

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

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

**COST SUBMISSIONS OF
UBS SECURITIES CANADA INC.**

May 30, 2018

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Lawyers for the Defendant, Novus Wireless Communications Inc.

A. OVERVIEW

1. The moving party and defendant, UBS Securities Canada Inc. (“**UBS**”), seeks costs on a substantial indemnity scale of \$244,288.19, inclusive of disbursements and taxes, representing (a) professional fees of \$105,104.41 in respect of the motions to strike the claim, *inter alia*, as an abuse of process; (b) professional fees of \$138,312.51 in respect of other costs of the action; and (c) disbursements of \$871.27. In the alternative, UBS seeks partial indemnity costs of \$162,277.94. A Bill of Costs is attached as **Schedule “A”**.

2. This action was commenced by The Catalyst Group Inc. (“**Catalyst**”) in June 2016. At first, the only allegation made by Catalyst against UBS was a breach of contract claim in respect of two contracts to which UBS was not a party. Presented with a motion to strike, Catalyst amended its claim to add allegations that UBS was party to a conspiracy, but persisted in its obviously untenable claims that UBS somehow breached contracts to which it was not a party.

3. By the time the motions to strike were heard, Catalyst had amended its claim to seek over \$1.3 billion in damages. The magnitude of the claim demanded a thorough investigation and vigorous defence. UBS submits that given the nature of this claim, the costs sought are reasonable, proportionate, and well within the range that would have been expected by Catalyst.

4. This Court granted UBS’s motion to strike, along with the motions of all other defendants, on the grounds, *inter alia*, that the action constituted an abuse of process because it seeks to relitigate issues already determined in the action commenced by Catalyst against West Face Capital Inc. and a former employee, Brandon Moyses, for misuse of confidential information (the “**Moyse Action**”). For the reasons set out herein, UBS submits that substantial indemnity

costs are appropriate to punish an abuse of process and to deter actions that seek to relitigate claims.

B. LAW AND ARGUMENT

5. Pursuant to section 131 of the *Courts of Justice Act*¹ and Rule 57.01 of the *Rules of Civil Procedure*,² costs of a proceeding are in the discretion of the court.

6. Rule 57.01(1) lists a broad range of factors that the court may consider in exercising its discretion to award costs and include, *inter alia*, the result in the proceeding, the complexity of the proceeding, the importance of the issues and whether any step in the proceeding was improper, vexatious or unnecessary.³

Substantial Indemnity is Appropriate for this Action

7. The court maintains discretion to award costs on a substantial indemnity scale. Conduct of a party that is reprehensible, scandalous or outrageous are grounds for costs to be awarded on a substantial indemnity basis.⁴

8. The doctrine of abuse of process engages the inherent power of the Court to prevent a misuse of its procedure that would bring the administration of justice into disrepute. It is a flexible doctrine, unencumbered by the specific requirements of concepts such as issue estoppel.⁵

9. Ontario courts have shown that where a party has engaged in an abuse of process, it is often appropriate to award costs to the successful party on a substantial indemnity basis.⁶

¹ *Courts of Justice Act*, R.S.O. 1990, c. C. 43, s. 131.

² *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R. 57.01(4).

³ *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R. 57.01(c), (d), (f).

⁴ *Young v Young* (1993), 4 S.C.R. 3. at para 260.

⁵ *Canam Enterprises Inc. v. Coles*, [2000] O.J. No. 4607 (Ont. C.A.) at para. 55 dissenting, approved [2002] 3 S.C.R. 307 (S.C.C.).

10. In *Rousseau v. Scotia Mortgage Corp.*,⁷ Reid J. concluded that the action was an abuse of process and the issues were *res judicata*, being based on the same facts as alleged in a prior action. Reid J. noted that re-litigation of claims is not in the public interest and is to be discouraged, and awarded costs on a substantial indemnity basis as a result.

11. The same result was reached in *Said v. University of Ottawa*⁸ on a successful motion to dismiss for an abuse of process, again because the defendant had been forced to respond to a plaintiff's attempt to re-litigate claims.

12. These findings apply equally to the present case. Here, the plaintiff attempted to re-litigate the same facts raised in the prior proceeding and it was ultimately determined by this court to be an abuse of process.⁹ To discourage the advancement of such actions, substantial indemnity costs should be awarded against the plaintiff.

13. Notably, substantial indemnity costs were awarded against Catalyst by Newbould J. on the trial of the Moyses Action, which determined the issues that Catalyst now seeks to re-litigate.¹⁰ It is hard to imagine a rationale for awarding substantial indemnity costs in respect of an original claim but only partial indemnity costs in respect of the failed attempt to re-litigate those claims.

