Each of the foregoing considerations – individually and cumulatively – militates against granting Catalyst the discretionary remedy of an accounting. Each will be considered separately in the paragraphs that follow.

i. An Accounting of Profits is an "Extraordinary Remedy", Available Only in "Exceptional" Circumstances, and the Current Case is not "Exceptional"

559. The most fundamental reason why this Honourable Court should decline to award Catalyst an accounting of profits is that there is nothing "exceptional" in the current dispute which would justify the granting of this "extraordinary" remedy.

560. In a very recent ruling, *Apotex v. Eli Lilly*, the Ontario Court of Appeal referred to "the *exceptional remedy* of disgorgement" – and, later, to "the *extraordinary remedy* of disgorgement of profits" – in the course of refusing to grant the plaintiff this requested

relief.[651] Justice Feldman emphasized that such disgorgement should be awarded only in the most extreme circumstances, citing as examples Canadian and U.K. rulings which had granted the disgorgement remedy in response to (i) *breaches of trust* and (ii) breaches of contract "*akin to a breach of fiduciary duty*".[652]

561. Seeking to rationalize these past cases, in which a disgorgement of profits had been awarded "despite the absence of any quantifiable loss to the plaintiff", Feldman J.A. offered the following explanatory gloss:

> [47] …**These cases arise where a defendant has committed an underlying legal wrong against a plaintiff**, and the ordinary damages remedy for the underlying wrong is inadequate. **The "wrong" in these contexts typically consists of a breach of fiduciary duty or a breach of trust**, and in some instances has involved criminal conduct, breach of contract or a tort committed against the plaintiff. **Courts that have applied this restitutionary remedy in non-fiduciary contexts have explained that it is limited to exceptional cases, emphasizing that restitution damages are employed infrequently. …**[653]

562. Justice Feldman thus concluded that an accounting of profits is most commonly and appropriately granted in response to a *fiduciary breach* or *breach of trust*, and that this restitutionary remedy will be "*employed infrequently*" in other circumstances (*e.g.*, in cases where the relevant cause of action is a non-fiduciary breach of confidence). These twin themes are reflected in the leading rulings of the Supreme Court addressing non-fiduciary breaches of confidence:

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651 See *Apotex Inc. v. Eli Lilly and Co.*, 2015 ONCA 305, *per* Feldman J.A. at paras. 41 & 54, *leave to appeal refused*, [2015] S.C.C.A. No. 291. Note: The cause of action at issue was unjust enrichment, but (as will be seen), the Court canvassed the broader jurisprudence in its analysis of the disgorgement remedy.

652 See *Apotex Inc. v. Eli Lilly and Co.*, 2015 ONCA 305, *per* Feldman J.A. at paras. 48-51 (emphasis added), *leave to appeal refused*, [2015] S.C.C.A. No. 291.

653 See *Apotex Inc. v. Eli Lilly and Co.*, 2015 ONCA 305, *per* Feldman J.A. at para. 47 (emphasis added), *leave to appeal refused*, [2015] S.C.C.A. No. 291.

(a) In *Lac Minerals*, both the minority and the majority agreed that "restitutionary" relief (*e.g.*, a constructive trust or, by extension, an accounting) is often a necessary response to a *breach of fiduciary duty*, but is rarely an appropriate remedy when there has been *a simple breach of confidence*. For the majority, Justice La Forest did ultimately award a constructive trust, but also acknowledged that "[*i*]*n the vast majority*" of breach of confidence cases, such restitutionary relief "*will not be the appropriate remedy*".[654] Writing for the minority (on the issue of remedy), Justice Sopinka specifically noted that, while restitutionary relief may be appropriate to remedy fiduciary misconduct, damages will almost always suffice in cases where the misuse of confidential information was committed by a non-fiduciary:

> [81] **A restitutionary remedy is appropriate in cases involving fiduciaries because they are required to disgorge any benefits derived from the breach of trust**. **In a breach of confidence case**…[t]he object is to restore the plaintiff monetarily to the position he would have been in if no wrong had been committed….[**T**]**his object is generally achieved by an award of damages**, **and a restitutionary remedy is inappropriate**.[655]

(b) Likewise, in the more recent ruling in *Cadbury Schweppes*, the Supreme Court affirmed that different remedial principles apply to breach of confidence and to breach of fiduciary duty, respectively.[656] (Also relevant – as will be discussed below – was the distinction drawn by Justice Binnie

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654 See *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, *per* La Forest J. at para. 197 (QL) (emphasis added). Moreover, two members of the three judge majority on remedy (LaForest and Wilson JJ.) found that there had been a breach of fiduciary duty.

