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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff/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 Parties

FACTUM OF WEST FACE CAPITAL INC.
MOTION TO STRIKE FOR ABUSE OF PROCESS
(August 16-18, 2017)

July 21, 2017

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PART I ~ OVERVIEW

1. After two years of litigation and a hard fought trial before Justice Newbould, the claim by The Catalyst Capital Group Inc. ("**Catalyst**") that West Face Capital Inc. ("**West Face**") robbed it of the opportunity to buy WIND Mobile Inc. ("**WIND**") was dismissed. This initial claim by Catalyst was based on an alleged breach of confidence. Justice Newbould carefully considered the evidence of the witnesses and contemporaneous documents, and held that there had been no breach of confidence. Instead, he held that Catalyst's own duplicity and intransigence, and not anything done by West Face, were to blame for Catalyst's failure to acquire WIND. Unable or unwilling to accept that result, Catalyst has not only appealed Justice Newbould's ruling, but has also pursued this action positing an alternative theory for how it lost WIND. This new

theory could and should have been advanced in the first case, rather than by pursuing litigation in installments. In any event, the theory is defeated by Justice Newbould's finding that Catalyst failed in its effort to acquire WIND because of its own mistakes and misconduct, and not because of anything that West Face did. Catalyst's latest claim is barred by the doctrines of issue estoppel, cause of action estoppel and abuse of process, and should be permanently stayed or dismissed.

2. In the summer of 2014, both Catalyst and West Face were pursuing the acquisition of WIND from its controlling shareholder, VimpelCom Inc. ("**VimpelCom**"). Catalyst enjoyed a period of exclusive negotiations with VimpelCom for WIND in July and August 2014, but was unable to reach an agreement when it refused to agree to, or even to negotiate, VimpelCom's request for a break fee to protect VimpelCom against the risk of the Government of Canada not approving or delaying the sale. Shortly thereafter, West Face succeeded where Catalyst could not, by participating with a number of other firms (the "**Consortium**") in a successful bid for WIND after Catalyst's period of exclusivity had expired.

3. Rather than accept responsibility for its own errors in judgment and intransigence, Catalyst immediately turned to the courts. Having already sued West Face in June 2014 after West Face hired Catalyst's most junior analyst, Brandon Moyse, Catalyst amended its Claim to allege that the Consortium's success in acquiring WIND was attributable to the misuse of confidential information purloined from Catalyst by Mr. Moyse. Catalyst asserted claims for a constructive trust and for damages.

4. The stakes in the Moyse action escalated dramatically in December 2015, when the Consortium announced that it had reached an agreement to sell WIND to Shaw Communications Inc. for $1.6 billion. This represented a $1.3 billion increase over the $300 million valuation that formed the basis of the Consortium's acquisition of WIND just 15 months earlier. Catalyst opposed the approval by the Court of a Plan of Arrangement to consummate the sale of WIND based on: (i) the constructive trust it had asserted over the interest of West Face in WIND in the Moyse action; and (ii) a previously unasserted claim for inducing a breach of Catalyst's exclusivity agreement with VimpelCom. The latter claim lies at the heart of the case at bar.

5. In assessing Catalyst's opposition to the approval by the Court of the proposed Plan of Arrangement, Justice Newbould found that Catalyst had acted in bad faith by choosing to "lie in the weeds" rather than assert its claim for inducing breach in a timely manner. In fact, he held that the explanation for Catalyst's delay in asserting this claim advanced by James Riley, Catalyst's Chief Operating Officer and an experienced lawyer, "was not true". Justice Newbould prohibited Catalyst from asserting the inducing breach claim in opposition to the Plan of Arrangement, but gave Catalyst an opportunity to amend its Claim in the Moyse action and assert it there.

6. Catalyst made the tactical choice not to amend its Claim in the Moyse action to assert its claim for inducing breach. While Catalyst now claims that Justice Newbould prohibited it from asserting its inducing breach claim in the Moyse action, this is simply not true. In fact, Catalyst was invited explicitly to amend its Claim in the Moyse action, and was asked repeatedly by counsel to West Face if it was pursuing a claim in

the Moyse action for inducing breach. Catalyst never suggested that it was not permitted to do so until after commencing this inducing breach litigation.

7. Catalyst chose not to amend its Claim in the Moyse action to assert a claim for inducing breach in September 2014, when Catalyst first learned of the underlying events in the case at bar; or in May 2015, when Mr. Riley admitted on cross-examination that Catalyst was considering a claim for inducing breach of contract; or in January 2016, after being chastised by Justice Newbould for choosing to "lie in the weeds" for so long; or in February 2016 when it was invited to do so after the Plan of Arrangement had been resolved. Instead, Catalyst waited until May 31, 2017, one week before the commencement of trial in the Moyse action, to commence the case at bar. West Face immediately took the position that this action is an abuse of process and advised Catalyst that it would bring a motion in due course to strike Catalyst's new Claim, with costs on a full indemnity basis.

8. The Moyse action went to trial on June 6, 2016 before Justice Newbould. Catalyst was not prohibited from leading evidence, or from making any arguments that it may have wished to advance. Justice Newbould dismissed Catalyst's claim in the Moyse action in its entirety. In addressing Catalyst's claim for breach of confidence, he made two findings that are fatal to Catalyst's claims in the case at bar:

(a) Catalyst did not lose its bid for WIND because of anything done by West Face. Rather, Catalyst lost its bid because it refused to accept VimpelCom's request for a $5-20 million break fee to cover the risks

associated with regulatory approval for the sale of VimpelCom's interest in WIND being delayed or denied;[1] and

(b) even if Catalyst had been able to sign an agreement to acquire WIND, it could never have closed the acquisition. Catalyst required regulatory concessions before it would have closed an acquisition of WIND, and the Government of Canada had categorically refused to grant the concessions in question.[2]

9. These findings are as fatal to Catalyst's claims in the case at bar as they were to Catalyst's claims in the Moyse action. As such, Catalyst's claims in this action are barred by the doctrines of issue estoppel, cause of action estoppel, and abuse of process, and must be permanently stayed or dismissed.

PART II ~ THE FACTS

A. Background to the WIND Opportunity

10. In 2013, WIND was a relatively new Canadian wireless telecommunications company owned by VimpelCom and the Defendant Globalive Capital Inc. ("**Globalive**"). As VimpelCom was Dutch-headquartered and mostly Russian-owned, to satisfy the federal government's Canadian ownership requirements,

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1 *Catalyst v. Moyse et. al*, reasons for Judgment of Justice Newbould dated August 18, 2016, paras. 127-130 [Trial Reasons], West Face Motion Record ["MR"], Exhibit 1, pp. 122-123.

2 Trial Reasons, para. 131, MR Exhibit 1, pp. 123-124.

Globalive held the majority of the voting equity despite the fact that VimpelCom held the majority of the total equity. VimpelCom also held $1.3 billion in shareholder debt.[3]

11. The government's ownership restrictions foiled VimpelCom's efforts to obtain control of WIND. In late 2013 VimpelCom decided to sell its debt and equity interests in WIND. By the spring of 2014, VimpelCom had written off its interest in WIND, and its "asking price" for the sale of its interest in WIND was based on a $300 million enterprise value for the entire company, failing which VimpelCom was prepared to pursue CCAA proceedings. This valuation represented a deep discount on VimpelCom's investment in WIND. VimpelCom's desire to sell was well-known in the industry, and Catalyst and West Face both had preliminary discussions with VimpelCom in late 2013 and early 2014.[4]

B. West Face's Hiring of Brandon Moyse in Spring 2014

12. In early 2014, Brandon Moyse was working as a junior analyst at Catalyst. In March 2014, Moyse was assigned to Catalyst's internal "telecom" deal team following the departure of another Catalyst analyst. At the time, Catalyst's Partners were considering pursuing an acquisition of WIND in order to combine it with Mobilicity (another struggling Canadian wireless telecommunications company in which Catalyst held debt).[5] Catalyst only obtained access to the WIND data room and commenced due diligence in early May 2014, and on May 16, 2014, Mr. Moyse left for a vacation in

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3 Affidavit of Andrew Carlson, sworn December 7, 2016, para. 6 [Carlson Affidavit], MR Tab B, pp. 30-32; Trial Reasons, paras. 17-26, MR Exhibit 1, pp. 91-93.

4 Carlson Affidavit, para. 6, MR Tab B, pp. 30-32; Trial Reasons, paras. 22-30, MR Exhibit 1, pp. 92-93.

5 Trial Reasons, paras. 40-41, MR Exhibit 1, p. 96.

Asia.[6] On May 24 – before he had even returned from vacation – Mr. Moyse resigned from Catalyst in order to accept a job offer from West Face. On Monday, May 26, Mr. Moyse returned to Catalyst to begin serving out the 30-day notice period provided for in his Employment Agreement with Catalyst. Mr. Moyse told Mr. Riley that he was moving to West Face. Mr. Moyse was immediately sent home and cut off from accessing Catalyst's servers and emails. He was completely shut out of Catalyst from that day onward.[7]

13. Just four days later, on May 30, 2014, Catalyst's counsel wrote to West Face seeking to enforce the non-competition covenant in Mr. Moyse's Employment Agreement with Catalyst, and expressing concerns about confidentiality.[8] During a subsequent conversation with counsel for West Face on June 18, 2014, Catalyst's counsel specifically adverted to a concern about Mr. Moyse's work on an active "telecom file" while at Catalyst, which West Face assumed was WIND. West Face therefore erected a confidentiality wall before Mr. Moyse started working at West Face on Monday, June 23, in order to ensure that he had no communications with anyone at West Face about WIND.[9] Mr. Moyse was also warned by West Face's General Counsel, by its Chief Compliance Officer and by one of its Partners about the importance of protecting and not sharing Catalyst's confidential information.[10] West Face's counsel advised Catalyst's counsel immediately on June 19 that these safeguards had been put into place. Apparently unsatisfied with West Face's assurances, Catalyst sued to

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6 Trial Reasons, paras. 52, 76, MR Exhibit 1, pp. 100, 106-107.
7 Trial Reasons, para. 61, MR Exhibit 1, p. 103.
8 Trial Reasons, para. 62, MR Exhibit 1, p. 103.
9 Trial Reasons, paras. 63-65, MR Exhibit 1, pp. 103-104.
10 Trial Reasons, para. 65, MR Exhibit 1, pp. 103-104.

enforce the non-competition clause in Mr. Moyse's Employment Agreement with Catalyst on June 25, 2014.

14. Mr. Moyse worked at West Face from June 23 to July 16, 2014, following which he was placed on leave as a result of an Interim Order made on consent pending the hearing of Catalyst's motion for an interlocutory injunction prohibiting Mr. Moyse from working at West Face during the six month period of his non-compete covenant. Mr. Moyse never returned to West Face, and accordingly worked there for a period of only three weeks. Mr. Moyse never worked on any matters for West Face related to the telecommunications industry.[11] In the meantime, both Catalyst and West Face had been independently pursuing an acquisition of WIND.

15. The evidence at trial in the Moyse action demonstrated beyond peradventure that Mr. Moyse shared no confidential information of Catalyst concerning WIND with anyone at West Face at any time.

C. West Face Participates in the Acquisition of WIND After Catalyst's Efforts to Do so Fail

16. Catalyst's strategy for WIND hinged on obtaining significant regulatory concessions from the Government of Canada. At the time VimpelCom put WIND up for sale, WIND was effectively prohibited from selling or otherwise transferring its wireless spectrum to any of the incumbent Canadian wireless companies: Rogers, Bell or Telus. However, Catalyst was not willing to acquire WIND without a commitment from the Government of Canada that after five years of owning and operating WIND, Catalyst would not be prevented from selling WIND or its spectrum to an incumbent. Catalyst's

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[11] Trial Reasons, paras. 66-67, MR Exhibit 1, p. 104.

