

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff/
Responding Party

- and -

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

Defendants/
Moving Party

**FACTUM OF THE MOVING PARTY, THE DEFENDANT
WEST FACE CAPITAL INC.**

October 17, 2016

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Defendants/
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**FACTUM OF THE MOVING PARTY DEFENDANT,
WEST FACE CAPITAL INC.**

PART I ~ OVERVIEW

1. This motion asks whether a commercial dispute that is linked inextricably to two closely related matters involving the purchase and sale of WIND Mobile Corp. ("**WIND**") that have recently been heard and decided by Justice Newbould on the Commercial List, should itself be transferred to the Commercial List. The Defendant, West Face Capital Inc. ("**West Face**") has served a Notice of Motion seeking three principal forms of relief. First, West Face moves to have this action transferred to the Commercial List. Second, West Face has moved for an Order dismissing or permanently staying this action based on the doctrines of abuse of process, collateral attack, issue estoppel and cause of action estoppel, based on various findings made by Justice

Newbould in the earlier related proceedings. West Face respectfully submits that those findings are dispositive of the claims asserted against it in this action. Finally, West Face has moved, to the extent necessary, for an order striking the jury notice, on the grounds that the complexity of this case makes it unsuitable for a jury trial. However, at this time West Face only advances its motion to transfer this matter to the Commercial List. Once the matter has been transferred, argument of the remaining grounds for relief can be scheduled appropriately. West Face is supported in this motion by the other ten Defendants. The remainder of West Face's motion can and should be determined by a Justice of the Commercial List after the requested transfer has been effected. The only party that opposes this motion is the Plaintiff, The Catalyst Capital Group Inc. ("**Catalyst**").

2. There can be no serious question that this case involves the very sort of high stakes, complex, multi-party commercial litigation that has been the "bread and butter" of the Commercial List for more than three decades. Catalyst, a Toronto-based investment management firm with billions of dollars in assets under management, claims \$750 million in damages for breach of contract, inducing breach of contract, conspiracy, and misuse of confidential information against eleven different Defendants represented by eight different law firms. These Defendants are located around the globe, and include other multi-billion dollar investment management firms (such as West Face), an international telecommunications giant, a multi-national investment bank, numerous other private equity firms, funds, and special-purpose vehicles, and the owner of an active Canadian wireless telecommunications operator that is seeking to become Canada's fourth national wireless carrier in furtherance of longstanding Government policy.

3. The subject matter of this dispute is also undisputedly commercial in nature. The proceeding concerns the acquisition of WIND, a Canadian wireless telecommunications provider, by a multi-national consortium of investors (which included West Face) on September 16, 2014, following a public sales process run by WIND's then-owner, the Defendant VimpeCom Ltd. and its financial advisor, the Defendant UBS Securities Canada Inc. Catalyst was an unsuccessful competing bidder in that process, and is now a classic "bitter bidder" that has engaged in serial, abusive litigation against West Face and others arising from its failure to acquire WIND. Catalyst's efforts in this regard have been driven by its founder and CEO, Newton Glassman. As described more fully below, as recently as October 7, 2016 Justice Newbould awarded substantial indemnity costs against Catalyst for its abusive conduct in pursuing meritless claims against West Face concerning its acquisition of WIND. In doing so, he held that Mr. Glassman "was not able to accept that he lost his chance to acquire [WIND] by being outsmarted by someone else".¹

4. The sale of WIND has already been the subject of **two** different proceedings before the Commercial List, namely the "**Moyse Litigation**"² and the "**Plan of Arrangement Application**".³ These proceedings are described in detail below. Catalyst was unsuccessful in both of them. That makes this litigation (the "**New Litigation**") the third proceeding in which Catalyst has alleged wrongdoing in respect of West Face's participation in the acquisition of WIND in September 2014.

¹ *Catalyst Capital Group Inc. v. Moyse*, 2016 ONSC 6285 at para. 10, *per* Newbould J. [*Costs Endorsement*].

² The Moyse Litigation proceeded as *The Catalyst Capital Group Inc. v. Brandon Moyse and West Face Capital Inc.* in the Ontario Superior Court of Justice (Commercial List), Court File No. CV-16-11272-00CL.

³ The Plan of Arrangement Application proceeded as *Re: Mid-Bowline Group Corp.* in the Ontario Superior Court of Justice (Commercial List), Court File No. CV-15-11238-00CL.

5. There can be no doubt that justice will be better served if this matter is presided over by a Justice of the Commercial List with experience and expertise in complex commercial matters. Moreover, Catalyst has conceded explicitly in a recent letter addressed to Regional Senior Justice Morawetz that this action is complex and would benefit from case management.⁴ The Commercial List will provide Catalyst (and the other parties) with these same case management tools, and more.

PART II ~ SUMMARY OF FACTS

6. This matter is closely related to the Moyse Litigation and to the Plan of Arrangement Application, both heard on the Commercial List by Justice Newbould. Thus, in order to understand why this matter belongs on the Commercial List, it is first necessary to understand the common background that these three proceedings share.⁵

A. A Brief History of WIND

7. As stated above, WIND is a Canadian wireless telecommunications provider.⁶ At the end of 2013, the majority of its voting shares were held by the Defendant Globalive Capital Inc. ("**Globalive**"), an Ontario-based diversified investment corporation, while a majority of the total equity was held by the Defendant VimpelCom Ltd. ("**VimpelCom**"), a large multi-national telecommunications company.⁷

⁴ Catalyst requested a case management conference from the civil trial office for October 13, 2016. The civil trial office declined to schedule such a conference, without explanation.

⁵ The facts set out in this Part are either not contentious procedural facts or are based on the findings of fact made by Justice Newbould in the Moyse Litigation and/or in the Plan of Arrangement Application.

⁶ *Catalyst Capital Group Inc. v. Moyse*, 2016 ONSC 5271, at para. 17, *per* Newbould J. [the *Trial Reasons*]. See also *Re Mid-Bowline Group Corp.*, 2016 ONSC 669, at para. 2, *per* Newbould J. [the *Plan of Arrangement Reasons*].

⁷ *Trial Reasons*, at paras. 17, 18, & 21. See also *Plan of Arrangement Reasons*, at para. 2.

8. By the end of 2013, VimpelCom had become frustrated by the regulatory hurdles it faced in Canada, which had prevented it from either acquiring Globalive's interest in WIND, or selling VimpelCom's interest. VimpelCom had engaged the Defendant UBS Securities Canada Inc. ("**UBS**") to assist it in its efforts to find a purchaser either for VimpelCom's debt and equity interests in WIND, or for WIND in its entirety.⁸

9. Catalyst and West Face both participated in negotiations with VimpelCom in the first half of 2014.⁹ Both parties' interest in WIND was discussed in the business media during the course of VimpelCom's efforts to sell WIND in 2013 and 2014.¹⁰

10. On July 23, 2014, VimpelCom entered into exclusive negotiations with Catalyst concerning the negotiation of a Share Purchase Agreement for the acquisition of WIND. This period of exclusivity was extended several times, ultimately to August 18, 2014.¹¹

11. On August 7, 2014 the Defendants West Face, Tennenbaum Capital Partners LLC ("**Tennenbaum**"), and the principals of the Defendants 64NM Holdings GP LLC ("**64NM GP**"), 64NM Holdings LP ("**64NM LP**") and LG Capital Investors LLC ("**LG Capital**") (West Face, Tennenbaum and LG Capital, together, the "**New Investors**") made an unsolicited offer to VimpelCom to purchase its interests in WIND (the "**August 7 Proposal**").¹²

⁸ *Trial Reasons*, at paras. 22-24.

