

**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

SUPPLEMENTARY MOTION RECORD OF ZAYO CANADA INC.

July 27, 2016

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TO: Service List

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Tab 1

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

**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

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CANADA INC., PRIMUS TELECOMMUNICATIONS, INC.
AND LINGO, INC.**

Applicants

REPLY AFFIDAVIT OF JULIE WONG BARKER

I, JULIE WONG BARKER, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:


1. I am Senior Legal Counsel at Zayo Canada Inc. ("**Zayo**") (formerly known as "**Allstream Inc.**"), and have been since 2011. Zayo has brought a motion for, among other things, an order that FTI Consulting Canada Inc., in its capacity as Monitor for Applicants, pay Cure Costs to Zayo in the sum of \$1,228,779.81. On June 10, 2016, I swore an affidavit in support of Zayo's motion ("**First Affidavit**"). I continue to stand by my First Affidavit and adopt the defined terms therein.
2. I have read the unsworn affidavit of Michael Nolan, which was served by the Applicants. Mr. Nolan's affidavit is potentially misleading on the facts concerning Zayo's request for Primus Canada's consent to the assignment of contracts to Zayo, which I correct in this reply affidavit.
3. Contrary to Mr. Nolan's statement at paragraph 69 of his affidavit, Zayo did not seek Primus Canada's assistance "to effect a corporate restructuring." Rather, Zayo's request for Primus

Canada’s consent to assign contracts was made for the purpose of assisting Primus Canada with its request to assign contracts to Birch Communications Inc. (“**Birch**”).

4. To put Zayo’s request in context, as of January 28, 2016, Primus Canada had sent Zayo three letters requesting Zayo’s consent to assign certain contracts to Birch. Upon reviewing these contracts, Zayo learned that the service provider identified in some of the contracts was inaccurate. For instance, in some of these contracts, MTS Inc. was mistakenly identified as the counterparty and service provider when it was actually Zayo who was the counterparty providing the services to Primus Canada.

5. Thus, to reflect accurately who was providing the services under the contracts to Primus Canada, and to ensure that Zayo could properly consent to Primus Canada’s requests to assign those contracts, Zayo asked Primus Canada to acknowledge that Zayo was the true service provider to the applicable contracts, not MTS Inc. The purpose of Zayo’s request for Primus Canada’s consent to certain assignments of contracts was not borne out of Zayo’s “corporate restructuring”, but rather, to assist Primus Canada with the sale of its assets to Birch.

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario on July⁸....., 2016



Commissioner for Taking Affidavits
(or as may be)

} 

JULIE WONG BARKER

**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 PT HOLDCO, INC., PRIMUS TELECOMMUNICATIONS
CANADA, INC., PTUS, 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**

REPLY AFFIDAVIT OF JULIE WONG BARKER

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Lawyers for Zayo Canada Inc.

Tab 2

In the Matter Of:

RE: Primus Telecommunications Canada Inc. et al

JULIE WONG BARKER

July 20, 2016

neelsons

141 Adelaide Street West | 11th Floor

Toronto, Ontario M5H 3L5

1.888.525.6666 | 416.413.7755

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Court File No. CV-11257-00CL
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

--- This is the Cross-Examination of JULIE WONG
BARKER on her affidavits sworn June 10, 2016 and
July 8, 2016, herein, taken at the offices of
Neesons Court Reporting, Inc., Suite 1108, 141
Adelaide Street West, Toronto, Ontario, M5H 3L5 on
the 20th day of July 2016.

1 A P P E A R A N C E S:

2

3 Daniel Murdoch, for the Applicants

4 Matthew Milne-Smith, for the Syndicate

5 & Natasha MacParland,

6 Jason Wadden for Birch

7 Matthew F. Gottlieb, for Zayo Canada Inc.

8 & Larissa Mosen

9 Aryo Shalviri, on behalf of the

10 Monitor

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16 REPORTED BY: Sheila M. Finlay, CSR

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I N D E X

| | | |
|---|-------------------|------|
| WITNESS: | JULIE WONG BARKER | PAGE |
| CROSS-EXAMINATION BY MR. MILNE-SMITH..... | | 5 |

The following list of undertakings, advisements and refusals is meant as a guide only for the assistance of counsel and for no other purpose.

INDEX OF UNDERTAKINGS

The questions/requests undertaken are noted by U/T and appear on the following page numbers: None noted

INDEX OF ADVISEMENTS

The questions/requests taken under advisement are noted by U/A and appear on the following page numbers: None noted

INDEX OF REFUSALS

The questions/requests refused are noted by R/F and appear on the following page numbers: 13, 14, 15, 23, 25, 27, 30, 31, 36, 45, 46, 57, 67, 75, 76, 77

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| NO. 1: Julie Wong Barker's LinkedIn page | 7 |
| NO. 2: Cassels Brock Lawyers web page entitled Financial Services | 10 |
| NO. 3: Annual Information Form for the year ended December 31, 2016 - MTS Allstream | 18 |

1 ---Upon Commencing at 10:05 a.m.

2 JULIE WONG BARKER; Affirmed.

3 CROSS-EXAMINATION BY MR. MILNE-SMITH:

4 1 Q. So good morning, Ms. Wong Barker.
5 I understand you are senior legal counsel for,
6 which entity is it, Allstream or Zayo now?

7 A. It had a name change, Zayo Canada
8 Inc.

9 2 Q. Zayo Canada, I wasn't sure about
10 the pronunciation. And you've sworn two affidavits
11 in this proceeding, correct?

12 A. Correct.

13 3 Q. And one of them was dated June
14 10th, 2016?

15 A. Correct.

16 4 Q. And the other one was dated July
17 8th, 2016?

18 A. Correct.

19 5 Q. I take it you reviewed those
20 affidavits in preparation for this
21 cross-examination?

22 A. Correct.

23 6 Q. And you're confident all the
24 statements in those affidavits are correct to the
25 best of your knowledge?

1 A. Correct.

2 7 Q. And you don't want to make any
3 corrections at this time?

4 A. There was one item that I noticed.

5 MR. GOTTLIEB: You are going to have to
6 speak up a tiny bit.

7 THE DEPONENT: There was one item that
8 I noticed at page 9. It says Primus' counsel, it
9 should have said Monitor's counsel.

10 BY MR. MILNE-SMITH:

11 8 Q. So page 9 of your first affidavit?

12 A. Yes.

13 9 Q. Which paragraph?

14 A. 33.

15 10 Q. Okay. So that's in the third
16 line, it says Primus' counsel?

17 A. Correct.

18 11 Q. But you meant the Monitor's
19 counsel?

20 A. I believe so.

21 MR. GOTTLIEB: It says at Blakes.

22 BY MR. MILNE-SMITH:

23 12 Q. At Blakes, yes. That's okay, I
24 don't think anyone was misled.

25 Just to start with a little background,

1 please, can you confirm for me that this is your
2 LinkedIn page?

3 A. Yes.

4 13 Q. Can we mark that as Exhibit 1,
5 please.

6 EXHIBIT NO. 1: Julie Wong Barker's
7 LinkedIn page.

8 BY MR. MILNE-SMITH:

9 14 Q. Just using this as a guideline, I
10 understand that you received your honours bachelor
11 of arts from University of British Columbia in
12 2000?

13 A. Yes.

14 15 Q. And you won a president's entrance
15 scholarship and a Canada scholarship for science
16 and technology?

17 A. Yes.

18 16 Q. I take it those are merit based
19 scholarships?

20 A. Yes.

21 17 Q. And then following your studies at
22 UBC you won a Commonwealth scholarship to pursue
23 your masters at a school in India?

24 A. Yes.

25 18 Q. And just for the record, a

1 Commonwealth scholarship is a merit based
2 scholarship for post-graduate studies?

3 A. Yes.

4 19 Q. It requires an application, as I
5 understand it's quite difficult to win?

6 A. I believe so, yes.

7 20 Q. Sort of like a Rhode scholarship,
8 but for Commonwealth citizens, right?

9 A. I believe so.

10 21 Q. And UBC were a member of the
11 Golden Key International Honour Society?

12 A. Yes.

13 22 Q. And I take it that membership in
14 that society is based on your academic performance
15 at UBC?

16 A. Yes.

17 23 Q. You then attended McGill for law
18 school?

19 A. Yes.

20 24 Q. And I think it's fair to say that
21 McGill is widely perceived as being one of the more
22 prestigious and selective law schools in Canada?

23 A. Okay.

24 25 Q. You don't disagree with me?

25 A. I don't disagree.

1 26 Q. And you graduated there with
2 distinction?

3 A. Yes.

4 27 Q. Now, after articling you joined
5 Cassels Brock as an associate?

6 A. Yes.

7 28 Q. That's a major downtown Toronto
8 law firm?

9 A. Yes.

10 29 Q. And you practiced, as I understand
11 it, in the Financial Services Group; is that right?

12 A. Yes.

13 30 Q. Now, I've gone to the Cassels
14 Brock website and printed out their page on their
15 Financial Services Group. Can you have a look at
16 that. Does that accurately reflect the Financial
17 Services Group as you I understand it?

18 MR. GOTTLIEB: Mr. Milne-Smith, when is
19 this taken from?

20 MR. MILNE-SMITH: Yesterday.

21 MR. GOTTLIEB: And when, what's the
22 timeframe that Ms. Wong Barker was at the firm?

23 BY MR. MILNE-SMITH:

24 31 Q. You were at Cassels Brock from
25 2007 to 2009?

1 MR. GOTTLIEB: So you printed this off
2 from now and asked if it applied back then?

3 MR. MILNE-SMITH: Yes, that's why I'm
4 asking if it accurately describes the group she was
5 in.

6 MR. GOTTLIEB: Mr. Milne-Smith, I don't
7 frankly think anything turns on this, I'm not going
8 do get into a debate about whether this accurately
9 describes. She can't read that and say whether it
10 accurately describes Cassels Brock business as it
11 existed back nine, eight years ago.

12 For what your purposes are, Cassels
13 Brock had a Financial Services Group that provided
14 financial services to clients and we're not going
15 to have any issue about that.

16 MR. MILNE-SMITH: Let's mark this, do
17 you want to mark it as an exhibit or if you want to
18 make it for identification, it doesn't really
19 matter to me.

20 MR. GOTTLIEB: If you say it is an
21 accurate representation as it existed on the
22 website this week, I take you on your word for
23 that.

24 MR. MILNE-SMITH: Thank you.

25 EXHIBIT NO. 2: Cassels Brock Lawyers

1 web page entitled Financial Services.

2 BY MR. MILNE-SMITH:

3 32 Q. So let's do it this way, this web
4 page describes the Financial Services Group at
5 Cassels Brock. If you look at the first paragraph
6 as being comprised of business lawyers with
7 complementary expertise and practice skills that
8 include corporate and commercial lending, asset
9 financing and leasing, alternative financing,
10 mergers and acquisitions, private equity,
11 restructuring, insolvency and financial sector
12 regulation. Now, I'm not asking you if you did all
13 of those things at your time there. All I'm asking
14 you is, is that a fair description of what the
15 Financial Services Group was made up of at the time
16 you were there?

17 A. I don't see insurance, there was
18 insurance in the Financial Services Group.

19 33 Q. But all the sectors that were
20 listed were an aspect of the Financial Services
21 Group as you participated in it or as you were
22 remember of it?

23 A. As I remember.

24 34 Q. Good enough. So can I take it
25 that as of the beginning of 2016, January 1st,

1 2016, just to pick a date, you were certainly aware
2 of what the CCAA was?

3 A. I knew it was the Companies'
4 Creditors Arrangement Act.

5 MR. GOTTLIEB: Just speak up, it's for
6 the Reporter's sake.

7 BY MR. MILNE-SMITH:

8 35 Q. And you understood that it was an
9 insolvency statute?