655 See *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, *per* Sopinka J. at para. 81 (QL) (emphasis added).

656 See *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142, *per* Binnie J. at para. 32.

between the remedial principles applicable to breach of confidence and the "proprietary" principles applicable to intellectual property infringement.)[657]

563. Each of the principles thus endorsed by the highest Canadian courts – *viz.*, (i) the extraordinary nature of the accounting remedy, (ii) its availability only in exceptional circumstances, (iii) its usefulness in fiduciary breach cases, (iv) conversely, its general inapplicability in responding to non-fiduciary breaches of confidence, and (v) the distinction between remedies for intellectual property infringement and for breach of confidence, respectively – have been usefully systematized and applied in a body of recent U.K. jurisprudence.

564. These U.K. rulings emanate from the specialized Chancery Division,[658] and culminate in an important ruling of the English Court of Appeal, *Walsh v. Shanahan*.[659] They provide this Honourable Court with valuable (albeit non-binding) guidance on the following highly relevant issues:

(a) *First*, these cases clearly establish that an accounting of profits is an "exceptional" or "extraordinary" remedy, and one that should consequently be granted only in genuinely appropriate circumstances;[660]

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657 See *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142, *per* Binnie J. at paras. 39-48.

658 The judges of the Chancery Division, of course, possess particular expertise in equitable principles and remedies.

659 See *Walsh v. Shanahan,* [2013] EWCA Civ 411.

660 See *Vercoe v. Rutland Fund Management Ltd.*, [2010] EWHC 424 (Ch.), *per* Sales J. at paras. 340-342 & 344; *CF Partners (UK) LLP v Barclays Bank PLC,* [2014] EWHC 3049 (Ch.), *per* Hildyard J. at paras. 1171-1172 & 1174-1175; and *Jones v Ricoh U.K. Ltd.,* [2010] EWHC 1743 (Ch.), *per* Roth J. at paras. 88-89.

(b) *Second*, this line of recent U.K. rulings makes clear that an accounting of profits will frequently be awarded in response to a *fiduciary's breach* of duty. As established by this jurisprudence, it is the *sui generis* nature of the fiduciary relationship – where extremely high standards of conduct are zealously policed by the courts – that renders the imposition of an accounting remedy appropriate. Because a faithless fiduciary must not be permitted to retain any of his or her ill-gotten gains, disgorgement is a particularly apt remedy;[661]

(c) *Third*, where the plaintiff and defendant in a breach of confidence case are direct competitors in the commercial arena (rather than fiduciaries), "a degree of self-seeking and ruthless behaviour is expected and accepted to a degree".[662] As explained by the English Court of Appeal, where no fiduciary breach is at issue, the principal rationale for ordering disgorgement is absent: "I can see *no justification* for judging [commercial parties'] conduct *as if it involved a breach of a* [*fiduciary*] *duty* they did not owe"; such individuals should not be "subject[ed]…to a remedy that might have been appropriate for a different wrong [*i.e.*, fiduciary breach] that they did not commit".[663] An even more sweeping summary of the law was offered by the most recent of these U.K. decisions: "*In the absence of a*

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661 See generally *Walsh v. Shanahan,* [2013] EWCA Civ 411, *per* Rimer L.J. at paras. 55, 67-68 & 70, as well as *Vercoe v. Rutland Fund Management Ltd.*, [2010] EWHC 424 (Ch.), *per* Sales J. at paras. 340 & 342-345; *CF Partners (UK) LLP v Barclays Bank PLC,* [2014] EWHC 3049 (Ch.), *per* Hildyard J. at paras. 1172, 1176 & 1179-1180; and *Jones v Ricoh U.K. Ltd.,* [2010] EWHC 1743 (Ch.), *per* Roth J. at paras. 88-89.

662 See *Vercoe v. Rutland Fund Management Ltd.*, [2010] EWHC 424 (Ch.), *per* Sales J. at para. 343 (and see more generally paras. 342-345); and *CF Partners (UK) LLP v Barclays Bank PLC,* [2014] EWHC 3049 (Ch.), *per* Hildyard J. at para. 1172.