⁹ *Trial Reasons*, at para. 30.

¹⁰ *Trial Reasons*, at para. 89.

¹¹ *Trial Reasons*, at para. 30. See also *Plan of Arrangement Reasons*, at para. 10.

¹² *Trial Reasons*, at paras. 31 & 104.

12. On or around August 15, 2014, VimpelCom requested that Catalyst agree to a break fee if regulatory approval of the potential sale of WIND to Catalyst was not granted following execution of the Share Purchase Agreement then being negotiated.¹³

13. Catalyst rejected VimpelCom's request for a break fee, cut off further communications with VimpelCom, let its period of exclusivity expire on August 18, 2014, and encouraged VimpelCom to explore its options.¹⁴ VimpelCom did so. One of those options involved the New Investors combining with Globalive and the Defendants Novus Wireless Communications Inc. ("**Novus**") and Serruya Private Equity Inc. ("**Serruya**") (Globalive, Novus, Serruya, and the New Investors collectively, the "**Consortium**") to make a further proposal to VimpelCom based on the August 7 Proposal.¹⁵

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

15. In November 2014, the ownership structure of WIND was reorganized following receipt of the necessary regulatory approvals from the Federal Government, so that WIND became an indirect wholly-owned subsidiary of the Defendant Mid-Bowline Group Corp. ("**Mid-Bowline**"), with the various members of the Consortium holding voting shares in proportion to their equity contributions.¹⁷

¹³ *Trial Reasons*, at para. 128.

¹⁴ *Trial Reasons*, at paras. 128-130.

¹⁵ *Trial Reasons*, at paras. 31 & 129.

¹⁶ *Trial Reasons*, at para. 31.

¹⁷ *Plan of Arrangement Reasons*, at para. 9.

B. There Have Been Two Prior Proceedings Concerning the Same Subject Matter Decided by Justice Newbould on the Commercial List

(i) *The Commencement of the Moyse Litigation*

16. In May 2014, Brandon Moyse was a 26 year-old junior analyst at Catalyst. Mr. Moyse was frustrated by and unhappy with the discourteous way in which Mr. Glassman and others treated him at Catalyst.¹⁸ He resigned from his position at Catalyst and accepted a job offer from West Face. Before Mr. Moyse began working at West Face, Catalyst expressed concern to West Face that Mr. Moyse had obtained access to confidential information about a "telecom file", while working at Catalyst. West Face assumed that that file involved WIND. As a result, before Mr. Moyse began working at West Face on June 23, 2014, West Face erected an ethical wall that expressly precluded Mr. Moyse from sharing with anyone at West Face confidential information of Catalyst concerning WIND, and from playing any role whatsoever in West Face's efforts to acquire WIND. That ethical wall was implemented physically and electronically, was brought to the attention of Mr. Moyse and all relevant employees of West Face both orally and in writing, and was complied with assiduously.¹⁹

17. On June 25, 2014, Catalyst issued the Statement of Claim in the Moyse Litigation against West Face and Mr. Moyse. Among other things, Catalyst alleged that Mr. Moyse had misappropriated unspecified confidential information of Catalyst for use by West Face.²⁰

¹⁸ *Trial Reasons*, at para. 54.

¹⁹ *Trial Reasons*, at paras. 32, 34, 52, & 53-67.

²⁰ See Catalyst's Statement of Claim issued June 25, 2014. See also *Plan of Arrangement Reasons*, at para. 19.

18. On July 16, 2014, West Face and Mr. Moyle consented to an Interim Order placing Mr. Moyle on indefinite leave from West Face. Ultimately, Mr. Moyle never returned to work at West Face, with the result that his entire period of employment with West Face lasted only three weeks.²¹

19. On September 16, 2014, the Consortium acquired WIND. Several weeks later, on October 9, 2014, Catalyst amended its pleading in the Moyle Litigation to allege explicitly that: "West Face wrongfully used Catalyst's Confidential Information, which it solicited and obtained from Moyle, to obtain an unfair advantage over Catalyst in its negotiations with [WIND]. But for the transmission of Confidential Information concerning [WIND] from Moyle to West Face, West Face would not have successfully negotiated a purchase of [WIND]".²² Those allegations were unfounded, as Justice Newbould confirmed in his findings following the conclusion of trial in the Moyle Litigation. In the case at bar, Catalyst also alleges that West Face used Catalyst confidential information to obtain an unfair advantage in its negotiations with VimpelCom. The difference is that Catalyst now alleges that the confidential information came from WIND's CEO, Mr. Lacavera, rather than from Mr. Moyle.²³

20. Significantly, Catalyst made that allegation in these proceedings before the Moyle Litigation proceeded to trial, rather than after. Catalyst can hardly suggest that it learned of new facts or evidence during the trial of the Moyle Litigation that caused it to commence these proceedings.

²¹ *Trial Reasons*, at para. 66.

²² See Catalyst's Amended Statement of Claim dated October 9, 2014, at para. 34.6.

²³ See Catalyst's Statement of Claim issued May 31, 2016, at paras. 73-80.

21. On December 16, 2014, Catalyst further amended its Statement of Claim in the Moyse Litigation to seek: (i) a constructive trust over West Face's interest in WIND; and (ii) an accounting of profits earned by West Face with respect to its investment in WIND as a result of the alleged misuse of Catalyst's confidential information.²⁴ Catalyst made the informed, tactical choice not to assert any claims or causes of action associated with the alleged breach by VimpelCom of its exclusivity obligations to Catalyst, or pertaining to an alleged breach of confidence by VimpelCom or others.

22. From approximately January 2015 to January 2016, Catalyst proceeded with an interlocutory motion seeking to enjoin West Face from exercising any control over WIND (among other relief) and an appeal from the dismissal of that motion. Catalyst lost this motion. Thereafter, Catalyst appealed to the wrong court, failed to seek leave to appeal to the Divisional Court on a timely basis, and lost a contested motion in the Divisional Court to extend time for seeking leave to appeal, and for leave to appeal.²⁵

(i) The Plan of Arrangement Application

23. In January 2016, Mid-Bowline (the entity through which members of the Consortium held their interests in WIND) brought an application on the Commercial List for an order approving a plan of arrangement (the "**Plan of Arrangement**") pursuant to which the shares of Mid-Bowline were to be transferred to Shaw Communications Inc. ("**Shaw**") for approximately \$1.6 billion. The Plan of Arrangement was necessary so that

²⁴ See Catalyst's Amended Amended Statement of Claim dated December 16, 2014, at sub-paras. 1(d.3) & (d.4). See also *Plan of Arrangement Reasons*, at para. 20.

