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

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.

COSTS SUBMISSIONS OF FTI CONSULTING CANADA INC. AS MONITOR (RE: MOTION OF ZAYO CANADA INC. RETURNABLE AUGUST 9, 2016)

August 29, 2016

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Lawyers for FTI Consulting Canada Inc. in its capacity as Monitor

1. FTI Consulting Canada Inc., in its capacity as court appointed monitor of the Applicants[1] (in such capacity, the "**Monitor**") respectfully requests an award for its legal costs, at a partial indemnity rate at approximately 40% of the rates actually charged by the Monitor's counsel, in the amount of $23,643.39, inclusive of disbursements and HST, from Zayo as a result of Zayo's unsuccessful motion seeking payment of the Zayo Pre-Filing Amount.

2. The Syndicate was successful in its opposition to Zayo's motion and Zayo was entirely unsuccessful[2]. The general rule is that absent special circumstance, costs follow such an event[3].

3. Courts have previously awarded costs to monitors and their counsel where they have deemed it appropriate to do so[4]. In *Return on Innovation* (2011) the monitor successfully sought and obtained costs on a partial indemnity basis from a losing party. In determining that costs were appropriate, Justice Newbould held that in those circumstances the responsibilities of the monitor extended to bringing the matter before the court and taking the position that it did[5].

4. In its Motion Record, Zayo asserted that the process through which consents were obtained to the assignment of contracts was not fair and transparent and Zayo made several express allegations and references to the Monitor, including incorrectly asserting that Zayo requested to be provided a copy of the Asset Purchase Agreement when available and that the Monitor failed to honour such request[6].

5. Given Zayo's election to make the foregoing part of the central issues of its argument, the Monitor was compelled to respond. The Monitor carefully and independently

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[1] Initially capitalized terms not otherwise defined herein have the meanings given to them in the Third Report of the Monitor dated July 13, 2016 (the "**Monitor's Third Report**").
[2] *Zayo Inc. v. Primus Telecommunications Canada Inc.*, 2016 ONSC 5251 [*Reasons*]
[3] *St. Jean (litigation Guardian) v. Cheung*, [2009] O.J. No. 27 at para. 4 (C.A.).
[4] *Return on Innovation v. Gandi Innovations*, 2011 ONSC 7465, at paras 2-7, 16 (Commercial List) [*Return on Innovation*];
[5] *Return on Innovation,* at paras 2-7, 16.
[6] *Reasons, at para* 32.

reviewed the evidence filed in connection with this motion, considered the positions of the parties and prepared the Third Report so as to provide the Court and all stakeholders, including Zayo, with the benefit of being able to consider the Monitor's position in advance of the hearing. This course of action was entirely consistent with the Monitor's role to be the Court's "eyes and ears", act independently, monitor the activities of the Applicants and evaluate the positions of parties from a neutral prospective and provide stakeholders and the Court with its views and recommendations based on its involvement in the proceedings, its expertise and its experience.

6. This motion required two cross-examinations and a full day for argument. The parties filed extensive arguments and evidence which the Monitor had to review and independently consider.

7. Based on current forecasts, the costs incurred by the Monitor as a result of Zayo's motion will be borne entirely by the Syndicate, which was successful in responding to Zayo's motion. The Syndicate has advised the Monitor of its view that it is appropriate for Zayo, the unsuccessful party, to bear a portion of such costs and the Monitor concurs with such view.

8. As set out above, given the allegations of unfairness by Zayo and references to the Monitor in its court materials, including expected conduct thereof, Zayo ought to have reasonably expected that the Monitor would have to consider the evidence filed and prepare a report setting out its views.

9. Although there is authority to seek costs for both the Monitor's professional fees and its legal fees, the Monitor is seeking only legal fees in these circumstances.

10. In light of the foregoing, the Monitor respectfully submits that an award of costs in the amount of $23,643.39 representing an award on a partial indemnity basis at approximately 40% of the rates actually charged by the Monitor's counsel, is appropriate in the circumstances.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of August, 2016.