14. Catalyst's statement of claim was without merit and fruitless. Catalyst knew, or ought to have known, that this action was an attempt to impose a new legal theory of wrongdoing on the

⁶ *Rousseau v Scotia Mortgage Corp*, 2013 ONSC 677

⁷ *Rousseau v Scotia Mortgage Corp*, 2013 ONSC 677 at paras 26-27.

⁸ *Said v. University of Ottawa*, 2014 ONSC 771 at para 16.

⁹ Reasons for Decision of Justice Hainey, dated April 18, 2018 ("Reasons for Decision"), at para 89.

¹⁰ *Catalyst Capital Group Inc. v Moyses*, 2016 ONSC 6285

same facts.¹¹ Catalyst chose to pursue its claim, and its chosen remedy, without regard to the seriousness of the allegations or the negative impact such allegations would have on the defendants.

Costs Can Be Used As A Deterrent

15. Costs can be used by the courts as a deterrent for an abuse of process. Plaintiffs ought to be discouraged by the disposition of costs from making attempts to re-litigate issues already decided in prior proceedings.¹²

16. In *Rousseau*, Reid J. held that the award of substantial indemnity costs, or the threat of it, can ideally function as a tool available to the courts to prevent or control frivolous or needless litigation. In awarding substantial indemnity costs against the plaintiff, Reid J. stated:

Substantial indemnity costs when awarded independently of a relevant rule 49 offer contain an element of penalty. For example, such a costs award was made where one party to the litigation behaved in an abusive manner, brought proceedings wholly devoid of merit, and unnecessarily ran up the costs of the litigation. An award of substantial indemnity costs, or the threat of it, can ideally function as a tool available to the courts to prevent or control frivolous or needless litigation. Making such an award in proper circumstances enhances access to the justice system for other litigants.¹³

17. The bringing of an action to determine an issue which has already been settled by a court of competent jurisdiction constitutes an abuse of process and should be discouraged by the court.¹⁴

¹¹ Reasons for Decision at para 64.

¹² *Kakoutis v. Bank of Nova Scoti*, 2016 ONSC 2899 at para 6.

¹³ *Rousseau v Scotia Mortgage Corp*, 2013 ONSC 677 at para 23.

¹⁴ *Canadian International Petroleum Corp. v. Dover Investments Ltd.* 2017 ONCA 120, 2017 CarswellOnt 1651

The Costs Claimed are Fair and Reasonable

18. In the Supreme Court of Canada's decision on costs in *Kerr v. Danier Leather Inc.*,¹⁵ the court viewed the parties as sophisticated commercial actors who knew and could afford the consequences of complex litigation involving the potential for a very substantial award if successful.

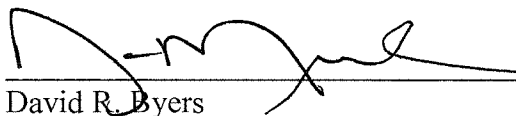
19. Catalyst must have reasonably expected that, if unsuccessful, it would have to pay a significant amount in costs. The motion to strike involved multiple parties, various pre- and post-hearing court attendances, and four hearing days spread over a 9 months. Given the multiplicity of counsel, UBS's counsel promoted efficiency by having only one counsel in attendance at the hearing. Given the magnitude of the issues at stake, UBS submits that substantial indemnity costs of just over \$100,000 for the motion and approximately \$140,000 for the balance of the action are entirely appropriate.

C. ORDER REQUESTED

20. For the foregoing reasons, UBS requests an order for the payment of costs by Catalyst in the amount of \$244,288.19, inclusive of disbursements and taxes, representing (a) professional fees of \$105,104.41 in respect of the motions to strike the claim, *inter alia*, as an abuse of process; (b) professional fees of \$138,312.51 in respect of other costs of the action; and (c) disbursements of \$871.27.

¹⁵ *Kerr v. Danier Leather Inc.*, [2007] 2 S.C.R. 331 (S.C.C.) at para 68.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of May, 2018

A handwritten signature in black ink, appearing to read 'D. Murdoch', is written over a horizontal line.

David R. Byers
Daniel S. Murdoch
Lawyers for UBS Securities Canada Inc.

THE CATALYST CAPITAL GROUP INC. and VIMPELCOM LTD. *et al.*

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

Plaintiff

Defendants

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceeding commenced at Toronto

**COST SUBMISSIONS OF
UBS SECURITIES CANADA INC.**

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Lawyers for the Defendant,
UBS Securities Canada Inc.

**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

**BILL OF COSTS OF THE DEFENDANT, UBS SECURITIES CANADA INC.
AMOUNTS CLAIMED FOR FEES AND DISBURSEMENTS**

May 30, 2018

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Lawyers for the Defendant,
UBS Securities Canada Inc.

