

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

IN THE MATTER OF THE *COMPANIES' CREDITORS
ARRANGEMENT ACT*, R.S.C. 1985, C. c-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF **PRIMUS TELECOMMUNICATIONS
CANADA INC., PRIMUS TELECOMMUNICATIONS, INC.
AND LINGO, INC.**

Applicants

FACTUM OF THE MOVING PARTY, ZAYO CANADA INC.

July 27, 2016

LAX O'SULLIVAN LISUS GOTTLIEB LLP
Counsel
Suite 2750, 145 King Street West
Toronto ON M5H 1J8

Matthew P. Gottlieb LSUC#: 32268B
mgottlieb@counsel-toronto.com
Tel: 416 644 5353

Andrew Winton LSUC#: 54473I
awinton@counsel-toronto.com
Tel: 416 644 5342

Larissa Moscu LSUC#: 62928W
lmoscu@counsel-toronto.com
Tel: 416 360 3018
Fax: 416 598 3730

Lawyers for the Moving Party, Zayo Canada Inc.

TO: Service List

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

IN THE MATTER OF THE *COMPANIES' CREDITORS
ARRANGEMENT ACT*, R.S.C. 1985, C. c-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF **PRIMUS TELECOMMUNICATIONS
CANADA INC., PRIMUS TELECOMMUNICATIONS, INC.
AND LINGO, INC.**

Applicants

FACTUM OF THE MOVING PARTY, ZAYO CANADA INC.

PART I - OVERVIEW

1. This is a motion by Zayo Canada Inc. ("**Zayo**") for an Order requiring the Monitor to pay \$1,228,779.81 from the proceeds of the Applicants' asset sale to Birch Communications Inc. ("**Birch**") to Zayo, on account of the arrears owed by Primus Telecommunications Canada Inc. ("**Primus**") to Zayo at the time Primus was granted protection under the CCAA.
2. Zayo is a critical service provider to Primus and counterparty to several material contracts required to operate Primus' business as a going concern ("**Zayo Essential Contracts**"). The asset purchase agreement between Primus and Birch ("**APA**") required, as a condition to closing the transaction, the assignment of the Zayo Essential Contracts to Birch. The APA also provided a mechanism for the payment of arrears for contracts that were to be assigned to Birch.
3. From January 22 to January 28, 2016, Primus sought Zayo's consent to assign the Zayo Essential Contracts. Notwithstanding that Zayo asked to see the APA at the time, the APA was not

3. From January 22 to January 28, 2016, Primus sought Zayo's consent to assign the Zayo Essential Contracts. Notwithstanding that Zayo asked to see the APA at the time, the APA was not provided to Zayo, and Zayo was not told of the APA's provisions with respect to the payment of arrears for contracts to be assigned. In order to cooperate with Primus in its restructuring efforts, Zayo agreed to the assignments.

4. Primus now takes the position that Zayo is not entitled to its arrears because it did not demand payment at the time it cooperated with Primus' request to assign the Zayo Essential Contracts to Birch. Remarkably, those suppliers who refused to consent to the assignments and who were compelled to assign their agreements to Birch by Court Order recovered all arrears.

5. Zayo had no way of knowing that Primus never intended to pay its arrears unless Zayo demanded payment as a condition of the assignments or forced Primus to bring a motion to compel the assignments. The evidence is uncontested that Zayo would not have consented to the assignments had it known of the position Primus intended to take. Had Zayo withheld consent and forced Primus to bring a motion to compel the assignments, Zayo would have recovered all of its arrears pursuant to s. 11.3(4) of the CCAA.

6. It would be unfair and contrary to the goals of efficiency and cooperation under the CCAA if Zayo is put in a worse position for having assisted Primus' restructuring process by consenting to the assignment of the Zayo Essential Contracts than it would have been in had it refused consent and forced Primus to incur the time and expense of bringing a motion to compel the assignments. There is no evidence that either Primus, Birch, or any other party would suffer any prejudice if this motion is granted. The CCAA is not meant to penalize critical suppliers who provide essential services to debtors and cooperate with the debtor's restructuring process.

PART II - SUMMARY OF FACTS

1. The Parties and the Zayo Essential Contracts

7. Zayo (formerly “**Allstream Inc.**”) is a leader in communications infrastructure. It provides customers with fibre and bandwidth connectivity and “cloud” services. Zayo acquired Allstream Inc. (a wholly-owned subsidiary of Manitoba Telecom Services Inc.) on January 15, 2016, to become the only pan – U.S/Canada fiber network provider.¹

8. Zayo (as Allstream Inc.) had enjoyed a decades-long relationship with Primus. It provided Primus with wholesale telecommunications services, including local business and residential telephone lines, 911 services, toll-free calling services, and data and cloud services.² Zayo also provided Primus a twenty-year “Indefeasible Right of Use” (“**IRU**”) national fiber optic network, inclusive of an “Optical Carrier 12” (or “**OC-12**”) network.³ An OC-12 network is a network line with transmission speeds of up to 622 million bits per second. Primus maintains the exclusive and indefeasible right to use the network capacity for the duration of the IRU agreement.⁴

9. Zayo provided these services to Primus pursuant to thirteen agreements and amendments with Primus. There is no dispute that these services were critical to Primus to allow it to carry on its business and that the agreements were, as described below, Essential Contracts.