²⁵ *Plan of Arrangement Reasons*, at paras. 27-33. See also *The Catalyst Capital Group Inc. v. Moyse*, 2015 ONSC 4388, per Glustein J., and *The Catalyst Capital Group Inc. v. Moyse*, 2016 ONSC 554 (Div. Ct.), per Swinton J.

Shaw could take the shares of WIND free and clear of Catalyst's claim for a constructive trust in the Moyse Litigation.²⁶

24. The parties attended a series of 9:30 chambers appointments before Justice Newbould in advance of the hearing of the Plan of Arrangement. The Plan of Arrangement hearing ultimately was scheduled for January 25, 2016.²⁷

25. At the same time, on January 13, 2016, West Face brought a motion to transfer the Moyse Litigation to the Commercial List. Catalyst did not oppose this motion, and Justice Newbould granted the motion the following day.²⁸

26. At the commencement of the hearing of the Plan of Arrangement Application on January 25, 2016, Catalyst opposed the approval by Justice Newbould of the proposed Plan of Arrangement on the basis that it was not fair and reasonable in light of Catalyst's claim in the Moyse Litigation for a constructive trust over West Face's interest in WIND. Catalyst also advised, for the first time, of its intention to assert claims of inducing breach of the Catalyst-VimpelCom exclusivity agreement against West Face and other members of the Consortium (*i.e.*, the claims now made in this New Litigation).²⁹

27. In Reasons released the following day, Justice Newbould held, based on the "voluminous" evidence filed in the Moyse Litigation and the Plan of Arrangement Application, that Catalyst's threatened claim for inducing breach of contract "could have

²⁶ See *Plan of Arrangement Reasons*, generally.

²⁷ *Plan of Arrangement Reasons*, at paras. 21-24.

²⁸ Order of The Honourable Justice Newbould dated January 14, 2016 in Court File No. CV-14-507120.

²⁹ *Plan of Arrangement Reasons*, at paras. 51-53.

been started in March, 2015 when the facts were disclosed and known to Catalyst".³⁰ He further held that Catalyst had "[lain] in the weeds" and not acted in good faith by not bringing its claim earlier.³¹

28. Justice Newbould ordered an expedited trial of an issue in the Plan of Arrangement Application in respect of Catalyst's constructive trust claim. This trial of an issue, which overlapped significantly with the subject matter of the Moyse Litigation, was scheduled for late February. Catalyst was directed not to raise its inducing breach claim in this mini-trial in the Plan of Arrangement Application because it had delayed in advancing that claim for tactical purposes, and had not acted in good faith.³²

29. Shortly after Justice Newbould released his Plan of Arrangement Reasons, Catalyst consented to an Order approving the Plan of Arrangement, thereby agreeing that it would not pursue a claim for a constructive trust over the shares of Mid-Bowline to be transferred to Shaw.³³ The Plan of Arrangement transaction closed shortly thereafter with no need for an expedited trial of Catalyst's constructive trust claim. The late February trial of an issue was rendered moot and abandoned.

30. The Moyse Litigation then proceeded on the Commercial List in the ordinary course, and reached trial in June 2016 before Justice Newbould. As explained below, Catalyst could have pursued its inducing breach claim against West Face in the Moyse Litigation, but made the tactical choice not to do so.

³⁰ *Plan of Arrangement Reasons*, at para. 59.

³¹ *Plan of Arrangement Reasons*, at para. 59.

³² *Plan of Arrangement Reasons*, at paras. 50 & 61.

³³ Order of The Honourable Justice Newbould dated February 3, 2016 in Court File No. CV-15-11238-00CL.

(ii) The Continuation and Trial of the Moyse Litigation

31. On February 25, 2016, Catalyst delivered an ~~Amended~~ Amended Amended Statement of Claim in the Moyse Litigation. While Catalyst deleted its claim for a constructive trust, and added new allegations of spoliation against Mr. Moyse, it chose not to assert claims of inducing breach and/or conspiracy against West Face.³⁴

32. Following Catalyst's delivery of its thrice-amended Claim, West Face and Mr. Moyse delivered their respective Defences, and the parties proceeded to documentary and oral discoveries. Again, the parties, including Catalyst, made use of the special procedures of the Commercial List, including telephone case conferences and 9:30 appointments before Justice Newbould to address discovery-related disputes and pre-trial issues as they arose.

33. The Moyse Litigation proceeded to trial on the Commercial List before Justice Newbould in June, 2016. There were six extended hearing days of evidence and one full day of closing submissions. The parties called a total of 13 witnesses to give live evidence. As is becoming increasingly common on the Commercial List, the parties' evidence in chief was put in primarily by way of detailed pre-trial affidavits, with exhibits. The parties also agreed that they could rely on affidavits and transcripts that had previously been filed in conjunction with interlocutory motions.³⁵

34. Ultimately, the parties' closing submissions totalled close to 500 pages in length. The trial record included over 30 affidavits, over 800 documents, and almost 2000 pages of pre-trial examination transcripts.

³⁴ See Catalyst's ~~Amended~~ Amended Amended Statement of Claim dated February 25, 2016.

³⁵ *Trial Reasons*, at para. 10.

(iii) The Reasons for Judgment

35. On August 18, 2016, Justice Newbould released his Reasons for Judgment in the Moyse Litigation (the "**Trial Reasons**"), in which he dismissed Catalyst's action "in its entirety".³⁶ Justice Newbould made numerous findings against Catalyst concerning virtually every aspect of its Claim, which West Face and various other Defendants will argue are fatal to Catalyst's latest claims in the New Litigation. Indeed, West Face and various other Defendants have already commenced motions to dismiss, permanently stay, and/or strike Catalyst's Claim in the New Litigation on the grounds that it is an abuse of process, and/or barred by the doctrines of cause of action estoppel, issue estoppel and collateral attack. This motion seeks to ensure that the Defendants' motions in that regard are decided by a judge of the Commercial List, which is where the Moyse Litigation and the Plan of Arrangement Application were already decided.

36. In any event, Catalyst's claims and allegations in this proceeding are contradicted significantly by many of the findings made by Justice Newbould in both the Plan of Arrangement Application and the Moyse Litigation, both of which proceeded on the Commercial List.

PART III ~ LAW & ARGUMENT**A. General Principles on Motions to Transfer to the Commercial List**

37. Generally speaking, judges who sit on the Commercial List are those who have "experience, expertise and an interest by aptitude and inclination" in complex corporate/commercial matters.³⁷ The List strives to provide the benefits of "real time"

³⁶ *Trial Reasons*, at paras. 8 & 169.