10 A. Yes.

11 36 Q. You understood it set out certain
12 creditor rights?

13 A. Yes.

14 37 Q. Okay. When you left private
15 practice and went in-house, you knew that there
16 were specialists in the field of insolvency whom
17 you could consult regarding the CCAA if necessary?

18 A. Yes.

19 38 Q. Okay. In your private practice I
20 trust you understood that your obligation was to
21 provide legal advice to your clients, correct?

22 A. Could you repeat the question,
23 please.

24 39 Q. In the course of your private
25 practice, so this is when you were articling and

1 then when you were at Cassels, I trust you
2 understood your obligation to be to provide legal
3 advice to your clients?

4 A. Yes.

5 40 Q. And in the course of doing so you,
6 of course, would not mislead anybody else, you
7 never participated in a falsehood of any kind?

8 R/F MR. GOTTLIEB: I object to the question
9 on the basis of relevance and vagueness.

10 MR. MILNE-SMITH: That's fine. I'm
11 just trying to be fair to the witness, quite
12 frankly.

13 BY MR. MILNE-SMITH:

14 41 Q. I take it you would not take upon
15 yourself the obligation or the role to provide
16 legal advice to an adverse party?

17 R/F MR. GOTTLIEB: I object to the question
18 on the same basis of relevance and vagueness.

19 BY MR. MILNE-SMITH:

20 42 Q. Ms. Wong Barker, I should ask, do
21 you go by Barker or Wong Barker?

22 A. I go by Wong Barker.

23 43 Q. As a hyphenated name, I feel I
24 should be true to whatever you adhere to.

25 In your private practice I trust you

1 understood your obligation was to provide legal
2 advice only to your clients and not to any adverse
3 parties?

4 R/F MR. GOTTLIEB: I object to the question
5 on the basis of relevance and vagueness.

6 BY MR. MILNE-SMITH:

7 44 Q. In your role at Allstream, you
8 understood that your duties were to Allstream and
9 not to any contractual kind of party?

10 R/F MR. GOTTLIEB: I object to the question
11 on the basis of relevance and vagueness.

12 BY MR. MILNE-SMITH:

13 45 Q. During the matters in issue in
14 this proceeding, you understood at all relevant
15 time that Stikeman Elliott's client was Primus and
16 the related entities?

17 A. Yes.

18 46 Q. And you understood that Blake,
19 Cassels client was the Monitor?

20 A. Yes.

21 47 Q. And you don't assert that either
22 firm had any obligation to provide legal advice to
23 Allstream, correct?

24 MR. GOTTLIEB: You're asking if that's
25 her assertion? I object to the questions on the

1 basis --

2 MR. MILNE-SMITH: No, I'm suggesting
3 she does not assert, she is not taking the position
4 that either Stikeman Elliott or Blake Cassels had
5 any obligation to provide legal advice to Allstream
6 or Zayo.

7 R/F MR. GOTTLIEB: I object to the
8 question, she's not here to set out positions.

9 MR. MILNE-SMITH: I am asking whether
10 she asserts that as a matter of fact.

11 MR. GOTTLIEB: That's not what you
12 asked, so I'm objecting to the question.

13 BY MR. MILNE-SMITH:

14 48 Q. I take it you don't assert as a
15 matter of fact that either Stikeman Elliott or
16 Blake, Cassels have any obligation to provide legal
17 advice to Allstream or Zayo?

18 R/F MR. GOTTLIEB: I object to the
19 question.

20 BY MR. MILNE-SMITH:

21 49 Q. Do you understand that this motion
22 concerns the faith of approximately \$1.2 million?

23 A. Yes.

24 50 Q. So it's obviously an important
25 matter and you gave your affidavit your close

1 attention?

2 A. Yes.

3 51 Q. And you've included in your
4 affidavits all relevant communications with Primus,
5 the Monitor, or their counsels?

6 A. All relevant communication with?

7 52 Q. Primus, the Monitor, or their
8 respective counsel?

9 A. I believe so.

10 53 Q. Okay. There were no telephone
11 calls, emails, other communications of substance
12 with any of those parties that you've omitted from
13 your affidavit and you think are relevant to this
14 proceeding, correct?

15 A. Correct.

16 54 Q. Now, you've been either legal
17 counsel or senior legal counsel at Zayo or its
18 predecessor company since 2011; is that right?

19 A. Right.

20 55 Q. Do I understand correctly that
21 Allstream was sold in 2016 to Zayo for 465 million?

22 A. I'm not sure if that's the exact
23 figure.

24 MR. GOTTLIEB: Don't guess, if you
25 don't know the answer you can just say you don't

1 know.

2 BY MR. MILNE-SMITH:

3 56 Q. Does that sound about right?

4 A. It sounds about right.

5 57 Q. It's in the record of Nowlan's
6 affidavit, if you want to use it.

7 My understanding is that Allstream's
8 2014 revenues, so this is broken out in the MTS
9 annual information form between MTS and Allstream,
10 so the Allstream only revenues for 2014 were 644
11 million; were you aware of that?

12 A. I didn't look at the annual
13 report, so I'm not sure of that figure. If you say
14 that's the figure, then --

15 58 Q. That's fine. I don't mean this to
16 be a memory test, by any means. I'll show you the
17 first page, it's the 2014 AIF for MTS Allstream.
18 At page 5 you can see the chart setting out the
19 revenues.

20 A. This is for 2014 for Allstream?

21 59 Q. Correct.

22 A. That's what I see in the AIF.

23 60 Q. Okay. Can we mark the AIF as
24 Exhibit 3?

25 MR. GOTTLIEB: Yes.

1 EXHIBIT NO. 3: Annual Information Form
2 for the year ended December 31, 2016 -
3 MTS Allstream.

4 MR. GOTTLIEB: Do you want me to keep
5 this in front or you're not going to use it?

6 MR. MILNE-SMITH: No, I'm done.

7 MR. GOTTLIEB: Thank you.

8 BY MR. MILNE-SMITH:

9 61 Q. What was the size of the Allstream
10 legal department as at January 1st, 2016?

11 A. The Allstream legal department as
12 at January 1st, 2016?

13 62 Q. Yes.

14 A. There was Mark Eklove --

15 MR. GOTTLIEB: Can you just give an
16 estimate number to Mr. Milne-Smith and he'd be
17 happy with that.

18 THE DEPONENT: A handful of lawyers.

19 BY MR. MILNE-SMITH:

20 63 Q. So a half dozen lawyers?

21 A. I think.

22 64 Q. Around that?

23 A. Yes.

24 65 Q. I picked a date in time, January
25 1st, randomly. I take it there's no major change

1 in the size, I understand one or two people come
2 and go, but no major changes in the size of the
3 group from January 1st up to today?

4 A. Well, there have been departures.

5 66 Q. Let's talk about during the period
6 in question that this was happening between January
7 through say the end of March of 2016. Were there
8 major departures during that period?

9 A. My former general counsel Mark
10 Eklove left at the end of March, I believe.

11 67 Q. Was he replaced?

12 A. He was replaced by my GC at Zayo.

13 68 Q. Okay. So that was, was that a
14 pre-existing Zayo person that came in to the group
15 or was this someone new that was hired to take
16 Mark's position?

17 A. Previously at Zayo.

18 69 Q. Let me just understand, did they
19 have pre-existing Canadian operations or were they
20 purely a US company that now acquired a Canadian
21 company?

22 A. They were, from what I understand,
23 not a purely US because they had made acquisitions,
24 I believe, in Europe.

25 70 Q. Oh, I'm sorry. I should have

1 phrased my question more precisely. Did they have
2 Canadian operations before acquiring Allstream?

3 A. Not that I'm aware of.

4 71 Q. So the new general counsel who
5 came in, was he a Canadian lawyer?

6 A. No.

7 72 Q. Were there any other departures
8 during that time period?

9 A. I'm trying to remember when one
10 lawyer left, I'm not sure if he left before the end
11 of March or after.

12 73 Q. So around that time?

13 A. I'd have to double-check.

14 74 Q. That's fine. I don't think it's
15 material for our purposes.

16 So the person that left, that was Mark,
17 what was his last name?

18 A. Eklove.

19 75 Q. Can you spell that?

20 A. E-K-L-O-V-E.

21 76 Q. So Mr. Eklove, you said, left
22 around the end of March; is that right?

23 A. I believe he left mid-March.

24 77 Q. Okay. And was that, I trust, in
25 relation or arising out of the acquisition of

1 Allstream?

2 A. That's my understanding.

3 78 Q. Was he playing an active role in
4 the day-to-day business of the company between the
5 announcement of the acquisition in January and his
6 departure in mid-March or was he sort of
7 transitioning out?

8 MR. GOTTLIEB: I don't want you to
9 guess if you don't know.

10 THE DEPONENT: I don't feel comfortable
11 answering.

12 BY MR. MILNE-SMITH:

13 79 Q. Was he the person that you
14 reported to?

15 A. Yes.

16 80 Q. Let me understand how your group
17 worked. Did you divide up responsibilities by
18 subject-matter or how was the work flow managed in
19 your group?

20 A. Sometimes he would assign work
21 directly, and sometimes people in the business
22 would come to me directly, go to the lawyer
23 directly.

24 81 Q. Did you have a particular
25 subject-matter area that you focused on?

1 A. I focused on more network service
2 agreements.

3 82 Q. Okay. And how did this particular
4 file, the Primus CCAA, come to your desk?

5 MR. GOTTLIEB: You have to be a little
6 bit careful hitting on privilege issues. I don't
7 think you hit on it in that question, but I'm just
8 going to raise you antenna. I know you're not
9 intentionally going to go into that area, so we'll
10 just take it slow if you're touching on the service
11 of it, okay?

12 MR. MILNE-SMITH: That's fine.

13 THE DEPONENT: I'm not sure that I
14 recall.

15 BY MR. MILNE-SMITH:

16 83 Q. Okay. Did you report on this
17 matter to someone on the business side?

18 MR. GOTTLIEB: Mr. Milne-Smith, I am
19 going to object to the question. That would, in
20 the normal course, asking if a lawyer reports to a
21 business person, be a privileged question.

22 MR. MILNE-SMITH: I think the content
23 of communication might be privileged, but the
24 reporting responsibilities, it's a factual matter
25 that I don't think touches on privilege.

1 R/F MR. GOTTLIEB: I'm not sure I agree.
2 The reason I am going to object is I don't see how
3 it frankly moves the ball forward in this dispute
4 and how it's relevant. So because it's either
5 close to the line or beyond the line, I'm going to
6 object to it. Who she reported to and how I don't
7 think is relevant to the issues that we've got, so
8 I'm going to object to the question.

9 MR. MILNE-SMITH: Well, obviously this
10 may be coming up more often in the future, so let
11 me just state my position once for the record and
12 then I'll just take your refusals as they come.

13 MR. GOTTLIEB: Okay.

14 MR. MILNE-SMITH: It's obviously, we
15 think, very important what steps were taken by Ms.
16 Wong Barker to familiarize herself with the
17 relevant issues in this case. So we certainly --
18 she has, at I think paragraph 39 of her affidavit,
19 referred to various other members of the legal
20 department, so I certainly do think it is relevant
21 who else had their fingerprints on this file and I
22 do plan to ask questions about that.

23 MR. GOTTLIEB: Okay.

24 BY MR. MILNE-SMITH:

25 84 Q. Did you report to Mark Eklove,

1 without asking about the content of any
2 conversation that may be subject to privilege, did
3 you report to Mark Eklove about this file?

4 A. Yes.

5 85 Q. And was there, other than you and
6 Mark, was there anyone else in the legal department
7 that was involved in this file?

8 A. Yes.

9 86 Q. Who else?

10 A. Gregg Strumberger.

11 87 Q. Can you spell his last name?