10. Primus resells the services it receives from Zayo to its own business and residential customers for their applications and connectivity needs.⁵

¹ Affidavit of Julie Wong Barker, sworn June 10, 2016 (“**Wong Barker Affidavit**”) para. 7 (Motion Record of the Moving Party, Zayo Canada Inc. (“**Zayo Motion Record**”), Tab 3, p. 12).

² Wong Barker Affidavit, para. 8 (Zayo Motion Record, Tab 3, p. 12).

³ Wong Barker Affidavit, para. 9 (Zayo Motion Record, Tab 3, p. 12).

⁴ Wong Barker Affidavit, para. 9 (Zayo Motion Record, Tab 3, p. 12).

⁵ Wong Barker Affidavit, para. 8 (Zayo Motion Record, Tab 3, p. 12).

2. The Relevant Provisions of the APA

11. In late 2014, the Primus Entities became unable to satisfy their obligations as they became due.⁶ They sought to sell the business by way of a privately structured and supervised pre-filing sales and investor solicitation process. Birch emerged as the successful bidder and the APA was executed on January 19, 2016, the same day that the Primus Entities applied for CCAA protection.⁷

12. The APA required the Primus Entities to make commercially reasonable efforts to obtain consents to assign “Essential Contracts” from counterparties where required by the terms of the contract.⁸ It is not in dispute that the Zayo Essential Contracts, which are listed in Schedule “B” to the APA⁹, are required to operate the business by Birch. Without these contracts, Primus could not sell its business as a going concern. In fact, the assignment to Birch of the Zayo Essential Contracts was a condition precedent to closing the transaction.¹⁰

13. The APA also required “Cure Costs” to be paid. Cure Costs are defined in the APA as:

in respect of any Assumed Contract all amounts required to be paid to cure any monetary defaults thereunder, if any, required to effect an assignment thereof from a Vendor to the Purchaser...¹¹

14. To the extent that the Primus Entities were unable to obtain a counterparty’s consent to assign an Essential Contract, the APA required the Primus Entities to bring a motion and seek an

⁶ Nowlan Affidavit, para. 4 (Responding Motion Record, Tab 1, p. 2).

⁷ Nowlan Affidavit, para. 6 (Responding Motion Record, Tab 1, p. 2).

⁸ Nowlan Affidavit, para. 29 (Responding Motion Record, Tab 1, p. 8).

⁹ Asset Purchase Agreement, Exhibit “D” to the Nowlan Affidavit (Responding Motion Record, Tab 1D, pp. 90-99).

¹⁰ Nowlan Affidavit, para. 31 (Responding Motion Record, Tab 1, p. 9).

¹¹ Asset Purchase Agreement, Exhibit “D” to the Nowlan Affidavit (Responding Motion Record, Tab 1D, p. 54).

order from the Court directing the assignment of the unassigned Essential Contracts, pursuant to section 11.3 of the CCAA.¹²

3. Primus Enters CCAA and Zayo Requests Information from the Monitor

15. As mentioned above, Primus sought and obtained CCAA protection on January 19, 2016.¹³

16. Two days later, on January 21, 2016, Zayo's in-house counsel, Julie Wong Barker ("**Ms. Wong Barker**") wrote to the Monitor advising that Zayo was a significant supplier to and creditor of Primus, and asking the Monitor to confirm that Zayo would be added to any creditor's list and "provided with all required notices accordingly."¹⁴ The obvious purpose of her email was to ensure that Zayo, a significant creditor, be kept apprised of all correspondence and receive a copy of all notices in the proceeding. Because Zayo was not put on the Service List, this did not happen.

17. In her email, Ms. Wong Barker also asked the Monitor to advise when the "proof of claims" forms would be available to creditors and asked the Monitor to email her these forms if they were already available.¹⁵ Ms. Wong Barker took these steps in order to protect Zayo's rights and ability to seek payment of its arrears.¹⁶

18. The Monitor replied on January 22, 2016, advising that Zayo was on the list of known creditors. The Monitor also advised that "[a]t this time, there is no claims process approved by the

¹² Nowlan Affidavit, para. 26 (Responding Motion Record, Tab 1, p. 7). For reference, the relevant provision of the APA is s. 2.3(1)(b)-(c).

¹³ Nowlan Affidavit, para. 7 (Responding Motion Record, Tab 1, p. 2).

¹⁴ Wong Barker Affidavit, para. 13 (Zayo Motion Record, Tab 3, p. 13). A copy of Ms. Wong Barker's email to the Monitor is found at Exhibit "B" to the Wong Barker Affidavit (Zayo Motion Record, Tab 3B, p. 40).

¹⁵ Wong-Barker Affidavit, para. 13 (Zayo Motion Record, Tab 3, p. 13). See also Exhibit "B" to the Wong Barker Affidavit (Zayo Motion Record, Tab 3B, p. 40).

¹⁶ Wong-Barker Affidavit, para. 13 (Zayo Motion Record, Tab 3, p. 13).

Court so there is no Proof of Claims forms that need to be submitted.”¹⁷ Implicit in the Monitor’s response is that there were therefore no steps that Zayo could yet take to recover any debt owed.

19. The Monitor did not inform Zayo that it was not on the Service List, or that there was any distinction between the “known creditor’s list” and the Service List.