663 See *Walsh v. Shanahan,* [2013] EWCA Civ 411, *per* Rimer L.J. at para. 68 (emphasis added).

fiduciary relationship … I think an account of profits would seldom, if ever, be likely to be a just response ….In all of the circumstances, I do not think that there is sufficient reason for departing from what appears to me to have become *the usual or default approach where there is no fiduciary relationship, which is to restrict the claimant to a claim in damages*";[664] and

(d) *Fourth,* these U.K. rulings identify one additional category of cases in which the imposition of an accounting of profits may be justified – namely, disputes involving the infringement of a truly "proprietary" right (*e.g.*, a right arising under a patent). As these courts made clear, true "infringement" cases (which do justify an accounting) must be distinguished from cases involving a simple breach of confidence (which will generally not justify an accounting). As confirmed by these rulings, even in breach of confidence cases where the misused confidential information strongly resembles a "classic intellectual property right" (*e.g.*, where the confidential information is a secret technological formula or design), an accounting may or may not be available. In contrast, where the confidential information is purely "commercial" (*i.e.*, where the information, such as a customer list, is not truly "proprietary" in nature), the accounting remedy will generally *not* be appropriate.[665]

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664 See *CF Partners (UK) LLP v Barclays Bank PLC,* [2014] EWHC 3049 (Ch.), *per* Hildyard J. at paras. 1179-1189 (emphasis added).

665 See generally *Walsh v. Shanahan,* [2013] EWCA Civ 411, *per* Rimer L.J. at para. 73, as well as *Vercoe v. Rutland Fund Management Ltd.*, [2010] EWHC 424 (Ch.), *per* Sales J. at paras. 341 & 345; *CF Partners (UK) LLP v Barclays Bank PLC,* [2014] EWHC 3049 (Ch.), *per* Hildyard J. at paras. 1173 & 1176; and *Jones v Ricoh U.K. Ltd.,* [2010] EWHC 1743 (Ch.), *per* Roth J. at paras. 88-89.

565. In summary, high authority from both Canada and the U.K. has consistently endorsed a set of principles confirming the "infrequent" availability of the "extraordinary" remedy of accounting and disgorgement of profits. Clearly, the criteria identified in these cases (which justify such a remedy) are wholly absent in the current proceeding: *First,* the relationship between Catalyst and West Face was merely that of commercial competitors; *Second,* no fiduciary duties were at issue; *Third,* the confidential information identified by Catalyst is of a purely "commercial" character; and *Fourth,* Catalyst's information possesses no "proprietary" aspect, resembling the rights attaching to a patent or similar intellectual property.

566. It is thus submitted that none of the "exceptional" circumstances justifying an accounting of profits is present, and that Catalyst's request for an accounting must be dismissed on this ground alone.

ii. An Accounting of Profits is Inappropriate in Light of the Low Value of Catalyst's "Regulatory Strategy"

567. As recently explained by the Ontario Court of Appeal in its ruling in *GasTOPS v. Forsyth*, "[t]he nature of the confidential information that is misappropriated is…important" in selecting the appropriate remedy.[666] In the *GasTOPS* case, the information misappropriated – by corporate fiduciaries[667] – took the form of highly technical and valuable trade secrets, which were characterized as "*very special indeed*" (quoting the words of Lord Denning).[668] Justice Feldman confirmed that it was the high

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666 See *GasTOPS Ltd. v. Forsyth*, 2012 ONCA 134, *per* Goudge J.A. at para. 57.

667 See *GasTOPS Ltd. v. Forsyth*, 2012 ONCA 134, *per* Goudge J.A. at para. 55.

668 See *GasTOPS Ltd. v. Forsyth*, 2012 ONCA 134, *per* Goudge J.A. at para. 57, quoting from *Seager v Copydex (No. 2)*, [1969] 2 All E.R. 718 (C.A.), *per* Lord Denning M.R. at pp. 719-720.

value of this technical information which justified the granting of a sweeping accounting award.[669]

568. West Face has already submitted that Catalyst's so-called "regulatory strategy" was "nothing very special".[670] Catalyst's "strategy" has been shown to consist of a collection of non-inventive, non-confidential, ill-considered and useless "ideas", which were either already known to West Face or – if they had been presented to West Face at the time – would have been rejected as unsupportable, wrongheaded and entirely incompatible with West Face's own independent assessment of the WIND opportunity.

569. It is well established that, even if the misuse of such "nothing very special" information could be established in the present case, such misuse will not justify granting an accounting of profits, or any other equitable or restitutionary remedy.

