

**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.**

**COST SUBMISSIONS OF
THE PURCHASER (BIRCH COMMUNICATIONS INC.)
(motion held on August 9, 2016)**

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Lawyers for the Purchaser,
Birch Communications Inc.

I. OVERVIEW

1. Birch Communications Inc. (“Birch”) respectfully submits that it is entitled to its costs of the motion brought by Zayo Canada Inc. (“Zayo”) on a partial indemnity scale, fixed in the amount of \$30,786.05, which represents 40% of the fees actually charged plus disbursements at taxes as set out in the attached Costs Outline.

II. LAW AND ARGUMENT

2. Costs are governed by, *inter alia*, section 131 of the *Courts of Justice Act* and Rule 57.01 of the *Rules of Civil Procedure*. In this motion, the following factors are particularly relevant: (i) the costs Zayo could reasonably have expected to pay in the circumstances; (ii) the importance of the issues on the motion; and (iii) the nature of the claim and Zayo’s conduct in the litigation.

A. Zayo ought to have expected to pay costs to Birch

3. In the motion, Zayo relied upon the Asset Purchase Agreement between Birch and the Applicants (“APA”) in support of its motion. Thus, Zayo commenced its motion knowing that Birch might be required to pay up to 50% of any amounts awarded and, therefore, had a very significant economic stake in the motion. Accordingly, Zayo ought to have expected Birch to vigorously defend the motion by investigating the claims, researching the various issues of law, preparing for and attending cross-examinations, coordinating with the other responding parties, and making submissions based upon its particular interests and vantage point in this matter.

B. The issues on the motion were important

4. Zayo knew that Birch was at risk of having to pay in excess of \$600,000 as a result of this one motion. This was not a merely a procedural or interlocutory motion – rather, Birch was put

at risk of having to pay a significant amount of money, more than what is sought in the entirety of many litigation claims. Accordingly, it was clear from the outset that the motion was important and that Birch would be required to respond in a manner that was commensurate with the potential consequences of the motion.

C. The nature of the claim and Zayo’s conduct warrants a significant costs award

5. The nature of the claim and Zayo’s conduct warrants a significant costs award. First, Zayo sought to foist the consequences of its own failings onto the responding parties.¹ The motion was not brought to remedy something the responding parties did or did not do to Zayo.

6. Second, the motion was more complicated than necessary since Zayo did not rely on any established law or legal principles in support of its motion. Rather it ignored the applicable legal principles and instead relied solely on vague notions of “fairness”. Zayo left it to the responding parties to do the work of identifying and articulating all of the various applicable legal principles, each of which demonstrated that Zayo’s motion was ill-founded.

7. Lastly, a significant costs award is appropriate given that Zayo made allegations of misconduct that were not proven at the hearing. Birch repeats the submissions of the Syndicate and the Applicants in their respective costs submissions in this regard. Moreover, Birch repeats its submissions at para. 17 of its factum that certain of the allegations and claims made by Zayo were simply not credible.

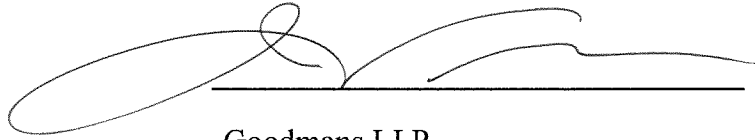
III. ORDER REQUESTED

8. For these reasons, Birch requests its costs fixed in the amount of \$30,786.05.

¹ Reasons at paras. 27, 31, 48, 55, 57, and 71-72.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

August 29, 2016

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, positioned above a solid horizontal line.

Goodmans LLP
Lawyers for the Purchaser,
Birch Communications Inc.

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COSTS OUTLINE
OF THE PURCHASER, BIRCH COMMUNICATIONS INC. ON A
PARTIAL INDEMNITY BASIS

(returnable on Tuesday, August 9, 2016)

The Purchaser, Birch Communications Inc. provides the following outline of the submissions in support of the costs the parties will seek if successful:

	<u>Partial</u>
Fees - as detailed below	\$24,373.50
Lawyer's fee for appearance on August 9, 2016 - <i>Jason Wadden</i>	\$2,100.00
Disbursements (as detailed in the attached Appendix, including HST)	\$1,143.99
HST on fees of \$24,373.50	\$3,168.56
TOTAL	\$30,786.05

The experience of the parties' lawyers:

Name of Lawyer	Year of Call/Position
Jason Wadden	2002 (14 years)
Cathy Costa	2002 (14 years)
Charlie Pettypiece	2014 (2 years)
Scott Kerr	Student-at-Law
Tom Spelt	Student-at-Law
Monique Allen	Law Clerk

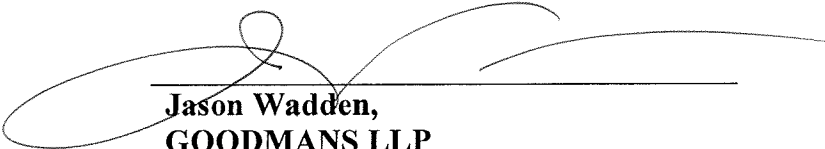
The hours spent, the rates sought for costs and the rate actually charged by the parties' lawyers:

Fee Items	Persons	Hours	Partial Indemnity Rate (@40%)	Actual Rate	Partial Indemnity Total
(a) Reviewing motion materials, research, preparation of factum (29 pgs.); Book of Authorities (126 pgs.); Supplemental Book of Authorities (20 pgs.); Prepare for and attend cross-examinations; Attend hearing	J. Wadden	55.9	\$275	\$730	\$15,372.50
	C. Costa	14.9	\$265	\$715	\$3,948.50
	C. Pettypiece	10.5	\$185	\$440	\$1,942.50
	S. Kerr	22.8	\$60	\$295	\$1,368.00
	T. Spelt	25.7	\$60	\$230	\$1,542.00
(b) Prepare Cost Outline	M. Allen	2.5	\$80	\$435	\$200.00
Total:					\$24,373.50

LAWYER'S CERTIFICATE

I CERTIFY that the hours claimed have been spent, that the rates shown are correct and that each disbursement has been incurred as claimed.

August 29, 2016


Jason Wadden,
GOODMANS LLP
 Lawyers for the Purchaser, Birch
 Communications Inc.

**APPENDIX
DISBURSEMENTS**

Paid to Issue Fresh As Amended Interim Receivership Order	\$100.00
For copies of any documents or authorities prepared for or by a party for use of the Court and supplied to the opposite party - Copies of motion material (including Factum, Book of Authorities and Supplemental Book of Authorities) - 175 pages x 5 copies @ .25¢ per page	\$218.75
- Computer Searches	\$793.24
HST on the disbursement amount of \$1,011.99	\$132.00
TOTAL	\$1,143.99

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

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Proceeding commenced at Toronto

**COSTS OUTLINE OF
OF THE PURCHASER, BIRCH
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