4. Primus Requests Zayo’s Consent to Assign Contract and Warns of a Motion

20. On January 22, 2016, Zayo received a letter from Primus advising that the Primus Entities and Birch had entered into the APA, pursuant to which the Primus Entities would sell their business and assets and assign certain contracts to Birch.¹⁸ Primus did not provide Zayo with a copy of the APA.

21. In the letter, Primus requested Zayo’s consent to assign to Birch a June 2000 contract it had with Zayo. The letter stated that if Zayo did not consent to the assignment within one week (by January 29, 2016), Primus would bring a motion compelling the assignment:

We hope to have received consents from all counterparties to the Assumed Contracts by January 29, 2016. However, to the extent any consent... is not received by [this date]... *[t]he Primus Entities will be seeking an order for the assignment of any Assumed Contracts ... If we have not received your consent by January 29, 2016, we will serve you with notice of the motion as well as the motion materials* in connection with this request and evidence in support thereof.¹⁹ [Emphasis added.]

22. While the letter referred to certain provisions of the APA, the letter did not disclose that the APA had express provisions dealing with “Cure Costs” and arrears, nor did it disclose any

¹⁷ Wong Barker Affidavit, para. 14 (Zayo Motion Record, Tab 3, p. 13). A copy the Monitor’s email to Ms. Wong Barker is found at Exhibit “C” to the Wong-Barker Affidavit (Zayo Motion Record, Tab 3C, p. 42).

¹⁸ Wong Barker Affidavit, para. 15 (Zayo Motion Record, Tab 3, p. 13). A copy of the letter from Primus dated January 22, 2016 is found at Exhibit “D” to the Wong Barker Affidavit (Zayo Motion Record, Tab 3D, p. 45).

¹⁹ Exhibit “D” to the Wong Barker Affidavit (Zayo Motion Record, Tab 3D, p. 45).

explanation of how or when or in what conditions Zayo could recover the debt owed to it by Primus. The letter also did not disclose :

- (a) that if Zayo refused to consent to the assignment of the Zayo Essential Contracts to Birch, Zayo would be paid arrears owing to it as part of the court Order Primus would seek compelling the assignment; or
- (b) that if Zayo did consent to the assignment of the Zayo Essential Contracts to Birch, without demanding payment of Primus' arrears, the Primus Entities would later take the position that Zayo had waived its right to recover arrears.

23. The letter did refer, without any explanation, to s. 11.3 of the CCAA. Ms. Wong Barker's evidence is that she reviewed s. 11.3 at the time she received the Primus letter.²⁰ Ms. Wong Barker's evidence is that she did not read s. 11.3 as somehow taking away Zayo's right to recover its arrears if it voluntarily consented to the assignment.²¹

5. Primus Seeks Additional Consents

24. On January 26, 2016, Primus sent Zayo two additional letters requesting Zayo's consent to assign additional Essential Contracts to Birch.²² The body of the letters was identical to the letter dated January 22, 2016, and again warned that if Zayo did not consent to assign certain contracts by January 29, 2016, Primus would bring a motion to compel the assignments.²³ Again, this letter did not refer to Cure Costs or Zayo's ability to recover its arrears. The APA was not attached.

²⁰ Cross-Examination of Julie Wong Barker held July 20, 2016 ("**Wong Barker Cross**"), Q. 166 (Supplementary Motion Record of Zayo Canada Inc. ("**Zayo Supplementary Record**"), Tab 2, p. 48).

²¹ Wong Barker Cross, Q. 165 (Zayo Supplementary Record, Tab 2, p. 48).

²² Wong Barker Affidavit, para. 17 (Zayo Motion Record, Tab 3, p. 14). A copy of the letter from Primus dated January 26, 2016 is found at Exhibit "E" to the Wong Barker Affidavit (Zayo Motion Record, Tab 3E, pp. 49-52).

²³ Exhibit "E" to the Wong Barker Affidavit (Zayo Motion Record, Tab 3E, pp. 49-52).

25. Zayo understood that Primus was asking Zayo, its long-time supplier, for Zayo's cooperation to avoid a costly and time-consuming motion. The message from Primus was clear: if Zayo did not voluntarily consent to the assignments, Zayo would be forced to respond to a motion at which the assignments would be ordered by the Court. In other words, Primus/Birch would achieve the same result whether or not Zayo consented, with the only difference being that Zayo would be required to attend at court with potential cost consequences for not cooperating and consenting to the assignments.²⁴

6. Zayo Requests a Copy of the APA

26. On January 26, Zayo attempted to review the contents of the APA before taking any next steps. Zayo wrote to the Monitor to ask the Monitor when the APA would be available, or, alternatively, for a copy of the APA if it was already available.²⁵

27. By reply email, the Monitor informed Zayo that "a copy of the asset purchase agreement is not available as it is not a public document." The Monitor did not advise when the APA would be available.²⁶

7. Primus Again Asks for Consent and Zayo Consents

28. On January 28, 2016, Primus sent Zayo yet another letter requesting Zayo's consent to assign another Essential Contract. The letter mirrored the previous correspondence.²⁷ Again, the APA was not attached.

²⁴ Wong Barker Affidavit, para. 18 (Zayo Motion Record, Tab 3, p. 14).

