

The Latest in the Catalyst Capital Litigation Saga: Spoliation, Substantial Indemnity Costs and Abuse of Process

April 23, 2018

By

Two decisions have been recently issued in respect of the claims brought by the investment management firm Catalyst Capital Group Inc. following its unsuccessful efforts to acquire WIND Mobile Inc. in 2014. The results in both decisions (one by the Ontario Superior Court of Justice, and the other by the Court of Appeal) were driven primarily by factual findings. However, the reasons of both courts consider a number of legal points, such as spoliation, substantial indemnity costs, and dismissal of proceedings on the basis of issue estoppel, cause of action estoppel, and abuse of process.

At the time of Catalyst's acquisition efforts, separate acquisition efforts were made by another investment management firm, West Face Capital Inc. In early 2014, Catalyst and the principal shareholder of WIND engaged in negotiations and appeared to be close to a deal. However, in August 2014, West Face, along with other investors (collectively referred to in the decisions as the "consortium"), made a new bid which resulted in their acquisition of WIND. West Face and the consortium later sold WIND for a very substantial profit to Shaw Communications.

Catalyst brought an action against West Face and Brandon Moyse, an analyst at Catalyst who left the company to work at West Face in May 2014. Catalyst alleged that Moyse communicated confidential information to West Face about Catalyst's acquisition strategy, and that West Face used that confidential information to successfully pursue its acquisition of WIND. Catalyst alleged that as a result of the misuse of confidential information, West Face and Moyse caused damage to Catalyst, and also sought an accounting of profits made by West Face and the consortium when WIND was subsequently sold to Shaw Communications.

In addition to these claims, Catalyst sued West Face and Moyse for spoliation, alleging that Moyse had destroyed relevant evidence contained on his cellphone and computer. Catalyst advanced spoliation as a distinct tort claim, seeking damages equal to its costs in pursuing the misuse of confidential information claim, as well as an evidentiary rule available to assist Catalyst in respect of the main claim. Typically, the finding of spoliation would allow the court to draw an inference that the destroyed evidence would have been damaging to the "spoliator".

At first instance, Justice Newbould dismissed all of Catalyst's claims, and awarded costs of West Face on a substantial indemnity basis and costs to Moyse on a partial indemnity basis¹. In *Catalyst Capital Group Inc. v Moyse*², the Ontario Court of Appeal dismissed Catalyst's appeal from that decision. Among other things, the Court of Appeal deferred to Justice Newbould's findings of fact and his assessment of the witnesses' evidence, and found that there had been no misapprehension of evidence.

With respect to spoliation, the Court of Appeal's decision does not contain an extensive analysis of the relevant legal principles. However, combined with the reasons of Justice Newbould, it reflects the following state of the law with respect to spoliation: First, the availability of a separate tort of spoliation in Ontario or Canada remains uncertain. Although this claim was abandoned by Catalyst in the oral argument, the Court of Appeal noted in its reasons that the existence of an independent tort of spoliation was "an open question."

Second, there is a high threshold for the finding of spoliation, which requires intentional destruction of relevant evidence for the purpose of influencing the outcome of the litigation. In this case, the trial judge found that no relevant evidence was destroyed.

Rather, Justice Newbould accepted Moyse's evidence that he deleted his browsing history because he was concerned about Catalyst gaining access to his personal browsing history (in particular, that he had accessed adult entertainment websites), and that he did not intend to breach a prior preservation order or destroy any evidence relevant to the litigation³.

The Court of Appeal also upheld the award of substantial indemnity costs because Catalyst made serious and unfounded allegations impugning the honesty and integrity of West Face and its senior executives, and maintained them "in the face of substantial evidence refuting the allegations." The Court of Appeal did not agree with Catalyst's argument that the substantial costs award was based on Catalyst's failure to prove its case.

In addition to the action against West Face and Moyse discussed above, five days before the commencement of the trial in that action, Catalyst commenced another action against West Face, the shareholders of WIND and certain members of the consortium. Catalyst alleged, among other things, that the defendants committed the torts of inducing breach of contract, conspiracy and breach of confidence which prevented Catalyst from acquiring Wind. The defendants' motions to dismiss the action on the basis of issue estoppel, cause of action estoppel and abuse of process were granted by Justice Hainey⁴. His Honour found that Catalyst unsuccessfully litigated its failure to acquire WIND in the Moyse/West Face action, that Justice Newbould made findings at trial that were determinative of its claims against the defendants in the second action, and that the issue of Catalyst's failure to acquire WIND should not be re-litigated.

This series of decisions is a reminder to plaintiffs and their counsel to carefully evaluate the allegations advanced in an action against its factual underpinnings and anticipated evidence – especially as the case develops through discovery and pre-trial motions – in order to assess the risk of incurring substantial indemnity costs. Further, ongoing evaluation of the claims and the issues at stake in the litigation are crucial as it may not be possible to pursue parallel actions, even when, on their face, the causes of action or specific claims advanced may appear dissimilar.

[1] Catalyst Capital Group Inc. v Moyse, 2016 ONSC 5271.

[2] 2018 ONCA 283.

[3] This finding has to be considered in the light of Catalyst's concession that there was no evidence that Moyse had destroyed documents that no longer existed either at Catalyst or West Face.

[4] The Catalyst Capital Group Inc. v VimpelCom Ltd., 2018 ONSC 2471.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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