I. STATEMENT OF EXPERIENCE

A claim for fees is being made with respect to the following lawyers:

<u>Name of Lawyer</u>	<u>Years of experience</u>	<u>Year of Call</u>	<u>Rate</u>
David Byers	35	1983	\$950/hr (2016) \$1000/hr (2017 & 2018)
Daniel Murdoch	15	2003 (New York) 2006 (Ontario)	\$700/hr (2016) \$750/hr (2017) \$800/hr (2018)
Vanessa Voakes	7	2010	\$570/hr (2017) \$600/hr (2018)
Chris Lofft	14	2004	\$580/hr
Students			\$295-\$315/hr

II. FEES

PLEADINGS - Including review of Statement of Claim and Statements of Defence of other defendants and amendments to Statement of Claim;					
Person	Hours	Rate	Partial	Substantial	Actual
D. Byers	5.00	\$950.00	\$2,850.00	\$4,275.00	\$4,750.00
	0.90	\$1,000.00	\$540.00	\$810.00	\$900.00
D. Murdoch	4.20	\$700.00	\$1,764.00	\$2,646.00	\$2,940.00
	0.40	\$750.00	\$180.00	\$270.00	\$300.00
V. Voakes	3.10	\$570.00	\$1,060.20	\$1,590.30	\$1,767.00
	0.50	\$600.00	\$180.00	\$270.00	\$300.00
Subtotal	14.10		\$6,574.20	\$9,861.30	\$10,957.00
STRATEGY - Including review of trial proceedings, review of documents, meetings and communications with defence counsel, meetings and communications with client and internal meetings and communications;					
Person	Hours	Rate	Partial	Substantial	Actual
D. Byers	21.40	\$950.00	\$12,198.00	\$18,297.00	\$20,330.00
	0.80	\$1,000.00	\$480.00	\$720.00	\$800.00
D. Murdoch	17.60	\$700.00	\$7,392.00	\$11,088.00	\$12,320.00
	4.00	\$750.00	\$1,800.00	\$2,700.00	\$3,000.00
V. Voakes	7.85	\$570.00	\$2,684.70	\$4,027.05	\$4,474.50
	0.80	\$600.00	\$288.00	\$432.00	\$480.00
Subtotal	52.45		\$24,842.70	\$37,264.05	\$41,404.50

DOCUMENTS - Including issues relating to document holds, collection and review of client documents, review of documents from other defendants, preparation of document summaries and preparation of key documents brief;					
Person	Hours	Rate	Partial	Substantial	Actual
D. Byers	1.15	\$950.00	\$655.50	\$983.25	\$1,092.50
D. Murdoch	1.95	\$700.00	\$819.00	\$1,228.50	\$1,365.00
	2.40	\$750.00	\$1,080.00	\$1,620.00	\$1,800.00
V. Voakes	2.20	\$570.00	\$752.40	\$1,128.60	\$1,254.00
	9.65	\$600.00	\$3,474.00	\$5,211.00	\$5,790.00
Students	139.20	\$295.00	\$24,638.40	\$36,957.60	\$41,064.00
Subtotal	156.55		\$31,419.30	\$47,128.95	\$52,365.50
DEFENDANTS' MOTIONS - Including review of motions brought by other defendants, communications with counsel regarding scheduling and timetable for motions;					
Person	Hours	Rate	Partial	Substantial	Actual
D. Byers	1.90	\$950.00	\$1,083.00	\$1,624.50	\$1,805.00
	3.90	\$1,000.00	\$2,340.00	\$3,510.00	\$3,900.00
D. Murdoch	0.20	\$700.00	\$84.00	\$126.00	\$140.00
	4.80	\$750.00	\$2,160.00	\$3,240.00	\$3,600.00
V. Voakes	1.00	\$570.00	\$342.00	\$513.00	\$570.00
	0.10	\$600.00	\$36.00	\$54.00	\$60.00
Subtotal	11.90	4570.00	\$6,045.00	\$9,067.50	\$10,075.00
MOTION TO TRANSFER TO COMMERCIAL LIST - Including review of motion materials, attendance at scheduling conference, and communications regarding consent Order;					
Person	Hours	Rate	Partial	Substantial	Actual
D. Byers	4.60	\$950.00	\$2,622.00	\$3,933.00	\$4,370.00
	0.80	\$1,000.00	\$480.00	\$720.00	\$800.00
D. Murdoch	5.60	\$700.00	\$2,352.00	\$3,528.00	\$3,920.00
	1.40	\$750.00	\$630.00	\$945.00	\$1,050.00
V. Voakes	2.20	\$570.00	\$752.40	\$1,128.60	\$1,254.00
	1.90	\$600.00	\$684.00	\$1,026.00	\$1,140.00
Subtotal	16.50		\$7,520.40	\$11,280.60	\$12,534.00
LEGAL RESEARCH					
Person	Hours	Rate	Partial	Substantial	Actual
D. Murdoch	1.20	\$700.00	\$504.00	\$756.00	\$840.00
C. Lofft	0.60	\$580.00	\$208.80	\$313.20	\$348.00
V. Voakes	8.15	\$570.00	\$2,787.30	\$4,180.95	\$4,645.50
Students	6.70	\$305.00	\$1,226.10	\$1,839.15	\$2,043.50
	2.50	\$315.00	\$472.50	\$708.75	\$787.50
Subtotal	19.15		\$5,198.70	\$7,798.05	\$8,664.50