²⁵ Wong Barker Affidavit, para. 19 (Zayo Motion Record, Tab 3, p. 15).

²⁶ Wong Barker Affidavit, para. 20 (Zayo Motion Record, Tab 3, p. 14). A copy of the Monitor's email to Zayo is attached as Exhibit "G" to the Wong-Barker Affidavit (Zayo Motion Record, Tab 3G, p. 59).

²⁷ Wong Barker Affidavit, para. 21 (Zayo Motion Record, Tab 3, p. 14). A copy of the letter from Primus to Zayo dated January 28, 2016 is attached as Exhibit "H" to the Wong Barker Affidavit (Zayo Motion Record, Tab 3H, pp. 62-64).

29. Michael Nowlan, the CEO of the Primus Entities, admitted on cross-examination that the letters sent to Zayo were intentionally drafted with the goal of obtaining Zayo's consent and to minimize the number of parties to an assignment motion:

Q. And obviously *the goal of the debtors was to get as many consents as possible* without the need to pay, pardon me, *without the need to have a motion for an assignment*, correct?

A. That was the understanding of the APA *and that was the intent*.²⁸ [Emphasis added.]

8. APA Still Not Available By the Consent Deadline

30. Mr. Nowlan admitted in his cross-examination that the APA was still not made available to Zayo as of the January 29, 2016 deadline by which Primus had demanded Zayo's consent to assign the Zayo Essential Contracts.²⁹

31. In an effort to cooperate and save Primus the time and expense associated with bringing an assignment motion, Zayo consented to Primus' request to assign the Zayo Essential Contracts to Birch.³⁰

32. On February 17, 2016, Zayo wrote to Primus enclosing a revised list of the Zayo Essential Contracts. In the process of reviewing these contracts in order to consent to Primus' request, Zayo realized that the service provider identified in some of the contracts was inaccurate. In some of these contracts, a party no longer affiliated with Zayo was mistakenly identified as the

²⁸ Cross-Examination of Michael Nowlan held July 20, 2016 ("Nowlan Cross") Q. 30 (Zayo Supplementary Record, Tab 3, p 105).

²⁹ Nowlan Cross, Q. 66 (Zayo Supplementary Record, Tab 3, p.116).

³⁰ Wong- Barker Affidavit, paras. 23-24 (Zayo Motion Record, Tab 3, pp. 15-16).

counterparty and service provider, when it was actually Zayo who was the counterparty and service provider, and had been since 2012.³¹

33. In order to “clean up” the contracts and ensure that Zayo could properly consent to Primus’ requests to assign the contracts to Birch³², Zayo asked Primus to acknowledge that Zayo was the proper counterparty and service provider, not MTS Inc. Ms. Wong Barker’s sworn evidence is that the purpose of Zayo’s request for Primus’ consent was simply to ensure that Zayo could properly consent to Primus’ request (and was not done to benefit Zayo):

Q. Not my question, my question was much narrower. I'm saying that you had been asked to assign and you in turn were asking for an assignment, correct?

A. Because we can't consent to an assignment when the counterparty in the contract is not accurate. We were the service provider.³³

...

Q. You asked for consent to assign those contracts.

A. Yes, *because Primus was asking for our consent to assign to Birch.*³⁴ [Emphasis added.]

34. Ms. Wong Barker’s evidence is clear that Zayo was not advised that “voluntarily consenting to the assignment would put [Zayo] in a worse position than if [it] didn't cooperate.”³⁵

The evidence is uncontested that Zayo would not have consented to the assignments had it been

³¹ Wong Barker Cross, Q. 246 (Zayo Supplementary Record, Tab 2, p. 68).

³² Wong Barker Cross, Q. 246 (Zayo Supplementary Record, Tab 2, p. 68).

³³ Wong Barker Cross, Q. 233 (Zayo Supplementary Record, Tab 2, p. 64).

³⁴ Wong Barker Cross, Q. 247 (Zayo Supplementary Record, Tab 2, p. 68). See also the Reply Affidavit of Julie Wong Barker, sworn July 8, 2016, paras. 4-5 (Zayo Supplementary Record, Tab 1, p. 2).

³⁵ Wong Barker Cross, Q. 164 (Zayo Supplementary Record, Tab 2, p. 47)

made aware that Primus and the secured creditors would later take the position that it had waived its right to arrears / Cure Costs.³⁶

9. Zayo Is Not Served With Any Motion Material

35. In response to this motion, Primus (and Birch) rely on the fact that the APA closed and on the Approval and Vesting Order obtained on February 25, 2016 regarding the closing of the APA.

36. Despite being a significant creditor and supplier to Primus, and despite having asked to receive a copy of the APA and all notices related to its role as a creditor, Zayo was not provided with a copy of the APA. Nor was Zayo served with the motion material in support of the Approval and Vesting Order or a copy of the Approval and Vesting Order.³⁷

37. Zayo was also not served with any motion material in connection with the Primus Entities' motion for the assignment of those Essential Contracts for which consent had not been obtained.³⁸ According to Primus, the Primus Entities served a motion record for an Assignment Order between February 9, and February 16.³⁹ Zayo was not served with these motion materials.⁴⁰

38. The Primus Entities then prepared a supplemental motion record, which included an update on the status of outstanding consents, as well as the quantum of Cure Costs owing under each contract, and served this supplemental motion record on February 29, 2016.⁴¹ Zayo was not served with this supplemental record.⁴²

³⁶ Wong Barker Affidavit, para. 23 (Zayo Motion Record, Tab 3, p. 16).