Founder, CEO, and Managing Partner Newton Glassman strongly believed that the acquisition price and cost of necessary and expensive capital upgrades for WIND could not be financed without this concession from the Government of Canada.[12]

17. Catalyst and its experienced government relations advisor, Bruce Drysdale, solicited government representatives for this concession on no less than five occasions. On every occasion, Catalyst was told unambiguously and unconditionally that the concession it was demanding would not be granted. Catalyst was told this in person at meetings with government representatives on March 27 and May 12, 2014. It was told this on three separate occasions following private meetings or conversations between Mr. Drysdale and senior representatives of the government on May 7, July 25 and August 3, 2014. On this final occasion, Mr. Drysdale reported to Catalyst that according to senior officials of Industry Canada, "Minister [of Industry] Moore and PM Harper are entrenched and there will be no flip flop".[13] In addition to these rejections by government officials, Catalyst's experienced regulatory counsel at Faskens advised Catalyst on May 19, 2014 that any future proposed transfer of spectrum to an incumbent was "most unlikely to succeed".[14]

18. On July 23, 2014, Catalyst and VimpelCom entered into an exclusivity agreement. That agreement was limited in scope and in duration, and simply prohibited VimpelCom from *negotiating* with any other party during the term of that agreement. The term of that agreement was subsequently extended multiple times and ultimately

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12 Trial Reasons, paras. 76-79, MR Exhibit 1, pp. 106-108.
13 CCG0025843, MR Exhibit 41, Tab 15, p. 5839-5841.
14 Glassman Cross, June 7, 2016, pp. 472:24-476:19, MR Exhibit 62, pp. 6631-6635.

expired on August 18, 2014.[15] On August 7, 2014, three members of the Consortium – the Defendants Tennenbaum Capital Partners LLC, West Face and LG Capital Investors LLC – submitted an unsolicited offer to buy VimpelCom's stake in WIND to VimpelCom's negotiator, Felix Saratovsky.[16] However, there was no evidence led at the trial of the Moyse action that VimpelCom's Board was ever made aware of the Consortium's unsolicited offer during the exclusivity period. Catalyst chose not to call Mr. Saratovsky, or any member of VimpelCom's Board as witnesses at trial in the Moyse action, to provide this critical piece of evidence or to otherwise shed light on VimpelCom's decision-making process.

19. West Face was not a party to, and did not receive at the time, Catalyst's exclusivity agreement with VimpelCom. Moreover, that agreement did not somehow prohibit West Face or other members of the Consortium from making unsolicited offers to VimpelCom. Critically, Catalyst was aware as early as August or September 2014 (over a year and a half before the June 2016 trial of the Moyse action) that Consortium members had made an unsolicited offer during Catalyst's exclusive negotiations with Vimplecom. This was not a late-breaking revelation that only occurred to Catalyst shortly before these proceedings commenced in June 2016. Catalyst's chief negotiator, Gabriel de Alba, admitted on discovery and at trial that after Catalyst's exclusivity expired in

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15 Trial Reasons, para. 30, MR Exhibit 1, p. 93.

16 Trial Reasons, paras. 31, 103-114, MR Exhibit 1, pp. 94, 115-119; Glassman Cross, June 7, 2016, p. 515:5-14, MR Exhibit 62, p. 6674.

August 2014, he was informed of the offer by VimpelCom's external counsel at Bennett Jones LLP.[17]

20. Catalyst's negotiations with VimpelCom continued after the August 7 offer, and in fact on August 8, 2014 VimpelCom agreed to further extend Catalyst's period of exclusivity to August 18, 2014. Eventually, however, VimpelCom requested that Catalyst agree to pay a break fee in the range of $5 to $20 million if regulatory approval of the acquisition was not granted within 60 days.[18] Catalyst made the tactical choice to reject VimpelCom's request for this modest break fee, cut off communications with VimpelCom, and let its period of exclusivity expire, in the hope that VimpelCom would have to compromise for lack of better options.[19] But Catalyst had miscalculated. After exclusivity expired, the Consortium – which ultimately included West Face, Tennenbaum, LG Capital and Globalive – made a more detailed offer that resulted in the Consortium acquiring WIND on September 16, 2014.[20]

21. The alleged breach by VimpelCom of its exclusivity agreement with Catalyst lies at the heart of Catalyst's claims in the case at bar. Catalyst alleges that West Face and other members of the Consortium induced VimpelCom to breach the exclusivity agreement, received confidential information from the Defendants UBS and VimpelCom concerning the existence and terms of the exclusivity agreement and Catalyst's negotiations with VimpelCom, and in doing so gained unfair advantage that

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17 Carlson Affidavit, para. 9, MR Tab B, pp. 33-36; De Alba Cross, June 6, 2016, pp. 238:18-243:17, MR Exhibit 5, pp. 188-193.

18 Trial Reasons, paras. 30, 128-129, MR Exhibit 1, pp. 93, 123.

19 Glassman Cross, June 7, 2016, pp. 540:25-544:4, MR Exhibit 62, p. 6699-6703.

20 Trial Reasons, para. 3, MR Exhibit 1, p. 86; Carlson Affidavit, para. 18, MR Tab B, pp. 38-43; Griffin Affidavit sworn March 7, 2015, at para. 80, MR Exhibit 9, pp 632-633.

resulted in the Consortium acquiring WIND on September 16, 2014. Critically, as will be described below, these subjects were all explored with West Face's witnesses at the trial of the Moyse action and should have been pleaded in that proceeding.

22. Catalyst's allegations in the case at bar are flatly inconsistent with the findings of Justice Newbould in the Moyse action concerning what West Face knew and why Catalyst failed to acquire WIND. Specifically, Justice Newbould found as facts that:

(a) West Face never knew for sure that Catalyst was the bidder for WIND, but merely suspected that it was based on information circulating in the marketplace, including Catalyst's own warning directly to West Face that Mr. Moyse had been working on a "telecom file";[21]

(b) The Consortium's offer played no role in VimpelCom's request for a break fee of $5 to $20 million. VimpelCom asked for this break fee as protection against ongoing operating losses it would incur if regulatory approval of the sale was not granted on a timely basis. Catalyst's refusal to even consider such a break fee, and not anything done by the Consortium, caused its failure to acquire WIND;[22] and

(c) Catalyst would not have proceeded with its proposed acquisition of WIND unless it obtained significant regulatory concessions from the Government

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21 Trial Reasons, para. 89-90, MR Exhibit 1, pp. 110-111.

22 Trial Reasons, paras. 127-130, MR Exhibit 1, pp. 122-123.

of Canada, while VimpelCom was unwilling to permit Catalyst to seek any such regulatory contingency.[23]

23. There was extensive evidence led at trial that supported Justice Newbould's findings. Representatives of West Face, Tennenbaum, and LG Capital all testified that they surmised, but had not been told that Catalyst was the party in exclusivity with VimpelCom.[24] With regard to why Catalyst's proposed transaction with VimpelCom failed, Catalyst's Partners Mr. Glassman and Mr. Riley conceded at trial that their deal with VimpelCom failed because Catalyst refused to accept, or even to negotiate, the modest break fee that VimpelCom had requested.[25]

24. The evidence concerning Catalyst's inability to complete its proposed transaction with VimpelCom was even more damning. VimpelCom was very concerned about regulatory approvals and did not want Catalyst doing anything to jeopardize or delay the receipt of those approvals.[26] For this reason, the form of Share Purchase Agreement that Catalyst and VimpelCom had negotiated prohibited Catalyst from even seeking regulatory concessions in the interim period between signing and closing. As Catalyst's chief negotiator Mr. De Alba conceded in cross-examination, under the form of agreement the parties had agreed to, Catalyst "would not have been allowed to go and seek concessions from the government until after closing about the ability to sell

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23 Trial Reasons, para. 131, MR Exhibit 1, pp. 123-124.

24 Griffin Chief, June 8, 2016, p. 762:11-21, MR Exhibit 65, p. 6885; Griffin Cross, June 9, 2016, pp. 1031:7-1033:15, MR Exhibit 66, pp. 7045-7047; Leitner Cross, June 9, 2016, pp. 916:20-920:15, MR Exhibit 70, pp. 7259-7263; Burt Cross, June 9, 2016, pp. 848:10-849:25, MR Exhibit 68, pp. 7182-7183; and Burt Cross, June 9, 2016, pp. 855:22-858:7, MR Exhibit 68, pp. 7189-7192.

25 Glassman Cross, June 7, 2016, pp. 540:25-544:4, MR Exhibit 62, pp. 6699-6703; Riley Cross, June 8, 2016, pp. 601:20-602:3, MR Exhibit 64, pp. 6769-6770.

26 De Alba Cross, June 7, 2016, pp. 281:16-282:25, MR Exhibit 60, pp. 6433-6434.

spectrum to an incumbent".[27] The problem, according to Catalyst's investment thesis, was that regulatory concessions were required in order to make the WIND investment viable.[28] Mr. De Alba and Mr. Glassman both conceded in cross-examination that Catalyst's plan, if it had entered its proposed Agreement with VimpelCom, "was to sign the SPA and even though the government said they wouldn't give [Catalyst] concessions, [Catalyst was] going to try and get concessions before the deal closed".[29] Most critically of all, Mr. De Alba conceded that "if Catalyst had not obtained any of the concessions [Catalyst was seeking], [Catalyst] would not have proceeded to close [the] deal to acquire WIND".[30]

25. In short, Catalyst's plan was to sign the Share Purchase Agreement with VimpelCom, immediately breach the prohibition contained in that Agreement against Catalyst making any effort whatsoever to seek or obtain regulatory concessions in the period prior to closing, and then to back out of the deal if these concessions could not be obtained. Catalyst formulated and implemented this duplicitous strategy even though the Government and Catalyst's own experienced advisors had stated repeatedly that the concessions demanded by Catalyst would never be granted. Justice Newbould's critical finding that Catalyst could never have acquired WIND, regardless of what West Face did, was amply supported by the evidence.

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27 De Alba Cross, June 7, 2016, p. 300:3-7; see also p. 282:15-25, MR Exhibit 60, p. 6452 and p. 6434.

28 Glassman Cross, June 7, 2016, pp. 415:12-417:23; see also p. 470:1-17, MR Exhibit 62, pp. 6574-6576 and 6629.

29 De Alba Cross, June 7, 2016, p. 279:11-25, MR Exhibit 60, p. 6431; Glassman Cross, June 7, 2016, p. 507:13-19, MR Exhibit 62, p. 6666.

30 De Alba Cross, June 7, 2016, p. 280:1-281:7, MR Exhibit 60, pp. 6432-6433.

D. Catalyst Chooses to "Lie in the Weeds"

26. Following the announcement of the Consortium's acquisition of WIND, Catalyst amended its Claim in the Moyse action on October 9, 2014. The Amended Claim alleged that Moyse had disclosed confidential information concerning Catalyst's plans for WIND, which enabled West Face and the Consortium to best Catalyst's offer.[31] Catalyst made the tactical choice not to allege that VimpelCom breached the exclusivity agreement, or that West Face had induced VimpelCom to do so, despite being aware at that time of the very facts it relied upon almost two years later to assert such a claim. It chose instead, in the words of Justice Newbould (discussed in more detail below), to "lie in the weeds".[32]

27. Catalyst further amended its Claim in the Moyse action on December 16, 2014 to add claims for a constructive trust and a tracing remedy. Again, it chose at that time not to assert the claims that it now makes in the case at bar.[33]

28. On January 13, 2015, Catalyst launched a motion in the Moyse action to enjoin West Face from exercising any role in the management of WIND, and to appoint an Independent Supervising Solicitor to forensically analyze the computers and other electronic devices of West Face in order to determine whether West Face had received any confidential information of Catalyst from Mr. Moyse concerning WIND.[34] In support of that motion, Catalyst filed the affidavit of Mr. Riley who, as stated above, is its Chief

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31 Carlson Affidavit, para. 8, MR Tab B, p. 33; Catalyst's Amended Statement of Claim (Moyse Action), para. 34.6, MR Exhibit 4, p. 184.

32 *Re: Mid-Bowline Group Corp* decision of Justice Newbould dated January 25, 2016, para. 59, MR Exhibit 2, p. 151 [Plan of Arrangement Reasons].

33 Carlson Affidavit, para. 11, MR Tab B, p. 36; Catalyst's Amended Amended Statement of Claim (Moyse Action) dated December 16, 2014, MR Exhibit 6, p. 200.