12 A. S-T-R-U-M-B-E, I believe, R-G-E-R.
13 Gregg is with two Gs.

14 88 Q. Again, without disclosing the
15 contents of any privilege communications, what was
16 the nature of his involvement, what were his
17 responsibilities?

18 MR. GOTTLIEB: That's going to be
19 pretty difficult to answer without saying what you
20 said she shouldn't disclose. What his role was
21 without disclosing, that's pretty tough.

22 MR. MILNE-SMITH: What I would like to
23 know is was he reviewing, was he acting in a
24 supervisory capacity? Did he give off one
25 particular aspect and manage that? In other words,

1 was it overlapping responsibility? Was it
2 discreet? What was the nature of his involvement?
3 R/F MR. GOTTLIEB: I'm going to object to
4 the question on the basis of both relevance and
5 privilege.

6 BY MR. MILNE-SMITH:

7 89 Q. At paragraph 39 of your affidavit
8 you say:

9 "As I mentioned, at the time
10 Zayo consented to assign its
11 contracts to Birch neither I nor my
12 colleagues in the legal department
13 at Zayo knew that Primus and Virgin
14 intended to avoid paying cure costs
15 to counterparties who cooperated
16 with Primus' request to assign the
17 central contracts."

18 Mr. Gottlieb, I think in that
19 paragraph, at a bear minimum, certainly Ms. Wong
20 Barker has put into issues the state of knowledge
21 and awareness of this file of her colleagues in the
22 legal department. I think I'm entitled to know
23 what that is or to strike that paragraph from the
24 affidavit, at a minimum.

25 MR. GOTTLIEB: I understand your point

1 that you've raised. It's still the limit that I
2 have to be careful of letting you cross and the
3 difficulty I've got with your questions so far is
4 that they are not, with respect, focused enough
5 that I can be sure that the answers given will not
6 stray from non-privileged areas.

7 MR. MILNE-SMITH: It's hard for me to
8 focus my questions when I'm not told anything.

9 MR. GOTTLIEB: Well, then you can move
10 on to another area or you can try harder, it's
11 really your call. The question as requested has
12 been denied because I think it's an improper
13 question.

14 MR. MILNE-SMITH: So I'm going to ask
15 that paragraph 39 be disregarded at the return of the
16 motion.

17 MR. GOTTLIEB: As I'm saying, my
18 objection is based on the particular question asked
19 because of its breadth and you can take at the
20 motion whatever position you want. I understand,
21 thank you for letting me know.

22 BY MR. MILNE-SMITH:

23 90 Q. When you refer to your colleagues
24 in the legal department, who are you referring to,
25 is it Mark and Gregg?

1 A. Yes.

2 91 Q. Okay. What investigation had Mark
3 or Gregg done so that they could know whether or
4 not Primus and Virgin intended to avoid paying cure
5 costs to counterparties?

6 A. How could I know that? I don't
7 know.

8 92 Q. What was the basis for, you stated
9 here their knowledge, what was the basis for their
10 knowledge?

11 R/F MR. GOTTLIEB: You have misstated what
12 that paragraph says, so I'm going to have to
13 object. If you look at the record later you'll see
14 that the question you asked is not consistent with
15 what the statement there is.

16 MR. MILNE-SMITH: Okay.

17 BY MR. MILNE-SMITH:

18 93 Q. You said that neither you nor your
19 colleagues knew that Primus and Virgin intended to
20 avoid paying cure costs. What inquiries did your
21 colleagues in the legal department make in that
22 regard?

23 A. They asked me to ask the Monitor.

24 94 Q. So they had no independent
25 knowledge on the matter, they just relied on you?

1 A. I don't know.

2 95 Q. And you made no inquiry of them?

3 A. Inquiry of?

4 96 Q. Of them as to what source of
5 knowledge they might have.

6 A. I didn't.

7 97 Q. Are you aware of any basis by
8 which Mark or Gregg would know something about this
9 file that you didn't?

10 A. Can you repeat the question,
11 please.

12 98 Q. Are you aware of any basis on
13 which Mark or Gregg would be aware of something
14 with respect to this file that you were not?

15 You seem to be struggling with this
16 question, do you want me to rephrase or can you
17 answer?

18 A. Rephrase, please.

19 MR. GOTTLIEB: Mr. Milne-Smith, if you
20 could timeframe it, it might help.

21 BY MR. MILNE-SMITH:

22 99 Q. We're not talking about a very
23 long timeframe, we're talking about from, was it
24 January 19th through April of the events covered in
25 your affidavit, fair enough?

1 A. Okay.

2 100 Q. So in that time period, did Mark
3 and Gregg get all their information about this file
4 directly from you or are you aware of them
5 independently going out and gathering additional
6 information from other sources?

7 A. It sounds like a two-part
8 question.

9 101 Q. It's an either/or. Either they
10 got everything from you or they may have been
11 getting information from someplace else.

12 MR. GOTTLIEB: Or she doesn't know.

13 MR. MILNE-SMITH: That's fine.

14 THE DEPONENT: I don't know.

15 BY MR. MILNE-SMITH:

16 102 Q. You understand, as a member of the
17 Law Society of Upper Canada, you understand the
18 competency requirement to the Rules of Civil
19 Procedure?

20 MR. GOTTLIEB: I'm sorry, the what?

21 BY MR. MILNE-SMITH:

22 103 Q. Competency. Sorry, not Rules of
23 Civil Procedure, Rules of Professional Conduct?

24 A. Yes.

25 104 Q. You specifically understand your

1 obligation to seek out the necessary expertise from
2 another lawyer if you lack the requisite skills?

3 A. Yes.

4 105 Q. And so you were competent to
5 handle a CCAA matter like the one we're dealing
6 with today?

7 A. I am going to say that CCAA
8 litigation is a specialized area of litigation and
9 I would not say that I'm competent to handle CCAA
10 litigation.

11 106 Q. Was anyone in your group competent
12 to handle CCAA litigation?

13 A. I don't know.

14 107 Q. So not that you're aware of?

15 A. I don't know.

16 108 Q. You told me earlier when you were
17 telling me about your background at Cassels Brock
18 that you were aware that there were specialists in
19 the field who you could consult regarding the CCAA,
20 if necessary, but you chose not to do so in this
21 case?

22 R/F MR. GOTTLIEB: I have no object to the
23 question on the basis of privilege.

24 BY MR. MILNE-SMITH:

25 109 Q. Why did you not retain CCAA

1 counsel in this matter?

2 R/F MR. GOTTLIEB: Same objection on the
3 basis of privilege

4 BY MR. MILNE-SMITH:

5 110 Q. Was it a budgetary problem?

6 R/F MR. GOTTLIEB: Same objection on the
7 basis of privilege.

8 BY MR. MILNE-SMITH:

9 111 Q. Ms. Wong Barker, I understand from
10 your affidavit that Allstream had a decade's long
11 relationship with Primus, paragraph 8 of your
12 affidavit?

13 A. Yes, that's my understanding.

14 112 Q. And my understanding is that for
15 2014, '15, average revenue to Allstream was
16 approximately \$8 million; is that right?

17 A. Revenue from?

18 113 Q. From Primus.

19 A. I don't know.

20 114 Q. Could you please make inquiries
21 and advise whether I am correct that for the years
22 2014, 2015 the average revenue to MTS and/or
23 Allstream from Primus was approximately \$8 million?

24 R/F MR. GOTTLIEB: No, we will not. That's
25 information obviously that the parties have here

1 and chose not to put in the record. So if it was
2 thought to be relevant, it could have been put in.
3 Frankly, I don't think it's relevant.

4 BY MR. MILNE-SMITH:

5 115 Q. Zayo claims to be approximately
6 \$1.2 million?

7 A. Yes.

8 116 Q. And none of that debt was secured?

9 A. I don't know.

10 117 Q. And you knew the amount of the
11 debt at all relevant times?

12 A. No.

13 118 Q. When did you learn the amount of
14 the debt? When I say all relevant times, I'm
15 talking from January 19 forward, January 19, 2016?

16 MR. GOTTLIEB: Until when, Mr.
17 Milne-Smith, you don't mean until today when you
18 say the relevant times?

19 MR. MILNE-SMITH: For the purposes of
20 this question I do, if she knows it, she knows it.

21 BY MR. MILNE-SMITH:

22 119 Q. In general, when I say the
23 relevant time I mean starting January 19, 2016 and
24 going through April.

25 A. Well, my understanding of the

1 billing is that it's complicated because of the
2 finale of interconnection agreements. Some of the
3 chart is the fixed charges, other charges being
4 usage charges charged in arrears. So in January
5 the number wasn't as high, I believe, as 1.2
6 million. I was relying on my billing analyst
7 providing me with a table, which I included at the
8 end of my affidavit.

9 120 Q. So the February, March invoices
10 are for relatively small amounts. So we just look
11 through January, it's still pretty close to that
12 \$1.2 million figure, maybe 1.1 million, correct?

13 A. Looking at December and January?

14 121 Q. No, if you look, sorry, March and
15 February are a total of around \$76,000.00, correct?

16 A. February and March?

17 122 Q. Yes.

18 A. Okay.

19 123 Q. Look at page 11, paragraph 42 of
20 your affidavit, February, March are around
21 \$76,000.00, correct?

22 A. Correct.

23 124 Q. So if you subtract that from the
24 total pre-filing you come up with 1.125ish million?

25 MR. GOTTLIEB: You're just --

1 THE DEPONENT: Is this a math exercise?

2 MR. GOTTLIEB: You're just doing the
3 math there?

4 MR. MILNE-SMITH: I'm just trying to
5 make sure we're on common ground here.

6 MR. GOTTLIEB: Common ground for what?

7 MR. MILNE-SMITH: How much was owed,
8 according to Zayo, according to Allstream, how much
9 was owed to it by Primus.

10 MR. GOTTLIEB: So it's set out in the
11 chart.

12 MR. MILNE-SMITH: Yes.

13 MR. GOTTLIEB: So that's why, I
14 apologize, it's probably my fault, I'm not
15 understanding what you're asking.

16 BY MR. MILNE-SMITH:

17 125 Q. My point is as of January you knew
18 this was a significant amount of money.

19 MR. GOTTLIEB: Understood.

20 THE DEPONENT: In January the number
21 was much lower than 1.2.

22 BY MR. MILNE-SMITH:

23 126 Q. Would you agree -- we just looked
24 at what February and March were, right, so by the
25 end of January --

1 A. But this chart was provided around
2 the time that my affidavit was sworn.

3 127 Q. Let me ask you a different way.
4 In January when this file landed on your desk, did
5 you have any understanding whatsoever as to how
6 much was in issue for Allstream?

7 A. That it would become 1.2?

8 128 Q. Just tell me what your
9 understanding was about how important this was and
10 how much money was at issue?

11 MR. GOTTLIEB: Those are two different
12 questions.

13 THE DEPONENT: Could you break that
14 down, please?

15 BY MR. MILNE-SMITH:

16 129 Q. As of January when you first got
17 involved in this matter, what, if anything, did you
18 know about how much money was owed to Allstream,
19 Zayo?

20 A. My recollection in January, based
21 on what the billing analyst was telling me, was
22 that the number was around 600,000.

23 130 Q. And were you updated by that
24 billing analyst along the way?

25 A. Yes.

1 131 Q. So, for example, by -- I assume
2 you would have learned about the January invoices
3 some time in February?

4 A. I would have to go back and look
5 at my emails.

6 132 Q. Can you please advise me?

7 R/F MR. GOTTLIEB: No. Mr. Milne-Smith, I
8 apologize, I'm missing the relevance of when Ms.
9 Wong Barker knew the amounts owing.

10 MR. MILNE-SMITH: I've already stated
11 what the relevant is, so we'll leave it for
12 argument.

13 MR. GOTTLIEB: Okay.

14 BY MR. MILNE-SMITH:

15 133 Q. You learned of the Primus CCAA
16 filing on January 19th, 2016, the day it happened?