³⁷ Nowlan Affidavit, para. 51 (Responding Motion Record, Tab 1, p. 15).

³⁸ Nowlan Affidavit, para. 54 (Responding Motion Record, Tab 1, p. 16).

³⁹ Nowlan Affidavit, para. 54 (Responding Motion Record, Tab 1, p. 16).

⁴⁰ Nowlan Affidavit, para. 54 (Responding Motion Record, Tab 1, p. 16).

⁴¹ Nowlan Affidavit, para. 55 (Responding Motion Record, Tab 1, p. 16).

⁴² Nowlan Affidavit, paras. 54-55 (Responding Motion Record, Tab 1, p. 16).

39. On March 1, 2016, Primus served a revised Schedule “A” to the Assignment Order, which reflected a change to the quantum of Cure Costs to be paid to certain counterparties.⁴³ Zayo was not served with this revised Schedule “A” to the Assignment Order.⁴⁴

40. Zayo received no further communication from Primus until a phone call on March 1, 2016.

41. That same day, Kyle Mitchell, Regulatory Counsel at Primus, called Zayo, but he did not discuss any motion material.⁴⁵ Rather, Mr. Mitchell explained that Primus had received Zayo’s February 17 letter, but that this letter needed “tweaking”.⁴⁶ Birch’s counsel was concerned that Zayo’s February 17 letter did not properly consent to an assignment to Birch.⁴⁷ Mr. Mitchell therefore asked that Zayo’s President and Managing Director, Michael Strople, to sign a new letter noting that Primus agreed that Zayo could assume the MTS Inc. contracts and reiterating that these contracts were then being assigned to Birch. He explained that he needed this letter for clarification “at the motion tomorrow.” Mr. Mitchell did not explain what this motion was about or mention anything about “Cure Costs”.⁴⁸

42. At no point on this call did Mr. Mitchell advise or take the position that by voluntarily consenting to assign contracts to Birch, Zayo would be waiving its rights to seek arrears/Cure Costs.⁴⁹

⁴³ Nowlan Affidavit, para. 56 (Responding Motion Record, Tab 1, p. 17).

⁴⁴ Nowlan Affidavit, para. 54 (Responding Motion Record, Tab 1, p. 16).

⁴⁵ Wong Barker Affidavit, para. 30 (Zayo Motion Record, Tab 3, p. 17). See also Q. 182 of the Wong Barker Cross, where Ms. Wong Barker confirms that she has included all relevant aspects of her call with Mr. Mitchell, that she can recall, in her affidavit. (Zayo Supplementary Record, Tab 2, p. 52).

⁴⁶ Wong Barker Affidavit, para. 30 (Zayo Motion Record, Tab 3, p. 17).

⁴⁷ Nowlan Affidavit, para 81 (Responding Motion Record, Tab 1, p. 25).

⁴⁸ Wong-Barker Affidavit, para. 31 (Zayo Motion Record, Tab 3, p. 17).

⁴⁹ Wong Barker Affidavit, para. 31 (Zayo Motion Record, Tab 3, p. 17).

43. The next day, on March 2, 2016, Justice Wilton-Siegel issued the Assignment Order. Cure Costs were required to be paid to those counterparties who had not consented to the assignment or who demanded that Cure Costs be paid as a condition of consenting to an assignment.⁵⁰

44. On April 4, 2016, given that the Monitor had still not yet advised on a claims process, or provided any information about when Zayo could submit a proof of claim form, Ms. Wong Barker reached out directly to the Monitor's counsel at Blake, Cassels & Graydon to inquire as to the steps Zayo should take in order to recover the debt owed by Primus.⁵¹ The Monitor's counsel took the position that Zayo could not seek its arrears/ Cure Costs.

PART III - STATEMENT OF ISSUES AND LAW

45. The only issue on this motion is whether, in the circumstances, Zayo can recover the pre-filing arrears owed to it by Primus.

46. It would be unfair and contrary to the purpose of the CCAA to penalize Zayo for cooperating with Primus by consenting to the assignment of the Zayo Essential Contracts, while benefitting those counterparties who refused to consent to the assignment. This is particularly the case when Primus did not provide Zayo with the APA at the time it sought consent and intentionally omitted relevant information regarding the payment of arrears/ Cure Costs from the consent request letters it sent to Zayo. It would also be unfair to penalize Zayo given that there is no evidence that Primus, Birch or any other party will suffer any prejudice if this motion is granted.

⁵⁰ Wong Barker Affidavit, para. 38 (Zayo Motion Record, Tab 3, p. 17). See also Nowlan Affidavit, para. 57 (Responding Motion Record, Tab 1, p. 17).

⁵¹ Wong Barker Affidavit, para. 33 (Zayo Motion Record, Tab 3, p. 18).

1. The Court Has Jurisdiction To Grant the Order Sought

47. Zayo seeks an Order requiring the Monitor to pay \$1,228,779.81 from the proceeds of the Applicants' asset sale to Birch on account of Primus' pre-filing arrears to Zayo.