34 Carlson Affidavit, para. 12, MR Tab B, pp. 36-37; Catalyst's Notice of Motion dated January 13, 2015, paras. (b) and (c), MR Exhibit 7, pp. 215-217.

Operating Officer and an experienced commercial lawyer. Mr. Riley claimed in that Affidavit that Catalyst's acquisition of WIND failed because: (i) "Catalyst wanted to ensure that its purchase was conditional on receiving certain regulatory concessions from Industry Canada, but VimpelCom would not agree to the conditions Catalyst sought";[35] and (ii) the Consortium bested Catalyst's offer because it had allegedly agreed to waive this condition that Catalyst had allegedly insisted upon.[36]

29. As Mr. Riley subsequently conceded in cross-examination at trial in the Moyse action, these assertions about regulatory concessions were entirely false.[37] In fact, as described above, the Share Purchase Agreement negotiated by Catalyst and VimpelCom expressly prohibited Catalyst from even requesting regulatory concessions once the Agreement was signed.[38] In reality, as noted above, the deal failed because of Catalyst's refusal to accept a break fee. The reality, however, did not fit with Catalyst's invented narrative concerning Mr. Moyse having informed West Face of Catalyst's desire for regulatory concessions. Mr. Riley therefore falsely denied that VimpelCom had asked for a break fee in cross-examination on Catalyst's 2015 injunction motion.[39] Catalyst only admitted the truth about VimpelCom's request for a break fee in answers to undertakings that were provided to West Face on the eve of trial.[40]

30. On March 13, 2015, West Face served its responding motion record on the injunction motion. This record included a lengthy affidavit from West Face Partner

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35 Riley Affidavit sworn February 18, 2015, para. 45, MR Exhibit 8, Tab 3, p. 305.
36 Riley Affidavit sworn February 18, 2015, para. 46, MR Exhibit 8, Tab 3, p. 306.
37 Riley Cross, June 8, 2016, pp. 617:24-619:4, MR Exhibit 64, pp. 6785-6787.
38 Trial Reasons, para. 131, MR Exhibit 1, pp. 123-124; De Alba Cross, June 7, 2016, p. 300:3-7; see also p. 282:15-25, MR Exhibit 60, p. 6452 and p. 6434.
39 Riley Cross, May 15, 2015, pp. 127:15-128:4, MR Exhibit 22B, p. 3740; Undertakings Chart to the Riley Cross held May 13, 2015, U/T 15-16, MR Exhibit 22B, p. 3820.
40 Riley Cross, June 8, 2016, pp. 598:1-608:11, MR Exhibit 64, pp. 6766-6776.

Anthony Griffin. Among other things, Mr. Griffin explained in detail how the Consortium had acquired WIND. His evidence included the key facts Catalyst subsequently relied upon to advance its claims in the case at bar, including:

(a) West Face had a relationship with, and had been in communications with Globalive's Chairman, Anthony Lacavera, in the period before Catalyst entered into exclusivity;[41]

(b) members of the Consortium worked together in July and August 2014 to prepare an offer that would be acceptable to VimpelCom;[42]

(c) West Face was aware by July 23, 2014 that VimpelCom was in exclusivity with another bidder;[43]

(d) representatives of Globalive, including Mr. Lacavera, had various communications with West Face and other Consortium members before Globalive entered into a Support Agreement with VimpelCom on August 7, 2014;[44] and

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41 Carlson Affidavit, para. 18, MR Tab B, pp. 38-43; Griffin Affidavit March 7, 2015, paras. 6-7, 31, 36, MR Exhibit 9A, pp. 606, 614, and 616; Amended Amended Amended Statement of Claim (VimpelCom Action) paras. 95-102 [Thrice Amended Claim], West Face Supplementary Motion Record, Exhibit 1, pp. 27-28 ["Supp. MR"].

42 Carlson Affidavit, para. 18, MR Tab B, pp. 38-43; Griffin Affidavit March 7, 2015, paras. 71-80, MR Exhibit 9A, pp. 629-633; Thrice Amended Claim, paras. 103-113, Supp. MR Exhibit 1, pp. 29-31.

43 Carlson Affidavit, para. 18, MR Tab B, pp. 38-43; Griffin Affidavit March 7, 2015, para. 71, MR Exhibit 9A, p. 629; Thrice Amended Claim para. 63, Supp. MR Exhibit 1, p. 22.

44 Carlson Affidavit, para. 18, MR Tab B, pp. 38-43; Griffin Affidavit March 7, 2015, paras. 6, 31, 36-37, 77, MR Exhibit 9A, pp. 606, 614, 616, 631-632; Thrice Amended Claim paras. 95-102, Supp. MR Exhibit 1 pp. 27-28.

(e) West Face, Tennenbaum and LG Capital made an unsolicited offer to VimpelCom on August 7, 2014.[45]

31. Upon receiving Mr. Griffin's affidavit, Catalyst took no steps to amend its Claim in the Moyse action to assert the claims it now advances in the case at bar.

32. In cross-examination in May 2015 on his affidavits in the injunction motion, Mr. Riley admitted that Catalyst believed that it had causes of action in respect of the alleged breach and inducing breach of the exclusivity agreement, but chose not to assert claims in that regard:

> Q. **There is no suggestion here that VimpelCom breached exclusivity?**
>
> A. **I wouldn't say that.**
>
> Q. You haven't sent a demand letter to·VimpelCom?
>
> A. We have not at this time.
>
> Q. You haven't made any allegation to·VimpelCom in that regard?
>
> A. Not to my knowledge. However, when a contract is breached, as I recall, there's two -- you can -- under the theory of Lumley and Gye, and I'm not trying to play lawyer, **you can go after one of two parties, the party breaching or the party inducing a breach**.
>
> Q. There's been no pleading of inducing breach of contract?
>
> A. There's been no pleading.[46] (emphasis added)

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[45] Carlson Affidavit, para. 18, MR Tab B, pp. 38-43; Griffin Affidavit March 7, 2015, para. 77, MR Tab 9A, pp. 631-632; Thrice Amended Claim, para. 110, Supp. MR Exhibit 1, p. 30.

33. As it turns out, Catalyst did not assert claims for breach or inducing breach of its exclusivity agreement with VimpelCom for more than another year.

E. Catalyst's Injunction Motion Fails

34. Catalyst's injunction motion in the Moyse action was argued before Justice Glustein on July 2, 2015, and dismissed on July 7, 2015.[47] Following this setback, Catalyst took no steps to advance the Moyse action, or to amend the claim to assert the claims of inducing breach of contract and related claims that it now asserts in the case at bar. Instead, Catalyst purported to appeal Justice Glustein's decision to the Court of Appeal. When that purported appeal was quashed for want of jurisdiction, Catalyst moved to extend the time to seek leave to appeal, and for leave to appeal, to the Divisional Court. Those motions were dismissed by Justice Swinton on January 22, 2016.[48]

F. West Face Consortium Sells WIND by Plan of Arrangement

35. The merits of Catalyst's claims in the Moyse action were only brought to a head at West Face's insistence following the announcement on December 16, 2015 that the Consortium had agreed to sell WIND to Shaw Communications Inc. for $1.6 billion.[49] Catalyst's claim for a constructive trust had to be disposed of or eliminated to enable Shaw to acquire clear title to WIND, and so the sale was structured to occur by way of Plan of Arrangement. On December 21, 2015, West Face requested a 9:30

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46 Riley Cross, May 13, 2015, p. 119:1-17, MR Exhibit 11, p. 2642; Carlson Affidavit, paras. 21-22, MR Tab B, pp. 44-45; *Lumley v. Gye,* (1853) 118 ER 749 (Q.B.), West Face Book of Authorities, Tab 18 ["BOA"].

47 *The Catalyst Capital Group Inc. v. Moyse*, 2015 ONSC 4388, BOA Tab 6.

48 Carlson Affidavit, paras. 25-32, MR Tab B, pp. 45-47; Plan of Arrangement Reasons, para. 32, MR Exhibit 2, p. 143.

49 Carlson Affidavit, para. 38; MR Tab B, p. 49; Email from Matthew Milne-Smith to Rocco DiPucchio dated December 16, 2015, MR Exhibit 20, p. 2880-2883.

appointment to schedule the trial of an issue concerning Catalyst's claims in respect of WIND.[50] On December 23, 2015, West Face issued its Notice of Application for approval of a Plan of Arrangement to effect the sale of WIND, free and clear of Catalyst's claim for a constructive trust.[51] Section 4.5 of the Plan of Arrangement clearly disclosed that West Face's intention was to extinguish "all actions, causes of action, claims or proceedings (**actual or contingent and whether or not previously asserted**) based on or in any way relating to" WIND.[52] On January 8, 2016, the Consortium served an Application Record containing affidavits from West Face, Tennenbaum, LG Capital, and Globalive. All four affidavits confirmed the manner in which the Consortium had acquired WIND, as previously set out in Mr. Griffin's affidavit in March 2015.[53]

36. In response, Catalyst did not assert or even disclose its purported cause of action for breach and inducing breach of its exclusivity agreement with VimpelCom.

37. Although it opposed approval by the Court of West Face's proposed Plan of Arrangement, Catalyst chose not to cross-examine West Face's affiants or to file responding evidence.[54] The hearing of the Plan of Arrangement application was scheduled to last four days, and to commence before Justice Newbould on January 25,

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50 Carlson Affidavit, para. 39, MR Tab B, p. 49; Email from Matthew Milne-Smith to Commercial List dated December 21, 2015, MR Exhibit 21, p. 2884.

51 Carlson Affidavit, paras. 35-37, MR Tab B, p. 48; Mid-Bowline Application Record dated January 8, 2016, MR Exhibit 22A, pp. 2902-2905.

52 Proposed Plan of Arrangement, para. 4.5 (emphasis added), Exhibit D to the Arrangement Agreement and the Plan of Arrangement effective December 16, 2015, MR Exhibit 22A, p. 3128.

53 Carlson Affidavit, paras. 41-43, MR Tab B, pp. 49-50; Griffin Affidavit, sworn January 8, 2016 at paras. 52-61, MR Exhibit 22A, pp. 2939-2942; Burt Affidavit, sworn January 7, 2016, paras. 11-24, MR Exhibit 22D, pp. 4621-4625; Leitner Affidavit, sworn January 7, 2016, paras. 10-24, MR Exhibit 22D, pp. 4633-4638; Lockie Affidavit, sworn January 8, 2016, paras. 17-38, MR Exhibit 22D, pp. 4684-4693.

54 Plan of Arrangement Reasons, para. 24, MR Exhibit 2, p. 141.

2016. West Face also delivered its Affidavit of Documents in the Moyse action on January 9, 2016.[55]

38. Catalyst did not deliver responding materials on the Plan of Arrangement application until minutes before the hearing was scheduled to start at 2:00 p.m. on January 25, 2016. Catalyst did so after it was invited to deliver responding materials by Justice Newbould that morning.[56] Those materials consisted of an affidavit of Mr. Riley in which he asserted that the Plan should not be approved so that Catalyst could have "the ability to amend the [Moyse] claim to take into account information learned for the first time through the materials filed on this application."[57] During oral argument of the application that afternoon, counsel to Catalyst, for the first time, advised that the potential amendment referred to by Mr. Riley was for inducing breach of Catalyst's exclusivity agreement with VimpelCom.[58] This, of course, is the very same claim at the core of the case at bar.

39. As is evident from the chronology described above, Mr. Riley's assertion that the facts giving rise to Catalyst's claim for inducing breach were "learned for the first time through the materials filed on this application" – was entirely false. As Justice Newbould concluded in rejecting Catalyst's request, "it is quite clear that the information regarding the unsolicited bid was known by Mr. Riley early in 2015. It was contained in Mr. Griffin's affidavit sworn March 7, 2015 in response to Catalyst's motion seeking

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55 Carlson Affidavit, para. 68, MR Tab B, pp. 59-60.

56 Carlson Affidavit, paras. 46-47, MR Tab B, p. 50-51; Catalyst's Responding Application Record, MR Exhibit 26, p. 5068, Catalyst's Responding Factum, MR Exhibit 27, p. 5133.