17 A. Yes.

18 134 Q. And how was it brought to your
19 attention?

20 A. The sales account manager. I
21 believe it's in my affidavit.

22 135 Q. Paragraph 11 is where you --

23 A. Yes.

24 136 Q. So who is that account manager?

25 A. Brian Beube.

1 MR. GOTTLIEB: Do you know how to spell
2 that?

3 THE DEPONENT: B-E-U-B-E.

4 BY MR. MILNE-SMITH:

5 137 Q. And shortly thereafter Primus
6 started sending Allstream notices requesting
7 consent to assignment of certain contracts. I
8 believe the first of those is at Exhibit "D" of
9 your affidavit, correct?

10 A. January 22nd, yes.

11 138 Q. So Exhibit "D" refers to a June
12 20, 2000 contract between AT&T Canada and Primus
13 Telecommunications Canada, correct?

14 A. It does in the first paragraph.

15 139 Q. And this letter disclosed the
16 existence of the asset purchase agreement with
17 Birch Hill in the third paragraph?

18 A. With Birch, yes.

19 140 Q. Sorry, I'm thinking about another
20 client, Birch, not Birch Hill. Too many Birches
21 running around.

22 It also disclosed that motion materials
23 in connection with Primus' motion to approve the
24 sale would be available shortly on the Monitor's
25 website, correct?

1 A. Correct.

2 141 Q. And you understood that those
3 motion materials would likely include the asset
4 purchase agreement itself?

5 A. Yes.

6 142 Q. And the letter requested
7 Allstream's consent to assign the contract referred
8 to in the first paragraph, correct?

9 A. Yes.

10 143 Q. And on page 2 of the letter it
11 discloses that:

12 "Following the assignment, the
13 purchaser [Birch] will be
14 responsible for all
15 obligations...arising after
16 closing."

17 Do you see that in the first paragraph
18 at the top of page 2?

19 A. I do. To me it read like a run-on
20 sentence with a missing comma.

21 144 Q. Where did you think the comma
22 should be?

23 A. After arising, as in:

24 "...the purchaser will be
25 responsible for all obligations

1 under the contract arising, after
2 the closing."

3 The way you read it sounds like you're
4 saying the comma goes after contract, as in before
5 arising. So you read it as:

6 "...the purchaser will be
7 responsible for all obligations
8 under the contract, arising after
9 the closing."

10 145 Q. So your interpretation of this is
11 that the purchaser would be responsible for all
12 obligations arising before and after the closing,
13 that's your read of this?

14 A. My read is that it's ambiguous.

15 146 Q. Did you call up the author of this
16 letter to clarify that ambiguity?

17 A. It said that for any questions to
18 contact the Monitor and I did contact the Monitor.

19 147 Q. It says call either me, Steven
20 Bissell of the Monitor, Vlad Calina of Stikeman
21 Elliott. So you didn't call Mr. Nice, correct?

22 A. No.

23 148 Q. And I've seen in your
24 correspondence --

25 A. Is there a number for Bob Nice in

1 this letter?

2 149 Q. Yes, there's letterhead at the
3 bottom of the first page, two different telephone
4 numbers.

5 A. Are those his direct telephone
6 numbers?

7 150 Q. I don't know. My question is,
8 you're a competent woman, Ms. Wong Barker, if you
9 wanted to call Bob Nice you could, right?

10 A. Correct.

11 151 Q. Even if he didn't put his phone
12 number in the letter, you could figure out a way to
13 call him if you wanted to, right?

14 A. Correct, and I did not.

15 152 Q. And you chose not to, thank you.
16 I've seen your correspondence with the
17 Monitor, I haven't seen any place whatsoever where
18 you purported or attempted to clarify this
19 ambiguity you've identified in the first paragraph
20 on page 2 of the letter; am I right?

21 A. Yes, but in a Court Monitor
22 process I thought that we had some protections,
23 especially when I asked for notices to be sent to
24 me, including the asset purchase agreement to be
25 sent to me.

1 153 Q. I'm not asking you about what
2 protections were available, I'm asking about a
3 specific ambiguity you've identified here for the
4 first time. You never did anything to clarify that
5 ambiguity with any of Primus, the Monitor or their
6 respective counsel?

7 A. Correct.

8 154 Q. This letter also, if you continue
9 down after the notice provisions and look at the
10 penultimate paragraph, you'll see Mr. Nice's letter
11 disclosed that if consent, the consent being
12 requested is not granted, that Primus intended to
13 rely on Section 11.3 of the CCAA; do you see that?

14 A. Yes.

15 155 Q. Specifically Mr. Nice said that it
16 gives the Court the jurisdiction to order the
17 assignment of a contract without consent on certain
18 terms and conditions set forth in Section 11.3 of
19 the CCAA; do you see that?

20 A. Yes.

21 156 Q. And I take it that sitting here
22 now today you have read Section 11.3 of the CCAA?

23 A. Yes.

24 157 Q. And you understand that it allows
25 a Court to make an order assigning rights and

1 obligations, contractual rights and obligations of
2 the debtor to a third party despite the
3 counterparty's objection, counterparty in this case
4 being Allstream?

5 A. Could you repeat the question.

6 158 Q. You understand now that Section
7 11.3 allows the Court to make an order assigning
8 rights and obligations under a contract of the
9 debtor to a third party despite the counterparty to
10 the contract's objections?

11 A. Yes.

12 159 Q. And I take it you've read 11.3
13 (4)?

14 A. Yes.

15 160 Q. And 11.3 (4) requires payment of
16 cure costs as a condition of obtaining an order
17 under Section 11.3, correct?

18 A. Yes.

19 161 Q. So had you read 11.3 you would
20 have known that the terms and conditions referred
21 to in this letter would have included paying
22 prefiling debts?

23 MR. GOTTLIEB: Can you ask that again,
24 Mr. Milne-Smith.

25 BY MR. MILNE-SMITH:

1 162 Q. Had you read 11.3, Section 11.3 of
2 the CCAA at the time that you received this letter,
3 you would have known that the terms and conditions
4 referred to in Mr. Nice's letter would have
5 included paying prefiling debts?

6 MR. GOTTLIEB: In that paragraph?

7 MR. MILNE-SMITH: Yes.

8 THE DEPONENT: The way that it is
9 phrased in this paragraph to which you're referring
10 makes it seem like the result would be the same.

11 BY MR. MILNE-SMITH:

12 163 Q. That's not my question.

13 MR. GOTTLIEB: You have to let her
14 answer because you're asking for what she would
15 have done at the time and I think it's fair she
16 answer what she understood.

17 BY MR. MILNE-SMITH:

18 164 Q. Go ahead and then we'll come back
19 to my question.

20 MR. GOTTLIEB: Thank you.

21 THE DEPONENT: So I had no idea that
22 voluntarily consenting to the assignment would put
23 us in a worse position than if we didn't cooperate.

24 BY MR. MILNE-SMITH:

25 165 Q. I understand. Let's come back to

1 my question, now. Had you read 11.3 you would have
2 known that the terms and conditions referred to in
3 this paragraph would have included paying prefiling
4 debts?

5 A. 11.3 (4) seemed like another means
6 to obtain our cure costs. Reading it with this
7 paragraph didn't suggest that consenting would
8 prevent us from obtaining our cure costs.

9 166 Q. Let me clarify that. Did you read
10 11.3 of the CCAA when you got this letter?

11 A. Yes.

12 167 Q. You didn't retain outside counsel?

13 A. No.

14 168 Q. And you didn't ask Primus, the
15 Monitor or their counsel to clarify what the terms
16 and conditions under 11.3 were?

17 MR. GOTTLIEB: I don't understand that
18 question.

19 BY MR. MILNE-SMITH:

20 169 Q. You didn't ask Primus, the Monitor
21 or either of their respective counsel to clarify
22 what they meant by the certain terms and conditions
23 set forth in Section 11.3 of the CCAA?

24 A. One of your questions earlier said
25 that they can't provide me legal advice anyway.

1 170 Q. I'm asking a factual question.
2 You didn't ask Primus, the Monitor or either of
3 their respective counsel to clarify what the
4 certain terms and conditions set fort in Section
5 11.3 of the CCAA were? It's a factual question, I
6 take it the answer is no?

7 A. No, but I didn't think I had to
8 when I emailed the Monitor saying that we were a
9 significant creditor and supplier and what is the
10 proof of claims process and when will the asset
11 purchase agreement be available, and if it is
12 available please send it to me.

13 171 Q. Without getting into the content
14 of any privilege communication, did you ask anyone
15 else in the Allstream legal group about Section
16 11.3 of the CCAA?

17 R/F MR. GOTTLIEB: Sorry, she can't answer
18 that without giving privilege information, Mr.
19 Milne-Smith, so I have to object.

20 BY MR. MILNE-SMITH:

21 172 Q. Did you give this letter to anyone
22 else in the legal group?

23 R/F MR. GOTTLIEB: The same point.

24 BY MR. MILNE-SMITH:

25 173 Q. Did anyone else in the group

1 receive this letter?

2 MR. GOTTLIEB: Directly?

3 MR. MILNE-SMITH: Directly or
4 indirectly.

5 MR. GOTTLIEB: Well, isn't that asking
6 the same question that I've just objected to?

7 MR. MILNE-SMITH: I don't know, that's
8 for you to decide.

9 R/F MR. GOTTLIEB: It's for you not to ask
10 if I've just objected, and trying to get the
11 information a different way, if it's improper, it's
12 still improper. I think it's asking the same
13 information, so I'm going to object on the same
14 basis.

15 MR. MILNE-SMITH: We obviously disagree
16 about the propriety of the question. Why don't we
17 take a quick break there.

18 -- Recessed at 10:57 a.m.

19 -- Reconvened at 11:07 a.m.

20 BY MR. MILNE-SMITH:

21 174 Q. So we were looking before the
22 break at Exhibit "D". If you just want to turn to
23 the next letter Exhibit "E", this is a January 26
24 letter from Primus to Ron Haseman, H-A-S-E-M-A-N,
25 and the legal department at Allstream. Do you have

1 that?

2 A. I do.

3 175 Q. This was regarding a series of
4 agreements listed at Schedule "A" as referred to in
5 the first paragraph?

6 A. Yes.

7 176 Q. And as it was sent to the legal
8 department, I trust you received a copy of it
9 around the time of January 26th?

10 A. Yes.

11 177 Q. And I take it you would agree with
12 me that other than it deals with different
13 contracts, the content is essentially identical to
14 Exhibit "D"?

15 A. Correct.

16 178 Q. Now, Ms. Wong Barker, you've told
17 us in your affidavit and you've also told us this
18 morning that your interpretation of these letters
19 is that Primus could achieve the same result
20 whether Zayo consented or not?

21 A. Correct.

22 179 Q. But you'd agree with me that
23 neither of these letters, in fact no letter or
24 communication attached to your affidavit actually
25 says that?

1 A. I'm looking at Exhibit "E", page
2 2, last paragraph.

3 180 Q. So that and similar paragraphs in
4 other letters received from Primus are the only
5 thing you rely upon for your conclusion that Primus
6 could achieve the same result whether Zayo
7 consented or not, there's not any other
8 communication you're relying on in that regard?

9 A. Umm, I suppose I'm also relying on
10 the phone call I had with Kyle Mitchell on March,
11 on or around March 1st.

12 181 Q. So this is as described in
13 paragraph 30 and 31 of your affidavit?

14 A. Yes.

15 182 Q. And you have included in paragraph
16 30 and 31 all the relevant aspects of that phone
17 call that you can recall?

18 A. Yes.

19 183 Q. And what you're relying on
20 specifically is the last two sentences of paragraph
21 31 where you talk about what Mr. Mitchell did not
22 say, correct?