Blake, Cassels & Graydon LLP
Lawyers for FTI Consulting Canada Inc., as Monitor

SCHEDULE "A"

LIST OF AUTHORITIES

1. *St. Jean (litigation Guardian) v. Cheung,* [2009] O.J. No. 27
2. *Return on Innovation v. Gandi Innovations*, 2011 ONSC 7465
3. *Zayo Inc. v. Primus Telecommunications Canada Inc.*, 2016 ONSC 5251

SCHEDULE "B"

STATUTORY PROVISIONS

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

...

Costs

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

...

***Rules of Civil Procedure*, R.R.O. 1990, Reg. 194**

...

Factors in Discretion

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

(0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;

(0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;

(a) the amount claimed and the amount recovered in the proceeding;

(b) the apportionment of liability;

(c) the complexity of the proceeding;

(d) the importance of the issues;

(e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;

(f) whether any step in the proceeding was,

(i) improper, vexatious or unnecessary, or

(ii) taken through negligence, mistake or excessive caution;

(g) a party's denial of or refusal to admit anything that should have been admitted;

(h) whether it is appropriate to award any costs or more than one set of costs where a party,

(i) commenced separate proceedings for claims that should have been made in one proceeding, or

(ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and

(i) any other matter relevant to the question of costs. R.R.O. 1990, Reg. 194, r. 57.01 (1); O. Reg. 627/98, s. 6; O. Reg. 42/05, s. 4 (1); O. Reg. 575/07, s. 1.

TAB 1A

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

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.

BILL OF COSTS OF FTI CONSULTING CANADA INC. AS MONITOR
(RE: MOTION OF ZAYO CANADA INC. RETURNABLE AUGUST 9, 2016)

Motion by Zayo Canada Inc. to have its pre-filing amounts paid including, reviewing the Notice of Motion and Motion Records, affidavits and factums, attending to scheduling and evidentiary matters regarding entitlement to pre-filing amounts, drafting litigation schedule and attending scheduling motion, assisting with the drafting of the Monitor's report analyzing case law, attending cross-examinations, corresponding with counsel and the Court, and preparing for and attending the Motion on August 9, 2016

Preparation and Attendance:	
Steven Weisz (Year of Call – 1991) 22.5 hrs. @ $895./hr. =	$20,137.50
Linc Rogers (Year of Call – 2000) 15.9 hrs. @ $810./hr. =	$12,879.00
Aryo Shalviri (Year of Call – 2013) 36.4 hrs. @ $530./hr. =	$19,292.00
	$52,308.40

TOTAL ACTUAL FEES	**$52,308.40**
40 % OF ACTUAL FEES CLAIMED	**$20,923.36**
HST	**$ 2,720.03**
TOTAL	**$23,643.39**

Court File No: CV 16-11257-00CL

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.

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

BILL OF COSTS OF THE MONITOR

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Lawyers for FTI Consulting Canada Inc., as Monitor

TAB 2

Most Negative Treatment: Check subsequent history and related treatments.

2009 ONCA 9
Ontario Court of Appeal

St. Jean (Litigation Guardian of) v. Cheung

2009 CarswellOnt 19, 2009 ONCA 9, [2009] O.J. No. 27, 173 A.C.W.S. (3d) 984, 45 E.T.R. (3d) 171

J. Robert St. Jean, a party under disability by his litigation guardian, Jennifer L. St. Jean, Jennifer L. St. Jean, personally, and Nicole St. Jean (Plaintiffs / Appellants) and Dr. Wai Ming Cheung, Dr. John Murray, Dr. Rosalind Curtis, Dr. John Doe, North York General Hospital and Nurse Jane Doe (Defendants / Respondents)