57 Riley Affidavit sworn January 25, 2016, para. 21, MR Exhibit 26, p. 5078.

58 Plan of Arrangement Reasons, para. 52, MR Exhibit 2, p. 149.

interlocutory relief against West Face."[59] After recounting the relevant evidence, including Mr. Riley's reference to *Lumley v. Gye* during his cross-examination on May 13, 2015, Justice Newbould concluded as follows on Catalyst's knowledge of facts giving rise to a claim for inducing breach of contract:

> This intended action has not been started. **It could have been started in March, 2015 when the facts were disclosed and known to Catalyst. To lie in the weeds until the hearing of the application** and assert such a right to stop the plan of arrangement is **troubling indeed and not acting in good faith. Waiting and seeing how things are going in the litigation process before springing a new theory at the last moment is not to be encouraged.** Apart from the **statement of Mr. Riley** that the information was first learned in the material in this application, **which was not true**, no evidence has been given by Catalyst to explain why this new intended claim was not brought sooner.[60] (emphasis added)

40. Justice Newbould's decision was not appealed. These findings are final.

41. As will be described below, Catalyst's response to this remarkable admonition was not to promptly amend its Claim in the Moyse action to assert its claims for inducing breach of contract. Nor did Catalyst promptly launch a new action, which could have been joined to or tried together with the Moyse action. Rather, it chose again to "lie in the weeds", "wait[ ] and see[ ] how things are going in the litigation process", and then "spring[ ] a new theory at the last moment", less than a week before the trial of the Moyse action was to commence.

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[59] Plan of Arrangement Reasons, para. 53, MR Exhibit 2, p. 149.
[60] Plan of Arrangement Reasons, para. 59, MR Exhibit 2, p. 151.

42. Justice Newbould concluded that the proposed Plan of Arrangement was fair and reasonable.[61] However, he did not immediately approve the Plan. Instead, he adjourned the Plan of Arrangement application to permit the expedited trial of an issue "involving this application and the claim of Catalyst against West Face and Mr. Moyse" on February 22 to 26, 2016. He further ordered that the "issue to be tried is whether Catalyst has a right to a constructive trust of the share interest of West Face in Mid-Bowline",[62] but the "trial of the issue I have ordered is not to consider" the inducing breach claim given the expedited schedule.[63] It is notable that Mr. Moyse was not a party in the Plan of Arrangement application. While he undoubtedly would have been a witness, he was not represented by counsel in the Plan of Arrangement proceedings.

43. Justice Newbould went on to explain that the trial of an issue needed to be conducted quickly so that the Application could be resolved:

> The reality in this case is that the issue needs to be decided quickly for all concerned. The wireless industry in Canada is in a state of flux **and whether Shaw is or is not entitled to acquire WIND is important to that industry**.[64] (emphasis added).

44. To summarize, Justice Newbould did not order a full trial of the Moyse action. Rather, he ordered an expedited trial of an issue in the context of the Plan of Arrangement, which happened to overlap substantially (but not completely) with the issues in the Moyse action.

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61 Plan of Arrangement Reasons, para. 45, MR Exhibit 2, p. 147.
62 Plan of Arrangement Reasons, para. 50(i), MR Exhibit 2, p. 148.
63 Plan of Arrangement Reasons, para. 61, MR Exhibit 2, p. 150.
64 Plan of Arrangement Reasons, para. 49, MR Exhibit 2, p. 148.

G. Catalyst Chooses Not to Assert Inducing Breach Claims in Moyse Action

45. The following facts are responsive to Catalyst's assertion that it "was not permitted to amend its statement of claim [in the Moyse action] to add any allegations" that are in the new claim for inducing breach.[65] This assertion is incorrect, and in fact was never made by Catalyst until West Face's counsel asserted that the new action was an abuse of process, despite numerous occasions on which Catalyst was directly asked if it was pleading, or intending to plead, claims relating to inducing breach in the Moyse action. Catalyst was offered repeatedly the chance to amend its Claim in the Moyse action, or to otherwise assert claims for inducing breach of contract, and had never once claimed that it had been forbidden to do so.

46. As matters transpired, the expedited trial of an issue ordered by Justice Newbould, which was the only proceeding from which inducing breach claims were excluded, never happened.

47. On January 27, 2016, the parties to the Plan of Arrangement proceedings attended before Justice Newbould for a 9:30 scheduling conference to address procedural matters surrounding the trial of an issue. Notes maintained by Catalyst's counsel indicate that Catalyst's position was that "if Catalyst abandoned the constructive trust claim", then Catalyst could advance whatever claims it wanted against the sale proceeds, "including inducing br[each]."[66] Catalyst's counsel also suggested that Catalyst could commence a "sep[arate] action for inducing br[each] of [contract]

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65 DiPucchio Letter dated June 2, 2016, MR Exhibit 45, p. 5895.

66 Exhibit A to the Vermeersch Affidavit, sworn May 19, 2017 [Vermeersch Affidavit], Responding Motion Record of the Plaintiff dated May 23, 2017 Tab A, p. 6 ["Resp. MR"].

against anyone we want".[67] No one suggested that Justice Newbould had forbidden the assertion of such claims in the Moyse action.

48. On January 31, 2016, Catalyst's counsel advised that Catalyst was withdrawing its claim for a constructive trust over West Face's interest in WIND.[68] This rendered the expedited trial of an issue unnecessary, as a claim for damages asserted against West Face would not attach to the shares being sold to Shaw. The next day, the parties had another 9:30 attendance at which Justice Newbould accepted Catalyst's suggestion that the February dates that had been set aside for the expedited trial of an issue be abandoned in light of Catalyst's withdrawal of its opposition to the Plan of Arrangement. The parties agreed to have further discussions about scheduling.[69]

49. On February 2, 2016, counsel to West Face and Catalyst had a telephone call to discuss potential trial dates for the Moyse action now that the trial of an issue had been cancelled. Counsel to West Face advised counsel to Catalyst that if Catalyst intended to assert a claim against West Face for inducing breach, it should do so promptly by way of amendment to its Claim in the Moyse action so that all claims relating to WIND could be resolved at once. In response, counsel to Catalyst **did not assert that Justice Newbould had forbidden such an amendment**. On the contrary, West Face's counsel's contemporaneous notes of the conversation indicate that

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67 Exhibit A to the Vermeersch Affidavit, Resp. MR Tab A, p. 6.
68 Di Pucchio Email dated January 31, 2016, MR Exhibit 28, p. 5153.
69 Exhibit B to the Vermeersch Affidavit, Resp. MR Tab B, pp. 8-10.

counsel for Catalyst said that he wanted to "think about that", that he "may want it all tried together", and that "in principle I'm not objecting to that".[70]

50. Justice Newbold's Order approving the Plan of Arrangement was granted the next day, on February 3, 2016, and Shaw's acquisition of WIND closed on March 1, 2016.[71] In the meantime, the trial of the Moyse action was scheduled for May 18, 2016, and then subsequently postponed on consent to June 6, 2016.[72]

51. Catalyst could and should have amended its Claim in the Moyse action to add claims of inducing breach. As of the beginning of February 2016, the Moyse action had barely moved beyond the pleadings stage. West Face had served an Affidavit of Documents several weeks before, but Catalyst had not. Oral examinations for discovery had not yet occurred (and did not occur until May 2016). There was no reason for Catalyst not to assert an inducing breach claim, other than the tactical risk that by doing so, Catalyst might undermine its case against Mr. Moyse.

52. On or around February 8, 2016, counsel for Catalyst indicated in a further phone call that while he would be amending the claim in the Moyse action, he had chosen not to include claims for inducing breach.[73] Once again, he did not assert or imply that Catalyst had been forbidden to do so by Justice Newbould; rather, it was

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70 Carlson Affidavit, para. 59, MR Tab B, pp. 56-57; Carlson Handwritten Notes dated February 2, 2016, MR Exhibit 30, p. 5168-5169; Carlson Transcribed Notes dated February 2, 2016, MR Exhibit 31, p. 5170.

71 Carlson Affidavit, para. 54, MR Tab B, p. 55; Order of Justice Newbould Approving the Plan of Arrangement dated February 3, 2016, MR Exhibit 29, p. 5155.

72 Carlson Affidavit, paras. 63, 71, MR Tab B, pp. 57-58; Counsel Slip dated February 3, 2016, MR Exhibit 32, p. 5172.

73 Carlson Affidavit, para. 69 and footnote 35, MR Tab B, p. 60; Carlson Handwritten Notes dated February 7, 2016, MR Exhibit 34, pp. 5180-5183; Carlson Transcribed Notes dated February 7, 2016, MR Exhibit 35, pp. 5184-5187.

Catalyst's tactical choice not to assert such claims. Catalyst ultimately served an Amended Amended Amended Claim on February 25, 2016, which added entirely new claims for spoliation against Mr. Moyse. In spite of adding an entirely new cause of action against Mr. Moyse, Catalyst chose not to add a claim for inducing breach of contract against West Face.[74]

53. Documentary disclosure occurred over the next ten weeks, and oral discoveries occurred in the period from May 10 to 12, 2017.[75] During the discovery of Mr. De Alba on behalf of Catalyst, West Face's counsel asked if Catalyst was pursuing a claim for inducing breach of contract, or a claim that Globalive had breached any kind of legal duty to Catalyst. Catalyst did not claim that it had been forbidden from doing so. Rather, it simply stated that it was not doing so in the Moyse action.[76] Mr. De Alba also admitted during this discovery that, as set out above, he had been informed by VimpelCom's counsel in August or September 2014 that members of the West Face Consortium had submitted an offer to VimpelCom during Catalyst's exclusivity period. In other words, Catalyst knew the facts necessary to assert its inducing breach claim far earlier than March 2015.

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74 Carlson Affidavit, para. 70, MR Tab B, pp. 60-61; Amended Amended Amended Statement of Claim (Moyse Action), MR Exhibit 36, p. 5188.

75 Carlson Affidavit, paras. 72-80, MR Tab B, pp. 61-64; Winton Letter dated April 8, 2016, pp. 1-2, MR Exhibit 37, p. 5209-5210; Catalyst's Case Conference Memorandum dated April 12, 2016, at para. 3(b), MR Exhibit 38, p. 5212; West Face's Responding Case Conference Memorandum dated April 12, 2016, para. 11, MR Exhibit 39, p. 5219.

76 Carlson Affidavit, paras. 83-88, MR Tab B, pp. 65-67; Examination for Discovery of Gabriel DeAlba held May 11, 2016, pp. 135:2-136:16, MR Exhibit 41, p. 5492-5493; Catalyst's Revised Undertakings, Under Advisements, and Refusals Chart dated June 2, 2016, at No. 34 and 48, MR Exhibit 41, p. 5858.8 and 5859.9.

H. Catalyst Serves New Inducing Breach Claim on Eve of Moyse Trial

54. At 12:09 p.m. on June 1, 2016, just three business days before the scheduled June 6 trial of the Moyse action, Catalyst provided West Face's counsel with its Statement of Claim in this action.[77] At 5:24 p.m. that same day, June 1, West Face's counsel wrote to Catalyst's counsel to advise of West Face's position that the Claim constituted litigation by installment, and was an abuse of process. This letter referred specifically to Justice Newbould's Reasons in the Plan of Arrangement proceedings, and to Mr. De Alba's admission on discovery that he was aware in August or September 2014 of the facts giving rise to the claim for inducing breach of contract. West Face advised of its intention to transfer the action to the Commercial List and bring a motion to strike with costs on a full indemnity basis as soon as the Moyse matter was resolved.[78] That, of course, is precisely what West Face has now done.

55. In response to this letter, Catalyst claimed for the first time that paragraph 61 of the Plan of Arrangement Reasons, which said that the trial of an issue was not to consider the inducing breach claim, barred Catalyst from asserting inducing breach claims in the Moyse action.[79] As explained above, that assertion was (and is) plainly wrong. By taking this position and proceeding with the trial of the Moyse action, Catalyst assumed the risk that its new Claim would be considered an abuse of process

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77 Carlson Affidavit, paras. 90-91, MR Tab B, p. 68; Letter dated June 1, 2016 and Statement of Claim (VimpelCom Action), MR Exhibit 42, p. 5859. It is perhaps noteworthy that within four hours of service, *The Globe and Mail* had published an online article about the claim; *Globe and Mail* article dated June 1, 2016, MR Exhibit 43, p. 5888.