48. Both s. 11 of the CCAA, which grants the court the broad power to "make any order that it considers appropriate in the circumstances", and this Court's inherent and equitable jurisdiction permit the Court to make the requested order.

49. In the landmark 2010 case of *Century Services*⁵², the Supreme Court of Canada reviewed, for the first time, then-newly enacted amendments to the CCAA, including amendments to s. 11(1) that made explicit the discretionary authority of the Courts. The Supreme Court determined that with these amendments, Parliament endorsed the "broad reading of CCAA authority that had been developed by the jurisprudence"⁵³. The Supreme Court confirmed that the statute is capable of "expansive interpretation" and that "when given an appropriately purposive and liberal interpretation, the CCAA will be sufficient in most instances" to grant orders requested in CCAA proceedings.⁵⁴

50. The Ontario Court of Appeal has also recently confirmed that the CCAA gives judges "broad discretionary powers."⁵⁵

51. In the present case, s. 11 and the Court's inherent jurisdiction enable the Court to order the Monitor to make the requested Order, including, if necessary, an Order varying the Approval and Vesting order or the Assignment Order.

⁵² *Ted Leroy Trucking [Century Services] Ltd., Re*, [2010] 3 S.C.R. 379 ["*Century Services*"] (Brief of Authorities of the Moving Party, Zayo Canada Inc. ("**Zayo's BOA**"), Tab 1).

⁵³ *Century Services*, *supra* note 52 at para. 67 (Zayo's BOA, Tab 1).

⁵⁴ *Century Services*, *supra* note 52 at para. 65-66 (Zayo's BOA, Tab 1).

⁵⁵ *Grant Forest Products Inc. v. Toronto-Dominion Bank* 2015 ONCA 570 ["*Grant Forest*"] at para. 103 (Zayo's BOA, Tab 2).

2. The CCAA Should Be Applied in a Manner that Promotes Fairness

52. As Justice Morawetz confirmed this year in *Re Target Canada Co.*, “[i]t is *incumbent upon the court*, in its supervisory role, to ensure that the CCAA process unfolds in a *fair and transparent* manner.”⁵⁶

53. The CCAA permits a broad balancing of stakeholder interests⁵⁷ and seeks to protect creditors' interests.⁵⁸ Justice Morawetz's comments in *Re Target Canada Co.* are consistent with a long line of authority confirming that proceedings under the CCAA are “designed to be flexible and responsive, with a view to providing fairness” to all stakeholders, including creditors.⁵⁹ In considering whether assignments are appropriate under s. 11.3 of the CCAA, courts have also considered whether the assignment meets the “twin goals” of “assisting the reorganization process... while also treating a counterparty fairly and equitably.”⁶⁰

54. Moreover, just last year, the Ontario Court of Appeal, relying on the Supreme Court's guidance in *Century Services*, urged CCAA judges to “do more than simply decide motions placed before him or her” and instead, to “be cognizant of the various interests at stake in the reorganization.”⁶¹

55. In the present case, Zayo was a counterparty to several Essential Contracts with Primus and is a significant creditor of Primus. The business carried on by Primus could not continue as a going concern without these contracts. The process by which Primus sought Zayo's consent to

⁵⁶ *Target Canada Co., Re* 2016 ONSC 316 at para. 72 [Emphasis added] (Zayo's BOA, Tab 3).

⁵⁷ *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1990 CarswellOnt 139 (Ont. C.A.) (Zayo's BOA, Tab 4); *Air Canada, Re (2004)*, 2004 CarswellOnt 870 (Ont. S.C.J. [Commercial List]) (Zayo's BOA, Tab 5).

⁵⁸ *Meridian Development Inc. v. Toronto Dominion Bank* (1984), 53 A.R. 39, 52 C.B.R. (N.S.) 109 (Alta. Q.B.) (Zayo's BOA, Tab 6).

⁵⁹ *Century Services, supra* note 52 at para. 65-66 (Zayo's BOA, Tab 1).

⁶⁰ *Veris Gold Corp., Re* 2015 BCSC 1204 [“*Veris Gold*”] (Zayo's BOA, Tab 7)

⁶¹ *Grant Forest, supra* note 53 at para 104 (Zayo's BOA, Tab 2).

assign Essential Contracts should have been “fair and transparent.” It was not. Primus should have treated those who cooperated with it in its restructuring at least as well as those who did not cooperate.

3. The Contract Assignment Process Was Not Fair and Transparent

A. The Consent Letters Intentionally Omit Reference to Cure Costs

56. Intentionally, there was no mention of “Cure Costs” in the letters to Zayo. Nor is there anything in the letters that advises Zayo that the APA expressly dealt with the payment of arrears/Cure Costs with respect to the assignment of contracts. Nor did the letter say that Primus and Birch would only pay arrears/Cure Costs if forced to as a condition of consent to an assignment or on a motion to compel assignment. In other words, there is nothing in the letters that suggests that Primus and Birch would later refuse to pay arrears/Cure Costs owed to counterparties who cooperated but did not immediately demand payment of arrears as a condition of giving consent or force a motion. There is nothing in the letters that advises that cooperative counterparties would be disadvantaged by consenting to the assignments as compared to those counterparties who refused to consent.