MOTION TO STRIKE BY UBS SECURITIES CANADA INC.

Preparation of Motion materials and Factum					
Person	Hours	Rate	Partial	Substantial	Actual
D. Byers	4.75	\$950.00	\$2,707.50	\$4,061.25	\$4,512.50
	0.50	\$1,000.00	\$300.00	\$450.00	\$500.00
D. Murdoch	8.15	\$700.00	\$3,423.00	\$5,134.50	\$5,705.00
	13.10	\$750.00	\$5,895.00	\$8,842.50	\$9,825.00
V. Voakes	13.00	\$570.00	\$4,446.00	\$6,669.00	\$7,410.00
	31.45	\$600.00	\$11,322.00	\$16,983.00	\$18,870.00
Subtotal	70.95		\$28,093.50	\$42,140.25	\$46,822.50
Review of responding materials and responding factum					
Person	Hours	Rate	Partial	Substantial	Actual
D. Byers	0.60	\$1,000.00	\$360.00	\$540.00	\$600.00
D. Murdoch	7.00	\$750.00	\$3,150.00	\$4,725.00	\$5,250.00
V. Voakes	0.60	\$600.00	\$216.00	\$324.00	\$360.00
Subtotal	8.20		\$3,726.00	\$5,589.00	\$6,210.00
Preparation for motion					
Person	Hours	Rate	Partial	Substantial	Actual
D. Byers	1.00	\$1,000.00	\$600.00	\$900.00	\$1,000.00
D. Murdoch	16.50	\$750.00	\$7,425.00	\$11,137.50	\$12,375.00
Subtotal	17.50		\$8,025.00	\$12,037.50	\$13,375.00
Attendance on Motion - August 2017					
Person	Hours	Rate	Partial	Substantial	Actual
D. Murdoch	21.00	\$750.00	\$9,450.00	\$14,175.00	\$15,750.00
Subtotal	21.00		\$9,450.00	\$14,175.00	\$15,750.00
Post-Motion matters, including correspondence with counsel, review of Court of Appeal decision regarding related litigation and scheduling of further attendance.					
Person	Hours	Rate	Partial	Substantial	Actual
D. Byers	7.20	\$1,000.00	\$4,320.00	\$6,480.00	\$7,200.00
D. Murdoch	5.00	\$750.00	\$2,250.00	\$3,375.00	\$3,750.00
	9.30	\$800.00	\$4,464.00	\$6,696.00	\$7,440.00
Subtotal	21.50		\$11,034.00	\$16,551.00	\$18,390.00
Attendance on Motion - April 2018					
Person	Hours	Rate	Partial	Substantial	Actual
D. Murdoch	3.50	\$800.00	\$1,680.00	\$2,520.00	\$2,800.00
Subtotal	3.50		\$1,680.00	\$2,520.00	\$2,800.00
Total Fees			\$143,608.80	\$215,413.20	\$239,348.00
HST @ 13%			<u>\$18,669.14</u>	<u>\$28,003.72</u>	<u>\$31,115.24</u>
TOTAL FEES			\$162,277.94	\$243,416.92	\$270,463.24

III. DISBURSEMENTS

DISBURSEMENTS

<u>Taxable</u>	
Photocopies	\$338.95
Scanning	\$13.30
Book Binding	\$81.28
Deliveries	\$115.91
Agents' Fees	<u>\$80.00</u>
Subtotal	\$629.44
HST @ 13%	\$81.83
<u>Non-Taxable</u>	
Filing Fees	<u>\$160.00</u>
TOTAL DISBURSEMENTS	<u>\$871.27</u>

SUMMARY	Partial (60% Actual)	Substantial (90% Actual)	Actual
Fees	\$162,277.94	\$243,416.92	\$270,463.24
Disbursements	<u>\$871.27</u>	<u>\$871.27</u>	<u>\$871.27</u>
TOTAL	<u>\$163,149.21</u>	<u>\$244,288.19</u>	<u>\$271,334.51</u>

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

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

**ONTARIO
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Proceeding commenced at Toronto

BILL OF COSTS

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UBS Securities Canada Inc.