78 Carlson Affidavit, para. 92, MR Tab B, pp. 68-69; Email from Milne-Smith dated June 1, 2016, MR Exhibit 44, pp. 5891-5892.

79 Carlson Affidavit, para. 94, MR Tab B, p. 69; DiPucchio letter dated June 2, 2016, MR Exhibit 45, p. 5894.

and would also be *res judicata* once the Moyse action had been decided. West Face had made its position in that regard abundantly clear.

I. The Trial of the Moyse Action

56. The Moyse action was tried over six extended sitting days, running from 9:00 a.m. to 5:00 p.m. in the period from June 6 to June 13, 2016. Evidence was submitted in chief by way of detailed affidavits, and the parties also agreed that all of the affidavits, exhibits, and cross-examinations exchanged and conducted in interlocutory proceedings were admissible at trial.[80]

57. At the outset of trial, West Face listed a series of findings of fact that it intended to ask Justice Newbould to make at the close of trial. Those findings included four that are particularly relevant to the case at bar:

(a) Catalyst would not have completed the acquisition of WIND in 2014 without obtaining regulatory concessions, including to permit it to sell WIND or its wireless spectrum to an incumbent after five years;

(b) the Canadian Government gave Catalyst no indication that it was willing to grant to Catalyst its required regulatory concessions. Instead, the Government made clear that the concessions sought by Catalyst would not be granted;

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[80] Carlson Affidavit, paras. 98, 100-101; Trial Affidavits, MR Exhibits 46, 47, 48, 49, 50, 51, 52, 53, 54, and 55; Pre-Trial Affidavits and Cross-Examination Transcripts, MR Exhibits 8, 9, and 10.

(c) Catalyst intended to sign a Share Purchase Agreement with VimpelCom and then engage in a course of conduct that the Agreement specifically precluded in the period prior to closing; and

(d) Catalyst failed to acquire WIND because it refused to meet VimpelCom's demands for a break fee to protect VimpelCom from regulatory risk. Catalyst made that choice based on its own assessment and on the advice of senior corporate counsel from Faskens and investment bankers from Morgan Stanley.[81]

58. Catalyst never suggested that these proposed findings of fact were improper or otherwise outside the scope of the matters at issue in the Moyse action. On the contrary, they were manifestly responsive to Catalyst's claim for breach of confidence. If West Face did not cause Catalyst to lose WIND, and Catalyst could never have acquired WIND regardless of what West Face or Mr. Moyse did, then Catalyst's claims against West Face were bound to fail.

59. During the course of trial, counsel for Catalyst cross-examined West Face's witnesses about all of the matters that now form the basis for its claims and allegations in the case at bar. This includes:

(a) whether VimpelCom, Globalive, and/or UBS revealed the state of Catalyst's negotiations with VimpelCom to members of the Consortium;[82]

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81 West Face Opening Slideshow, pp. 84-86, Supp. MR Exhibit 2, pp. 122-124**.**

82 Thrice Amended Statement of Claim, paras. 55-59, 63-64; 71-75, 98-100, 103-106, Supp. MR Exhibit 1, pp. 20-22, 24, 27-29; Griffin Cross, June 9, 2016, pp. 1027:9-1042:24, MR Exhibit 66,

(b) whether the Consortium induced VimpelCom to breach its exclusivity agreement with Catalyst;[83] and

(c) whether VimpelCom breached its exclusivity agreement with Catalyst.[84]

60. This evidence was not directly relevant to Catalyst's claims against Mr. Moyse, who resigned from Catalyst on May 24, 2014 and was not alleged to have received any updates concerning Catalyst's strategy or negotiations with VimpelCom in the period thereafter. Nonetheless, Catalyst elicited the foregoing evidence about post-May 2014 confidential information in support of its allegations about "a general attitude amongst West Face and the consortium partners to confidential information in a bidding process".[85]

61. In rendering his Decision in the Moyse action, Justice Newbould had the benefit of: (i) over 30 affidavits from 17 different affiants, including affidavits filed by way of evidence in chief; (ii) transcripts of pre-trial cross-examinations of many of those affiants; (iii) live examinations-in-chief and cross-examinations at trial of 13 lay and expert witnesses; (iv) hundreds of documents introduced as evidence at trial; and (v) detailed written and oral closing submissions.

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pp. 7041-7056; Burt Cross, June 9, 2016, pp. 855:22-861:24, especially p. 857:11-17, MR Exhibit 68, pp. 7189-7195; Leitner Cross, June 9, 2016, pp. 916:20-933-8 and 935:6-945:19, MR Exhibit 70, pp. 7259-7276 and 7278-7288.

83 Thrice Amended Statement of Claim, paras. 110-113, Supp. MR Exhibit 1, pp. 30-31; Griffin Cross, June 9, 2016, pp. 1027:9-1042:24, MR Exhibit 66, pp. 7041-7056; Burt Cross, June 9, 2016, pp. 855:22-861:24, especially p. 857:11-17, MR Exhibit 68, pp. 7189-7195; Leitner Cross, June 9, 2016, pp. 916:20-933-8 and 935:6-945:19, MR Exhibit 70, pp. 7259-7276 and 7278-7288.

84 Thrice Amended Statement of Claim, para. 114-122, Supp. MR Exhibit 1, pp. 31-32; Griffin Cross, June 9, 2016, pp. 1027:9-1042:24, MR Exhibit 66, pp. 7041-7056; Burt Cross, June 9, 2016, pp. 855:22-861:24, especially p. 857:11-17, MR Exhibit 68, pp. 7189-7195; Leitner Cross, June 9, 2016, pp. 916:20-933-8 and 935:6-945:19, MR Exhibit 70, pp. 7259-7276 and 7278-7288.

85 Griffin Transcript, June 9, 2016, p. 1043:24-1044:7, MR Exhibit 66, pp. 7057-7058.

62. No evidence that Catalyst sought to lead was excluded. No witnesses Catalyst sought to call at trial were unavailable. Catalyst was denied no opportunity to lead whatever evidence it deemed necessary or appropriate.[86] While West Face objected at one point to Catalyst's cross-examination of Mr. Griffin as being relevant only to the inducing breach claim, Justice Newbould took the objection under advisement and did not prevent Catalyst from asking further questions on the subject.[87]

63. At no point during trial did Catalyst raise any objection whatsoever to the manner in which the trial was conducted. Catalyst's allegations of procedural unfairness in its appeal of the Moyse trial were not raised in a timely manner or at all, and in reality reflect nothing more than Catalyst's dissatisfaction with the result at trial.

64. In the result, Justice Newbould dismissed Catalyst's claim in its entirety and awarded West Face its costs on a substantial indemnity basis. As stated above, two of Justice Newbould's findings are of particular significance to the claims asserted against West Face in this proceeding. First, Justice Newbould found that the Consortium's unsolicited offer of August 7 did not cause the failure of VimpelCom's negotiations with Catalyst during Catalyst's period of exclusivity, which expired on August 18, 2014:

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86 Carlson Affidavit, para. 99, MR Tab B, pp. 71-72.

87 Griffin Transcript, June 9, 2016, pp. 1043:2-1054:22, MR Exhibit 66, pp. 7057-7068; Griffin Cross, June 9 and 10, 2016, pp. 1054:24-1081:21 and 1090:7-1112:21, MR Exhibit 66, pp. 7068-7095 and 7103-7125.

[127] **Catalyst has failed to establish that it suffered any detriment by any misuse of Catalyst confidential information. There is no evidence that the bid of the consortium** of August 7, 2014 was even looked at by the board of VimpelCom during the period of exclusivity with Catalyst, or that it **played any part in the position taken by VimpelCom with Catalyst that it wanted a break fee from Catalyst.** It was that position taken by VimpelCom that caused Catalyst to terminate discussions with VimpelCom.

[128] On August 11, 2014 the Chairman of the Board of VimpelCom advised Mr. De Alba that the Board was concerned about the Government's behaviour and wanted protection in case the Government did not approve the transaction. The Chairman advised Catalyst that VimpelCom insisted on a new term that provided for a $5-20 million break fee if regulatory approval was not granted within 60 days. Mr. Glassman was furious and told his people on August 11, 2014 as well as Mr. Levin who was advising Catalyst that VimpelCom had to announce the deal publicly that day or else there would be no deal. He stated "I am fed up. I do not want to hear a single more excuse from them". On August 14, 2014 Mr. Glassman told his people that the deal was technically dead or in deep trouble. The next day Mr. Levin [of Faskens, Catalyst's legal advisors] advised that VimpelCom was "out to lunch and I think we should tell them". Mr. Babcock of Morgan Stanley, Catalyst's financial advisor, advised Catalyst to tell VimpelCom that "and then down communication. This needs to go past the exclusivity time and [VimpelCom] needs to see his alternatives and their terms."

[129] Catalyst then told VimpelCom that the request for a break fee was unacceptable and it shut down communications and let the period of exclusivity expire. It was after that that VimpelCom and the consortium, including West Face, concluded a deal. **Mr. Glassman acknowledged in his evidence that the reason the deal between Catalyst and VimpelCom fell through was because of the break fee that VimpelCom requested that Catalyst would not agree to.**

> [130] For the same reason, Catalyst has not established that it suffered any damages. Catalyst has not established that but for the misuse by West Face of the confidential Catalyst information that it says West Face was given by Mr. Moyse it would have acquired WIND from VimpelCom. **It was Catalyst's refusal to agree to a break fee requested by VimpelCom that caused Catalyst to end negotiations with VimpelCom.**[88] (emphasis added)

65. Second, Justice Newbould held that Catalyst had failed to establish that it suffered any damages arising from conduct engaged in by West Face because Catalyst would not have completed its proposed acquisition of WIND even if it had completed and executed the form of Share Purchase Agreement that it had negotiated with VimpelCom:

> [131] There is another reason why Catalyst has not established any damages from misuse of confidential Catalyst information. **It is clear that VimpelCom would not agree to any deal that carried any risk of the Government not approving the deal. Mr. Glassman's evidence throughout was that Catalyst would not agree to a deal without Government concessions permitting the sale of spectrum to an incumbent in five years.** Mr. Riley in his affidavit of February 18, 2015 stated that during the exclusivity period, the only point over which VimpelCom and Catalyst could not agree was regulatory approval risk. **Catalyst wanted to ensure that its purchase was conditional on receiving regulatory concessions from Industry Canada, but VimpelCom would not agree to the conditions Catalyst sought.** Given that evidence, and VimpelCom's refusal to agree to a deal that contained any such condition, **there was no chance that Catalyst could have successfully concluded a deal with VimpelCom**.[89] (emphasis added)

66. These findings were based on Justice Newbould's assessment of the evidence in the Moyse litigation, including the credibility of the witnesses, and cannot be

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88 Trial Reasons at paras. 127-130, MR Exhibit 1, pp. 122-123.

89 Trial Reasons at para. 131, MR Exhibit 1, pp. 123-124.

challenged collaterally or re-litigated. They are fatal to Catalyst's claims against West Face in this proceeding. Because West Face's conduct did not cause the failure of VimpelCom's negotiations with Catalyst, and because Catalyst would never have acquired WIND even if it had successfully executed its Proposed Share Purchase Agreement with VimpelCom, Catalyst cannot have suffered compensable loss or harm because of the conduct of West Face complained of in this proceeding.