57. Zayo’s evidence is that it would not have consented to the assignment of the Zayo Essential Contracts to Birch had it been aware that it would be considered to be waiving any rights to be paid its arrears.

B. The APA was Unavailable for Zayo’s Review Before the Consent Deadline

58. Three of the four Consent Letters – those dated January 22 and January 26 – demanded Zayo’s consent by January 29, 2015. The APA was not made available to Zayo. It is undisputed that there was no way Zayo could have reviewed the APA prior to the date by which Primus

demanded its consent, and therefore, no way Zayo could have known the APA provided for payment of arrears for assignment of the Zayo Essential Contracts.

59. It was unfair for Primus (a company under discretionary CCAA protection) to demand that Zayo consent to assign the Zayo Essential Contracts without providing it with a copy of the APA. The Cure Cost provision in the APA purports to limit recovery of arrears to those counterparties who demand, at the time they consent to the assignment, to payment of arrears, yet there is nothing in the letters to Zayo to this effect.

60. While the letters to Zayo do refer to s. 11.3 of the CCAA, Ms. Wong Barker's evidence in cross-examination was that she did not read s. 11.3 as displacing Zayo's ability to be paid its arrears. Indeed, s. 11.3 of the CCAA does not say any such thing.

61. Ms. Wong Barker's understanding is reasonable and correct. Nothing in s. 11.3 suggests that Zayo should have demanded payment of arrears as a condition to consenting to the assignment. Nothing in s. 11.3 takes away from a counterparty's ability to be paid its arrears. By referring to s. 11.3 in its letters to Zayo, all Primus did was identify that Primus and Birch would likely be in the same position after a motion as they would be if the counterparty simply consented. Any other interpretation of s. 11.3 would be illogical and unfair.

C. Zayo Should Have Been Served With Motion Material

62. Primus chose not to serve Zayo with motion material for the assignment motion because "as at the date of service of these motion materials, Zayo had already provided the necessary consent to assignment of its agreements."⁶² If this were correct, however, Birch's counsel would not have insisted that Mr. Mitchell call Zayo the day before the Assignment order motion to

⁶² Nowlan Affidavit, para. 54 (Responding Motion Record, Tab 1, p. 16).

urgently request that Zayo sign an additional letter “clarifying” its consent and “consolidating and replacing Zayo’s prior letter.”⁶³ If Zayo’s consent was not good enough for Birch’s counsel, then Zayo should have been served with motion material for the assignment motion, or at the very least, provided with the material prior to or in conjunction with Mr. Mitchell’s telephone call.

63. It was unfair for Primus to withhold this motion material from Zayo after Zayo asked for a copy of all relevant material. The process was not transparent.

64. In the 2015 decision of *Veris Gold*, the monitor applied to the Court for an order approving and completing an asset sale agreement. As in the present case, the asset sale agreement provided that the purchaser would be assigned certain contracts, many of which would facilitate the purchaser’s ability to continue these operations. Indeed, some of the contracts were “critical or necessary for future operations.” The asset sale agreement also contemplated payment of cure costs.

65. The monitor sought approval of the assignment of the contracts to the purchaser. The monitor admitted, however, that “only those persons on the service list were served with the Canadian application materials.”⁶⁴ The Court was concerned that not all counterparties received a copy of the motion materials. It stressed that all counterparties, even those who do not object to an assignment, must receive motion material:

While no objection was raised to the assignments by persons who did not otherwise consent, the Monitor's counsel was candid in advising the court that only those persons on the service list were served with the Canadian application materials. ***It is not therefore apparent that the counterparties to the contracts did in fact receive a copy of the application materials.***

⁶³ Exhibit “K” to the Wong Barker Affidavit (Zayo Motion Record, Tab 3K, p. 83).

⁶⁴ *Veris Gold*, *supra* note 57 at para. 59 (Zayo’s BOA, Tab 7).

This is not an approach that I would endorse. ...

The best practice... is to serve all counterparties to the particular contracts that are sought to be assigned, whether they are on the service list or not.

Only by service will that counterparty be made aware of the need to consider its position if such approval is granted and possibly advance evidence and considerations that would be equally relevant to the court's decision on the issue.⁶⁵ [Emphasis added.]

66. These comments are instructive in the present case, especially when Birch's counsel was concerned that as of March 1, the consents given by Zayo were not effective. Had Primus properly served Zayo with motion material, Zayo would have been made aware that other parties had sought Cure Costs as a condition of closing. Zayo would also have been aware of the quantum of Cure Costs being paid and learned of the Primus Entities' intention to avoid paying Cure Costs later.

67. At the very least, had Zayo received motion material for the assignment motion, Zayo could have attended at the motion and advised Primus and the court that it always intended to be paid the arrears owed by Primus.

D. Zayo Would Have Recovered All of its Arrears on the Assignment Motion

68. The amount owed to Zayo as of January 19, 2016 is not in dispute.

69. Had Zayo withheld consent to assign the Zayo Essential Contracts – which it would have, had it known Primus would refuse to later pay Cure Costs – then at the assignment motion, Zayo would have recovered all money owed by Primus pursuant to s. 11.3(4) of the CCAA.