23 A. He did not say and he also said
24 that the motion the following day was just going to
25 be about assignments and that if we sign the letter

1 and cooperated then we could avoid the expense and
2 hassle of attending the motion hearing the
3 following day.

4 184 Q. And --

5 A. Could I add to my answer?

6 185 Q. Yes.

7 A. I believe in his affidavit he
8 quoted me saying that I said the words --

9 186 Q. Sorry, you mean Michael Nowlan's
10 affidavit?

11 A. I mean Kyle Mitchell's.

12 187 Q. He quotes you saying what?

13 A. He quoted me as saying a sensible
14 path forward, I don't have it in front of me. I
15 certainly would not have said those words if Zayo
16 was being asked to waive its right to \$1.2 million.

17 188 Q. And going back to Exhibit "E", you
18 saw that the assignment of the contract by Section
19 11.3 would be subject to certain terms and
20 conditions?

21 A. Looking at page 2 of Exhibit "E"?

22 189 Q. The paragraph of the letter that
23 you relied on, bottom of page 2, Exhibit "E".

24 A. Yes.

25 190 Q. You say, where it refers to the

1 assignment pursuant to Section 11.3, would be
2 subject to certain terms and conditions?

3 A. Yes, I see that.

4 191 Q. And you also knew that if you
5 consented there were no terms and conditions
6 attached to it?

7 A. I did not know that at the time.

8 192 Q. No one said that there would be
9 any terms and conditions attached to it if you
10 consented?

11 A. Yes, but I thought the result
12 would be the same, that we would be financially
13 disadvantaged by cooperating.

14 193 Q. But answer to my question is yes?

15 A. The question again is?

16 194 Q. Please read the question again.

17 THE REPORTER:

18 "No one said that there would
19 be any terms and conditions attached
20 to it if you consented.

21 THE DEPONENT: I suppose not
22 explicitly.

23 BY MR. MILNE-SMITH:

24 195 Q. And, in fact, you never told
25 anyone that Allstream expected to be paid all

1 prefiling debts?

2 A. I believe in my email to the
3 Monitor when I advised that we were a creditor and
4 supplier and that we wanted to submit proof of
5 claims forms that I was basically saying that.

6 196 Q. But you understood that in a CCAA
7 context creditors often will not recover full
8 amounts owed to them, correct? You understand
9 that, that's not a controversial fact, yes?

10 A. Yes.

11 197 Q. And, in fact, in Exhibit "L" to
12 your affidavit, --

13 A. Yes.

14 198 Q. -- you'll see your last paragraph
15 says:

16 "We wish to know given the
17 nature and priority of claims what
18 Zayo may expect to receive on its
19 1.2 million prefiling claim about.
20 What steps may be taken by Zayo to
21 maximize recovering such 1.2
22 million."

23 So you were implicitly acknowledging
24 that Zayo was, in fact, likely to recover less than
25 1.2 million, but you wanted to maximize the

1 recovery?

2 A. I suppose so, yes.

3 199 Q. And had you taken up the
4 invitation in Mr. Nice's letter to call himself or
5 Steve Bissell of the Monitor or Vlad Calina of
6 Stikeman Elliott, had you taken up that invitation
7 to call one of those people and to clarify any
8 ambiguities you might have had, you don't know what
9 Mr. Nice would have said, there's no way for you to
10 know what he would have said?

11 A. No. You're implying he would have
12 given me a fulsome reply?

13 200 Q. I'm not implying anything, I'm
14 saying you wouldn't have known what he could have
15 said.

16 A. No, but I imagine it would have
17 been similar to the response that I did get by
18 email, which was it was the obligation on me to
19 pull from the website, not for them to push notices
20 to me that were going to significantly effect
21 Zayo's rights.

22 MR. GOTTLIEB: The question is
23 obviously not necessary, Mr. Milne-Smith. You're
24 asking if she could know what someone would say to
25 a question she did not ask of that someone. I

1 think we can take an agreement that she is
2 powerless to know what someone would have said in
3 response to a question that was not asked.

4 BY MR. MILNE-SMITH:

5 201 Q. You obviously don't know what the
6 result of any possible negotiation over cure costs
7 might have resulted in?

8 A. I'm not clairvoyant, no.

9 202 Q. So obviously you don't know if you
10 had asked for cure costs whether Primus would have
11 paid them or just walked from certain contracts
12 rather than assign them?

13 A. I can't know. Can I add? I can't
14 know, but in asset purchase agreements the
15 essential contracts are listed at Schedule "B".

16 203 Q. And you're aware that there were
17 changes made to those schedules over time?

18 A. According to Michael Nowlan's
19 affidavit.

20 204 Q. Right. So you understand that
21 Primus and Birch had the ability to add or remove
22 contracts from those schedules as they saw fit or
23 as they agreed between them and that was not up to
24 you?

25 A. That was not up to me. Can I add,

1 it was not up to me, but I recall seeing language
2 in the asset purchase agreement about
3 interconnection contracts being significant and
4 likely to be included at Schedule "B" as essential
5 contracts.

6 205 Q. I believe the interpretation of
7 the APA is a matter for argument.

8 On January 29th, Exhibit "I" to your
9 affidavit, your president wrote to Mr. Bissell of
10 Primus; do you have that letter?

11 A. Mm-hmm.

12 206 Q. And he was writing about the
13 various requests for consent to assign contracts
14 that have been received by Allstream?

15 A. Yes.

16 207 Q. And you see in the third
17 paragraph -- first of all, it discloses the main
18 change and then the sale of Allstream to Zayo?

19 A. Yes.

20 208 Q. And then it says:

21 "In connection with such
22 transaction and to reflect the
23 actual usage of the contracts, MTS
24 wishes to assign to Allstream MTS'
25 rights, benefits and obligations

1 under the contracts, and Allstream
2 wishes to assume such obligations,
3 exercise such rights, and receive
4 such benefits."

5 I take it from that that Allstream
6 wanted to take the benefit of the assignment of
7 contracts?

8 A. From MTS to Allstream?

9 209 Q. Yes.

10 A. Yes.

11 210 Q. And by this time MTS and Allstream
12 were obviously two separate companies?

13 A. Yes.

14 211 Q. And Allstream needed the contracts
15 assigned to it so they could have the benefit of
16 those agreements?

17 A. Yes.

18 212 Q. And by this letter Allstream asked
19 for Primus' consent to these assignments?

20 A. Yes, and we would not have done so
21 had Primus not asked for our consent.

22 213 Q. That will be a question for the
23 Court.

24 MR. GOTTLIEB: No, it wouldn't, that's
25 a factual statement she just made, Mr. Milne-Smith.

1 MR. MILNE-SMITH: As you know, Courts
2 can decide matters of fact as well matters of law,
3 Mr. Gottlieb.

4 MR. GOTTLIEB: Yes, they can.

5 BY MR. MILNE-SMITH:

6 214 Q. Your company, Allstream, further
7 asked that MTS be released from all obligations
8 under the contracts arising after January 29, 2016;
9 do you see that in the same paragraph?

10 A. Yes.

11 215 Q. And you, of course, don't assert
12 that Primus was obligated to provide such a
13 release?

14 A. Well, I have to go back and look
15 at the contracts and I imagine the contracts would
16 have said such consent not to be unreasonably
17 withheld.

18 216 Q. But you were asking for the
19 consent in this letter? You're not telling them
20 they have to, you're asking for it, correct?

21 A. Okay.

22 217 Q. And was it a term of the sale
23 acquisition of Allstream that you seek and obtain
24 such assignments and releases?

25 A. Repeat the question.

1 218 Q. Was it a term of the Zayo
2 acquisition of Allstream that you seek and obtain
3 the assignments and releases referred to in this
4 paragraph?

5 A. I don't know.

6 219 Q. Could you please produce the
7 acquisition agreement between Zayo and MTS?

8 A. I believe --

9 R/F MR. GOTTLIEB: I'm going to object.
10 No, we will not.

11 BY MR. MILNE-SMITH:

12 220 Q. Just to be clear, I would like to
13 know if there was any legal obligation on either
14 MTS or Allstream or any related entity to them to
15 obtain the assignments and/or releases that are
16 requested in this paragraph.

17 MR. GOTTLIEB: Understood.

18 MR. MILNE-SMITH: Is that question
19 refused?

20 R/F MR. GOTTLIEB: Yes, sir.

21 BY MR. MILNE-SMITH:

22 221 Q. I take it from the events you set
23 out in your affidavit that you did not continue to
24 monitor the FTI website, the Monitor's website for
25 their motion materials to approve the sale to

1 Birch?

2 A. I monitored it intermittently.

3 222 Q. You accept, I trust, that the
4 motion materials were available as of February 2nd
5 and that those motion materials included the APA?

6 A. I understood after March 2nd that
7 the materials were available buried at Exhibit "L"
8 in a 413 pdf, but I did not know at the time.

9 223 Q. So you understood after March the
10 2nd?

11 A. Yes.

12 224 Q. So for the month of February you
13 didn't go to the Monitor's website to look for the
14 motion material to approve the sale?

15 A. I went and looked for the asset
16 purchase agreement and when I skimmed the website I
17 didn't see it.

18 225 Q. So you would have seen motion
19 materials to approve sale, but you just didn't
20 click through and look at it?

21 A. To Exhibit "L" of a 413 pdf, no, I
22 didn't find it.

23 226 Q. Did you open the pdf at all and
24 look at the index?

25 A. I don't recall doing that, no.

1 227 Q. Okay. So at the time prior to
2 March when you say you finally found this document,
3 prior to March you had looked at the website for
4 the Monitor, but you hadn't opened the motion
5 materials so you had no idea how hard it would be
6 to find?

7 MR. GOTTLIEB: She didn't say that, Mr.
8 Milne-Smith, she said she doesn't recall.

9 BY MR. MILNE-SMITH:

10 228 Q. Let's clarify. For the month of
11 February you never actually opened the pdf that
12 contained the motion materials to approve the sale?

13 A. Correct, and I was expecting that
14 the Monitor would send me the APA.

15 229 Q. Well, that's a separate debate
16 that I'll leave to you and the Monitor.

17 Can you turn to Exhibit "G", please.
18 So this is a letter dated February 17 from
19 Allstream to Primus.

20 A. Actually, to the Monitor.

21 230 Q. Sorry, yes, the Monitor, FTI
22 Consulting in its capacity Monitor. If you look at
23 the first paragraph I take it this letter was
24 attaching your revised schedule contracts for which
25 you were providing your consent to the assignment?

1 A. Correct.

2 231 Q. And again at the bottom of the
3 first page, so that last paragraph at the bottom of
4 the first page, you again explicitly asked that in
5 consideration for the assignment Primus agreed to
6 the assignment of contractual rights and
7 obligations from MTS to Allstream?

8 A. Sorry, could you repeat the
9 question.

10 232 Q. You explicitly asked that in
11 consideration for the assignment of the contracts
12 from Primus to Birch, that Primus agreed to
13 assignment of the contract from MTS to Allstream?

14 A. When you say in consideration of
15 are you equating the -- sorry, our, Zayo's request
16 to assign with Primus' request to assign to Birch,
17 are you equating the two in that there's adequate
18 consideration here when by consenting to the
19 assignment from MTS to Allstream there was no
20 waiver of 1.2 million by consenting to this
21 assignment.

22 233 Q. Not my question, my question was
23 much narrower. I'm saying that you had been asked
24 to assign and you in turn were asking for an
25 assignment, correct?

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

4 234 Q. Well, the only reason it wasn't
5 accurate is because you needed an assignment. MTS
6 could have simply agreed to the assignment, it
7 could have rested with MTS and then Allstream
8 wouldn't have had the benefit of the contract,
9 correct?

10 MR. GOTTLIEB: She's not, they are not
11 MTS, Mr. Milne-Smith. You're saying she could have
12 consented to an assignment on behalf of MTS when
13 they're not MTS.

