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

- 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

# FACTUM OF THE MOVING DEFENDANT UBS SECURITIES CANADA INC.
**(Motion Returnable August 16-18, 2017)**

July 21, 2017


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Defendants

**FACTUM OF THE MOVING DEFENDANT**
**UBS SECURITIES CANADA INC.**
**(Motion Returnable August 16-18, 2017)**

## PART I - OVERVIEW

1. This motion is brought by the defendant, UBS Securities Canada Inc. ("**UBS**"), pursuant to Rules 21.01(b) and 21.01(3)(d) of the *Rules of Civil Procedure* and the Court's inherent discretion to stay abusive proceedings. As with the other defendants in this action, UBS seeks an Order dismissing the action on the grounds that it is an abuse of process. The action against UBS is also barred by a judicially ordered release binding on the plaintiff, The Catalyst Capital Group Inc. ("**Catalyst**").

2. In the alternative, UBS seeks an Order striking the breach of contract claim advanced against UBS at paragraph 1(a) of the thrice amended Statement of Claim (the "**Statement of Claim**"), without leave to amend, on the ground that it discloses no reasonable cause of action. UBS was not a party (and is not alleged to be a party) to

either of the contracts the plaintiff claims were breached. The contention that UBS was "bound" by these agreements because it was allegedly acting as agent to the defendant VimpelCom Inc. ("**VimpelCom**") finds no support in contract or agency law.

3. This action is a collateral attack on final determinations made by Newbould J. in two separate proceedings relating to claims advanced by Catalyst in respect of its attempted acquisition of the debt and equity interests in WIND Mobile Corp. ("**WIND**") held by VimpelCom. UBS was engaged as an advisor to VimpelCom in respect of the sale of its interests in WIND.

4. ***First***, in an Order dated February 3, 2016, Newbould J. approved a plan of arrangement (the "**Plan of Arrangement**") in respect of WIND (described in more detail below) that included a release of the claims asserted by Catalyst in this proceeding. Catalyst participated in the Plan of Arrangement proceeding and is expressly referenced in the applicable release language.

5. ***Second***, the issues which form the basis for this action have already been determined against the plaintiff by Newbould J. in *Catalyst Capital Group Inc. v. Moyse* (the "**Moyse Action**"). By adding new defendants, this action attempts to circumvent and re-litigate crucial and determinative findings from the Moyse Action which establish that no possible damages can flow from the allegations made in the Statement of Claim, even if proven:

(a) There was "no chance that Catalyst would have successfully concluded a

deal with VimpelCom";[1] and

(b) "Catalyst had no intention of closing a deal with VimpelCom if it could not obtain the concessions it was looking for from the Government and "from the start Government officials had made clear that no such concessions would be given."[2]

6. ***Third***, Catalyst alleges that VimpelCom and UBS acted in breach of both a Confidentiality Agreement and an Exclusivity Agreement (both as defined below). UBS was not a party to either agreement and UBS's role as advisor to VimpelCom did not make it a party to these agreements. The breach of contract claim against UBS must accordingly be struck.

7. This action is barred by release, is a waste of judicial resources, risks inconsistent findings with the Moyse Action, and is accordingly an abuse of this Court's process. It should be dismissed in its entirety. Alternatively, at a minimum, the breach of contract claims against UBS should be struck.

## PART II - THE FACTS

8. This Court is receiving several facta from defendant moving parties in this action seeking similar relief to UBS, all to be heard August 16 to 18, 2017. In an effort to reduce duplication, this factum will only address issues specific to UBS's motion. In particular, UBS relies upon the facts set out in the factum of VimpelCom and the facts relating to the Moyse Action set out in the factum of the defendant West Face Capital

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[1] *Catalyst Capital Group Inc. v. Moyse*, 2016 ONSC 5271 at para 131 ("**Moyse Decision**"); Motion Record of West Face Capital Inc. ("**West Face Motion Record**"), Vol. 1, Ex. 1.
[2] *Ibid.* at paras 124 and 11(d).

Inc. ("**West Face**").

9. Catalyst alleges in the Statement of Claim that VimpelCom and UBS acted in breach of (a) a Confidentiality Agreement dated March 21, 2014 among VimpelCom, Global Telecom Holdings S.A.E. and Catalyst (the "**Confidentiality Agreement**") and (b) an Exclusivity Agreement dated July 23, 2014 between Catalyst and VimpelCom (the "**Exclusivity Agreement**").[3] The parties to these agreements are not in dispute, consistent with the pleadings at paragraphs 28 and 43, respectively, of the Statement of Claim.[4]

10. Catalyst alleges that VimpelCom and UBS breached these agreements by engaging in discussions with a consortium of potential investors (the "**Consortium**"), including West Face, to negotiate an alternative deal for the WIND interests during the term of the Exclusivity Agreement.[5] Catalyst also alleges that the defendant Globalive Capital Inc. ("**Globalive**") passed Catalyst's confidential information to the Consortium, providing the Consortium an unfair advantage over Catalyst in the WIND negotiations.[6] When the term of the Exclusivity Agreement expired on August 18, 2014, Catalyst and VimpelCom had not reached agreement for the WIND acquisition. The Consortium, together with UBS and Globalive, is alleged to have engaged in a conspiracy to induce VimpelCom to breach the Exclusivity Agreement and to cause

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[3] Amended Amended Statement of Claim, paras. 125-126, Third Amended Motion Record of UBS Securities Canada Inc. (the "**UBS Motion Record**"), Tab 4A.
[4] *Ibid.* at paras. 28 and 43.
[5] *Ibid.* at paras 103-109.
[6] *Ibid.* at paras. 95-102.

VimpelCom to cease negotiating with Catalyst.[7]

11. These allegations are only the latest in a series of attacks that Catalyst has pursued in the Courts to address its failures in the boardroom to negotiate a deal for WIND.