M. Rosenberg, S. Borins, E.E. Gillese JJ.A.

Heard: September 8, 2008
Judgment: January 7, 2009
Docket: CA C47654

Proceedings: additional reasons to *St. Jean (Litigation Guardian of) v. Cheung* (2008), 2008 ONCA 815, 2008 CarswellOnt 7209, E.E. Gillese J.A., M. Rosenberg J.A., S. Borins J.A. (Ont. C.A.); reversing *St. Jean (Litigation Guardian of) v. Cheung* (2007), [2007] O.J. No. 3562, 87 O.R. (3d) 711, 2007 CarswellOnt 5891, Murray J. (Ont. S.C.J.); additional reasons to *St. Jean (Litigation Guardian of) v. Cheung* (2007), 85 O.R. (3d) 275, 2007 CarswellOnt 1566, Murray J. (Ont. S.C.J.); reversing *St. Jean (Litigation Guardian of) v. Cheung* (2007), 85 O.R. (3d) 275, 2007 CarswellOnt 1566, Murray J. (Ont. S.C.J.)

Counsel: Christine Fotopoulos, Robin Squires for Appellants
Sarit E. Batner, Kenneth Morris for Respondents

Subject: Civil Practice and Procedure; Torts; Estates and Trusts; Public

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Civil practice and procedure

IV Actions involving parties under disability
IV.2 Mental incompetents
IV.2.d Guardian ad litem or litigation guardian

Civil practice and procedure

VII Limitation of actions
VII.1 Principles
VII.1.a Statutory limitation periods
VII.1.a.ii Interpretation

Civil practice and procedure

VII Limitation of actions
VII.5 Actions in tort
VII.5.a Specific actions
VII.5.a.i Actions against particular parties

VII.5.a.i.A Doctors and hospitals

Civil practice and procedure

XXIV Costs
XXIV.13 Costs of appeals
XXIV.13.i Miscellaneous

Headnote

Civil practice and procedure --- Costs — Costs of appeals — Miscellaneous

Setting aside order for costs of lower court proceeding — Plaintiffs successfully appealed from judgments dismissing action for damages for medical malpractice — Costs were awarded for appeal and lower court motion to plaintiffs in amounts of $30,000 and $40,000, respectively — Defendants asked to be permitted to make submissions on costs award saying that panel had not received submissions from counsel as to appropriateness of costs of lower court proceeding — Further submissions were accepted — In additional reasons, award of costs was affirmed — Motion judge did not refuse to award costs to any party solely due to dearth of law on subject or because of novelty of matters in issue — Despite defendants' success, motion judge chose to make no award of costs after consideration of all circumstances, including impecuniosity of plaintiffs, tragic circumstances of case, and novelty and importance of issues — Plaintiffs were successful on appeal and, as result, also on lower court motion — Despite novelty of issues decided, there was no reason to depart from general principle that, when appeal is allowed, order for costs below is set aside and costs below and of appeal are awarded to successful appellant — As appeal was successful, circumstances and considerations had changed — Plaintiffs were entirely successful on appeal with result that they were now permitted to continue their actions against new defendants — As such, plaintiffs were entitled to their costs both of motion below and appeal.

Table of Authorities

Cases considered:

Dines v. Harvey A.Helliwell Investments Ltd. (October 8, 1992), Doc. 617/89 (Ont. C.A.) — referred to

Hunt v. TD Securities Inc. (2003), 43 C.P.C. (5th) 211, 2003 CarswellOnt 4971, 40 B.L.R. (3d) 156 (Ont. C.A.) — referred to

ADDITIONAL REASONS concerning costs to judgment reported at *St. Jean (Litigation Guardian of) v. Cheung* (2008), 2008 ONCA 815, 2008 CarswellOnt 7209 (Ont. C.A.), allowing appeal by plaintiffs from judgments dismissing action for damages for medical malpractice.

***Per curiam*:**

1 In a decision dated December 3, 2008, this court allowed the appeal and awarded costs of the appeal and of the lower court motion to the appellants in the amounts of $30,000 and $40,000, respectively. By letter dated December 9, 2008, the respondents asked to be permitted to make submissions on the costs award saying that the panel had not received submissions from counsel as to the appropriateness of costs of the lower court proceeding.