570. The misuse of "nothing very special" information was at issue in the English Court of Appeal's recent accounting of profits ruling in *Walsh v. Shanahan*.[671] The plaintiff had commissioned and paid for the creation of certain confidential materials – namely, third-party legal and valuation reports – which the plaintiff intended to use in the acquisition of a particular property. Ultimately, however, the plaintiff opted not to proceed with the purchase of that property. Thereafter, his former agent (the defendant) improperly used the confidential information to acquire the same target property. A breach of confidence was accordingly found, but the plaintiff's request for an accounting of profits was rejected in favour of a much more modest award of

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669 See *GasTOPS Ltd. v. Forsyth*, 2012 ONCA 134, *per* Goudge J.A. at para. 57.

670 See, once again, *Seager v Copydex (No. 2)*, [1969] 2 All E.R. 718 (C.A.), *per* Lord Denning M.R. at pp. 719-720.

671 See *Walsh v. Shanahan,* [2013] EWCA Civ 411.

damages.[672] A key reason why the requested disgorgement remedy was refused by both the trial judge and the Court of Appeal was the fact that the misappropriated confidential information was generic and "nothing very special".[673] As explained by Lord Justice Rimer: "[*T*]*he only confidential information that the respondents appropriated was* the benefit of the professional work from [the third-party lawyers and valuators], being *work* [the defendants] *could have commissioned at their own expense*".[674]

571. As Rimer L.J. had earlier explained, a court exercising an equitable jurisdiction must "to do justice that is fair to both claimant and wrongdoer. The objective in any case is to identify the appropriate remedy for the circumstances of the wrongdoing – to make the remedy fit the tort".[675] On the facts of *Walsh v. Shanahan*, the low value of this misused information bore no relationship to the disgorgement of profits demanded by the plaintiff: "[*T*]*he account of profits sought was in respect of a property acquisition/development venture in which all the investment and risk had been taken by* [*the defendants*]".[676] As the Court of Appeal explained, in such circumstances, "*it 'would be manifestly disproportionate and in excess of the just response required' to direct an account of profits*".[677]

572. Likewise, in the case at bar, to award an accounting of profits in response to a *de minimis* misuse of Catalyst's "nothing very special" information would be equally "manifestly disproportionate".

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672 See *Walsh v. Shanahan*, [2013] EWCA Civ 411, *per* Rimer L.J. at paras. 20-22, 33, 39 & 55-73.
673 See *Walsh v. Shanahan*, [2013] EWCA Civ 411, *per* Rimer L.J. at paras. 61 & 72.
674 See *Walsh v. Shanahan*, [2013] EWCA Civ 411, *per* Rimer L.J. at paras 70 & 72 (emphasis added).
675 See *Walsh v. Shanahan*, [2013] EWCA Civ 411, *per* Rimer L.J. at para. 64.
676 See *Walsh v. Shanahan*, [2013] EWCA Civ 411, *per* Rimer L.J. at paras. 70-73 (emphasis added).
677 See *Walsh v. Shanahan*, [2013] EWCA Civ 411, *per* Rimer L.J. at para. 71 (emphasis added), quoting from the ruling below.

iii. An Accounting of Profits is Inappropriate where Misuse of the "Confidential Information" played a Small Role in Generating the Profits sought to be Disgorged

573. Catalyst's "regulatory strategy" could have played little (if any) role in West Face's successful acquisition of the WIND shares, and clearly played no role in its subsequent re-sale of those shares at a significant profit. Each of these events – and therefore the profits sought to be disgorged – are attributable to a variety of factors *having nothing to do* with Catalyst's so-called secret information.

574. This, in itself, is a strong justification for this Honourable Court to refuse Catalyst's request for an accounting of profits. In much the same way that the misuse of "nothing very special" information is inconsistent with the award of an accounting of profits (as is discussed immediately above), so too is an equitable accounting inappropriate where the defendant's misuse of confidential information played a small and insignificant role in the generation of the profits sought to be disgorged. As explained in a recent ruling of the U.K. Chancery Division: In non-fiduciary cases, in which "*the confidential information was not the sole key to the opportunity*,… *I think an account of profits would seldom, if ever, be likely to be a just response*…".[678]

575. In this regard, an important authority is, once again, the recent ruling of the English Court of Appeal in *Walsh v. Shanahan*. Lord Justice Rimer confirmed that the misuse of confidential information *must have played a significant role* in producing the profits sought to be disgorged. As noted above, the issue before the Court of Appeal was whether a plaintiff could demand disgorgement of the profits earned by the

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[678] See *CF Partners (UK) LLP v Barclays Bank PLC,* [2014] EWHC 3049 (Ch.), *per* Hildyard J. at para. 1179 (emphasis added).

defendant after using "nothing very special" confidential reports belonging to the plaintiff. The Court of Appeal found that although the defendants had misappropriated and misused the plaintiff's confidential reports, this misuse had only saved the defendants a small amount of time and money in the course of purchasing the property.[679]