12. As set out in detail in the West Face factum, Catalyst commenced the Moyse Action on June 25, 2014, by seeking to enjoin Mr. Moyse from disclosing confidential information to West Face relating to Catalyst.[8]

13. On September 16, 2014, VimpelCom reached agreement with the Consortium for the purchase and sale of VimpelCom's stake in WIND. Mid-Bowline Group Corp. ("**Mid-Bowline**") was incorporated as the Purchaser.[9]

14. In December 2014, Catalyst expanded the scope of the Moyse Action, alleging that Mr. Moyse had disclosed confidential information to West Face about Catalyst's negotiations with VimpelCom, claiming a constructive trust over West Face's interests in WIND and an accounting of profits.[10]

15. In December 2015, Mid-Bowline commenced an application in the Ontario Superior Court of Justice (Commercial List) for approval of the Plan of Arrangement to effect the sale of WIND to an entity controlled by Shaw Communications Inc. ("**Shaw**"). As set out in the reasons for decision of Newbould J. in approving the Plan of

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[7] *Ibid.* at paras. 110-113.
[8] Moyse Decision, *supra* note 1 at paras. 1, 76.
[9] *Ibid.* at para. 31; *Mid-Bowline Group Corp.*, 2016 ONSC 669 at paras 1, 3 and 18; West Face Motion Record, Vol. 1, Ex. 2. (the "**Plan of Arrangement Decision**").
[10] Affidavit of Andrew Carlson sworn December 7, 2016, para. 8, West Face Motion Record, Vol. 1, Tab B, para. 33.

Arrangement, "[t]he only reason that this transaction is proceeding by way of plan of arrangement is to provide Shaw with clear title to the shares of WIND. Had this not been required because of the Catalyst claim, the shareholders of Mid-Bowline were prepared to proceed by a share purchase agreement without any requirement of Court approval."[11]

16. Catalyst opposed the Plan of Arrangement. In doing so, it argued not only the issues raised in the Moyse Action and the claim for a constructive trust over West Face's interests in WIND, but also potential claims relating to breach of contract. As set out in paragraphs 25 to 27 of the VimpelCom factum, Newbould J. (a) determined that Catalyst's principal provided false testimony about when he learned about the potential contract claims; (b) determined it was "too late in the process" for the claims; and (c) affirmatively stated that the claims were barred by the Release (defined below) set out in the Plan of Arrangement.[12]

17. On February 3, 2016, following the reasons of decision of Newbould J., Catalyst consented to an Order giving effect to the Plan of Arrangement. At section 4.5, the Plan of Arrangement included a release of "all actions, causes of action, claims or proceedings...based on or in any way relating to any Purchased Shares..." (the "**Release**").[13]

18. Notwithstanding the above, shortly before the start of trial in the Moyse Action, Catalyst issued the original Statement of Claim in this action. In this pleading the *only*

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[11] Plan of Arrangement Decision, *supra* note 9 at para. 6.
[12] *Ibid.* at paras 56 to 61.
[13] Order of Justice Newbould dated February 3, 2016, West Face Motion Record, Vol. 14, Ex. 39, p. 5155-5167 (the "**Plan of Arrangement Order**").

claim against UBS was that it breached the Exclusivity and Confidentiality Agreements (to which it is not a party). This was a bald allegation limited to the statement that UBS disclosed the Exclusivity Agreement to the Consortium, and UBS was referenced only a handful of times in the 106-paragraph pleading. There is neither an allegation nor a suggestion that UBS was a participant in the Consortium's alleged conspiracy to induce VimpelCom to breach the Exclusivity Agreement.[14]

19. UBS delivered a notice of motion to strike the proceeding in its entirety (as against UBS) on the basis that there was no reasonable cause of action disclosed. Faced with the obvious deficiency of its pleading against UBS, Catalyst nevertheless waited until November 10, 2016 to deliver its Amended Statement of Claim, in which it alleged for the first time that UBS was a co-conspirator with the Consortium to induce VimpelCom to breach the Exclusivity Agreement. Catalyst failed to plead any motive or rationale for UBS to so conspire.[15]

## PART III - ISSUES AND THE LAW

20. These are the issues to be resolved on this motion:

(a) Whether the action ought to be dismissed on the basis that it is barred by the Release;

(b) Whether the action ought to be dismissed on the basis that it is an abuse of process; and

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[14] Statement of Claim, UBS Motion Record, Tab 2A, see paras. 1(a), 5, 16, 25, 27, 31, 48, 49, 81, 84 and 92.
[15] Amended Statement of Claim, UBS Motion Record, Tab 3A, see paras. 67-72 and 93.

(c) Alternatively, whether the claim against UBS for breach of contract ought to be struck without leave to amend.

21. For the reasons set out above and below, UBS respectfully submits that the answer to these questions is: Yes.

**A. The Claims are Governed by the Release**

22. In addition to the submissions below, UBS relies on the factum of VimpelCom, in particular, paragraphs 41 to 80 with respect to the application of the Release.

23. Catalyst consented to the Plan of Arrangement and is bound by the Release, its claim against UBS is captured by the Release, and UBS is entitled to benefit from the Release in its role as advisor to VimpelCom.

24. The Release is at section 4.5 of the Plan of Arrangement under the heading "Paramountcy". As described in the reasons for decision of Newbould J., the need for the Release in order to transfer clear title to the Purchased Shares (as defined) was the primary reason for the transaction being done by way of Plan of Arrangement. The Release requirement from Shaw was apparently triggered by Catalyst's claims in the Moyse Action and otherwise. The operative language is as follows:

> ...(iii) **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 any Purchased Shares or Options shall be deemed to have been settled, compromised, released and determined without liability** except as set forth herein; provided, however, that nothing in this section 4.5 shall be construed to extinguish any right of The Catalyst Capital Group Inc. to assert any of the following matters, with the exception of any constructive trust or equivalent remedy

> over the Purchased Shares, which shall be deemed to have been settled, compromised, released and determined without liability, along with all other claims in this section 4.5:
>
> (a) its existing claims as asserted in the Amended Amended Statement of Claim [in the Moyse Litigation];
>
> (b) as against any person (as defined in the OBCA), any potential claim for tracing of the money received by West Face Capital Inc. from the disposition of its interest in the Corporation pursuant to the Arrangement; or
>
> (c) as against the Former Shareholders, any potential claim relating to their acquisition from VimpelCom Ltd. of their interest directly or indirectly in WIND Mobile Corp., including, to the extent permitted by law, for a tracing of the money received by them pursuant to the Arrangement.[16]

25. None of the carve-outs in the Release are applicable to Catalyst's present action. Catalyst was represented by sophisticated counsel, made submissions in the Plan of Arrangement proceeding, and ultimately consented to the terms of the Plan of Arrangement after its objections were overturned by Newbould J. If Catalyst wished to preserve its right to pursue the present action it had the opportunity to try to preserve those rights. It did not do so.