2 We begin by noting that, in accordance with the court's practice direction, the time to make submissions respecting costs is at the time of the hearing: *Practice Direction Concerning Civil Appeals in the Court of Appeal* (October 7, 2003). Indeed, in the present matter, counsel provided costs outlines to the panel and addressed certain aspects of that matter. For example, respondents' counsel took issue with the appellants' entitlement to costs of the lower court motions on the basis that the appellants had not appealed that award. Further, respondents' counsel also made submissions on the

quantum of costs sought by the appellants, as it was her view that the amount of time spent by counsel for the appellants was excessive. Counsel for the appellants contended that costs should follow the event and, if they were successful, asked to be awarded costs of the proceedings below. Nonetheless, to accommodate the contention of respondents' counsel that she had not been heard on the matter, the panel accepted further submissions.

3 In respect of the costs awarded for the proceedings below, contrary to the submission of the respondents, we do not view the motion judge as refusing to award costs to any party solely due to a dearth of law on the subject or because of the novelty of the matters in issue. In our view, despite the respondents' success on the motion, the motion judge chose to exercise his discretion and make no award of costs after a consideration of all the circumstances, including:

(a) the impecuniosity of the appellants;

(b) the tragic circumstances of the case; and

(c) the novelty and importance of the issues raised on the motion.

4 In general, costs follow the event. The appellants were successful on the appeal, and, as a result, also on the lower court motion. The general principle when an appeal is allowed is that the order for costs below is set aside and the costs below and of the appeal are awarded to the successful appellant: see *Hunt v. TD Securities Inc.* (2003), 43 C.P.C. (5th) 211 (Ont. C.A.), at para. 2. Further, where the substantive disposition is different from that of the decision under appeal, leave to appeal costs is not necessary: see *Dines v. Harvey A. Helliwell Investments Ltd.*, [1992] O.J. No. 2107 (Ont. C.A.).

5 Despite the novelty of the issues that were decided, we see no reason to depart from the general principle. As the appeal was successful, the circumstances and considerations have changed. The appellants were entirely successful on the appeal with the result that they are now permitted to continue their actions against the new defendants. As such, they are entitled to their costs both of the motion below and of the appeal.

6 We wish to comment on an additional matter. The request to make additional submissions focussed on costs of the motion below. It would have been appropriate and preferable had counsels' submissions been limited to that matter.

7 Accordingly, the decision to award the appellants costs of the motion and the appeal fixed at $40,000 and $30,000, respectively, is affirmed.

Order accordingly.

End of Document

TAB 3

Most Negative Treatment: Check subsequent history and related treatments.

2011 ONSC 7465
Ontario Superior Court of Justice [Commercial List]

Return on Innovation Capital Ltd. v. Gandi Innovations Ltd.

2011 CarswellOnt 14401, 2011 ONSC 7465, 88 C.B.R. (5th) 320

Return on Innovation Capital Ltd. as agent for Roi Fund Inc, Roi Sceptre Canadian Retirement Fund, Roi Global Retirement Fund and Roi High Yield Private Placement Fund and Any Other Fund Managed by Roi from time to time (Applicants) and Gandi Innovations Limited, Gandi Innovations Holdings LLC, Gandi Innovations LLC, Gandi Innovations Hold Co and Gandi Special Holdings LLC. (Respondents)

Newbould J.

Judgment: December 16, 2011
Docket: 09-CL-8172

Proceedings: additional reasons to *Return on Innovation Capital Ltd. v. Gandi Innovations Ltd.* (2011), 2011 CarswellOnt 8590, 2011 ONSC 5018 (Ont. S.C.J. [Commercial List])

Counsel: Harvey Chaiton, Maya Poliak for Monitor, BDO Canada Limited
Mathew Halpin, Evan Cobb for TA Associates Inc.
Christopher J. Cosgriffe for Harry Gandy, James Gandy, Trent Garmoe

Subject: Insolvency; Civil Practice and Procedure; Corporate and Commercial

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

X Priorities of claims
X.6 Restricted and postponed claims
X.6.b Officers, directors, and stockholders

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous

Bankruptcy and insolvency

XX Miscellaneous

Business associations

III Specific matters of corporate organization
III.1 Directors and officers
III.1.e Duty to manage
III.1.e.iii Indemnification by corporation