14 BY MR. MILNE-SMITH:

15 235 Q. So you could have simply said to
16 them, go call MTS, that could have been your
17 response?

18 A. And they did.

19 236 Q. But that wasn't your response,
20 your response wasn't to go call MTS, it was to say
21 we also want it assigned to us, correct?

22 A. Actually, I did call MTS.

23 237 Q. That's not my question. You
24 didn't write back and say why are you bothering us,
25 this is MTS's contract, correct?

1 A. Well, it's implied.

2 238 Q. That's not -- I don't want to ask
3 about what's implied, I want to ask about what you
4 did. You never wrote back to the Monitor or Primus
5 saying leave us alone, these contracts are with
6 MTS, or words to that nature?

7 A. No, I suppose I didn't.

8 239 Q. Because you wanted to have the
9 contracts for the benefit of Allstream, we've
10 already talked about that this morning.

11 A. Well, we already had an
12 intercompany agreement wherein they were --

13 240 Q. No, MTS had an agreement, you just
14 made that point, MTS had that agreement, not
15 Allstream.

16 MR. GOTTLIEB: You have to let her
17 finish her answer before you interrupt, please.

18 THE DEPONENT: So I don't think it's a
19 secret that MTS was preparing Allstream for sale
20 and in January 1, 2012 we had, MTS and Allstream,
21 had an intercompany agreement and it's referenced
22 in my letter, whereby the national enterprise
23 business assets were assigned by MTS to Allstream.

24 BY MR. MILNE-SMITH:

25 241 Q. Okay. Again, it doesn't answer my

1 question. At no point did Allstream in response to
2 letters received from Primus or the Monitor reply
3 that you should simply go and ask for the consent
4 to these assignments from MTS, you never gave that
5 response?

6 A. I suppose not, but it's clear from
7 our letter that MTS would have to consent to the
8 assignment to Allstream. There's a signature box
9 in the February 17th letter, there's a signature
10 box in the, I think, January 29th letter.

11 242 Q. The fact of the matter is
12 Allstream wanted the contracts?

13 A. But we already had the contracts
14 because --

15 243 Q. No, MTS had the contracts. You've
16 just made that point, MTS had the contract and
17 Allstream wanted it, correct?

18 A. MTS had assigned the contracts to
19 Allstream by an intercompany agreement already.

20 244 Q. You knew that consent --

21 MR. GOTTLIEB: Please, please, let her
22 finish the sentence before you ask the next
23 question.

24 BY MR. MILNE-SMITH:

25 245 Q. Had you finished?

1 MR. GOTTLIEB: No, she wasn't finished,
2 you cut her off midstream. She said they had
3 already been assigned. Her reply affidavit states
4 all of these points explicitly.

5 MR. MILNE-SMITH: I understand that.

6 BY MR. MILNE-SMITH:

7 246 Q. Did you have any more to add?

8 A. I was saying that effective
9 January 1, 2012 MTS had already assigned agreements
10 to Allstream, so this was a matter of cleanup.

11 247 Q. You asked for consent to assign
12 those contracts.

13 A. Yes, because Primus was asking for
14 our consent to assign to Birch.

15 248 Q. Right. So you couldn't
16 unilaterally, MTS couldn't unilaterally assign the
17 contracts to Allstream?

18 A. I'm sorry, MTS couldn't?

19 249 Q. MTS couldn't unilaterally assign
20 the contracts with Primus to Allstream, you had to
21 get Primus' consent which is why you asked for it?

22 A. I haven't done an exhaustive
23 review of the contracts with Primus, but it
24 wouldn't surprise me if the assignment language in
25 the relevant contracts said that consent to

1 assignment would not be unreasonably withheld.

2 250 Q. The fact of the matter is you did
3 ask for consent?

4 A. Because we wanted to be
5 cooperative.

6 251 Q. Because you wanted to have the
7 contracts?

8 MR. GOTTLIEB: Mr. Milne-Smith, no
9 matter how many times you ask the question it's not
10 going to change the answer. The answer is
11 repeatedly the reason we asked for it is because
12 Primus asked for an assignment and therefore we
13 needed to get them in the right name. That is
14 repeatedly the answer given. I get it.

15 MR. MILNE-SMITH: I understand that's
16 the answer that you want to give, I'm asking a
17 different question.

18 MR. GOTTLIEB: That's the answer that's
19 given.

20 MR. MILNE-SMITH: Mr. Gottlieb, let me
21 ask my questions because I'm --

22 MR. GOTTLIEB: The problem is you've
23 asked it about seven times.

24 MR. MILNE-SMITH: Hang on, I'm talking
25 now. I'm asking questions and I'm getting answers

1 to different questions, I'm getting interjections
2 from counsel. If you just let me ask my questions
3 and get answers to my questions, we're all going to
4 be done very quickly.

5 MR. GOTTLIEB: I'm going to talk now.
6 You have asked the same question seven or eight
7 times. The record will show that. I appreciate
8 you're not enjoying the answer you're getting.
9 We'll all make the arguments based on the facts as
10 they are, as set out in the reply affidavit, as set
11 out in the answers given today.

12 The evidence isn't going to change
13 because you're asking the same question over and
14 over again. So there comes a point where it is
15 enough.

16 What question do you say you don't have
17 an answer to because I've let you repeat the same
18 question and argue with the witness, what's the
19 question that you say hasn't been answered?

20 BY MR. MILNE-SMITH:

21 252 Q. Ms. Wong Barker, Allstream wanted
22 to continue in business with Primus or Birch, as it
23 subsequently acquired, you wanted to continue with
24 these contracts, correct? It's a simple question.

25 A. Well, Primus relied on us for

1 data, for 911 services because it was a retailer.
2 If we were to drop these contracts, we would be, I
3 don't know, de facto interfering with the
4 contractual relations of Primus with its end
5 customers.

6 253 Q. The contracts were profitable for
7 Allstream, weren't they?

8 A. I don't know the profit margins.

9 254 Q. And you're going to get back to
10 me, I think, on whether or not you agree with my \$8
11 million annual revenue figure?

12 MR. GOTTLIEB: No, we said we wouldn't
13 do that.

14 MR. MILNE-SMITH: So I take it you'll
15 refuse to provide profit margin figures on these
16 contracts?

17 R/F MR. GOTTLIEB: Correct.

18 BY MR. MILNE-SMITH:

19 255 Q. Again, in this February 17 letter,
20 like the previous one, you asked that MTS be
21 released from all obligations under the contracts
22 in question arising after the date first noted
23 above?

24 A. Yes, I see that sentence.

25 256 Q. You did that because MTS needed a

1 release or wanted a release?

2 A. I don't know if they needed a
3 release.

4 257 Q. I said or wanted.

5 A. MTS wanted a clean assignment.

6 258 Q. Right. And they were asking for
7 that release in consideration of Allstream's
8 assumption of MTS's obligations under the
9 applicable contracts?

10 A. It makes it sound like --

11 MR. GOTTLIEB: No, no, just is that
12 what the letter says.

13 THE DEPONENT: Could you repeat the
14 question.

15 BY MR. MILNE-SMITH:

16 259 Q. They're asking for the release in
17 consideration for Allstream's assumption of MTS's
18 obligations under the applicable contracts, that's
19 what the letter says?

20 A. Okay.

21 260 Q. So you agree with that?

22 A. Could you repeat that, please?

23 MR. GOTTLIEB: Mr. Milne-Smith, are you
24 just asking her to confirm what the letter says?

25 MR. MILNE-SMITH: Yes.

1 MR. GOTTLIEB: If that's what the
2 letter says, then we agree that's what the letter
3 says.

4 BY MR. MILNE-SMITH:

5 261 Q. Now let me take the next step,
6 it's not just what the letter says, that was, in
7 fact, the truth?

8 MR. GOTTLIEB: Now you're going to have
9 to repeat the question, then.

10 BY MR. MILNE-SMITH:

11 262 Q. This letter says:

12 "MTS and Allstream request your
13 consent to these assignments and
14 your agreement that, in
15 consideration of Allstream's
16 assumption of MTS'S obligations
17 under the applicable contracts, MTS
18 is released from all obligations
19 under such contracts arising after
20 the date first noted above."

21 That accurately reflects what MTS and
22 Allstream wanted to happen, that's why you said it
23 in the letter, correct?

24 A. Yes, because we wanted to
25 cooperate with Primus' consent to the assignment to

1 Birch.

2 263 Q. A MTS release wasn't necessary for
3 the Primus assignment to Birch.

4 A. Is that a question or a statement?

5 264 Q. It's a statement. Do you disagree
6 with it?

7 A. Repeat the statement.

8 265 Q. A release of MTS wasn't essential
9 for the assignment of the contracts from Primus to
10 Birch, correct?

11 A. From whose point of view?

12 266 Q. From anybody's point of view.

13 A. I think MTS would take issue with
14 that statement.

15 267 Q. So it's something that MTS
16 required, not something that Primus or Birch
17 required, correct? It's what you just told me.

18 MR. GOTTLIEB: No, it's not. She's
19 gone over this several times.

20 MR. MILNE-SMITH: No, this is new area,
21 Mr. Gottlieb, it's a different point, so don't act
22 like this is retrodden ground, it's something new.

23 MR. GOTTLIEB: It is retrodden ground
24 for exactly the same reason she said before, but
25 you can go over it again.

1 BY MR. MILNE-SMITH:

2 268 Q. Ms. Wong Barker, you just told me
3 that it was something that MTS required, correct?

4 A. I would imagine that they would
5 want the release.

6 269 Q. And that's why you asked for it in
7 the letter?

8 A. Because we wanted to cooperate
9 with Primus' request for consent to assignment to
10 Birch.

11 270 Q. That' just my point, Ms. Wong
12 Barker. You keep on repeating that like a mantra,
13 but wouldn't you agree with me that if it was
14 something that MTS required, it had nothing to do
15 with cooperating with Primus and Birch?

16 A. Well, I disagree with that
17 statement because the trigger for this letter was
18 Primus' request for consent to the assignment to
19 Birch.

20 271 Q. I understand that's what set this
21 whole thing in motion. But, Ms. Wong Barker, you
22 are a lawyer, you're an Officer of the Court,
23 you're under oath, are you telling me that the
24 request for a release on behalf of MTS was
25 something done just for the benefit of Primus and

1 Birch; is that your testimony?

2 MR. GOTTLIEB: You can ignore the first
3 part of the question about being an Officer of the
4 Court and the like and being under oath and
5 consider the question.

6 THE DEPONENT: Could you repeat the
7 second part of your question?

8 THE REPORTER:

9 "...are you telling me that the
10 request for a release on behalf of
11 MTS was something done just for the
12 benefit of Primus and Birch; is that
13 your testimony?"

14 THE DEPONENT: It wouldn't have come up
15 but for Primus' request.

16 BY MR. MILNE-SMITH:

17 272 Q. That's not my question.

18 MR. GOTTLIEB: I think it is, Mr.
19 Milne-Smith. You're not getting it and that's
20 fine, we'll argue about it before the Court. But
21 she said the same position now repeatedly for the
22 last half hour. We'll argue about whether the
23 judge accepts that position or doesn't before the
24 Court. But the position is what the position is
25 and it has been stated repeatedly.

1 MR. MILNE-SMITH: The question she
2 answered is how it came up.

3 MR. GOTTLIEB: No, Mr. Milne-Smith,
4 you're not accepting it. That's fine. Why don't
5 we argue it before the Court as to the significance
6 of it and then we can move on. She's given this
7 answer repeatedly and I'm not really sure why you
8 keep going over it because it's pretty clear you're
9 not going to get a different answer.