26. The Release is open-ended and is driven by its subject matter – the Purchased Shares, and any claim based on or in any way relating to the Purchased Shares. The Purchased Shares are defined in the Plan of Arrangement as follows:

> the issued and outstanding shares in the capital of [Mid-Bowline] as of the Effective Time, including any shares issued on the exercise or deemed exercise of Options in

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[16] Plan of Arrangement Order, *supra* note 13, at s. 4.5. [Emphasis added]

> accordance with the Arrangement Agreement and this Plan of Arrangement.[17]

27. At paragraphs 46 to 61 of its factum, VimpelCom sets out in detail how the claims asserted by Catalyst in this action are based on or relating to the Purchased Shares. In addition, the breadth of this subject matter and therefore the scope of the Release is made apparent by the carve-outs:

(a) ***First,*** the carve-outs make clear that the beneficiaries of the Release are not limited to any enumerated party or parties, but relate to any claims that may be asserted against any party in any way relating to the Purchased Shares. This is made expressly clear in section 4.5(iii)(b), which creates a carve-out in respect of "**any person**" for only a specific type of claim, namely, the tracing claim set out therein. Claims against "any person" otherwise relating to the Purchased Shares are not carved out from the Release.[18]

(b) ***Second,*** the carve-out in section 4.5(iii)(c) shows that claims relating to the Consortium's acquisition of WIND from VimpelCom were captured within the Release, except as carved out in this subpart (c). Section 4.5(iii)(c) only carves out claims against Former Shareholders (as defined), it does not carve-out claims against VimpelCom and UBS. The reasons for decision of Newbould J. approving the Plan of Arrangement

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[17] *Ibid.*
[18] *Ibid.*

demonstrates that Catalyst was expressly aware of a potential claim against VimpelCom for breach of the Exclusivity Agreement.[19]

## B. The Action is an Abuse of Process

28. This action is the classic example of litigation by installments and demonstrates repeated abuse of this Court's process. Catalyst has made strategic decisions to pursue some claims against certain parties while foregoing others until later. Newbould J. has called its conduct "tactical";[20] accused it of delay and "l[ying] in the weeds";[21] and made the judicial determination that its witnesses were unreliable and not forthcoming.[22] Catalyst has repeatedly amended its pleadings, in this Action and the Moyse Action; objected to the Plan of Arrangement; and failed to abide by a Release to which it previously agreed.

29. In respect of UBS specifically, Catalyst clearly lumped it in as an afterthought when drafting its first Statement of Claim, alleging only that UBS breached contracts to which it was not a party. Faced with a motion to strike to which there was no possible response, only then did Catalyst advance the unsupported theory that UBS was in conspiracy with the Consortium to induce VimpelCom to breach the Exclusivity Agreement. These amendments serve to demonstrate that this litigation is frivolous and tactical in nature, and should be struck.[23]

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[19] Plan of Arrangement Decision, *supra* note 9 at paras 54-56.
[20] *Ibid.* at para. 33.
[21] *Ibid.* at para. 59.
[22] *Ibid.*
[23] *Bear v. Merck Frosst Canada Co.*, 2011 SKCA 152 at paras 81-83 ("*Bear*"), UBS Book of Authorities, Tab 1.

30. The issues which form the basis for this action have already been thoroughly canvassed before Newbould J. in the Moyse Action. While the Moyse Action did not, because of a tactical decision by Catalyst, include claims of breach of contract and conspiracy against UBS, the Moyse Action dealt directly with the reasons why Catalyst did not complete a transaction with VimpelCom. These findings from the reasons for decision of Newbould J. in the Moyse Action make it impossible, without inconsistent findings of fact, for this Court to find that the conduct alleged against UBS caused damages to VimpelCom:

(a) West Face independently knew that "VimpelCom wanted a clean exit without regulatory issues getting in the way" based on its own deal discussions and not because of confidential information it received about the Catalyst bid during the exclusivity period;[24]

(b) There was "no chance that Catalyst would have successfully concluded a deal with VimpelCom";[25] and

(c) "Catalyst had no intention of closing a deal with VimpelCom if it could not obtain the concessions it was looking for from the Government and "from the start Government officials had made clear that no such concessions would be given."[26]

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[24] Moyse Decision, *supra* note 1 at para 109;
[25] *Ibid.* at para 131.
[26] *Ibid.* at paras 124 and 11(d).

31. The doctrine of "abuse of process", which may preclude a party from attempting to re-litigate a claim or issue which has already been determined, bars Catalyst from pursuing this action.[27] As the Supreme Court of Canada held in *Toronto (City) v. C.U.P.E., Local 79*, the court in every case has the inherent and residual discretion to "prevent an abuse of the court's process".[28] In addition, the *Rules of Civil Procedure* state that "[a] defendant may move before a judge to have an action stayed or dismissed on the ground that...the action is frivolous or vexatious or is otherwise an abuse of process of the court, and the judge may make an order or grant judgment accordingly."[29]

32. There are no enumerated prerequisite factors that must be met before the doctrine of abuse of process can be invoked.[30] As stated by the Saskatchewan Court of Appeal, there is "often no individual marker indicating whether a proceeding is an abuse of process. Rather, it is typically necessary to consider all of the relevant context and background in assessing whether an abuse of process has been established."[31] Canadian courts have applied the doctrine of abuse of process where allowing the litigation to proceed would "violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice."[32]

33. Like *res judicata*, the doctrine of abuse of process may prevent a party from litigating issues that could have been, but were not, raised in earlier proceedings.

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[27] *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 SCR 77 at paras 35-38 (SCC) ("*C.U.P.E.*"), UBS Book of Authorities, Tab 2.
[28] *Ibid.* at para 35.
[29] *Rules of Civil Procedure*, RRO 1990, Reg 194 at Rule 21.01(3)(d). See also: Rule 25.11 and *Courts of Justice Act*, RSO 1990 c C. 43 at s. 106 re stay of proceedings.
[30] *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26 at para 40, UBS Book of Authorities, Tab 3.
[31] *Bear, supra* note 23 at para 41.
[32] *C.U.P.E., supra* note 27 at para 37.