70. Section 11.3(4) prohibits a court from ordering the assignment unless the court is satisfied that “***all monetary defaults*** in relation to the agreement will be remedied on or before the day fixed

⁶⁵ *Veris Gold*, *supra* note 57, at paras. 59-61 (Zayo's BOA, Tab 7).

by the court.” In light of s. 11.3(4), and the fact that assignment of the Zayo Essential Contracts was a pre-condition of the closing of the APA, Zayo would have recovered all arrears, not any less.

4. The Order Sought Does Not Prejudice Any Party

71. There is no evidence that any party will suffer prejudice if this motion is granted.

72. Primus and/or Birch would have known the total amount of arrears owed by Primus to Zayo as of the date Primus’ CCAA filing and would have had to pay this entire amount to Zayo had Zayo refused to consent to the assignments and been a party in the assignment order motion. It is not prejudicial that a party be required to pay an amount that otherwise would have been payable. Indeed, it would be a windfall to Primus and/or Birch to retain the arrears owed to Zayo.

PART IV - CONCLUSION

73. The CCAA court must promote fairness and transparency. Counterparties to contracts who are requested to consent to the assignment of those contracts should be treated fairly and equitably.

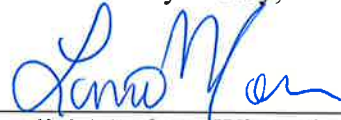
74. The process by which Zayo’s consent to assign Essential Contracts was procured was not fair or transparent. Zayo, a counterparty to Essential Contracts required to continue the Primus business, was not treated fairly and equitably. The CCAA court should not condone a process that results in a counterparty to essential contracts being financially disadvantaged for having cooperated and consented to the assignment of essential contracts.

PART V - ORDER REQUESTED

75. Zayo respectfully requests an Order requiring the Monitor to pay \$1,228,779.81 from the proceeds of the Applicants' asset sale to Birch to Zayo, on account of the pre-filing arrears owed by Primus.

76. Zayo was a critical service provider to Primus and counterparty to several material contracts required to operate Primus' business as a going concern. Zayo should not be penalized for cooperating with the debtor in its restructuring efforts and consenting to assign essential contracts to the debtor's purchaser. The Order sought is necessary to ensure that Zayo is treated fairly and equitably.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of July, 2016.



Matthew Gottlieb/ Andrew Winton/ Larissa Moscu

LAX O'SULLIVAN LISUS GOTTLIEB LLP

Counsel

Suite 2750, 145 King Street West

Toronto ON M5H 1J8

Matthew P. Gottlieb LSUC#: 32268B

mgottlieb@counsel-toronto.com

Tel: 416 644 5353

Andrew Winton LSUC#: 54473I

awinton@counsel-toronto.com

Tel: 416 644 5342

Larissa Moscu LSUC#: 62928W

lmoscu@counsel-toronto.com

Tel: 416 360 3018

Fax: 416 598 3730

Lawyers for the Moving Party, Zayo Canada Inc.

SCHEDULE “A”

LIST OF AUTHORITIES

1. *Ted Leroy Trucking [Century Services] Ltd., Re*, [2010] 3 S.C.R. 379
2. *Grant Forest Products Inc. v. Toronto-Dominion Bank* 2015 ONCA 570
3. *Target Canada Co., Re* 2016 ONSC 316
4. *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1990 CarswellOnt 139 (Ont. C.A.)
5. *Air Canada, Re (2004)*, 2004 CarswellOnt 870 (Ont. S.C.J. [Commercial List])
6. *Meridian Development Inc. v. Toronto Dominion Bank* (1984), 53 A.R. 39, 52 C.B.R. (N.S.) 109 (Alta. Q.B.)
7. *Veris Gold Corp., Re* 2015 BCSC 1204

SCHEDULE “B”**TEXT OF STATUTES, REGULATIONS & BY - LAWS*****Companies’ Creditors Arrangement Act****General power of court*

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Assignment of agreements

11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

Exceptions

(2) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

- **(a)** an agreement entered into on or after the day on which proceedings commence under this Act;
- **(b)** an eligible financial contract; or
- **(c)** a collective agreement.

Factors to be considered

(3) In deciding whether to make the order, the court is to consider, among other things,

- **(a)** whether the monitor approved the proposed assignment;
- **(b)** whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and
- **(c)** whether it would be appropriate to assign the rights and obligations to that person.

Restriction

(4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

Copy of order

(5) The applicant is to send a copy of the order to every party to the agreement.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,
R.S.C. 1985, C. c-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF PRIMUS TELECOMMUNICATIONS CANADA, INC.,
PRIMUS TELECOMMUNICATIONS, INC., AND LINGO, INC.

Applicants
Court File No. CV-16-11257-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT
TORONTO

**FACTUM OF THE MOVING PARTY,
ZAYO CANADA INC.**

LAX O'SULLIVAN LISUS GOTTLIEB LLP

Counsel

Suite 2750, 145 King Street West
Toronto ON M5H 1J8

Matthew P. Gottlieb LSUC#: 32268B

mgottlieb@counsel-toronto.com

Tel: 416 644 5353

Andrew Winton LSUC#: 54473I

awinton@counsel-toronto.com

Tel: 416 644 5342

Larissa Moscu LSUC#: 62928W

lmoscu@counsel-toronto.com

Tel: 416 360 3018

Fax: 416 598 3730

Lawyers for the Moving Party, Zayo Canada Inc.