³⁷ *771225 Ontario Inc. v. Bramco Holdings Co.*, [1992] O.J. No. 1772 at p. 3 (Ct. J. (Gen. Div.)).

litigation, where parties can gain access to justice on an expedited and efficient basis, and receive timely dispositions of their disputes involving commercial matters.³⁸

38. The Consolidated Practice Direction Concerning the Commercial List has long provided that a matter may be transferred to the Commercial List on a motion to a judge presiding over the List. While certain matters are, by their nature, automatically eligible for the Commercial List, sub-paragraph 1(m) of the Practice Direction provides that "such other commercial matters as a judge presiding over the Commercial List may direct to be listed on the Commercial List" are also eligible.

39. Thus, as noted by Justice Molloy, the Practice Direction clearly contemplates matters being transferred to the Commercial List despite opposition by the plaintiff:

[The] Practice Direction makes provision for a defendant to apply to have the action transferred to the Commercial List. Such a motion does not require the consent of the plaintiff. The Practice Direction therefore clearly contemplates situations in which a plaintiff who initially did not choose the Commercial List may nevertheless have his or her action transferred to it.³⁹

40. This "basket clause" (as paragraph 1(m) is widely known) provides a broad discretion to transfer matters to the List.⁴⁰ The basket clause has considerable breadth, and it is not necessary that the matter in question be analogous to the types of matters

³⁸ *Gyles v. Mytravel Canada Holidays Inc. (c.o.b. Sunquest Meetings and Incentives)*, [2006] O.J. No. 2497 at para. 15 (S.C.J.) [*Gyles*].

³⁹ *Lehner v. Gottfried*, [1999] O.J. No. 4083 at para. 14 (S.C.J. (Commercial List)) [*Lehner*].

⁴⁰ *Toronto Dominion Bank v. Bank of Nova Scotia*, [2013] O.J. No. 4355 at para. 4 (S.C.J. (Commercial List)).

enumerated in sub-paragraphs (a) to (l) of the Practice Direction.⁴¹ As noted by Justice Blair:

If the matter is a commercial one, and if it is of sufficient complexity in terms of subject matter or of procedure or in terms of the numbers of parties involved – or a combination of these varying factors – it will be considered.⁴²

41. Put differently, the basket clause provides for an "in essence" test. If the matter "in essence" involves a commercial dispute, it may be transferred to the List.⁴³ Whether the matter is "in essence" a commercial dispute is itself a matter of discretion – no hard and fast rules govern the assessment of sufficiency of the commercial nature of the action in question before a transfer can be granted.⁴⁴ It is also clear that there is no need that all of the issues in the proceeding are exclusively commercial in nature.⁴⁵

42. Overall, the basket clause has been applied broadly and with considerable flexibility on motions to transfer.⁴⁶ That said, and as touched on above, complexity is a compelling factor (though not a prerequisite) militating in favour of transfers to the Commercial List.⁴⁷

43. Finally, it has been judicially noted that there is "no disadvantage to a party in having a case listed on the Commercial List".⁴⁸

⁴¹ *Maple Valley Acres Ltd. v. Canadian Imperial Bank of Commerce*, [1992] O.J. No. 2610 at p. 3 (Ct. J. (Gen. Div.) [*Maple Valley*]).

⁴² *Maple Valley*, at p. 3.

⁴³ *Piedra v. Tsx Inc.*, [2009] O.J. No. 5351 at para. 10 (Div. Ct.) [*Piedra*].

⁴⁴ *Piedra v. Tsx Inc.*, at para. 18.

⁴⁵ *Royal Bank v. Société Générale (Canada)*, 2002 CarswellOnt 3852 at para. 2. (S.C.J.) [*Royal Bank*].

⁴⁶ *Gyles*, at para. 11.

⁴⁷ *Lehner*, at para. 15.

⁴⁸ *Piedra*, at para. 21. See also *Lehner*, at para. 23.

B. This Action Is "In Essence" Commercial Litigation and Should be Transferred to the Commercial List

44. There is no question that the New Litigation meets the "in essence" test. It is high stakes commercial litigation involving claims of approximately \$750 million that are factually, legally and procedurally complex, and involves twelve different parties (and considerably more witnesses) located around the globe.

45. Like the Moyse Litigation, the New Litigation raises complex factual and legal issues concerning the interpretation of a web of interconnected commercial relationships, dealings and negotiations between various commercial parties involved in the acquisition by the Consortium of VimpelCom's interest in WIND in September 2014.

46. Indeed, the reasons for transferring the New Litigation to the Commercial List are even more compelling than the reasons justifying the transfer to the Commercial List of the Moyse Litigation. That case was transferred to the Commercial List in January 2016 without opposition by Catalyst. In the Moyse Litigation, there were only three parties; the only causes of action advanced were breach of confidence and spoliation; and the issues were focussed on whether Mr. Moyse transferred Catalyst's confidential information to West Face, as well as the consequences associated with the conduct complained of by Catalyst. The New Litigation adds a number of new parties and causes of action that can only make it more suitable for management by the Commercial List. Finally, the Moyse Litigation began as an employment dispute of a kind typically handled by the regular list. The New Litigation, by contrast, is and has always been purely commercial litigation.

47. Moreover, many of the Defendants have commenced motions to dismiss, stay, and/or strike Catalyst's claim in the New Litigation based on prior proceedings before the Commercial List, and findings made in those proceedings by Justice Newbould.

48. In that regard, as this matter moves forward, all parties (including Catalyst) will benefit greatly from the special procedures adopted for the hearing of matters on the Commercial List, including 9:30 chambers appointments, expeditious hearing dates and case management. Catalyst frequently made use of 9:30 chambers appointments in both the Plan of Arrangement Application and the Moyse Litigation.

49. The eleven Defendants all agree that this matter should be transferred to the Commercial List. It is only the Plaintiff, Catalyst, that opposes this motion. That said, Catalyst cannot (and does not) seriously dispute that the matter meets the criteria for transfer to the Commercial List. In fact, on October 4, 2016 (after West Face and two other Defendants had already served Notices of Motion to transfer this action to the Commercial List), Catalyst's counsel sent a letter to The Honourable Regional Senior Justice Morawetz requesting case management for numerous reasons, including: (1) the number of parties and law firms involved; (2) the "multitude of motions" that are expected to be brought; (3) the "extensive timetabling required to set out production, discovery dates, and other pre-trial steps"; and (4) because the "subject matter of the Action is

complex". Catalyst further expressly recognized "the number of parties, the complexity of the matters at issue and the scale of the dispute".⁴⁹

50. In short, Catalyst has requested case management for many of the same reasons that this Court has previously stated weigh in favour of transferring a matter to the Commercial List. The principal distinction between case management on the Commercial List and ordinary civil case management is that through the former, the parties will also have the benefit of the general commercial expertise that is the hallmark of the Commercial List, where the closely related *Moyse* Litigation and Plan of Arrangement Application were litigated.

C. Catalyst Has No Good Reason to Oppose this Motion

51. Catalyst has indicated that its reason for opposing this motion is because it has requested case management on the regular list. Catalyst is in no position to rely upon that request, however, which was made after *West Face* and other Defendants had already commenced motions to transfer. Catalyst's late request for case management constitutes an improper effort to do an "end run" around these motions. There is no disadvantage or prejudice to Catalyst whatsoever in having this matter transferred to the Commercial List, and its tactical manoeuvring should be treated with disfavour.