However, unlike issue and cause of action estoppel, the abuse of process doctrine does not require that the parties be the same between the two proceedings. As the Nova Scotia Court of Appeal has stated:

> ...**abuse of process by re-litigation has sometimes been described as a rule against litigation by instalment**, or the rule in *Henderson* [(1843), 3 Hare 100]. To breach the rule in *Henderson*, **even though the parties are not the same**, is an abuse of process. **In applying abuse of process by re-litigation, the courts have taken a stern view of raising in new proceedings issues that ought reasonably to have been raised in earlier proceedings**. A party is not entitled to re-litigate a case because counsel failed to raise an argument which the party wanted to raise or re-litigate an issue indirectly by "a cleverly camouflaged effort."[33]

34. Thus, the doctrine of abuse of process may remedy the "grave evil"[34] of "litigation by installments"[35], which may occur, for example, "where a party, after a judgment, raises an issue that reasonably could have been raised at an earlier point..."[36]

35. To permit Catalyst to proceed with its action in the face of the decision of Newbould J. in the Moyse Action would not only sanction the quintessential "litigation by installments", it would do so in circumstances where Newbould J. has made factual and legal determinations that would have to be overridden for Catalyst to prove damages. Catalyst can point to nothing that prevented it from bringing these claims earlier, either as part of or parallel to the Moyse Action. It chose not to do so. Catalyst

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[33] *R. v. Gough*, 2006 NLCA 3 at para 49 (quoting Donald J. Lange, *The Doctrine of Res Judiciata in Canada*, (Toronto: Butterworths, 2000), at p. 361), UBS Book of Authorities, Tab 4. [Emphasis added]
[34] *Mainwaring v. Alberta*, 2000 ABCA 12 at para 6, UBS Book of Authorities, Tab 5.
[35] See, for example: *Bear, supra* note 23 at paras 72, 76 and 78. See also: *Samos Investments v. Pattinson*, 2004 BCSC 484, UBS Book of Authorities, Tab 6; *Panaccia Estate v. Toal*, 2012 ABQB 11 at paras 97, 105-106 and 116-117 ("*Panaccia*") aff'd 2012 ABCA 397, UBS Book of Authorities, Tab 7; *Skypower CL 1 LP v. Ontario Power Authority*, 2014 ONSC 6950 at paras 39-40, UBS Book of Authorities, Tab 8.
[36] *Pannaccia, supra* note 35 at para 95.

should not be given another kick at the can. Allowing this action to proceed would be antithetical to judicial economy, finality and, most importantly, the integrity of the administration of justice.

### C. The Claim Against UBS for Breach of Contract Must be Struck

#### i. Principles Applicable to Motions to Strike

36. Pursuant to Rule 21.01(b) of the *Rules of Civil Procedure*, a judge may "strike out a pleading on the ground that it discloses no reasonable cause of action".[37] Rule 21.01(b) is designed to "test whether a plaintiff's allegations state a legally sufficient or substantively adequate claim".[38] A motion to strike should be granted where it is "plain and obvious" that the pleading discloses no reasonable cause of action.[39] That test is met where (a) the plaintiff pleads allegations that do not give rise to a recognized cause of action; (b) the plaintiff fails to plead a necessary element of a recognized cause of action; or (c) the allegations in the pleading are simply conjecture, assumptions or speculation unsupported by material facts.[40]

37. In considering the impugned statement of claim, the judge must accept well-pleaded factual allegations as true for the purposes of the motion to strike, but need not accept factual allegations that are patently ridiculous, incapable of proof, or contradicted by documents relied on by the plaintiffs in their pleading.[41] As noted in *Boudreau v. Bank of Montreal*, "[a] pleading which contains an "untenable plea" in law

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[37] *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 21.01(1)(b).
[38] *Aristocrat Restaurants Ltd. v. Ontario*, 2003 CarswellOnt 5574 (WL Can) at para 16 (SCJ), UBS Book of Authorities, Tab 9.
[39] *Ibid.* citing *Hunt v. T& N plc*, [1990] 2 SCR 959 at para 33 (SCC).
[40] *Mitchell v. Bentley*, [2008] OJ No 5404 (QL) at para 8 (SCJ), UBS Book of Authorities, Tab 10.
[41] *Boudreau v. Bank of Montreal*, 2012 CarswellOnt 9428 (WL Can) at para 14 (SCJ), UBS Book of Authorities, Tab 11.

may be struck. An untenable plea is one "that is clearly impossible of success at law, it has no legal potential whatsoever, that is clearly unviable or unachievable at law" or raises no genuine issue of law. Such an untenable plea is frivolous, vexatious and an abuse of process of the court."[42]

### ii. The Statement of Claim Does Not Disclose a Cause of Action against UBS for Breach of Contract

38. Even if the action is found not to be an abuse of process, as a matter of law, it is plain and obvious that, at the very least, the Statement of Claim does not disclose a reasonable cause of action against UBS for breach of contract.

39. The parties to the Confidentiality Agreement are set out at paragraph 28 of the Statement of Claim. UBS is not one of them. The Statement of Claim alleges (at paragraph 29) that UBS was bound by the terms of the Confidentiality Agreement on the basis that it is an "Authorized Person" as defined in the Confidentiality Agreement.[43]

40. The parties to the Exclusivity Agreement are set out at paragraph 43 of the Statement of Claim, and again, UBS is not one of them. The Statement of Claim alleges (at paragraph 44) that UBS is bound to the Exclusivity Agreement because it was VimpelCom's agent or advisor.[44]

41. Neither the inclusion of UBS as an "Authorized Person" in the Confidentiality Agreement or the allegation that UBS was VimpelCom's agent or advisor serves to

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[42] *Ibid.* at para 17.
[43] Amended Amended Statement of Claim, *supra* note 3, at paras. 28-29.
[44] *Ibid.* at paras. 43-44.

create privity between UBS and Catalyst to support a cause of action. As aptly stated by the Ontario court in *Napev Construction Ltd. v. Lebedinsky*, "[i]t is trite law that a stranger to a contract cannot be sued on that contract...The reason is simple. A person can be sued for breach of contract only when he or she has agreed to accept the obligations or duties created by the contract."[45] The exception to this rule is that a principal may be sued **where the *agent* contracts *on behalf of the principal* (not vice versa)**.[46]

42. Because an agent is acting for and on behalf of one's principal, any acts of the agent are, in effect, those of the principal. The doctrine of privity does not apply where a party contracts as agent for another:

> There is ... a clear exception to the privity rule in agency relationships. Where a contracting party is an agent for a principal not a party to a contract, the principal may directly sue or be sued. **The reason is that the agent is the mere conduit for the principal and for that reason, the contract is that of the principal and not the agent**.[47]

43. Catalyst's claim against UBS for breach of contract is inconsistent with longstanding rules of agency. Even if UBS had entered into the Exclusivity Agreement and the Confidentiality Agreement as agent for VimpelCom, it could not be sued under either contract. Here, UBS is even further removed from any contractual relationship with Catalyst, not having entered into either contract at all. Based on the allegations in the Statement of Claim, UBS's contractual relationship was with VimpelCom, not

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[45] *Napev Construction Ltd. v. Lebedinsky*, 1984 CarswellOnt 725 (WL Can) at para 21 (HCJ) ("*Napev Construction*"), UBS Book of Authorities, Tab 12. See also: F.M.B. Reynolds, *Bowstead & Reynolds on Agency*, 19th ed. (London: Sweet & Maxwell, 2010) at para 9-002, UBS Book of Authorities, Tab 13, quoting an earlier case: "There is no doubt whatever as to the general rule as regards an agent, that where a person contracts as agent for a principal, the contract is the contract of the principal and not that of the agent; and prima facie, at common law the only person who may sue is the principal and the only person who can be sued is the principal."

[46] *Ibid.* at para 22..

[47] *Ibid.*

Catalyst. As UBS is not a party to either agreement in any capacity, it cannot have liability for breach of contract.

44. As a result, the claim against UBS for breach of contract is not tenable and must be struck, without leave to amend. There are no amendments that can be made to the Statement of Claim that would produce a viable cause of action for breach of contract against UBS.[48]

## PART IV - ORDER REQUESTED

45. For all of the foregoing reasons UBS respectfully requests that this Honourable Court grant:

(a) An Order dismissing or permanently staying the action against UBS on the grounds that it is barred by the Release;

(b) An Order dismissing or permanently staying the action against UBS on the grounds that it is an abuse of process;

(c) In the alternative, an Order striking the claim against UBS for breach of contract at paragraph 1(a) of the Statement of Claim, without leave to amend, on the grounds that it discloses no reasonable cause of action;

(d) costs of this motion to UBS on a substantial indemnity basis; and

(e) such further and other Order as this Honourable Court deems just.

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[48] Leave to amend a defective pleading should only be granted if the amendments would disclose a cause of action tenable in law. Leave to amend should not be granted where it is plain and obvious that the cause of action cannot succeed and cannot be corrected by amendment. See: *Jack v. Canada (Attorney General)*, 2004 CarswellOnt 3255 (WL Can) at paras 23-24 (SCJ), UBS Book of Authorities, Tab 14, and *Corfax Benefit Systems Ltd. v. Fiducie Desjardins Inc.*, 1997 CarswellOnt 4889 (WL Can) at para 27 (SCJ), UBS Book of Authorities, Tab 15.

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

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199 Bay Street
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Lawyers for the Defendant,
UBS Securities Canada Inc.

## SCHEDULE "A" - LIST OF AUTHORITIES

1. *Bear v. Merck Frosst Canada Co.*, 2011 SKCA 152
2. *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 SCR 77 (SCC)
3. *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26
4. *R. v. Gough*, 2006 NLCA 3
5. *Mainwaring v. Alberta*, 2000 ABCA 12
6. *Samos Investments v. Pattinson*, 2004 BCSC 484
7. *Panaccia Estate v. Toal*, 2012 ABQB 11 aff'd 2012 ABCA 397
8. *Skypower CL 1 LP v. Ontario Power Authority*, 2014 ONSC 6950
9. *Aristocrat Restaurants Ltd. v. Ontario*, 2003 CarswellOnt 5574 (WL Can) (SCJ)
10. *Mitchell v. Bentley*, [2008] OJ No 5404 (QL) (SCJ)
11. *Boudreau v. Bank of Montreal*, 2012 CarswellOnt 9428 (WL Can) (SCJ)
12. *Napev Construction Ltd. v. Lebedinsky*, 1984 CarswellOnt 725 (WL Can) (HCJ)
13. F.M.B. Reynolds, *Bowstead & Reynolds on Agency*, 19th ed. (London: Sweet & Maxwell, 2010)
14. *Jack v. Canada (Attorney General)*, 2004 CarswellOnt 3255 (WL Can) (SCJ)
15. *Corfax Benefit Systems Ltd. v. Fiducie Desjardins Inc.*, 1997 CarswellOnt 4889 (WL Can) (SCJ)

## SCHEDULE "B"
## RELEVANT STATUTES

*Rules of Civil Procedure*, **RRO 1990, Reg 194 at Rules 1.04(1), 21.01(1)(b), 21.01(3)(d), 25.11, 37 and 57**

**General Principle**

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

...

RULE 21 DETERMINATION OF AN ISSUE BEFORE TRIAL
WHERE AVAILABLE

**To Any Party on a Question of Law**

**21**.01 (1) A party may move before a judge,

...

> (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence, and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (1).

**To Defendant**

(3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,

...

**Action Frivolous, Vexatious or Abuse of Process**

> (d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court, and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (3).

...

**Striking Out a Pleading or Other Document**

25.11 The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,

(a) may prejudice or delay the fair trial of the action;

(b) is scandalous, frivolous or vexatious; or

(c) is an abuse of the process of the court. R.R.O. 1990, Reg. 194, r. 25.11.

...

MOTIONS AND APPLICATIONS
RULE 37 MOTIONS – JURISDICTION AND PROCEDURE

NOTICE OF MOTION

**37**.01 A motion shall be made by a notice of motion (Form 37A) unless the nature of the motion or the circumstances make a notice of motion unnecessary. R.R.O. 1990, Reg. 194, r. 37.01.

JURISDICTION TO HEAR A MOTION

Jurisdiction of Judge

**37**.02 (1) A judge has jurisdiction to hear any motion in a proceeding. R.R.O. 1990, Reg. 194, r. 37.02 (1).

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

Jurisdiction of Registrar
(3) The registrar shall make an order granting the relief sought on a motion for an order on consent, if,
(a) the consent of all parties (including the consent of any party to be added, deleted or substituted) is filed;
(b) the consent states that no party affected by the order is under disability; and
(c) the order sought is for,
(i) amendment of a pleading, notice of application or notice of motion,
(ii) addition, deletion or substitution of a party,
(iii) removal of a lawyer as lawyer of record;
(iv) setting aside the noting of a party in default,
(v) setting aside a default judgment,

(vi) discharge of a certificate of pending litigation,
(vii) security for costs in a specified amount,
(viii) re-attendance of a witness to answer questions on an examination,
(ix) fulfilment of undertakings given on an examination, or
(x) dismissal of a proceeding, with or without costs. O. Reg. 19/03, s. 8; O. Reg. 575/07, s. 21.