67. That Catalyst has not accepted these findings and now seeks to circumvent them should perhaps come as no surprise. In his Costs Endorsement, Justice Newbould found that costs to West Face against Catalyst on a substantial indemnity scale were appropriate because Catalyst had made unfounded accusations that West Face had knowingly solicited confidential information, and then lied systematically about having done so.[90] In words that echo through to this second case arising out of Catalyst's failure to acquire WIND, Justice Newbould specifically identified the failure of Newton Glassman, Catalyst's principal, to accept that he had lost the Moyse action fairly and squarely:

> This law suit was driven by Mr. Glassman. **He was not able to accept that he lost his chance to acquire Wind by being outsmarted by someone else.** He set out to prove his belief that the West Face witnesses were lying and that West Face had obtained confidential Catalyst information from Mr. Moyse that they used to defeat Catalyst's bid to acquire Wind. He was certainly playing hardball attacking the reputation and honesty of West Face. However, **in spite of**

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[90] Costs Endorsement of Justice Newbould dated October 7, 2016, paras. 5-9, MR Exhibit 84, pp. 8203-8024.

> **the best efforts of Catalyst's very able and skilled lawyers, he utterly failed**.[91] (emphasis added)

PART III ~ ISSUES AND THE LAW

68. There are three principal issues in this motion:

(a) *Do Catalyst's claims in the case at bar turn on issues that were already decided against Catalyst in the Moyse action?*

West Face submits that the answer to this question is "yes", and the claim is therefore barred by the doctrine of issue estoppel.

(b) *Do Catalyst's claims in the case at bar arise from the same cause of action as those asserted in the Moyse action?*

West Face submits that the answer to this question is "yes", and the claim is therefore barred by the doctrine of cause of action estoppel.

(c) *Would allowing Catalyst's claims to proceed be manifestly unfair to West Face, or otherwise bring the administration of justice into disrepute?*

West Face submits that the answer to this question is "yes", and the claim is therefore also barred by the doctrine of abuse of process.

A. Distinguishing the Three Forms of Preclusion at Issue in this Motion

69. The doctrines of issue estoppel, cause of action estoppel, and abuse of process, are of course closely related and are rooted in basic principles of fairness and finality. The Supreme Court of Canada has summarized the principles underlying these doctrines as follows:

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[91] Costs Endorsement of Justice Newbould dated October 7, 2016, para. 10, MR Exhibit 84, pp. 8024.

> The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. **A litigant, to use the vernacular, is only entitled to one bite at the cherry. … An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause.** Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.[92] (emphasis added)

70. Having commenced the Moyse action, Catalyst was required to put its best foot forward on the issue of whether West Face had improperly deprived Catalyst of the opportunity to acquire WIND and to advance all of its related claims, causes of action and allegations against West Face in one proceeding. Catalyst was criticized in January 2016 by Justice Newbould, in the course of the Plan of Arrangement proceedings, for choosing to "lie in the weeds" regarding its claim for inducing breach. Catalyst had numerous opportunities to assert those claims against West Face in the Moyse action in a timely manner, but chose not to do so. Instead, it purported to reserve to itself a second bite at the cherry. The law does not permit this approach to litigation. The common law has developed numerous different doctrines to address situations like these and at least three of them – issue estoppel, cause of action estoppel, and abuse of process – apply on these facts.

71. Though related and overlapping, the three preclusion doctrines at issue in this proceeding are distinct:

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92 *Danyluk v. Ainsworth Technologies*, 2001 SCC 44 at para. 18 [*Danyluk*], BOA Tab 9.

(a) issue estoppel precludes re-litigating particular findings, such as Justice Newbould's finding that even if it had concluded and executed a Share Purchase Agreement with VimpelCom Catalyst could not have acquired WIND, and that Catalyst was aware of a claim for inducing breach no later than by May 2015;

(b) cause of action estoppel precludes litigation by installment where new claims are asserted that arise from or pertain to facts and circumstances that were raised and dealt with in prior litigation, and could have been raised earlier; and

(c) abuse of process is a flexible doctrine that can apply even where the precise requirements of issue or cause of action estoppel are not met. It is meant to preserve the integrity of the administration of justice.

B. Catalyst's Claim Is Barred by Issue Estoppel

72. The Supreme Court of Canada described the three-part test for issue estoppel in *Danyluk v. Ainsworth Technologies Inc.*:

> (1) the issue must be the same as the one decided in the prior decision; (2) the prior judicial decision must have been final; and (3) the parties to both proceedings must be the same, or their privies.[93]

73. Issue estoppel is focused on preventing the re-litigation of **findings** made in a previous proceeding, whereas cause of action estoppel prohibits litigating different

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[93] *Danyluk*, *supra* note 92 at para. 25, BOA Tab 9; *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, 2003 SCC 63 at para. 23 [*C.U.P.E.*], BOA Tab 30.

claims arising out of the same set of facts. Justice Perell has explained the distinction as follows:

> The effect of the rule of *res judicata* is preclusive. It prevents a party and his or her privies from asserting a position, a claim, or defence. **Issue estoppel precludes a litigant from asserting a position that is inconsistent or contrary to a fundamental point decided in a past proceeding** in which the litigant or his or her privies participated. **Cause of action estoppel precludes a litigant and his or her privies from asserting a claim or a defence that it asserted (cause of action estoppel) or had an opportunity of asserting in past proceedings** (the rule from *Henderson v. Henderson*).[94] (emphasis added)

74. All of the requirements for issue estoppel are met in this case.

(i) The Issue Is the Same

75. Issue estoppel gives effect to basic principles of finality and judicial efficiency. For this doctrine to apply, the issue in question cannot have been merely incidental to the earlier decision, but need only be a material fact:

> Issue estoppel simply means that **once a material fact** such as a valid employment contract **is found to exist** (or not to exist) by a court or tribunal of competent jurisdiction, whether on the basis of evidence or admissions, **the same issue cannot be relitigated in subsequent proceedings** between the same parties.[95] (emphasis added)

76. More recently, the Ontario court has made clear that any right, question or fact determined directly by the earlier court can form the basis for issue estoppel:

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94 *Martin v. Goldfarb,* 2006 CarswellOnt 4355 (S.C.J.) at para. 59 [*Martin*]; additional reasons at 2006 CarswellOnt 7108 (S.C.J.), BOA Tab 20.

95 *Danyluk*, *supra* note 92 at para. 54, BOA Tab 9; see also *McIntosh v. Parent*, 1924 CarswellOnt 212 (C.A.) at p. 2, BOA Tab 21; *Dableh v. Ontario Hydro,* 1994 CaswellOnt 175 (Ont. Gen. Div.) at para 11 [*Dableh*]; additional reasons at 1995 CarswellOnt 2275 (Gen. Div.); leave to appeal refused at 1995 CarswellOnt 175 (Gen. Div.), BOA Tab 8.

> The case law cited above provides that the question must be fundamental to the decision in the earlier proceeding **and that question can be any right, question or fact distinctly put in issue and directly determined by the court in the earlier proceeding**.[96] (emphasis added)

77. As described above, Justice Newbould made critical findings of fact in deciding the Moyse action that are flatly inconsistent with and fatal to the claims asserted by Catalyst against West Face in the case at bar. Those findings were fundamental to Catalyst's claims in the Moyse action for breach of confidence. They defeated the causation and damages element of those claims. They were "distinctly put in issue and directly determined by the court". The causes of action pleaded against West Face in this action are breach of confidence, conspiracy, and inducing breach of contract.[97] All three of these torts include the requirement that the defendant's conduct actually caused damage to the plaintiff.[98] That is, no doubt, why Catalyst pleaded in the case at bar that the conduct of the defendants did, in fact, cause it loss or harm.[99]

78. The central problem with Catalyst's pleading in the case at bar is that, as described above, Justice Newbould has already held that the conduct of West Face (and other members of the Consortium) did not cause Catalyst to suffer loss or harm for two reasons:

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96 *Dableh*, *supra* note 95 at para. 16, BOA Tab 8.

97 Thrice Amended Statement of Claim, para. 1(b)(i), Supp. MR Exhibit 1 at p. 10.

98 For inducing breach of contract, see *OBG Ltd. v. Allan*, [2007] UKHL 21 at paras. 39-44, BOA Tab 26, and *Correia v. Canac Kitchens* 2008 ONCA 506 at para. 99, BOA Tab 7; for breach of confidence, see *Lac Minerals Ltd. v. International Corona Resources Ltd.*, 1989 CarswellOnt 126 (S.C.C.) at para. 179, BOA Tab 16; and *Lysko v. Braley,* 2006 CarswellOnt 1758 (C.A.) at para. 17; additional reasons at 2006 CarswellOnt 3159, BOA Tab 19; and for conspiracy, see *Canada Cement Lafarge Ltd. v. B.C. Lightweight Aggregate*, 1983 CarswellBC 812 (S.C.C.) at paras. 22-25, BOA Tab 4; *Agribrands Purina Canada Inc. v. Kasamekas,* 2011 ONCA 460 at para. 24; additional reasons at 2011 ONCA 581, BOA Tab 1.

99 Thrice Amended Statement of Claim, paras. 102, 109, 112, 125-127, Supp. MR Exhibit 1, pp. 28, 30, 33.

(a) Contrary to Catalyst's position throughout the Moyse litigation, "the reason the deal between Catalyst and VimpelCom fell through was because of the break fee that VimpelCom requested that Catalyst would not agree to." The Consortium's unsolicited offer of August 7, 2014 played no role in VimpelCom's request for a break fee. Nor did that offer cause VimpelCom to terminate its discussions and negotiations with Catalyst;[100] and

(b) given Catalyst's insistence that its purchase of WIND be conditional on receiving significant regulatory concessions from Industry Canada, the Government's adamant and repeated refusal to grant those concessions, and VimpelCom's refusal to accept such a condition, "there was no chance that Catalyst could have successfully concluded a deal with VimpelCom".[101]

79. In short, Catalyst had only itself to blame for its failure to acquire WIND. While the approach to the "same question" element has on occasion been described as a "fastidious approach",[102] the issue decided by Justice Newbould is identical to the one raised by the new case. In the face of the earlier findings of Justice Newbould, Catalyst cannot now launch a new case alleging different misconduct by West Face and other defendants that supposedly caused Catalyst's failure to acquire WIND.

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100 Trial Reasons, paras. 127-130, MR Exhibit 1, pp. 122-123.

101 Trial Reasons, para. 131, MR Exhibit 1, pp. 123-124.

102 *Rasanen v. Rosemount Instruments Ltd.,* 1994 CarswellOnt 960 (C.A.) at para 89; leave to appeal refused at [1994] S.C.C.A. No. 152 (QL), BOA Tab 28.

80. This case is very similar to the British Columbia Supreme Court's decision in *Foreman v. Niven*.[103] In that case, the plaintiff Foreman had been interested in acquiring a piece of real estate. He sought financing from Niven, who declined to provide the required loan. A third party who was interested in acquiring the property, Chambers, was then introduced to Foreman. Niven, the financier, passed on the information he had received from the plaintiff Foreman, to Chambers. Ultimately, Foreman was unable to negotiate a joint venture with Chambers, who then acquired the property himself with the co-operation of Niven. Foreman sued Chambers for breach of confidence and breach of fiduciary duty. Foreman's action against Chambers was dismissed on the basis that:

(a) the information Foreman had provided to Chambers was not confidential; and

(b) in any event, Foreman could never have acquired the property because he had insufficient assets to obtain the necessary loan.[104]

81. After the action against Chambers was dismissed, Foreman commenced a second action against Niven, who defended himself on the basis of the doctrines of issue estoppel and abuse of process.

82. On an application to strike out Foreman's Claim in the second action, the court noted that the issue of whether Foreman could have acquired the property absent the defendants' conduct was before the court in both cases:

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103 *Foreman v. Niven*, 2009 BCSC 1476 [*Foreman*], BOA Tab 11.

104 *Foreman*, *supra* note 103 at paras. 3, 7, BOA Tab 11.

> As I read both the decision of the trial judge and that of the Court of Appeal, both Courts accepted as made out that Niven rejected the loan application based on Foreman's lack of net worth. Both Courts also accepted that Foreman's claims against Chambers as a fiduciary failed because he could not make out that but for any breach he would have been able to acquire the lots. **In short, the issue of his credit worthiness to obtain financing for the opportunity was a central issue in the action and Foreman was unable to show that he could have obtained financing and thus have availed himself of the alleged opportunity.**[105] (emphasis added)

83. Put differently, a putative buyer cannot sue for being deprived of the opportunity to purchase an asset, if it could never have acquired the asset in any event. That conclusion doomed both actions brought by Foreman, and it equally dooms both actions brought by Catalyst. Once decided in the first action, it is issue estoppel in any subsequent ones.