576. Thus, in *Walsh v. Shanahan,* it could not be said that the defendants had been able to acquire the property "only" because of their misuse of the confidential information. Because the confidential information had played no role in actually alerting the defendant to the existence of this opportunity, Lord Justice Rimer refused to award the requested accounting: "[T]he [defendants'] *knowledge of the opportunity* to acquire and develop the property *was not itself information in respect of which they owed a duty of confidence* to [the plaintiff]…In those circumstances,…*it 'would be manifestly disproportionate and in excess of the just response required' to direct an account of profits*…. [*T*]*he making of such profits* by the respondents *did not involve their misappropriation of any proprietary interest of* [*the plaintiff*] *in the property*, since he had none".[680]

577. This same principle applies with equal or greater strength in the current proceedings. West Face did *not* require any "confidential" information belonging to Catalyst in order to learn of the opportunity to acquire WIND. Similarly, West Face did *not* need Catalyst's "regulatory strategy" in order to recognize the potential value of such an acquisition. Most importantly, West Face had independently developed a

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679 See *Walsh v. Shanahan*, [2013] EWCA Civ 411, *per* Rimer L.J. at paras. 20-22, 33, 39 & 55-73.

680 See *Walsh v. Shanahan*, [2013] EWCA Civ 411, *per* Rimer L.J. at paras. 70, 71 & 73 (emphasis added).

strategy for acquiring and monetizing the WIND shares which was incompatible with – and, indeed, which directly conflicted with – the key elements of Catalyst's so-called "strategy". As such, neither West Face's successful acquisition of the WIND shares, nor the profits which it subsequently earned from their re-sale, can in any way be attributed, directly or indirectly, to any element of Catalyst's "strategy". No order of disgorgement is appropriate in the circumstances.

iv. An Accounting of Profits is Inappropriate where it will Result in a Windfall for the Plaintiff

578. In the current proceedings, an accounting should not be ordered by this Honourable Court, because such a remedy will give Catalyst a financial "windfall" that is disproportionate to: (i) the wrongdoing committed by West Face; and (ii) the detriment suffered by Catalyst.

579. In an important fiduciary breach ruling, *Strother v. 3464920*, both the majority and the minority emphasized that an accounting of profits must never be used to effect an inequitable result:

(a) Writing for the majority, Justice Binnie noted that "[a]n accounting of profits is an equitable remedy", and that "*equity is not* so rigid as to be susceptible to being *used as a vehicle for punishing defendants with harsh damage awards* [*i.e*., disgorgement] *out of all proportion to their actual behaviour*".[681] Even in the context of "discouraging" defaulting fiduciaries – where full disgorgement of ill-gotten gains is itself an important policy

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681 See *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, *per* Binnie J. (for the majority) at paras. 88 & 89 (emphasis added), quoting *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, *per* La Forest J. at para. 81 (QL).

goal[682] – Binnie J. observed that "*the liability of the fiduciary should not be transformed into a vehicle for the unjust enrichment of the plaintiff*";[683] and

(b) Writing for the four-member minority, Chief Justice McLachlin went further, and cast doubt on the availability of <u>any</u> accounting of profits (even where a fiduciary breach has been established), in circumstances *where the victim of the breach has suffered no detriment*: "The question is whether the remedy of account and disgorgement of profits is appropriate in a case where the breach did not arise from the management of property, *where it did not cause the plaintiff any loss*, and where viewing the same facts through the lens of contract law, the plaintiff would have recovered nothing".[684]

580. The Alberta court subsequently summarized Justice Binnie's majority ruling in *Strother* as standing for the proposition that "the court in assessing damages [*i.e.*, in awarding an accounting] *must be careful not to give the plaintiff an inequitable remedy*".[685] Based on this principle, Justice Graesser cast doubt on the availability of an accounting of profits where such a remedy would lead to a windfall for the plaintiff:

> [35] [The defendant] has established that **there are a number of defences which it may raise to** [**the**] **claim for an accounting** [**including**] **that an accounting** beyond a fixed

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682 See, *inter alia, Strother v. 3464920 Canada Inc.*, 2007 SCC 24, *per* Binnie J. (for the majority) at para. 77 ("Where, as here, disgorgement is imposed to serve a prophylactic purpose, …[d]enying Strother profit generated by the financial interest that constituted his conflict teaches faithless fiduciaries that conflicts of interest do not pay. The prophylactic purpose thereby advances the policy of equity, even at the expense of a windfall to the wronged beneficiary").