PLACE OF HEARING OF MOTIONS

**37**.03 (1) All motions shall be brought and heard in the county where the proceeding was commenced or to which it has been transferred under rule 13.1.02, unless the court orders otherwise. O. Reg. 14/04, s. 17; O. Reg. 438/08, s. 32.
(2) Revoked: R.R.O. 1990, Reg. 194, r. 37.03 (3).
(3) Spent: O. Reg. 14/04, s. 17.

MOTIONS — TO WHOM TO BE MADE

**37**.04 A motion shall be made to the court if it is within the jurisdiction of a master or registrar and otherwise shall be made to a judge. R.R.O. 1990, Reg. 194, r. 37.04; O. Reg. 19/03, s. 9.

HEARING DATE FOR MOTIONS

Where no practice direction

**37**.05 (1) At any place where no practice direction concerning the scheduling of motions is in effect, a motion may be set down for hearing on any day on which a judge or master is scheduled to hear motions. O. Reg. 770/92, s. 10.

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

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

CONTENT OF NOTICE

**37**.06 Every notice of motion (Form 37A) shall,
(a) state the precise relief sought;
(b) state the grounds to be argued, including a reference to any statutory provision or rule to be relied on; and
(c) list the documentary evidence to be used at the hearing of the motion. R.R.O. 1990, Reg. 194, r. 37.06.

SERVICE OF NOTICE

Required as General Rule

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

Where Not Required
(2) Where the nature of the motion or the circumstances render service of the notice of motion impracticable or unnecessary, the court may make an order without notice. R.R.O. 1990, Reg. 194, r. 37.07 (2).

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

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

Where Notice Ought to Have Been Served
(5) Where it appears to the court that the notice of motion ought to have been served on a person who has not been served, the court may,
(a) dismiss the motion or dismiss it only against the person who was not served;
(b) adjourn the motion and direct that the notice of motion be served on the person; or
(c) direct that any order made on the motion be served on the person. R.R.O. 1990, Reg. 194, r. 37.07 (5).

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

FILING OF NOTICE OF MOTION

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

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

ABANDONED MOTIONS

**37**.09 (1) A party who makes a motion may abandon it by delivering a notice of abandonment. R.R.O. 1990, Reg. 194, r. 37.09 (1).

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

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

MATERIAL FOR USE ON MOTIONS

Where Motion Record Required

**37**.10 (1) Where a motion is made on notice, the moving party shall, unless the court orders otherwise before or at the hearing of the motion, serve a motion record on every other party to the motion and file it, with proof of service, in the court office where the motion is to be heard, at least seven days before the hearing, and the court file shall not be placed before the judge or master hearing the motion unless he or she requests it or a party requisitions it. R.R.O. 1990, Reg. 194, r. 37.10 (1); O. Reg. 171/98, s. 14 (1); O. Reg. 438/08, s. 35 (1).

Contents of Motion Record

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

(a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter;

(b) a copy of the notice of motion;

(c) a copy of all affidavits and other material served by any party for use on the motion;

(d) a list of all relevant transcripts of evidence in chronological order, but not necessarily the transcripts themselves; and

(e) a copy of any other material in the court file that is necessary for the hearing of the motion. R.R.O. 1990, Reg. 194, r. 37.10 (2).

Responding Party's Motion Record

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

(a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter; and

(b) a copy of any material to be used by the responding party on the motion and not included in the motion record. R.R.O. 1990, Reg. 194, r. 37.10 (3); O. Reg. 171/98, s. 14 (2); O. Reg. 438/08, s. 35 (2).

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

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

Factum
(6) A party may serve on every other party a factum consisting of a concise argument stating the facts and law relied on by the party. O. Reg. 14/04, s. 18.
(7) The moving party's factum, if any, shall be served and filed with proof of service in the court office where the motion is to be heard at least seven days before the hearing. O. Reg. 394/09, s. 15 (1).
(8) The responding party's factum, if any, shall be served and filed with proof of service in the court office where the motion is to be heard at least four days before the hearing. O. Reg. 394/09, s. 15 (2).
(9) Revoked: O. Reg. 394/09, s. 15 (3).

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

CONFIRMATION OF MOTION

Confirmation of Motion
**37**.10.1 (1) A party who makes a motion on notice to another party shall,
(a) confer or attempt to confer with the other party;
(b) not later than 2 p.m. three days before the hearing date, give the registrar a confirmation of motion (Form 37B) by,

(i) sending it by fax, or by e-mail if available in the court office, or
(ii) leaving it at the court office; and
(c) send a copy of the confirmation of motion to the other party by fax or e-mail. O. Reg. 14/04, s. 19; O. Reg. 438/08, s. 36.

Effect of Failure to Confirm
(2) If no confirmation is given, the motion shall not be heard, except by order of the court. O. Reg. 14/04, s. 19.
Duty to Update
(3) A party who has given a confirmation of motion and later determines that the confirmation is no longer correct shall immediately,
(a) give the registrar a corrected confirmation of motion (Form 37B) by,
(i) sending it by fax, or by e-mail if available in the court office, or
(ii) leaving it at the court office; and
(b) send a copy of the corrected confirmation of motion to the other party by fax or e-mail. O. Reg. 14/04, s. 19.

HEARING IN ABSENCE OF PUBLIC

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

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

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

HEARING WITHOUT ORAL ARGUMENT

Consent motions, unopposed motions and motions without notice
37.12.1 (1) Where a motion is on consent, unopposed or without notice under subrule 37.07 (2), the motion may be heard in writing without the attendance of the parties, unless the court orders otherwise. O. Reg. 465/93, s. 4 (2).
(2) Where the motion is on consent, the consent and a draft order shall be filed with the notice of motion. O. Reg. 766/93, s. 1 (1).
(2.1) In the case of a motion on consent in the Court of Appeal, an affidavit or other document setting out the reasons why it is appropriate to make the order sought on the motion shall also be filed with the notice of motion. O. Reg. 82/17, s. 3.