10 MR. MILNE-SMITH: Because it's not an
11 answer to my question.

12 MR. GOTTLIEB: With respect, yes, it
13 is.

14 MR. MILNE-SMITH: I'm going to ask it
15 one more time and you can refuse it or I can get an
16 answer.

17 MR. GOTTLIEB: I've already refused it,
18 so you don't have to answer it again.

19 MR. MILNE-SMITH: Okay, if it's been
20 refused I'll move on.

21 MR. GOTTLIEB: Sorry, I've refused the
22 repetition of it, she's answered it, that's my
23 refusal. If you want to ask it again, I'm going to
24 say it's been asked and answered, so it's your
25 call.

1 BY MR. MILNE-SMITH:

2 273 Q. You would agree with me that the
3 assignment could be done without the release?

4 A. Which assignment?

5 274 Q. The assignment from Primus to
6 Birch could be done without the release of MTS?

7 MR. GOTTLIEB: The assignment of what?

8 MR. MILNE-SMITH: The assignment of
9 contracts from Primus to Birch.

10 MR. GOTTLIEB: What contracts with what
11 counterparty, you can't do it in a vacuum.

12 BY MR. MILNE-SMITH:

13 275 Q. We're looking at a very specific
14 letter which deals with very specific contracts
15 that are identified as the schedule to the letter.
16 We're not dealing in a vacuum here. We've been
17 looking at Exhibit "J", the February 17 letter,
18 that's what we've been looking at for the last 20
19 minutes.

20 The assignments from Primus to Birch
21 referred to in this letter could be accomplished
22 without a release of MTS, yes or no?

23 MR. GOTTLIEB: If she can answer yes or
24 no.

25 THE DEPONENT: Certainly from Primus

1 and Birch's perspectives.

2 BY MR. MILNE-SMITH:

3 276 Q. Is that your full answer, you
4 paused?

5 A. I paused. I don't know. Would
6 Primus and Birch accept the consent to assignment
7 without releasing MTS, that's not for me to say.

8 277 Q. Okay. Ms. Wong Barker, have you
9 put the Lawyers' Professional Indemnity Corporation
10 on notice in respect of Zayo's claimed losses?

11 R/F MR. GOTTLIEB: I object to the question
12 on the basis of relevance.

13 BY MR. MILNE-SMITH:

14 278 Q. Have you received any --

15 MR. GOTTLIEB: And privilege, pardon
16 me.

17 BY MR. MILNE-SMITH:

18 279 Q. Have you received any informal or
19 formal reprimand or discipline in respect of this
20 issue?

21 R/F MR. GOTTLIEB: I object to the question
22 on the basis of relevance and privilege.

23 MR. MILNE-SMITH: Well, the relevance
24 is obviously that we think that there was just an
25 obvious mistake made, and to the extent that that

1 mistake has been recognized internally at Zayo, we
2 think that's extremely relevant.

3 MR. GOTTLIEB: Okay.

4 BY MR. MILNE-SMITH:

5 280 Q. Has Zayo conducted any
6 investigation into the events giving rise to this
7 motion?

8 R/F MR. GOTTLIEB: I object to the question
9 on the basis of relevance and vagueness.

10 BY MR. MILNE-SMITH:

11 281 Q. I would like you to produce all
12 internal correspondence at Zayo that bears on
13 whether you erred in failing to demand cure costs
14 before consenting to an assignment?

15 R/F MR. GOTTLIEB: I object to the question
16 on the basis of relevance and clear privilege.

17 BY MR. MILNE-SMITH:

18 282 Q. I would like to see your human
19 resources file at Zayo as it relates, if at all, to
20 this matter?

21 R/F MR. GOTTLIEB: I object to the question
22 on the basis of relevance and privilege.

23 MR. MILNE-SMITH: Let's take a moment
24 and check and see if we're done here or not.

25 MR. GOTTLIEB: Okay, great, thank you.

1 -- Recessed at 11:49 a.m.

2 -- Reconvened at 11:58 a.m.

3 MR. MILNE-SMITH: We have no further
4 questions. Thanks.

5 MR. GOTTLIEB: We have no questions for
6 re-exam.

7 --Whereupon the examination adjourned at 11:59 p.m.

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REPORTER'S CERTIFICATE

I, SHEILA M. FINLAY, CSR, Certified
Shorthand Reporter and Commissioner of Oaths within
and for the Province of Ontario, certify;

That the foregoing proceedings were
taken before me at the time and place therein set
forth, at which time the witness was put under oath
by me;

That the testimony of the witness and
all objections made at the time of the examination
were recorded stenographically by me and were
thereafter transcribed;

That the foregoing is a true and
correct transcript of my shorthand notes so taken.

Dated this 20th day of July 2016.

Sheila Finlay

NEESONS COURT REPORTING, INC.

SHEILA M. FINLAY, CSR

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Tab 3

In the Matter Of:

RE: Primus Telecommunications Canada Inc. et al

MICHAEL NOWLAN

July 20, 2016

neesons

141 Adelaide Street West | 11th Floor

Toronto, Ontario M5H 3L5

1.888.525.6666 | 416.413.7755

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Court File No. CV-11257-00CL
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

--- This is the Cross-Examination of MICHAEL NOWLAN
on his affidavits sworn June 30, 2016 and July 19,
2016, herein, taken at the offices of Neesons Court
Reporting, Inc., Suite 1108, 141 Adelaide Street
West, Toronto, Ontario, M5H 3L5 on the 20th day of
July 2016.

1 A P P E A R A N C E S:

2

3 Daniel Murdoch, for the Applicants

4 Sean Campbell, for the Syndicate

5 Jason Wadden for Birch

6 Matthew F. Gottlieb, for Zayo Canada Inc.

7 & Larissa Mosen

8 Aryo Shalviri, on behalf of the

9 Monitor

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15 REPORTED BY: Sheila M. Finlay, CSR

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I N D E X

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|--|------|
| WITNESS: MICHAEL NOWLAN | PAGE |
| CROSS-EXAMINATION BY MR. GOTTLIEB..... | 4 |

The following list of undertakings, advisements and refusals is meant as a guide only for the assistance of counsel and for no other purpose.

INDEX OF UNDERTAKINGS

The questions/requests undertaken are noted by U/T and appear on the following page numbers: None noted

INDEX OF ADVISEMENTS

The questions/requests taken under advisement are noted by U/A and appear on the following page numbers: None noted

INDEX OF REFUSALS

The questions/requests refused are noted by R/F and appear on the following page numbers: 21

INDEX OF EXHIBITS

No Exhibits Entered

1 ---Upon Commencing at 2:00 p.m.

2 MICHAEL NOWLAN; Sworn.

3 CROSS-EXAMINATION BY MR. GOTTLIEB:

4 1 Q. Good afternoon, Mr. Nowlan. Am I
5 pronouncing that right?

6 A. Now-lan (ph).

7 2 Q. Nowlan, I guess I should have
8 picked that up myself.

9 Sir, you're the CEO of the debtors in
10 this CCAA proceeding, correct?

11 A. Yes, I am.

12 3 Q. And you joined the debtor
13 companies in January 2014, as I understand?

14 A. December 2013.

15 4 Q. Okay. Thank you very much. And
16 you've obviously taken a leadership role in the
17 debtors restructuring efforts in late fall of 2015
18 to today?

19 A. Yes, I have been very actively
20 involved.

21 5 Q. And you were involved in the CISC
22 process?

23 A. Yes, I was.

24 6 Q. And you were involved, obviously,
25 in the APA reached with Birch Communications,

1 correct?

2 A. Yes.

3 7 Q. And under the APA, you know what I
4 mean by APA, right?

5 A. Yes, I do.

6 8 Q. Good, it will save time. Under
7 the APA Birch, there were obviously several
8 conditions to the contract, to the APA, correct?

9 A. Yes.

10 9 Q. And under some of those conditions
11 certain contracts of the debtors would need to be
12 assigned to Birch as part of the purchase
13 transaction, correct?

14 A. Yes.

15 10 Q. And many of those contracts that
16 would need to be assigned would require consent of
17 the counterparties to the assignment, correct?

18 A. Yes.

19 11 Q. And many of those contracts to be
20 assigned were in arrears at the time the APA was
21 entered into, correct?

22 A. That I don't know specifically as
23 to how much things were in arrears.

24 12 Q. Some were in arrears for sure?

25 A. Possibly. I don't have and I

1 don't know the exact status of all the accounts
2 payable, but there were some that probably would
3 have been in arrears considering we were looking at
4 CCAA. But that's -- once again, we were pretty
5 current with the majority by the definition on the
6 trade terms. We were not significantly in arrears
7 with our trade payables.

8 13 Q. Okay. We know from various
9 documents that have been filed in this proceeding
10 that there were, in fact, cure cost payments made
11 with respect to certain of the contracts that were
12 assigned; you're aware of that?

13 A. That doesn't mean they were in
14 arrears.

15 14 Q. I was about to ask you the next
16 question, which I was going to. Is it your
17 evidence, if it is, that's fine, that the debtors
18 were not in arrears of any of the contracts that
19 were assigned?

20 A. I can't --

21 MR. MURDOCH: That wasn't his evidence.
22 His evidence was that he didn't know whether they
23 were in arrears.

24 MR. GOTTLIEB: I'm pretty sure he was
25 just going to answer the question without your

1 assistance there, Mr. Murdoch, which is the way it
2 should be.

3 MR. MURDOCH: You mischaracterized what
4 his earlier testimony was.

5 MR. GOTTLIEB: I didn't characterize
6 what his testimony was, if you read the question.

7 MR. MURDOCH: Proceed, Mr. Gottlieb.

8 MR. GOTTLIEB: Thank you. Without
9 interruption, I hope.

10 BY MR. GOTTLIEB:

11 15 Q. So I'm sorry, sir, are you not
12 aware that there were contracts in arrears at the
13 time that the debtors filed for CCAA?

14 A. As I say, I am not aware of the
15 entire status of the accounts payable ledger at the
16 time of filing. So as to whether there may have
17 been some trade debtors in arrears, you know, there
18 could be and there could not be.

19 16 Q. Give me a sec, if you would,
20 please. I'm going to ask you to go to paragraph 27
21 of your affidavit, sir. Just so we know what we're
22 talking about, sir, this is an affidavit that you
23 swore on July 19, 2016; do you see that?

24 A. Yup.

25 17 Q. Sorry, that's a "yes", that's when

1 you swore it?

2 A. This is, yes.

3 18 Q. Paragraph 27, this is what you
4 swore to, sir. You swore, if I read it correctly:

5 "Given the Primus entities
6 liquidity difficulties several of
7 the assumed contracts were in
8 arrears."

9 Do you see that?

10 A. Yes, I do.

11 19 Q. That was true?

12 A. It's sworn here.

13 20 Q. You swore it?

14 A. Yes.

15 21 Q. So it is true?

16 A. Yes.

17 22 Q. So when you just said you weren't
18 really aware --

19 A. As I said, what I was saying was
20 I'm not aware of the entire accounts payable ledger
21 as to the status. So whether a contract's
22 individual trade payables were in arrears or not,
23 what I said earlier, we were filing for CCAA,
24 chances are some are in arrears, but I don't know
25 extensively who's in arrears and who's not at this

1 point in time.

2 23 Q. Why don't we get to what I think
3 we can agree on, which is, will you agree that at
4 the time of filing several of the assumed contracts
5 were in arrears?

6 A. That is what it says here and
7 that's what I swore and that's what I agree with.

8 24 Q. Okay, perfect. All right.
9 Therefore, you were aware, sir, that some of the
10 counterparties whose assignment you sought with
11 respect to their contracts, would insist on those
12 arrears being paid in order to consent to the
13 assignment, correct?

14 A. I think it was that some would
15 seek payment of arrears and payables that were due
16 as of the filing date.

17 25 Q. Right.

18 A. That doesn't mean they were in
19 arrears.

20 26 Q. Understood.

21 A. When you owe someone money as of
22 the filing date, they are not in arrears, but I
23 would expect that people would be looking to have
24 that paid, yes.