683 See *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, *per* Binnie J. (for the majority) at paras. 88 & 89 (emphasis added).

684 See *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, *per* McLachlin C.J.C. (for the minority) at paras. 152 & 153 (emphasis added).

685 See *Trimay Wear Plate Ltd. v. Way,* 2008 ABQB 707, *per* Graesser J. at paras. 21-25 (quotation at para. 25) (emphasis added).

> period of time **might give the plaintiff windfall-type damages**…[686]

581. This concern with avoiding "overcompensation" has been cited on several occasions by this Honourable Court, and has been recognized as a reason to refuse to award an equitable disgorgement of profits. For example, Justice Nordheimer has quoted a well-known passage from *Cadbury Schweppes* – namely, "Equity will avoid *unjustly enriching* [*a plaintiff*] *by overcompensating* for 'nothing very special' information"[687] – in discussing the potential unavailability of an accounting of profits, even if breach of confidence were proven:

> [27] The defendants have the right to demonstrate to the court that **the remedy of disgorgement is inappropriate in the circumstances of this case. One of the ways that the defendants might show that is by establishing that the harm suffered by the plaintiffs from any misuse of the confidential information was minor and that, consequently, an award of disgorgement** from [the defendant] **would be inappropriate as it would result in a windfall to the plaintiffs**. This is a legitimate consideration…[688]

582. Catalyst's inability to prove that West Face's conduct has caused it any detriment means that a disgorgement of West Face's profits would lead to a disproportionate and inequitable windfall to Catalyst. For this reason alone, this Honourable Court should refuse to grant the requested remedy.

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686 See *Trimay Wear Plate Ltd. v. Way,* 2008 ABQB 707, *per* Graesser J. at para. 35 (emphasis added).

687 See *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142, *per* Binnie J. at para. 76 (emphasis added), quoted with approval in *Air Canada v. Westjet Airlines Ltd.*, [2005] O.J. No. 5512 (S.C.J.), *per* Nordheimer J. at para. 27.

688 See *Air Canada v. Westjet Airlines Ltd.*, [2005] O.J. No. 5512 (S.C.J.), *per* Nordheimer J. at para. 27 (emphasis added).

v. An Accounting of Profits is Unavailable because it would Unjustly Prejudice West Face's Innocent Fund Investors

583. Equity's concern with doing justice not only militates against granting a windfall to a plaintiff, but also against granting an accounting of profits that would unfairly penalize innocent third parties.

584. This point was specifically identified by the British Columbia Court of Appeal in *Strother v. 3464920 Canada Inc*. Justice Newbury was careful to ensure that the accounting remedy that she granted avoided "the danger of prejudice to innocent persons" and also gave "due weight to the contributions made by the other shareholders to the success of the [corporation]".[689] As she explained:

> [52] The accounting remedy has often been used to redress and deter fiduciary wrongdoing in cases of "secret profits" and in cases where the profits are all clearly attributable to a specific asset wrongly acquired by the fiduciary. Where, however, the profits of a business are in question and the efforts and resources of persons other than the wrongdoer have contributed to those profits, **care must be taken to ensure that the remedy does not itself become an instrument of injustice. Courts of Equity have sounded notes of caution when they are asked to impose burdens on, or appropriate benefits from, investors or business partners who have little connection with the breach; and this is especially so where the plaintiff will be enriched by an accounting far beyond the profits he or she would have earned had the breach not occurred**…[690]

585. When the matter reached the Supreme Court, Justice Binnie concurred with the reasoning of the Court of Appeal – noting, *inter alia,* that "unjust enrichment of the plaintiff" must be avoided[691] and that "[full] disgorgement" would be unjust because it

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689 See *3464920 Canada Inc. v. Strother*, 2005 BCCA 35, *per* Newbury J.A. at para. 60, *affirmed but varied*, 2007 SCC 24.

690 See *3464920 Canada Inc. v. Strother*, 2005 BCCA 35, *per* Newbury J.A. at para. 52 (emphasis added), *affirmed but varied*, 2007 SCC 24.

691 See *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, *per* Binnie J. (for the majority) at para. 89, quoting *Warman International Ltd. v. Dwyer* (1995), 128 A.L.R. 201 (H.C.), at pp. 211-12.

"would be punitive, not prophylactic"[692] – and consequently *reduced still further* the scope of the disgorgement remedy granted below by Newbury J.A.[693]

586. In the current circumstances, an accounting of profits would have the inevitable (and unwarranted) effect of directly harming innocent third parties, who were in no way involved in any (alleged) misuse of confidential information.