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

Opposed Motions in Writing
(4) Where the issues of fact and law are not complex, the moving party may propose in the notice of motion that the motion be heard in writing without the attendance of the parties, in which case,
(a) the motion shall be made on at least fourteen days notice;
(b) the moving party shall serve with the notice of motion and immediately file, with proof of service in the court office where the motion is to be heard, a motion record, a draft order and a factum entitled factum for a motion in writing, setting out the moving party's argument;
(c) the motion may be heard in writing without the attendance of the parties, unless the court orders otherwise. O. Reg. 465/93, s. 4 (2); O. Reg. 766/93, s. 1 (2).
(5) Within ten days after being served with the moving party's material, the responding party shall serve and file, with proof of service, in the court office where the motion is to be heard,
(a) a consent to the motion;
(b) a notice that the responding party does not oppose the motion;
(c) a motion record, a notice that the responding party agrees to have the motion heard and determined in writing under this rule and a factum entitled factum for a motion in writing, setting out the party's argument; or
(d) a notice that the responding party intends to make oral argument, along with any material intended to be relied upon by the party. O. Reg. 465/93, s. 4 (2).
(6) Where the responding party delivers a notice under subrule (5) that the party intends to make oral argument, the moving party may either attend the hearing and make oral argument or not attend and rely on the party's motion record and factum. O. Reg. 465/93, s. 4 (2).

DISPOSITION OF MOTION
**37**.13 (1) On the hearing of a motion, the presiding judge or officer may grant the relief sought or dismiss or adjourn the motion, in whole or in part and with or without terms, and may,
(a) where the proceeding is an action, order that it be placed forthwith, or within a specified time, on a list of cases requiring speedy trial; or
(b) where the proceeding is an application, order that it be heard at such time and place as are just. R.R.O. 1990, Reg. 194, r. 37.13 (1).

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

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

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

SETTING ASIDE, VARYING OR AMENDING ORDERS

Motion to Set Aside or Vary

**37**.14 (1) A party or other person who,
(a) is affected by an order obtained on motion without notice;
(b) fails to appear on a motion through accident, mistake or insufficient notice; or
(c) is affected by an order of a registrar,
may move to set aside or vary the order, by a notice of motion that is served forthwith after the order comes to the person's attention and names the first available hearing date that is at least three days after service of the notice of motion. R.R.O. 1990, Reg. 194, r. 37.14 (1); O. Reg. 132/04, s. 9.

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

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

Order Made by Judge
(4) A motion under subrule (1) or any other rule to set aside, vary or amend an order of a judge may be made,
(a) to the judge who made it, at any place; or
(b) to any other judge, at a place determined in accordance with rule 37.03 (place of hearing of motions). R.R.O. 1990, Reg. 194, r. 37.14 (4).

Order Made by Master
(5) A motion under subrule (1) or any other rule to set aside, vary or amend an order of a master may be made,
(a) to the master who made it, at any place; or
(b) to any other master or to a judge, at a place determined in accordance with rule 37.03 (place of hearing of motions). R.R.O. 1990, Reg. 194, r. 37.14 (5).

Order Made in Court of Appeal or Divisional Court
(6) A motion under subrule (1) or any other rule to set aside, vary or amend an order made by a judge or panel of the Court of Appeal or Divisional Court may be made,
(a) where the order was made by a judge, to the judge who made it or any other judge of the court; or
(b) where the order was made by a panel of the court, to the panel that made it or any other panel of the court. R.R.O. 1990, Reg. 194, r. 37.14 (6); O. Reg. 82/17, s. 4, 17.

MOTIONS IN A COMPLICATED PROCEEDING OR SERIES OF PROCEEDINGS

**37**.15 (1) Where a proceeding involves complicated issues or where there are two or more proceedings that involve similar issues, the Chief Justice or Associate Chief Justice of the Superior Court of Justice, a regional senior judge of the Superior Court of Justice or a judge designated by any of them may direct that all motions in the proceeding or proceedings be heard by a particular judge, and rule 37.03 (place of hearing of motions) does not apply to those motions. R.R.O. 1990, Reg. 194, r. 37.15 (1); O. Reg. 292/99, ss. 2 (3), 4.

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

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

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

PROHIBITING MOTIONS WITHOUT LEAVE

**37**.16 On motion by any party, a judge or master may by order prohibit another party from making further motions in the proceeding without leave, where the judge or master on the hearing of the motion is satisfied that the other party is attempting to delay or add to the costs of the proceeding or otherwise abuse the process of the court by a multiplicity of frivolous or vexatious motions. R.R.O. 1990, Reg. 194, r. 37.16.

MOTION BEFORE COMMENCEMENT OF PROCEEDING

**37**.17 In an urgent case, a motion may be made before the commencement of a proceeding on the moving party's undertaking to commence the proceeding forthwith. R.R.O. 1990, Reg. 194, r. 37.17.

...

RULE 57 COSTS OF PROCEEDINGS
GENERAL PRINCIPLES

Factors in Discretion
**57**.01 (1) In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,

(0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;
(0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
(a) the amount claimed and the amount recovered in the proceeding;
(b) the apportionment of liability;
(c) the complexity of the proceeding;
(d) the importance of the issues;
(e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
(f) whether any step in the proceeding was,
(i) improper, vexatious or unnecessary, or
(ii) taken through negligence, mistake or excessive caution;
(g) a party's denial of or refusal to admit anything that should have been admitted;
(h) whether it is appropriate to award any costs or more than one set of costs where a party,
(i) commenced separate proceedings for claims that should have been made in one proceeding, or
(ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and
(i) any other matter relevant to the question of costs. R.R.O. 1990, Reg. 194, r. 57.01 (1); O. Reg. 627/98, s. 6; O. Reg. 42/05, s. 4 (1); O. Reg. 575/07, s. 1.

Costs Against Successful Party
(2) The fact that a party is successful in a proceeding or a step in a proceeding does not prevent the court from awarding costs against the party in a proper case. R.R.O. 1990, Reg. 194, r. 57.01 (2).

Fixing Costs: Tariffs
(3) When the court awards costs, it shall fix them in accordance with subrule (1) and the Tariffs. O. Reg. 284/01, s. 15 (1).
Assessment in Exceptional Cases
(3.1) Despite subrule (3), in an exceptional case the court may refer costs for assessment under Rule 58. O. Reg. 284/01, s. 15 (1).