25 27 Q. Just if I understand your

1 evidence, it was anticipated at the time of
2 entering into a BAPA that certain counterparties
3 would seek to have any arrears that were
4 outstanding plus payables that were outstanding as
5 a condition to their assignment, correct?

6 A. I think anyone in business
7 wouldn't seek to have their payables paid.

8 28 Q. Okay, understood. In fact the APA
9 dealt with the very issue in terms of the cure cost
10 provisions, they are set out in the APA, correct?

11 A. There is discussion of cure costs
12 in the APA, yes.

13 29 Q. In effect, if I understand the
14 terminology of the APA properly, to the effect that
15 there were cure costs that were more than \$3
16 million that had to be paid for the assignments,
17 those costs would be split 50-50 by the vendor and
18 purchaser under the APA, correct?

19 A. Yes.

20 30 Q. And obviously the goal of the
21 debtors was to get as many consents as possible
22 without the need to pay, pardon me, without the
23 need to have a motion for an assignment, correct?

24 A. That was the understanding of the
25 APA and that was the intent.

1 31 Q. And the desire of the debtors was
2 to have as low cure cost payments as possible,
3 correct?

4 A. Probably a logical assumption,
5 yes.

6 32 Q. At the time the APA was entered
7 into, we know that the debtor had several contracts
8 with certain Zayo entities, correct?

9 A. Yes. I mean Allstream at that
10 time as we referred to it, yes.

11 33 Q. Understood. I want to take you to
12 a couple of exhibits, if I could. Mr. Murdoch, if
13 you have the Motion Record in front of you.

14 Now, I think there's not a debate, so
15 let's just go to Exhibit "D", please, of the Motion
16 Record of Zayo. Sir, I just want to show you,
17 we'll just flip a little bit, but you see this is a
18 letter January 22, 2016; do you see that?

19 A. Yes.

20 34 Q. And it in the first paragraph it's
21 with respect to certain AT&T contracts?

22 A. Yes.

23 35 Q. And if you just flip to Exhibit
24 "E" for a moment, you'll see there's a January 26,
25 2016 letter that is with respect to certain MTS

1 Allstream contracts?

2 A. Yes.

3 36 Q. And if you look at the last page
4 of that same tab you'll see that there's a list of
5 agreements, contracts?

6 A. Yes.

7 37 Q. You've seen these before,
8 obviously, this correspondence?

9 A. Yes, I have.

10 38 Q. Let's go back to the "D" and this
11 is the letter of January 22nd, 2016. This was, as
12 it sets out in your affidavit, prepared by Primus
13 with the assistance of counsel and others, correct?

14 A. That is correct.

15 39 Q. All right. Same goes, obviously,
16 for the letter behind "E"?

17 A. Yes.

18 40 Q. And you saw the letter before it
19 went out, sir?

20 A. I saw a format of letters. I did
21 not look at every single letter that went out
22 individually.

23 41 Q. Understood.

24 A. I saw a form of letter, yes.

25 42 Q. My understanding from the

1 affidavit materials is that a template was
2 prepared, so you're referring to seeing the
3 template?

4 A. That's right.

5 43 Q. Okay, thank you very much. If I
6 can just summarize, if you don't think the summary
7 is fair you'll tell me, obviously, but by this
8 letter Primus is asking for Allstream Zayo to
9 consent to an assignment of certain contracts,
10 correct?

11 MR. MURDOCH: I think the letter speaks
12 for itself, Mr. Gottlieb.

13 MR. GOTTLIEB: It might, but I'm asking
14 if the witness will summarize it.

15 MR. MURDOCH: Not that particular
16 question, the letter speaks for itself.

17 MR. GOTTLIEB: I'm going to have a
18 significant problem if that's the continued answer,
19 but we'll deal with it, especially given the
20 questions that were asked this morning, but we'll
21 all do what we have to do here.

22 MR. MURDOCH: I didn't ask any question
23 this morning, Mr. Gottlieb.

24 MR. GOTTLIEB: No, you did sit idly by
25 while Mr. Milne-Smith did.

1 BY MR. GOTTLIEB:

2 44 Q. I want to go, sir, to paragraph 3
3 of the letter, sir. You'll see --

4 A. Which begins "prior to the
5 commencement"?

6 45 Q. Yes, sir.

7 A. Yes.

8 46 Q. It refers here, sir, to the APA
9 that was entered into that we've referred to
10 earlier, correct?

11 A. Yes, it does.

12 47 Q. And it refers to the assumed
13 contracts and certain aspects of that in that
14 paragraph, correct?

15 A. Yes, it does.

16 48 Q. And then if you look at paragraph
17 4, sir, it says that you, meaning Allstream at this
18 point, are receiving this communication because
19 you're a counterparty to one of the assumed
20 contracts; I've read that correctly?

21 A. Yes.

22 49 Q. And then it says:

23 "The APA contemplates the
24 assignment by Primus of the assumed
25 contracts in order that the

1 purchaser may continue the Primus
2 entities operations on a going
3 concern basis following the
4 acquisitions."

5 So it's referring to that part of the
6 APA there, too, correct?

7 A. Yes.

8 50 Q. Now if you go to the top of page
9 2, sir, it says:

10 "Following the assignment the
11 purchaser will be responsible for
12 all obligations under the contract
13 arising after the closing."

14 Do you see that?

15 A. I do.

16 51 Q. Now, I want to take you, sir, if
17 you can go to paragraph 45 of your affidavit, it's
18 the bottom of page 13, and it says the consent
19 letters, and, sir, this is the consent letter
20 you're referring to, yes?

21 A. Yes, it is.

22 52 Q. And it says:

23 "The consent letters also
24 expressly advised the recipients
25 that the purchaser would only be

1 responsible for obligations arising
2 under the assumed contracts arising
3 after the closing."

4 Sir, I want you to look at your letter
5 because in paragraph 45 you've added the word
6 "only", but that's not in the letter, is it?

7 A. Not in that paragraph that you
8 referred to at the top of page 2.

9 53 Q. Does it say "only" elsewhere in
10 the letter?

11 A. I don't know. I'm not going to --
12 I don't know if it's referred to, "only", in
13 another context within the letter was all I meant.

14 54 Q. Okay. But when I look at 45 it
15 says:

16 "The consent letters also
17 expressly advised the recipients
18 that the purchaser would only be
19 responsible for obligations arising
20 under the assumed contracts arising
21 after the closing."

22 A. Yes.

23 55 Q. And the reason, sir, I point you
24 to the top of page 2 is because it says:

25 "Following the assignment the

1 purchaser will be responsible for
2 all obligations under the contracts
3 arising after the closing."

4 I assumed, you can tell me incorrectly,
5 that that is what you were referring to in
6 paragraph 45 of your affidavit. Are you referring
7 to somewhere else in the consent letters?

8 A. No.

9 56 Q. So will you just confirm for me,
10 sir, that where you say in paragraph 45 of your
11 affidavit:

12 "The consent letters expressed
13 that the purchaser would only be
14 responsible for obligations arising
15 under the assumed contracts after
16 the closing."

17 That's not what the letter says, it
18 doesn't say "only"?

19 A. The word "only" is not there.

20 57 Q. Okay, perfect. Now, the letter,
21 sir, although you refer, Primus, you, you'll
22 understand what I mean by you when I say that, you
23 refer to the APA in various parts of this letter.
24 Nowhere, sir, do you refer to the cure cost
25 provisions of the APA, correct?

1 A. It's not in the letter, that is
2 correct.

3 58 Q. Okay. You, therefore, don't say
4 anything in the letter about the purchaser's
5 obligations with respect to cure costs with respect
6 to arrears if they are going to be paid, correct,
7 you don't say anything about that in the letter
8 either? Nothing about cure costs at all, correct?

9 A. As you see the letter, yes.

10 59 Q. And, sir, you see that this letter
11 requires in the second-last paragraph that consents
12 for the assignments be received by January 29th,
13 2016; do you see that? It's in the second last
14 full paragraph.

15 A. Mm-hmm.

16 60 Q. Yes?

17 A. I see where it refers to January
18 29th and if consent has not been received by that
19 date, yes.

20 61 Q. So what it says in the last
21 sentence there in that paragraph is:

22 "If we have not received your
23 consent by January 29th, 2016 we
24 will serve you with notice of the
25 motion as well as the motion

1 materials in connection with this
2 request and evidence in support
3 thereof."

4 So if I read this paragraph in its
5 entirety, the intention was to say consent by
6 January 29th, 2016 or else a motion will be brought
7 against you; is that fair, sir?

8 MR. MURDOCH: The letter speaks for
9 itself, Mr. Gottlieb. It's not Mr. Nowlan's
10 letter, it's not him to tell you what his
11 understanding is. The letter speaks for itself.

12 MR. GOTTLIEB: I don't agree with any
13 of that, but that's fine, I won't hear anything
14 back from the debtor on the letter, then, which
15 will be fine.

16 BY MR. GOTTLIEB:

17 62 Q. Sir, as of January 22nd, the date
18 of this letter, the APA had not been made public,
19 you're aware of that, correct?

20 A. Yes, I am aware of that.

21 63 Q. And you're also aware, sir, as of
22 the deadline date of January 29th set out in this
23 letter, the APA had not been made public, correct?

24 A. Yes, I believe that is correct.

25 64 Q. And if you go over to the next

1 tab, Tab "E", that same letter, the letter dated
2 January 26th, 2016; do you see that?

3 A. Mm-hmm.

4 65 Q. On the second page with respect to
5 the MTS agreements that are referred to in the
6 schedule, it says in the last sentence there again:

7 "If we have not received your
8 consent by January 29th we will
9 serve you with notice of motion as
10 well as motion materials."

11 Do you see that?

12 A. Yes, I do.

13 MR. MURDOCH: Where are you, I missed
14 that?

15 MR. GOTTLIEB: I believe it's page 50
16 of the record, if you have that.

17 MR. MURDOCH: You said "again", you're
18 just saying again in this letter, the same as the
19 last.

20 MR. GOTTLIEB: Correct.

21 MR. MURDOCH: Sorry, I was looking for
22 the word "again".

23 MR. GOTTLIEB: No, it's not there.

24 MR. MURDOCH: Proceed.

25 BY MR. GOTTLIEB:

1 66 Q. You're aware, sir, that, again, as
2 of the date that the demand was made and the
3 deadline given, the APA was not publicly available,
4 correct?

5 A. Yes.

6 67 Q. And therefore there would have
7 been no way for Allstream, Zayo to know what the
8 terms of the APA were when the demand was being
9 made, correct?

10 R/F MR. MURDOCH: It's not Mr. Nowlan here
11 to tell you about what Allstream was aware of or
12 what they were not aware of.

13 MR. GOTTLIEB: Thank you.

14 BY MR. GOTTLIEB:

15 68 Q. Sir, we know that Zayo, Allstream
16 did in fact give consents to the requested
17 assignments on January 29, correct?

18 A. Yes.

19 69 Q. Those are all my questions. Thank
20 you very much. Thank you, Mr. Nowlan, nice to meet
21 you.

22 ---Whereupon the examination adjourned at 2:19 p.m.

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REPORTER'S CERTIFICATE

I, SHEILA M. FINLAY, CSR, Certified
Shorthand Reporter and Commissioner of Oaths within
and for the Province of Ontario, certify;

That the foregoing proceedings were
taken before me at the time and place therein set
forth, at which time the witness was put under oath
by me;

That the testimony of the witness and
all objections made at the time of the examination
were recorded stenographically by me and were
thereafter transcribed;

That the foregoing is a true and
correct transcript of my shorthand notes so taken.

Dated this 20th day of July 2016.

Sheila Finlay

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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

**SUPPLEMENTARY MOTION RECORD OF ZAYO
CANADA INC.**

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