587. West Face used money supplied by its fund investors to purchase the WIND shares. Those fund investors waited patiently, and without any immediate return, while those shares were held for eighteen months. The profits generated by the sale of the WIND shares belongs principally to those blameless investors. As such, the imposition on West Face of a disgorgement order would deprive these third parties of funds that properly belong to them. This would be unjust and inequitable, and is not an outcome that should be ordered by this Honourable Court.

vi. An Accounting of Profits is Unavailable because Catalyst Comes before the Court with Unclean Hands

588. Finally, because disgorgement is an equitable remedy, it is trite that misconduct by the plaintiff will disentitle it from receiving the benefit of an accounting of profits. As Justice Matheson observed, in refusing to grant disgorgement in a breach of confidence proceeding: "An accounting is an equitable remedy and, therefore, the person or corporation asking for it must come to the court with clean hands".[694]

589. West Face acknowledges that, in this context, the concept of "clean hands" does not refer to "generalized misconduct" nor to inherent "bad character" on the part of

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692 See *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, *per* Binnie J. (for the majority) at para. 94.
693 See *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, *per* Binnie J. (for the majority) at para. 95.
694 See *Corrigan v. Di Domenico*, [2007] O.J. No. 4868 (S.C.J.), *per* Matheson J. at para. 60.

Catalyst. The concept addresses improper or abusive behaviour that is directly related to the equitable cause of action and/or the equitable remedy claimed by the plaintiff.[695] It is with this restriction in mind that West Face submits that Catalyst's "unclean hands" should prevent this Honourable Court from granting to it the equitable remedy that it seeks.

590. A recent ruling of the Divisional Court, *Royal Bank v. Boussoulas*, with reasons written by Pepall J. (as she then was), provides a useful illustration of the type of disqualifying conduct that will attract the "clean hands" doctrine. In *Royal Bank* – as in the current proceeding – all of the plaintiff's impugned conduct arose *during the course of the litigation itself*. The plaintiff bank, seeking the equitable remedy of a *Mareva* injunction,[696] had otherwise satisfied all of the prerequisites for such relief, but was found by both the motions judge and the Divisional Court to have acted in a manner that precluded the granting of the requested order.

591. Among the "unclean hands" conduct criticized by Justice Pepall was the following:

(a) the plaintiff's pleadings, affidavits and supporting materials contained sweeping allegations of fraudulent behaviour on the part of the defendants, which – in the words of Pepall J. – "*patently could not be substantiated*".[697] It was clear to the Divisional Court that there was no direct evidence, or indeed any clear support, for the various allegations of

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695 See *Royal Bank of Canada v. Boussoulas*, 2012 ONSC 2070 (Div. Ct.), *per* Pepall J. (as she then was) at para. 51.

696 The parties had previously agreed to a consent interim *Mareva* order pending the hearing in question.

697 See *Royal Bank of Canada v. Boussoulas*, 2012 ONSC 2070 (Div. Ct.), *per* Pepall J. (as she then was) at paras. 41 & 43 (emphasis added).

fraud. As Justice Pepall noted, this was "an allegation…*that should never had been made*, *without proper evidence to support it*";[698]

(b) at the return of the motion, these allegations of intentional misconduct were expressly not withdrawn by the plaintiff, although they ceased to be the focus of its argument. This was described by the Divisional Court as "a late in the day *tactical decision* not to rely on the allegations of fraud…but at the same time…not [to] abandon those allegations…This *tactical decision* tainted the Bank's request for in personam relief";[699]

(c) furthermore, Pepall J. noted that a factum previously filed with the court contained a "statement [that] was *unsupportable and misleading* in relation to [this] highly material and damaging allegation";[700] and

(d) likewise, affidavits relied upon by the plaintiff contained both blatant untruths and statements of "fact" that were made without any supporting evidence. These affidavits also included "*irrelevant and inadmissible allegations*" against the defendants.[701]

592. Interestingly, in *Royal Bank v. Boussoulas,* the Divisional Court was careful to note that the plaintiff and its counsel had possessed an honest belief in the truth of these allegations, and that they did not intentionally seek to deceive the Court.

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698 See *Royal Bank of Canada v. Boussoulas*, 2012 ONSC 2070 (Div. Ct.), *per* Pepall J. (as she then was) at para. 42, quoting with approval from the ruling below (emphasis added).

699 See *Royal Bank of Canada v. Boussoulas*, 2012 ONSC 2070 (Div. Ct.), *per* Pepall J. (as she then was) at paras. 49 & 50 (emphasis added), and at paras. 37, 38, 39 & 43.