84. Another similar decision is *Dableh v. Ontario Hydro*. In that case, Dableh was an employee of Ontario Hydro who was granted a patent relating to the operation of the Candu nuclear reactor. Subsequently, another employee (Cenanovic) was granted a different patent, which Dableh claimed infringed his patent. Dableh sued both Ontario Hydro and Cenanovic in the Ontario Superior Court for breach of confidence and breach of fiduciary duty arising out of the patent dispute. Subsequently, Dableh commenced an action in the Federal Court for patent infringement, which proceeded to trial while the action in the Ontario Superior Court lay dormant.

85. The Federal Court action was dismissed on the basis that Cenanovic's patent was distinct from that of Dableh. While the decision was under appeal, the

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105 *Foreman*, *supra* note 103 at para. 24, see also para. 29, BOA Tab 11.

defendants moved to stay or dismiss the General Division action for breach of confidence and fiduciary duties, on the grounds of issue estoppel. Even though the legal issues in the two cases were completely distinct – breach of confidence in one case, and patent infringement in the other – the court held that issue estoppel applied because the underlying factual determinations were essentially the same: "the fundamental question in the earlier proceeding and in the present action is, who invented the LIM method and resulting apparatus".[106]

86. By contrast with *Foreman*, *Dableh* and the case at bar, *Canam Enterprises v. Coles* demonstrates that the "same question" requirement is not met where the issue raised in the new case was not at issue in the prior action.[107] The dispute in *Canam* concerned a misleading representation pertaining to zoning in an acquisition of land. The buyer, Canam, initially sued the seller, National Trust, but the claim was dismissed because the representation had merged with the agreement of purchase and sale. Canam then sued its former lawyers for failing to discover the zoning issue. The Supreme Court of Canada ultimately accepted Justice Goudge's dissenting opinion in the Ontario Court of Appeal that the "same question" requirement for issue estoppel had not been met. The lawyers' duty to Canam was factually and legally distinct from Canam's contractual claim against National Trust.[108] The fact that the vendor's misrepresentation about zoning had merged meant nothing for the question of the lawyers' duty.

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106 *Dableh*, *supra* note 95 at para. 16, BOA Tab 8.

107 *Canam Enterprises Inc. v. Coles*, 2000 CarswellOnt 4739 (C.A.) per Goudge J.A., dissenting; dissent approved and adopted at 2002 SCC 63, BOA Tab 5 [*Canam*].

108 *Canam*, *supra* note 107 at para. 48. BOA Tab 5.

87. In the case at bar, by contrast, two of the same determinative issues are at stake now, just as they were in the Moyse action: causation and damages in relation to Catalyst's failure to acquire WIND. Those questions were decided against Catalyst in the Moyse action, and cannot be re-litigated now. Even if all of the new factual allegations in Catalyst's latest Claim were true, Catalyst cannot escape the findings that: (i) Catalyst lost WIND because it refused to negotiate VimpelCom's request for a break fee; and (ii) Catalyst would not and could not have completed its proposed acquisition of WIND even if it had completed and executed a Share Purchase Agreement with VimpelCom, and therefore suffered no damages as a result of West Face's conduct.

(ii) There is a Final, Prior Judicial Decision

88. There is obviously no dispute that the Moyse action was a judicial proceeding. The only issue under this branch of the test for issue estoppel is therefore whether the Decision of Justice Newbould is final in view of Catalyst's pending appeal to the Ontario Court of Appeal. There is an unresolved dispute in the jurisprudence on this subject.[109] The preponderance of Ontario case law has held that the "existence of a right of appeal has never been deemed to prevent a judgment from being regarded as final and conclusive".[110]

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109 Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 4th ed. (Markham, ON: LexisNexis Canada Inc., 2015) at 96, BOA Tab 32.

110 *Dableh, supra* note 95 at para. 11, BOA Tab 8 (citing to *Nouvion v. Freeman*, (1889) 15 App. Cas. 1 (U.K.H.L.) at p. 10, BOA Tab 24); *Bank of America Canada v. Willann Investments Ltd.*, 1993 CarswellOnt 249 (Gen. Div.) at para 18, BOA Tab 2; *Ontario v. National Hard Chrome Plating Co.*, 1996 CarswellOnt 199 (Gen. Div.), BOA Tab 27.

89. On the other hand, a line of authority predominantly emerging from the Federal Court suggests that a decision is not final if an appeal is pending.[111] Numerous other cases have simply noted, in holding that a decision was final, that there had been no appeal.[112]

90. It is not necessary to resolve this conflict on this motion. If all appeal rights arising from the Moyse action have not been exhausted when this motion is decided, a conditional stay of proceedings may be granted. Once all appeal rights are exhausted in the Moyse action, the case could then be dismissed. If the appeal were to overturn the findings in question, the conditional stay could be lifted. In the interim, West Face should not be "vexed" twice in the same cause by being required to re-litigate Catalyst's failure to acquire WIND while Catalyst's efforts to appeal the Decision of Justice Newbould are ongoing.

(iii) The Parties to Both Proceedings Are the Same

91. West Face and Catalyst were both parties to the Moyse action, and are both parties to the case at bar. The fact that there are additional defendants in both actions does not affect the operation of issue estoppel as between West Face and Catalyst.

1. The Court Should Not Exercise its Discretion in Favour of Catalyst

92. The Supreme Court of Canada has recognized that courts have a residual discretion not to apply estoppel in appropriate circumstances, but that "such a discretion

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111 *Novopharm Ltd. v. Eli Lilly and Co.*, 1998 CarswellNat 2226 (Fed. T.D.) at paras. 29-32, BOA Tab 25.

112 See, *e.g.*, *McQuillian v. Native Inter-Tribal Housing Co-operative Inc.*, 1998 CarswellOnt 4172 (C.A.) at paras. 2,10,15, BOA Tab 22.

must be very limited in application".[113] Those circumstances are typically where applying issue estoppel would give rise to a manifest injustice because of some unfairness in the earlier proceeding.[114] There is no basis on which to exercise this discretion in this case. Catalyst had the benefit of a full and fair trial. It brought this second proceeding on the eve of trial in the Moyse action, not because of any unfairness in the Moyse action, but as a hedge against an unfavourable outcome. Catalyst chose, in Justice Newbould's words, to "lie in the weeds" and preserve for itself a second bite at the cherry. This Court should not countenance this kind of behaviour, let alone exercise its residual discretion to reward it.

C. Catalyst's Claim is Barred by Cause of Action Estoppel

93. The form of cause of action estoppel that applies in this case is often referred to as the "rule from *Henderson v. Henderson*." In that case, the plaintiff was barred from asserting estate claims against his sister-in-law where he had failed to do so in previous estate litigation in the Colonial Court of Newfoundland. In an oft-cited passage, Vice Chancellor Wigram of the Court of Chancery explained why the plaintiff could not assert his claim even though it had not been litigated in the earlier proceeding:

> I believe I state the rule of the Court correctly when I say that, **where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest**, but which was

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113 *Naken v. General Motors of Canada Ltd.,* 1983 CarswellOnt 367 (S.C.C.) at para. 41, BOA Tab 23.

114 *Danyluk*, *supra* note 92 at paras. 62-64, BOA Tab 9.

> not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. **The plea of res judicata applies, except in a special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the litigation, and which the parties exercising reasonable diligence, might have brought forward at the time.**[115] (emphasis added)

94. It is important to understand that the term "cause of action" in this context does not have the narrow meaning of a particular legal theory, such as "breach of confidence" or "inducing breach of contract". Rather, a cause of action merely "refers to a set of facts giving rise to a legal claim or entitlement",[116] or a "factual situation which entitles one to a remedy."[117] The cause of action in both the Moyse action and the case at bar pertains to the Consortium's acquisition of WIND, and the failure of Catalyst to do the same.

95. Catalyst now claims that Justice Newbould somehow prohibited it from asserting its claim for inducing breach in the Moyse action. That is of course irrelevant to the application of issue estoppel, as described in the preceding section. Justice Newbould's findings are fatal to the new claim for inducing breach. In any event, Catalyst's assertion that it was barred from asserting its claim for inducing breach in the Moyse action is simply false. As described above, Justice Newbould only prohibited Catalyst from asserting that claim in the trial of an issue in the Plan of Arrangement

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115 *Henderson v. Henderson,* (1843) 67 E.R. 313 (U.K. Ch.) at p. 319, BOA Tab 14; see also *Reddy v. Oshawa Flying Club*, 1992 CarswellOnt 349 (Gen. Div.) at paras. 7, 8, BOA Tab 29; *Martin, supra* note 94 at para. 59, BOA Tab 20.

116 *Las Vegas Strip Ltd. v. Toronto (City)* (1996), 1996 CarswellOnt 3426 (Gen. Div.) at para. 18 [*Las Vegas Strip*]; aff'd at 1997 CarswellOnt 1279 (C.A.), BOA Tab 17.

117 *J.R.T. Nurseries Inc. v. 0843374 B.C. Ltd.*, 2016 BCSC 501 at para. 38, BOA Tab 15 [*J.R.T. Nurseries*].

proceedings, which was to be heard on a highly expedited basis in February 2016 to accommodate the timeline of the transaction by which WIND was to be sold to Shaw. Once Catalyst abandoned its constructive trust claim and the Plan of Arrangement was approved on consent, the trial of an issue (and the limitations on it) was abandoned. The full trial in the Moyse action was scheduled for June 2016 and was not subject to any prohibition by Justice Newbould in respect of the inducing breach issue.

96. The chronology of events beginning with Justice Newbould's Plan of Arrangement Reasons on January 26, 2016 through to Catalyst serving its new Claim on June 2, 2016, is a classic example of a "dog that didn't bark". Catalyst had ample opportunities to amend its Claim in the Moyse action to add a claim for inducing breach, and was explicitly and repeatedly invited to do so. Catalyst's counsel was asked repeatedly by counsel to West Face whether Catalyst was asserting, or intended to assert, claims for inducing breach of contract – on conference calls, at discovery and at 9:30 appointments. Not once did Catalyst or its counsel suggest that it was not **permitted** to do so; rather Catalyst simply chose not to do so, undoubtedly for tactical reasons. Nor did Catalyst ever appeal any supposed order prohibiting it from asserting its claim for inducing breach. Catalyst should not now be permitted to belatedly blame Justice Newbould for Catalyst's own tactical decisions as a pretext for engaging in litigation by installment.

97. The Supreme Court of Canada has held that litigation by installment is barred by cause of action estoppel, even where the plaintiff has not intentionally lain in

the weeds. In *Doering v. Grandview (Town)*,[118] Doering sued the town of Grandview on multiple occasions for flooding on his property caused by a dam. In the first case, Doering asserted that repairs to the dam had prevented water levels from falling to normal levels during the summer growing season, causing surface flooding that ruined his crops in 1967 and 1968. That claim was dismissed.

98. After the first action was dismissed, and while consulting with an expert about an appeal, Doering was told that surface flooding was not, in fact, to blame. Instead, the flooding was caused by water impounded by the dam flowing through a subterranean aquifer that had saturated the ground above.[119] He therefore commenced a new action on this new theory for flooding from 1969 through 1972. Even though the new claim concerned a different period of flooding as well as a different factual and legal theory, it was barred by the doctrine of cause of action estoppel because it could have been brought as part of the original action:

> **[A]ll the facts which are alleged to constitute tortious conduct by the town in the present case existed when the prior action went to trial** and it was there found that these facts did not support the present respondent's action for damage to his crops by water. … Nothing had changed between the bringing of the first action and the second one except that the respondent had received advice from a soil expert who expounded the aquifer theory.[120] (emphasis added)

99. Catalyst cannot avail itself of the narrow exception to cause of action estoppel which applies where the new theory could not have been discovered at the

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118 *Doering v. Grandview (Town)*, 1975 CarswellMan 64 (S.C.C.), BOA Tab 10 [*Doering*].
119 *Doering*, *supra* note 118 at paras. 5-7, BOA Tab 10.
120 *Doering*, *supra* note 118 at para. 11, BOA Tab 10.

time of the first proceeding by the exercise of reasonable diligence.[121] Catalyst has admitted to being aware of its alternative theory explaining its failure to acquire WIND long before commencing this action a week before the trial of the Moyse action. Catalyst partner Gabriel de Alba admitted that he knew about the Consortium's August 7, 2014 offer during Catalyst's period of exclusivity by as early as September 2014; Anthony Griffin's March 2015 affidavit disclosed the Consortium's conduct at issue in this case; Catalyst partner Jim Riley admitted in May 2015 that Catalyst was considering a claim for inducing breach of contract; and Justice Newbould held in the Plan of Arrangement proceeding in late January 2016 that Catalyst had long been aware of a potential claim for inducing breach but chose to "lie in the weeds".[122] Not only could the inducing breach claim have been discovered, it was, in fact, expressly known to Catalyst.