Authority of Court
(4) Nothing in this rule or rules 57.02 to 57.07 affects the authority of the court under section 131 of the *Courts of Justice Act*,
(a) to award or refuse costs in respect of a particular issue or part of a proceeding;
(b) to award a percentage of assessed costs or award assessed costs up to or from a particular stage of a proceeding;
(c) to award all or part of the costs on a substantial indemnity basis;
(d) to award costs in an amount that represents full indemnity; or
(e) to award costs to a party acting in person. R.R.O. 1990, Reg. 194, r. 57.01 (4); O. Reg. 284/01, s. 15 (2); O. Reg. 42/05, s. 4 (2); O. Reg. 8/07, s. 3.

Bill of Costs
(5) After a trial, the hearing of a motion that disposes of a proceeding or the hearing of an application, a party who is awarded costs shall serve a bill of costs (Form 57A) on the other parties and shall file it, with proof of service. O. Reg. 284/01, s. 15 (3).

Costs Outline
(6) Unless the parties have agreed on the costs that it would be appropriate to award for a step in a proceeding, every party who intends to seek costs for that step shall give to every other party involved in the same step, and bring to the hearing, a costs outline (Form 57B) not exceeding three pages in length. O. Reg. 42/05, s. 4 (3).

Process for Fixing Costs
(7) The court shall devise and adopt the simplest, least expensive and most expeditious process for fixing costs and, without limiting the generality of the foregoing, costs may be fixed after receiving written submissions, without the attendance of the parties. O. Reg. 42/05, s. 4 (3).

DIRECTIONS TO ASSESSMENT OFFICER
**57.02** (1) Where costs are to be assessed, the court may give directions to the assessment officer in respect of any matter referred to in rule 57.01. R.R.O. 1990, Reg. 194, r. 57.02 (1).
(2) The court shall record,
(a) any direction to the assessment officer;
(b) any direction that is requested by a party and refused; and
(c) any direction that is requested by a party and that the court declines to make but leaves to the discretion of the assessment officer. R.R.O. 1990, Reg. 194, r. 57.02 (2).

COSTS OF A MOTION
Contested Motion
**57.03** (1) On the hearing of a contested motion, unless the court is satisfied that a different order would be more just, the court shall,
(a) fix the costs of the motion and order them to be paid within 30 days; or
(b) in an exceptional case, refer the costs of the motion for assessment under Rule 58 and order them to be paid within 30 days after assessment. O. Reg. 284/01, s. 16.

(2) Where a party fails to pay the costs of a motion as required under subrule (1), the court may dismiss or stay the party's proceeding, strike out the party's defence or make such other order as is just. R.R.O. 1990, Reg. 194, r. 57.03 (2).

Motion Without Notice
(3) On a motion made without notice, there shall be no costs to any party, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 57.03 (3).

COSTS ON SETTLEMENT
**57.04** Where a proceeding is settled on the basis that a party shall pay or recover costs and the amount of costs is not included in or determined by the settlement, the costs

may be assessed under Rule 58 on the filing of a copy of the minutes of settlement in the office of the assessment officer. R.R.O. 1990, Reg. 194, r. 57.04.

COSTS WHERE ACTION BROUGHT IN WRONG COURT

Recovery within Monetary Jurisdiction of Small Claims Court
57.05 (1) If a plaintiff recovers an amount within the monetary jurisdiction of the Small Claims Court, the court may order that the plaintiff shall not recover any costs. O. Reg. 377/95, s. 4.
(2) Subrule (1) does not apply to an action transferred to the Superior Court of Justice under section 107 of the *Courts of Justice Act*. R.R.O. 1990, Reg. 194, r. 57.05 (2); O. Reg. 292/99, s. 2 (2).

Default Judgment within Monetary Jurisdiction of Small Claims Court
(3) If the plaintiff obtains a default judgment that is within the monetary jurisdiction of the Small Claims Court, costs shall be assessed in accordance with that court's tariff. O. Reg. 377/95, s. 4.

Proceeding Dismissed for Want of Jurisdiction
(4) Where a proceeding is dismissed for want of jurisdiction, the court may make an order for the costs of the proceeding. R.R.O. 1990, Reg. 194, r. 57.05 (4).

COSTS OF LITIGATION GUARDIAN

57.06 (1) The court may order a successful party to pay the costs of the litigation guardian of a party under disability who is a defendant or respondent, but may further order that the successful party pay those costs only to the extent that the successful party is able to recover them from the party liable for the successful party's costs. R.R.O. 1990, Reg. 194, r. 57.06 (1).

(2) A litigation guardian who has been ordered to pay costs is entitled to recover them from the person under disability for whom he or she has acted, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 57.06 (2).

LIABILITY OF LAWYER FOR COSTS

57.07 (1) Where a lawyer for a party has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default, the court may make an order,
(a) disallowing costs between the lawyer and client or directing the lawyer to repay to the client money paid on account of costs;
(b) directing the lawyer to reimburse the client for any costs that the client has been ordered to pay to any other party; and
(c) requiring the lawyer personally to pay the costs of any party. O. Reg. 575/07, s. 26.
(2) An order under subrule (1) may be made by the court on its own initiative or on the motion of any party to the proceeding, but no such order shall be made unless the

lawyer is given a reasonable opportunity to make representations to the court. R.R.O. 1990, Reg. 194, r. 57.07 (2); O. Reg. 575/07, s. 1.
(3) The court may direct that notice of an order against a lawyer under subrule (1) be given to the client in the manner specified in the order. R.R.O. 1990, Reg. 194, r. 57.07 (3); O. Reg. 575/07, s. 1.
...

*Courts of Justice Act*, **RSO 1990, c C.43 at s. 106 and s. 131(1)**

**Stay of proceedings**

**106** A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just. R.S.O. 1990, c. C.43, s. 106.

...

**Costs**

**131** (1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid. R.S.O. 1990, c. C.43, s. 131 (1).

THE CATALYST CAPITAL GROUP INC.
Plaintiff
and
VIMPELCOM LTD. et al.
Defendants

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

*ONTARIO*
**SUPERIOR COURT OF JUSTICE – COMM LIST**

Proceeding commenced at Toronto

**FACTUM OF THE MOVING DEFENDANT**
**(Motion Returnable August 16-18, 2017)**


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