700 See *Royal Bank of Canada v. Boussoulas*, 2012 ONSC 2070 (Div. Ct.), *per* Pepall J. (as she then was) at paras. 29 & 42 (emphasis added), with both paragraphs quoting with approval from the ruling below.

701 See *Royal Bank of Canada v. Boussoulas*, 2012 ONSC 2070 (Div. Ct.), *per* Pepall J. (as she then was) at para. 42, quoting with approval from the ruling below (emphasis added), and para. 29.

Nevertheless, the plaintiff was found to have unacceptably "*overstated its case*" and to have acted towards the plaintiff in a manner that "was *simply not fair*", particularly *vis-à-vis* the decision to leave the fraud allegations in place, but not to rely on them at the motion.[702] As Justice Pepall concluded: "[T]he motions judge was correct and made no error in principle in relying on the unclean hands doctrine associated with equitable relief. *The Bank's tactical decision was an iniquity done to the Defendants*".[703]

593. It is submitted that, while the facts of every case are different, the pattern of conduct which has marked Catalyst's prosecution of the current proceeding mirrors to a significant extent the "unclean hands" conduct of the plaintiff in *Royal Bank v. Boussoulas*:

(a) *First,* like the plaintiff in *Royal Bank*, Catalyst has made sweeping and wholly speculative allegations of serious intentional misconduct without a shred of evidence to substantiate its charges;

(b) *Second,* as was true of the *Royal Bank* plaintiff, Catalyst levelled a serious allegation of intentional wrongful conduct (namely, spoliation), against West Face's head of IT Chap Chau without any basis in fact, only to decide not to proceed with those allegations for seemingly "tactical" reasons;

(c) *Third,* like the plaintiff in *Royal Bank*, Catalyst has likewise relied on affidavits of Messrs. Riley, De Alba and Glassman subsequently shown to

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[702] See *Royal Bank of Canada v. Boussoulas*, 2012 ONSC 2070 (Div. Ct.), *per* Pepall J. (as she then was) at paras. 47 & 50 (emphasis added), and at paras. 29 & 42, quoting with approval from the ruling below.

[703] See *Royal Bank of Canada v. Boussoulas*, 2012 ONSC 2070 (Div. Ct.), *per* Pepall J. (as she then was) at para. 52 (emphasis added).

include misleading (or even untrue) statements, and has provided at least one false answer to an undertaking; and

(d) *Fourth,* Catalyst has attempted to frustrate the processes of this Court by bluntly refusing to answer proper questions concerning a fundamental factual matter solely within its knowledge (*i.e.*, whether Catalyst was pursuing a deal with VimpelCom during the period of West Face's exclusivity).

594. It is submitted that this constellation of bad conduct on the part of Catalyst is sufficient to render it ineligible to receive the equitable and discretionary remedy it seeks. An accounting of profits is a privilege and not a right. Catalyst has behaved in a manner that disentitles it from claiming the benefit of such a remedial privilege.

G. If Restitutionary Disgorgement is Awarded, it should be Restricted to a Symbolic or Nominal Portion of West Face's Profits

595. As noted above, this Honourable Court enjoys a broad discretion to fashion a contextually responsive, "bespoke" remedy that suits the facts of the current proceeding.[704] As has also been seen above, after determining that an accounting and disgorgement is an appropriate remedy, courts enjoy considerable latitude to customize the terms of that relief to ensure that it does justice between the parties, does not overcompensate the plaintiff, and does not penalize either the defendant or any third parties.[705]

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[704] See *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142, *per* Binnie J. at paras. 22 & 24.

[705] See *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, *per* Binnie J. (for the majority) at paras. 88, 89 & 94, *affirming but varying,* 2005 BCCA 35, *per* Newbury J.A. at paras. 53 & 60.

596. While West Face repeats its submission that an accounting of profits should *not* be granted in the current circumstances, it also submits (in the alternative) that – if this equitable remedy *is* awarded by this Honourable Court – an appropriate term of such relief is that West Face should be required to disgorge only a symbolic one dollar in profits. Such a nominal award would reflect all of the prevailing facts, most notably the marginal wrongdoing committed by the defendant and the absence of any demonstrable detriment suffered by the plaintiff.

PART VIII - CONCLUSION

597. West Face respectfully requests that Catalyst's claim be dismissed in its entirety. West Face reserves the right to seek costs on the highest possible scale and to make further submissions on the issue of costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of June, 2016.

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

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

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