100. The same result occurred in *Las Vegas Strip*, in which the plaintiff strip club had been enjoined from operating over its objection that it was a legal non-conforming use. After the first action had been resolved against Las Vegas Strip, it brought an action to strike down the by-law in question as vague or uncertain. The Court dismissed this new claim based on cause of action estoppel because it was based on the same set of facts that were in issue in the earlier proceeding. While Las Vegas Strip had "subtracted certain facts from the earlier claim … the issue remains

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121 See, *e.g., Doering*, *supra* note 118 at paras. 13; 15, BOA Tab 10; *Tsaoussis (Litigation Guardian of) v. Baetz*, 1998 CarswellOnt 3409 (C.A.) at paras. 43, 44; leave to appeal refused at [1998] S.C.C.A. No. 518 (QL), BOA Tab 31.

122 Plan of Arrangement Reasons, para. 59, MR Exhibit 2, p. 151.

whether its operation is illegal under the By-law".[123] In the case at bar Catalyst has added facts rather than subtracting them, but the result is the same.

101. Finally, in *J.R.T. Nurseries Inc. v. 0843374 B.C. Ltd.*, the plaintiff had used a new fertilizer that killed his crops. The plaintiff sued the manufacturer in Oregon and won, but not for the entire amount claimed. It then sued wholesalers in British Columbia under the provincial *Sale of Goods Act* for the balance of its damages. In other words, the plaintiff added defendants, and asserted a new statutory cause of action, but the basic gravamen of the complaint was the same as in the earlier case—just as Catalyst has done. The second claim was dismissed on the basis of cause of action estoppel.[124]

D. Catalyst's Claim is Barred by Abuse of Process

102. If, for any reason, the requirements of issue or cause of action estoppel are not met in a litigation proceeding, the doctrine of abuse of process can and should be invoked to permanently stay or dismiss Catalyst's latest Claim against West Face arising from its failure to acquire WIND. Abuse of process "is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel".[125] It is applied "to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice".[126]

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123 *Las Vegas Strip*, *supra* note 116 at para. 23, BOA Tab 17.
124 *J.R.T. Nurseries*, *supra* note 117 at paras. 47-55, BOA Tab 15.
125 *Canam, supra* note 107 at para. 55, BOA Tab 5; see also *C.U.P.E., supra* note 93 at para. 37, BOA Tab 30; *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26 at para. 40, BOA Tab 3.
126 *C.U.P.E., supra* note 93 at para. 37, BOA Tab 30.

103. For the reasons explained above, mutuality or privity are not in issue on West Face's motion. While invoking the doctrine of abuse of process may therefore not be necessary, it is still applicable to this matter. As the Supreme Court explained in its seminal decision in *CUPE v. City of Toronto*, abuse of process focusses on the integrity of the adjudicative process rather than on the motive or status of the parties:

> First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.[127]

104. These principles apply with full force and effect in the case at bar. Catalyst litigated its failure to acquire WIND against West Face for almost two years, culminating in a hard-fought trial before the most senior judge of the Commercial List. It made a deliberate choice not to allege inducing breach as a part of that proceeding, but to focus instead on supposed breaches of confidence by Mr. Moyse. It failed, and in doing so Justice Newbould made a series of findings that are fatal to its new Claim. Catalyst's only goal in the case at bar is to assert claims it chose not to assert before, and to obtain findings that are incompatible with those obtained by West Face in the Moyse action. That is the very definition of abuse of process.

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[127] *C.U.P.E., supra* note 93 at para. 51, BOA Tab 30.

105. In this respect, the case at bar is similar to *Free Trade Medical Network Inc. v. RBC Travel Insurance Co*.[128] In that case, the plaintiff Free Trade Medical ("FTM") was trying to broker a deal for travel insurance between Community Care Networks ("CCN", which offered a network of health care providers) and RBC Travel (which needed to offer its clients health coverage while travelling). CCN and RBC ultimately struck a deal directly without FTM's involvement. FTM brought an arbitration claim against CCN pursuant to an earlier agreement between them, and the arbitrator concluded that CCN had not breached its contract with FTM in respect of its dealings with RBC.[129]

106. Having lost the arbitration, FTM then commenced a claim against RBC for, among other things, intentional inference with FTM's contractual relations with CCN. This is obviously closely analogous to Catalyst's claim for inducing breach of contract in the case at bar. FTM argued that CCN had provided dishonest testimony in the arbitration. However, the court noted that the arbitration proceeding involved a fair process. FTM was represented by counsel, called evidence, and cross-examined opposing witnesses. The arbitrator had rejected FTM's complaints about CCN's evidence. There was no reason that the arbitral award should not be final and binding, and it precluded the relief sought in the new action, which was stayed or dismissed as an abuse of process.[130]

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128 *Free Trade Medical Network Inc. v. RBC Travel Insurance Co.*, 2005 CarswellOnt 4659 (S.C.J.) [*Free Trade Medical Network*]; aff'd at 2006 CarswellOnt 5503 (C.A.); leave to appeal refused at 2007 CarswellOnt 1353 (S.C.C.), BOA Tab 12.

129 *Free Trade Medical Network, supra* note 128 at para. 72, BOA Tab 12.

130 *Free Trade Medical Network, supra* note 128 at paras. 114-117, BOA Tab 12.

107. Another analogous case is the British Columbia Court of Appeal's recent decision in *Gonzalez v. Gonzale*z.[131] In that case, during earlier matrimonial litigation Mrs. Gonzalez filed an affidavit that included financial information of her husband found on a computer shared by the couple at their matrimonial home. The husband moved unsuccessfully to strike portions of the affidavit on the basis that his wife had violated his privacy in finding and utilizing his financial information. The husband then brought a civil action against his spouse for breach of the British Columbia *Privacy Act*, again based on his wife's obtaining his financial information from the shared computer.

108. Even though the legal issues in the two proceedings were entirely distinct, and "the new civil action raised materially different facts, including the allegation that Mrs. Gonzalez hacked Mr. Gonzalez's password-protected e-mail account",[132] the Court of Appeal held that the new action was an abuse of process. Additional facts or legal theories will not rescue an abusive action where the fundamental issue is the same: "the question of Mr. Gonzalez's privacy interest was the issue front and centre in the [matrimonial] litigation before Butler J. and was the issue before Wong J [in the civil action]".[133] In the case at bar, Catalyst's failure to acquire WIND was (and is) the issue "front and centre" in both the Moyse action and this action. Catalyst has simply re-packaged the same basic complaint against West Face with new parties and legal theories. This is a quintessential abuse of process.

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131 *Gonzalez v. Gonzalez*, 2016 BCCA 376 [*Gonzalez*]; leave to appeal denied at 2017 CarswellBC 598 (S.C.C.), BOA Tab 13.

132 *Gonzalez*, *supra* note 131 at para. 24, BOA Tab 13 (quotation marks omitted).

133 *Gonzalez*, *supra* note 131 at para. 25, BOA Tab 13 (quotation marks omitted).

PART IV ~ ORDER REQUESTED

109. For all of these reasons, West Face respectfully requests that an Order be made dismissing or permanently staying this action against it, with costs on a full indemnity basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of July, 2017.

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Lumley v. Gye,* (1853) 118 ER 749 (Q.B.)

2. *The Catalyst Capital Group Inc. v. Moyse*, 2015 ONSC 4388

3. *Danyluk v. Ainsworth Technologies*, 2001 SCC 44

4. *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, 2003 SCC 63

5. *Martin v. Goldfarb*, 2006 CarswellOnt 4355 (S.C.J.)

6. *McIntosh v. Parent*, 1924 CarswellOnt 212 (C.A.)

7. *Dableh v. Ontario Hydro*, 1994 CaswellOnt 175 (Ont. Gen. Div.), additional reasons at 1995 CarswellOnt 2275 (Gen. Div.), leave to appeal refused at 1995 CarswellOnt 175 (Gen. Div.)

8. *OBG Ltd. v. Allan*, [2007] UKHL 21

9. *Correia v. Canac Kitchens*, 2008 ONCA 506

10. *Lac Minerals Ltd. v. International Corona Resources Ltd.*, 1989 CarswellOnt 126 (S.C.C.)

11. *Lysko v. Braley,* 2006 CarswellOnt 1758 (C.A.), additional reasons at 2006 CarswellOnt 3159

12. *Canada Cement Lafarge Ltd. v. B.C. Lightweight Aggregate*, 1983 CarswellBC 812 (S.C.C.)

13. *Agribrands Purina Canada Inc. v. Kasamekas,* 2011 ONCA 460, additional reasons at 2011 ONCA 581

14. *Rasanen v. Rosemount Instruments Ltd.,* 1994 CarswellOnt 960 (C.A.), leave to appeal refused at [1994] S.C.C.A. No. 152 (QL)

15. *Foreman v. Niven*, 2009 BCSC 1476

16. *Canam Enterprises Inc. v. Coles*, 2000 CarswellOnt 4739 (C.A.) per Goudge J.A., dissenting, dissent approved and adopted at 2002 SCC 63

17. *Nouvion v. Freeman*, (1889) 15 App. Cas. 1 (U.K.H.L.)

18. *Bank of America Canada v. Willann Investments Ltd.*, 1993 CarswellOnt 249 (Gen. Div.)

19. *Ontario v. National Hard Chrome Plating Co.*, 1996 CarswellOnt 199 (Gen. Div.)

20. *Novopharm Ltd. v. Eli Lilly and Co.*, 1998 CarswellNat 2226 (Fed. T.D.)

21. *McQuillian v. Native Inter-Tribal Housing Co-operative Inc.*, 1998 CarswellOnt 4172 (C.A.)

22. *Naken v. General Motors of Canada Ltd.,* 1983 CarswellOnt 367 (S.C.C.)

23. *Henderson v. Henderson,* (1843) 67 E.R. 313 (U.K. Ch.)

24. *Reddy v. Oshawa Flying Club*, 1992 CarswellOnt 349 (Gen. Div.)

25. *Las Vegas Strip Ltd. v. Toronto (City)* (1996), 1996 CarswellOnt 3426 (Gen. Div.); aff'd at 1997 CarswellOnt 1279 (C.A.)

26. *J.R.T. Nurseries Inc. v. 0843374 B.C. Ltd.*, 2016 BCSC 501

27. *Doering v. Grandview (Town)*, 1975 CarswellMan 64 (S.C.C.)

28. *Tsaoussis (Litigation Guardian of) v. Baetz*, 1998 CarswellOnt 3409 (C.A.), leave to appeal refused at [1998] S.C.C.A. No. 518 (QL)

29. *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26

30. *Free Trade Medical Network Inc. v. RBC Travel Insurance Co.*, 2005 CarswellOnt 4659 (S.C.J.), aff'd at 2006 CarswellOnt 5503 (C.A.), leave to appeal refused at 2007 CarswellOnt 1353

31. *Gonzalez v. Gonzalez*, 2016 BCCA 376, leave to appeal denied at 2017 CarswellBC 598 (S.C.C.)

SCHEDULE "B"

1. Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 4th ed. (Markham, ON: LexisNexis Canada Inc., 2015)

The Catalyst Capital Group Inc. Plaintiff	and	**VimpelCom Ltd. et al.** Defendants	Court File No. CV-16-11595-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

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