52. Catalyst's argument for opposing this motion is misplaced, and Justice Morawetz has yet to accept Catalyst's request for case management in the regular list. Even if he had done so, however, Catalyst's efforts to oppose transferring this matter to the Commercial List would still be without merit. The very sorts of arguments Catalyst

⁴⁹ Letter dated October 4, 2016 from Rocco DiPucchio of Lax O'Sullivan Lisus Gottlieb LLP to The Honourable Regional Senior Justice Morawetz.

seeks to rely upon here have been rejected repeatedly, from the earliest days of the Commercial List.

53. For example, in the 1999 case of *Lehner v. Gottfried*, Justice Molloy heard and determined one of the first reported contested motions to transfer an action from the regular list to the Commercial List. The plaintiff took the position that she had "deliberately commenced her action on the regular civil list in Toronto", and that this Court should therefore "defer" to her choice of "forum".⁵⁰ Justice Molloy rejected this argument, holding that the Commercial List is not a separate "forum", that the caselaw dealing with deference to a plaintiff's choice of forum had no application,⁵¹ and that the plaintiff's decision to commence the action on the regular list was not a "compelling reason" to deny the defendant's motion.⁵²

54. Instead, Justice Molloy weighed the pros and cons of the Commercial List from the perspectives of all of the parties. Her Honour specifically considered the fact that the action was under case management on the regular list, and held that this was a "neutral factor" because "the administration of the Commercial List produces the same advantages as the case management system".⁵³ Thus, despite the fact that the action was already being case managed on the regular list, Justice Molloy held that the plaintiff had "failed to advance any reason for preferring the regular list or any disadvantage to her if the action is placed on the Commercial List".⁵⁴ On the other hand, Justice Molloy noted that the "particular expertise of the Commercial List" was a factor that was "clearly to the

⁵⁰ *Lehner*, at paras. 1 & 9.

⁵¹ *Lehner*, at para. 17.

⁵² *Lehner*, at para. 23.

⁵³ *Lehner*, at para. 21.

⁵⁴ *Lehner*, at para. 25.

defendant's benefit" given the commercial nature of the case.⁵⁵ Her Honour ordered that the action be transferred to the Commercial List.

55. Similarly, in the 2002 case of *Royal Bank v. Société Générale*, Justice Ground rejected an argument that case management on the regular list was a sufficient reason to deny a motion to transfer to the Commercial List:

I am not convinced that case management by case management masters on the Civil List is necessarily more efficient or more stringent than case management by a Commercial List Judge. In fact, the Commercial List Judge may take a more hands-on approach to case managing a proceeding and appointments with the Commercial List Judge are more readily obtainable.⁵⁶

56. In sum, the fact that case management of this action may be available on the regular list is not a relevant factor, let alone a dispositive factor, supporting Catalyst's opposition to the transfer of this proceeding to the Commercial List.

57. Catalyst may argue that because it served a Jury Notice in this case, a transfer to the Commercial List would not be appropriate. This argument is equally meritless – the existence of the Jury Notice is not a relevant concern when a motion to transfer is brought. Indeed, motions to transfer to the Commercial List have been approved repeatedly in cases involving jury notices.

58. As Justice Farley noted long ago in *Bank of Montreal v. Citak*, "[t]here is no technical reason why a jury trial could not be held for a Commercial List matter".⁵⁷ In that

⁵⁵ *Lehner*, at paras. 20-22.

⁵⁶ *Royal Bank*, at para. 3.

⁵⁷ *Bank of Montreal v. Citak*, 1997 CarswellOnt 4420 at para. 11 (Ct. J. (Gen. Div.)). Indeed, Justice Farley noted that he had been informed by Justice Blair that a jury civil fraud trial had been

case, Justice Farley granted a motion to transfer two related actions to the Commercial List, despite the fact that in one of those actions the plaintiff had served a jury notice. His Honour then considered whether the jury notice should be struck. Justice Farley ultimately struck the jury notice for various reasons.

59. Similarly, in the 2011 case of *Canadian National Railway v. Holmes*,⁵⁸ Justice Brown was faced with a motion to consolidate two related actions between Canadian National Railway ("**CN**") and one of its former employees, Scott Holmes, in relation to an alleged fraud perpetrated by Mr. Holmes on CN. The first of these actions had been initiated by CN in 2008, was proceeding in Toronto on the Commercial List, and was not the subject of a jury notice. The second action had been commenced in 2011 by Mr. Holmes and others in Hamilton and the plaintiffs had served a jury notice. Justice Brown determined that there would be a significant overlap of evidence in the two proceedings, which militated in favour of some form of joinder. Justice Brown also noted that the parties had "litigated for some time on the Commercial List, without protest about the venue". For this reason, he regarded the commencement of the second action in Hamilton "as more in the nature of a tactical step". Justice Brown ultimately ordered that the Hamilton action be transferred to the Commercial List so that the two actions could proceed and be heard one immediately after the other. Justice Brown made this order without striking the jury notice in the Hamilton action, despite the fact that he had been asked to do so by CN.⁵⁹

scheduled before the Commercial List for February 1998. West Face's counsel looked for evidence of this proceeding having taken place but could not find it.

⁵⁸ *Canadian National Railway v. Holmes*, 2011 CarswellOnt 7935 (S.C.J.) [*Canadian National*].
⁵⁹ *Canadian National*, at paras. 54-55.

60. Finally, in *Bell ExpressVu Ltd. Partnership v. Cohen*, the defendants brought motions to, among other things, *remove* three related actions from the Commercial List, on the grounds that they intended to raise constitutional issues and seek trial by jury. Justice Cumming dismissed the defendants' motion, stating: "These assertions do not in any way preclude the actions from remaining on the Commercial List".⁶⁰

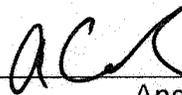
61. In sum, while West Face and various other Defendants have initiated motions to strike the Jury Notice in the case at bar, the current existence of the Jury Notice is no impediment to this motion to transfer. While the Defendants will argue that the Jury Notice should be struck for many of the same reasons that justify why this case should be transferred to the Commercial List (including complexity), the suitability of this matter to be determined by a jury can be dealt with at a later date, independently of this motion to transfer.

⁶⁰ *Bell ExpressVu Ltd. Partnership v. Cohen*, 2004 CarswellOnt 3952 at para. 11 (S.C.J. (Commercial List)).

PART IV ~ ORDER REQUESTED

62. West Face respectfully requests an Order transferring this action to the Commercial List.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of October, 2016.



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West Face Capital Inc.

SCHEDULE "A"

LIST OF AUTHORITIES

1. *771225 Ontario Inc. v. Bramco Holdings Co.*, [1992] O.J. No. 1772 (Ct. J. (Gen. Div.))
2. *Bank of Montreal v. Citak*, 1997 CarswellOnt 4420 (Ct. J. (Gen. Div.))
3. *Bell ExpressVu Ltd. Partnership v. Cohen*, 2004 CarswellOnt 3952 (S.C.J. (Commercial List))
4. *Canadian National Railway v. Holmes*, 2011 CarswellOnt 7935 (S.C.J.)
5. *Gyles v. Mytravel Canada Holidays Inc. (c.o.b. Sunquest Meetings and Incentives)*, [2006] O.J. No. 2497 (S.C.J.)
6. *Lehner v. Gottfried*, [1999] O.J. No. 4083 (S.C.J. (Commercial List))
7. *Maple Valley Acres Ltd. v. Canadian Imperial Bank of Commerce*, [1992] O.J. No. 2610 (Ct. J. (Gen. Div.))
8. *Piedra v. Tsx Inc.*, [2009] O.J. No. 5351 (Div. Ct.)
9. *Royal Bank v. Société Générale (Canada)*, 2002 CarswellOnt 3852 (S.C.J.)
10. *Toronto Dominion Bank v. Bank of Nova Scotia*, [2013] O.J. No. 4355 (S.C.J. (Commercial List)).

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

RULE 1 CITATION, APPLICATION AND INTERPRETATION

INTERPRETATION

General Principle

Rule 1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits. R.R.O. 1990, Reg. 194, r. 1.04 (1).

RULE 37 MOTIONS — JURISDICTION AND PROCEDURE

NOTICE OF MOTION

37.01 A motion shall be made by a notice of motion (Form 37A) unless the nature of the motion or the circumstances make a notice of motion unnecessary. R.R.O. 1990, Reg. 194, r. 37.01.

JURISDICTION TO HEAR A MOTION

Jurisdiction of Judge

37.02 (1) A judge has jurisdiction to hear any motion in a proceeding. R.R.O. 1990, Reg. 194, r. 37.02 (1).

Jurisdiction of a Master

(2) A master has jurisdiction to hear any motion in a proceeding, and has all the jurisdiction of a judge in respect of a motion, except a motion,

- (a) where the power to grant the relief sought is conferred expressly on a judge by a statute or rule;
- (b) to set aside, vary or amend an order of a judge;
- (c) to abridge or extend a time prescribed by an order that a master could not have made;
- (d) for judgment on consent in favour of or against a party under disability;
- (e) relating to the liberty of the subject;
- (f) under section 4 or 5 of the *Judicial Review Procedure Act*, or
- (g) in an appeal. R.R.O. 1990, Reg. 194, r. 37.02 (2).

Jurisdiction of Registrar

(3) The registrar shall make an order granting the relief sought on a motion for an order on consent, if,

- (a) the consent of all parties (including the consent of any party to be added, deleted or substituted) is filed;
- (b) the consent states that no party affected by the order is under disability; and
- (c) the order sought is for,
 - (i) amendment of a pleading, notice of application or notice of motion,

- (ii) addition, deletion or substitution of a party,
- (iii) removal of a lawyer as lawyer of record;
- (iv) setting aside the noting of a party in default,
- (v) setting aside a default judgment,
- (vi) discharge of a certificate of pending litigation,
- (vii) security for costs in a specified amount,
- (viii) re-attendance of a witness to answer questions on an examination,
- (ix) fulfilment of undertakings given on an examination, or
- (x) dismissal of a proceeding, with or without costs. O. Reg. 19/03, s. 8; O. Reg. 575/07, s. 21.

PLACE OF HEARING OF MOTIONS

37.03 (1) All motions shall be brought and heard in the county where the proceeding was commenced or to which it has been transferred under rule 13.1.02, unless the court orders otherwise. O. Reg. 14/04, s. 17; O. Reg. 438/08, s. 32.

(2) REVOKED: R.R.O. 1990, Reg. 194, r. 37.03 (3).

(3) SPENT: O. Reg. 14/04, s. 17.

MOTIONS — TO WHOM TO BE MADE

37.04 A motion shall be made to the court if it is within the jurisdiction of a master or registrar and otherwise shall be made to a judge. R.R.O. 1990, Reg. 194, r. 37.04; O. Reg. 19/03, s. 9.

HEARING DATE FOR MOTIONS

Where no practice direction

37.05 (1) At any place where no practice direction concerning the scheduling of motions is in effect, a motion may be set down for hearing on any day on which a judge or master is scheduled to hear motions. O. Reg. 770/92, s. 10.

Exception, lengthy hearing

(2) If a lawyer estimates that the hearing of the motion will be more than two hours long, a hearing date shall be obtained from the registrar before the notice of motion is served. O. Reg. 770/92, s. 10; O. Reg. 575/07, s. 3.

Urgent motion

(3) An urgent motion may be set down for hearing on any day on which a judge or master is scheduled to hear motions, even if a lawyer estimates that the hearing is likely to be more than two hours long. O. Reg. 770/92, s. 10; O. Reg. 575/07, s. 3.

CONTENT OF NOTICE

37.06 Every notice of motion (Form 37A) shall,

- (a) state the precise relief sought;
- (b) state the grounds to be argued, including a reference to any statutory provision or rule to be relied on; and

- (c) list the documentary evidence to be used at the hearing of the motion. R.R.O. 1990, Reg. 194, r. 37.06.

SERVICE OF NOTICE

Required as General Rule

37.07 (1) The notice of motion shall be served on any party or other person who will be affected by the order sought, unless these rules provide otherwise. R.R.O. 1990, Reg. 194, r. 37.07 (1); O. Reg. 260/05, s. 9 (1).

Where Not Required

(2) Where the nature of the motion or the circumstances render service of the notice of motion impracticable or unnecessary, the court may make an order without notice. R.R.O. 1990, Reg. 194, r. 37.07 (2).

(3) Where the delay necessary to effect service might entail serious consequences, the court may make an interim order without notice. R.R.O. 1990, Reg. 194, r. 37.07 (3).

(4) Unless the court orders or these rules provide otherwise, an order made without notice to a party or other person affected by the order shall be served on the party or other person, together with a copy of the notice of motion and all affidavits and other documents used at the hearing of the motion. O. Reg. 219/91, s. 3; O. Reg. 260/05, s. 9 (2).

Where Notice Ought to Have Been Served

(5) Where it appears to the court that the notice of motion ought to have been served on a person who has not been served, the court may,

- (a) dismiss the motion or dismiss it only against the person who was not served;
- (b) adjourn the motion and direct that the notice of motion be served on the person;
or
- (c) direct that any order made on the motion be served on the person. R.R.O. 1990, Reg. 194, r. 37.07 (5).

Minimum Notice Period

(6) Where a motion is made on notice, the notice of motion shall be served at least seven days before the date on which the motion is to be heard. R.R.O. 1990, Reg. 194, r. 37.07 (6); O. Reg. 171/98, s. 12; O. Reg. 438/08, s. 33.

FILING OF NOTICE OF MOTION

37.08 (1) Where a motion is made on notice, the notice of motion shall be filed with proof of service at least seven days before the hearing date in the court office where the motion is to be heard. R.R.O. 1990, Reg. 194, r. 37.08 (1); O. Reg. 171/98, s. 13; O. Reg. 438/08, s. 34.

(2) Where service of the notice of motion is not required, it shall be filed at or before the hearing. R.R.O. 1990, Reg. 194, r. 37.08 (2).

ABANDONED MOTIONS

37.09 (1) A party who makes a motion may abandon it by delivering a notice of abandonment. R.R.O. 1990, Reg. 194, r. 37.09 (1).

(2) A party who serves a notice of motion and does not file it or appear at the hearing shall be deemed to have abandoned the motion unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 37.09 (2).

(3) Where a motion is abandoned or is deemed to have been abandoned, a responding party on whom the notice of motion was served is entitled to the costs of the motion forthwith, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 37.09 (3).

MATERIAL FOR USE ON MOTIONS

Where Motion Record Required

37.10 (1) Where a motion is made on notice, the moving party shall, unless the court orders otherwise before or at the hearing of the motion, serve a motion record on every other party to the motion and file it, with proof of service, in the court office where the motion is to be heard, at least seven days before the hearing, and the court file shall not be placed before the judge or master hearing the motion unless he or she requests it or a party requisitions it. R.R.O. 1990, Reg. 194, r. 37.10 (1); O. Reg. 171/98, s. 14 (1); O. Reg. 438/08, s. 35 (1).

Contents of Motion Record

(2) The motion record shall contain, in consecutively numbered pages arranged in the following order,

- (a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter;
- (b) a copy of the notice of motion;
- (c) a copy of all affidavits and other material served by any party for use on the motion;
- (d) a list of all relevant transcripts of evidence in chronological order, but not necessarily the transcripts themselves; and
- (e) a copy of any other material in the court file that is necessary for the hearing of the motion. R.R.O. 1990, Reg. 194, r. 37.10 (2).

Responding Party's Motion Record

(3) Where a motion record is served a responding party who is of the opinion that it is incomplete may serve on every other party, and file, with proof of service, in the court office where the motion is to be heard, at least four days before the hearing, a responding party's motion record containing, in consecutively numbered pages arranged in the following order,

- (a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter; and
- (b) a copy of any material to be used by the responding party on the motion and not included in the motion record. R.R.O. 1990, Reg. 194, r. 37.10 (3); O. Reg. 171/98, s. 14 (2); O. Reg. 438/08, s. 35 (2).

Material may be Filed as Part of Record

(4) A notice of motion and any other material served by a party for use on a motion may be filed, together with proof of service, as part of the party's motion record and need not be filed separately. R.R.O. 1990, Reg. 194, r. 37.10 (4).

Transcript of Evidence

(5) A party who intends to refer to a transcript of evidence at the hearing of a motion shall file a copy of the transcript as provided by rule 34.18. R.R.O. 1990, Reg. 194, r. 37.10 (5).

Factum

(6) A party may serve on every other party a factum consisting of a concise argument stating the facts and law relied on by the party. O. Reg. 14/04, s. 18.

(7) The moving party's factum, if any, shall be served and filed with proof of service in the court office where the motion is to be heard at least seven days before the hearing. O. Reg. 394/09, s. 15 (1).

(8) The responding party's factum, if any, shall be served and filed with proof of service in the court office where the motion is to be heard at least four days before the hearing. O. Reg. 394/09, s. 15 (2).

(9) REVOKED: O. Reg. 394/09, s. 15 (3).

Refusals and Undertakings Chart

(10) On a motion to compel answers or to have undertakings given on an examination or cross-examination satisfied,

- (a) the moving party shall serve on every other party to the motion and file with proof of service, in the court office where the motion is to be heard, at least seven days before the hearing, a refusals and undertakings chart (Form 37C) that sets out,
 - (i) the issue that is the subject of the refusal or undertaking and its connection to the pleadings or affidavit,
 - (ii) the question number and a reference to the page of the transcript where the question appears, and
 - (iii) the exact words of the question; and
- (b) the responding party shall serve on the moving party and every other party to the motion and file with proof of service, in the court office where the motion is to be heard, at least four days before the hearing, a copy of the undertakings and refusals chart that was served by the moving party completed so as to show,
 - (i) the answer provided, or
 - (ii) the basis for the refusal to answer the question or satisfy the undertaking. O. Reg. 132/04, s. 8; O. Reg. 438/08, s. 35 (5, 6).

CONFIRMATION OF MOTION***Confirmation of Motion***

37.10.1 (1) A party who makes a motion on notice to another party shall,

- (a) confer or attempt to confer with the other party;

- (b) not later than 2 p.m. three days before the hearing date, give the registrar a confirmation of motion (Form 37B) by,
 - (i) sending it by fax, or by e-mail if available in the court office, or
 - (ii) leaving it at the court office; and
- (c) send a copy of the confirmation of motion to the other party by fax or e-mail. O. Reg. 14/04, s. 19; O. Reg. 438/08, s. 36.

Effect of Failure to Confirm

(2) If no confirmation is given, the motion shall not be heard, except by order of the court. O. Reg. 14/04, s. 19.

Duty to Update

(3) A party who has given a confirmation of motion and later determines that the confirmation is no longer correct shall immediately,

- (a) give the registrar a corrected confirmation of motion (Form 37B) by,
 - (i) sending it by fax, or by e-mail if available in the court office, or
 - (ii) leaving it at the court office; and
- (b) send a copy of the corrected confirmation of motion to the other party by fax or e-mail. O. Reg. 14/04, s. 19.

HEARING IN ABSENCE OF PUBLIC

37.11 (1) A motion may be heard in the absence of the public where,

- (a) the motion is to be heard and determined without oral argument;
- (b) because of urgency, it is impractical to have the motion heard in public;
- (c) the motion is to be heard by telephone conference or video conference;
- (d) the motion is made in the course of a pre-trial conference or case conference; or
- (e) the motion is before a single judge of an appellate court. R.R.O. 1990, Reg. 194, r. 37.11 (1); O. Reg. 465/93, s. 4 (1); O. Reg. 24/00, s. 7; O. Reg. 170/14, s. 9.

(2) The hearing of all other motions shall be open to the public, except as provided in section 135 of the *Courts of Justice Act*, in which case the presiding judge or officer shall endorse on the notice of motion leave for a hearing in the absence of the public. R.R.O. 1990, Reg. 194, r. 37.11 (2).

37.12 Revoked: O. Reg. 288/99, s. 15.

HEARING WITHOUT ORAL ARGUMENT

Consent motions, unopposed motions and motions without notice

37.12.1 (1) Where a motion is on consent, unopposed or without notice under subrule 37.07 (2), the motion may be heard in writing without the attendance of the parties, unless the court orders otherwise. O. Reg. 465/93, s. 4 (2).

(2) Where the motion is on consent, the consent and a draft order shall be filed with the notice of motion. O. Reg. 766/93, s. 1 (1).

(3) Where the motion is unopposed, a notice from the responding party stating that the party does not oppose the motion and a draft order shall be filed with the notice of motion. O. Reg. 766/93, s. 1 (1).

Opposed Motions in Writing

(4) Where the issues of fact and law are not complex, the moving party may propose in the notice of motion that the motion be heard in writing without the attendance of the parties, in which case,

- (a) the motion shall be made on at least fourteen days notice;
- (b) the moving party shall serve with the notice of motion and immediately file, with proof of service in the court office where the motion is to be heard, a motion record, a draft order and a factum entitled factum for a motion in writing, setting out the moving party's argument;
- (c) the motion may be heard in writing without the attendance of the parties, unless the court orders otherwise. O. Reg. 465/93, s. 4 (2); O. Reg. 766/93, s. 1 (2).

(5) Within ten days after being served with the moving party's material, the responding party shall serve and file, with proof of service, in the court office where the motion is to be heard,

- (a) a consent to the motion;
- (b) a notice that the responding party does not oppose the motion;
- (c) a motion record, a notice that the responding party agrees to have the motion heard and determined in writing under this rule and a factum entitled factum for a motion in writing, setting out the party's argument; or
- (d) a notice that the responding party intends to make oral argument, along with any material intended to be relied upon by the party. O. Reg. 465/93, s. 4 (2).

(6) Where the responding party delivers a notice under subrule (5) that the party intends to make oral argument, the moving party may either attend the hearing and make oral argument or not attend and rely on the party's motion record and factum. O. Reg. 465/93, s. 4 (2).

DISPOSITION OF MOTION

37.13 (1) On the hearing of a motion, the presiding judge or officer may grant the relief sought or dismiss or adjourn the motion, in whole or in part and with or without terms, and may,

- (a) where the proceeding is an action, order that it be placed forthwith, or within a specified time, on a list of cases requiring speedy trial; or
- (b) where the proceeding is an application, order that it be heard at such time and place as are just. R.R.O. 1990, Reg. 194, r. 37.13 (1).

(2) A judge who hears a motion may,

- (a) in proper case, order that the motion be converted into a motion for judgment; or
- (b) order the trial of an issue, with such directions as are just, and adjourn the motion to be disposed of by the trial judge. R.R.O. 1990, Reg. 194, r. 37.13 (2).

(3) Where on a motion a judge directs the trial of an issue, subrules 38.10 (2) and (3) (issue treated as action) apply with necessary modifications. R.R.O. 1990, Reg. 194, r. 37.13 (3).

Exception, motions in estate matters

(4) Clause (2) (b) and subrule (3) do not apply to motions under Rules 74 and 75. O. Reg. 484/94, s. 7.

SETTING ASIDE, VARYING OR AMENDING ORDERS

Motion to Set Aside or Vary

37.14 (1) A party or other person who,

- (a) is affected by an order obtained on motion without notice;
- (b) fails to appear on a motion through accident, mistake or insufficient notice; or
- (c) is affected by an order of a registrar,

may move to set aside or vary the order, by a notice of motion that is served forthwith after the order comes to the person's attention and names the first available hearing date that is at least three days after service of the notice of motion. R.R.O. 1990, Reg. 194, r. 37.14 (1); O. Reg. 132/04, s. 9.

(2) On a motion under subrule (1), the court may set aside or vary the order on such terms as are just. R.R.O. 1990, Reg. 194, r. 37.14 (2).

Order Made by Registrar

(3) A motion under subrule (1) or any other rule to set aside, vary or amend an order of a registrar may be made to a judge or master, at a place determined in accordance with rule 37.03 (place of hearing of motions). R.R.O. 1990, Reg. 194, r. 37.14 (3).

Order Made by Judge

(4) A motion under subrule (1) or any other rule to set aside, vary or amend an order of a judge may be made,

- (a) to the judge who made it, at any place; or
- (b) to any other judge, at a place determined in accordance with rule 37.03 (place of hearing of motions). R.R.O. 1990, Reg. 194, r. 37.14 (4).

Order Made by Master

(5) A motion under subrule (1) or any other rule to set aside, vary or amend an order of a master may be made,

- (a) to the master who made it, at any place; or
- (b) to any other master or to a judge, at a place determined in accordance with rule 37.03 (place of hearing of motions). R.R.O. 1990, Reg. 194, r. 37.14 (5).

Order Made in Court of Appeal or Divisional Court

(6) A motion under subrule (1) or any other rule to set aside, vary or amend an order made by a judge or panel of the Court of Appeal or Divisional Court may be made,

- (a) where the order was made by a judge, to the judge who made it or any other judge of the court; or

- (b) where the order was made by a panel of the court, to the panel that made it or any other panel of the court. R.R.O. 1990, Reg. 194, r. 37.14 (6).

MOTIONS IN A COMPLICATED PROCEEDING OR SERIES OF PROCEEDINGS

37.15 (1) Where a proceeding involves complicated issues or where there are two or more proceedings that involve similar issues, the Chief Justice or Associate Chief Justice of the Superior Court of Justice, a regional senior judge of the Superior Court of Justice or a judge designated by any of them may direct that all motions in the proceeding or proceedings be heard by a particular judge, and rule 37.03 (place of hearing of motions) does not apply to those motions. R.R.O. 1990, Reg. 194, r. 37.15 (1); O. Reg. 292/99, ss. 2 (3), 4.

(1.1) A judge who is directed to hear all motions under subrule (1) may refer to a master any motion within the jurisdiction of a master under subrule 37.02 (2) unless the judge who made the direction under subrule (1) directs otherwise. O. Reg. 348/97, s. 2.

(1.2) A judge who is directed to hear all motions under subrule (1) and a master to whom a motion is referred under subrule (1.1) may give such directions and make such procedural orders as are necessary to promote the most expeditious and least expensive determination of the proceeding. O. Reg. 438/08, s. 37 (1); O. Reg. 394/09, s. 16.

(2) A judge who hears motions pursuant to a direction under subrule (1) shall not preside at the trial of the actions or the hearing of the applications except with the written consent of all parties. R.R.O. 1990, Reg. 194, r. 37.15 (2); O. Reg. 438/08, s. 37 (2).

PROHIBITING MOTIONS WITHOUT LEAVE

37.16 On motion by any party, a judge or master may by order prohibit another party from making further motions in the proceeding without leave, where the judge or master on the hearing of the motion is satisfied that the other party is attempting to delay or add to the costs of the proceeding or otherwise abuse the process of the court by a multiplicity of frivolous or vexatious motions. R.R.O. 1990, Reg. 194, r. 37.16.

MOTION BEFORE COMMENCEMENT OF PROCEEDING

37.17 In an urgent case, a motion may be made before the commencement of a proceeding on the moving party's undertaking to commence the proceeding forthwith. R.R.O. 1990, Reg. 194, r. 37.17.

THE CATALYST CAPITAL GROUP INC.
Plaintiff

-and- VIMPELCOM LTD. et al.
Defendants

Court File No. CV-16-553800

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

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