Headnote

Bankruptcy and insolvency --- Miscellaneous

Costs — GG was group of companies under protection pursuant to Companies' Creditors Arrangement Act (CCAA) — GH LLC was parent of other companies in GG — Creditors were officers and board members of GH LLC — T Inc. invested in GG by way of debt and equity — T Inc. brought arbitration proceedings against creditors for recovery of its investment in GG — Creditors filed proof of claim against GG based on indemnity provisions — Creditors claimed they were entitled to indemnification by GG in respect of any damages award made against them in arbitration — Creditors disputed monitor's disallowance of indemnity claims — Monitor brought motion for advice and directions relating to creditors' indemnity claims — Motion was granted — Parties made submissions regarding costs — Certain creditor awarded $30,000, monitor awarded $50,000 for counsel fees and disbursements, and $12,000 for its own fees and disbursements — Making costs orders in proceedings under CCAA was not rare occurence — Monitor was successful and was entitled to costs — Monitor in proceedings had unusual functions such as filing plan — Claimants were sophisticated creditors whose claim of indemnification was intended to dilute unsecured creditors' claim — Monitor acted properly — Taking position contrary to claimants did not disentitle monitor from costs — Participation of certain creditor was not redundant and creditor was entitled to costs — Claimants' assertion that indemnities were under control of monitor added time to proceedings — Rates and time spent by counsel were not excessive.

Table of Authorities

Cases considered by *Newbould J.*:

Calpine Canada Energy Ltd., Re (2008), 2008 CarswellAlta 1163, 2008 ABQB 537, 46 C.B.R. (5th) 243 (Alta. Q.B.) — followed

Canadian Asbestos Services Ltd. v. Bank of Montreal (1993), 21 C.B.R. (3d) 120, [1995] G.S.T.C. 36, 1993 CarswellOnt 226 (Ont. Gen. Div.) — considered

Frazer v. Haukioja (2010), 261 O.A.C. 138, 101 O.R. (3d) 528, 73 C.C.L.T. (3d) 167, 317 D.L.R. (4th) 688, 2010 ONCA 249, 2010 CarswellOnt 1996 (Ont. C.A.) — considered

Grant Forest Products Inc., Re (2009), 58 C.B.R. (5th) 127, 2009 CarswellOnt 6099 (Ont. S.C.J. [Commercial List]) — considered

Grant Forest Products Inc., Re (2010), 276 O.A.C. 43, 101 O.R. (3d) 383, 67 C.B.R. (5th) 23, 2010 CarswellOnt 3001, 2010 ONCA 355, 318 D.L.R. (4th) 598 (Ont. C.A.) — considered

Indalex Ltd., Re (2011), 2011 CarswellOnt 9077, 2011 ONCA 578, 92 C.C.P.B. 277, 81 C.B.R. (5th) 165 (Ont. C.A.) — followed

Risorto v. State Farm Mutual Automobile Insurance Co. (2003), 32 C.P.C. (5th) 304, 2003 CarswellOnt 934, 64 O.R. (3d) 135 (Ont. S.C.J.) — considered

Thomas Cook Canada Inc. v. Skyservice Airlines Inc. (2011), 2011 CarswellOnt 10334, 2011 ONSC 5756 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 131 — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 57.01 — referred to

ADDITIONAL REASONS to judgment reported at *Return on Innovation Capital Ltd. v. Gandi Innovations Ltd.* (2011), 2011 CarswellOnt 8590, 2011 ONSC 5018 (Ont. S.C.J. [Commercial List]), respecting costs.

***Newbould J.*:**

1 On August 25, 2011 I released my endorsement on a motion brought by BDO Canada Limited in its capacity as a court-appointed Monitor of Gandi Innovations Limited, Gandi Innovations Holdings LLC, Gandi Innovations LLC, Gandi Innovations Hold Co, and Gandi Special Holdings LLC (the "Gandi Group") for advice and directions, and particularly to determine preliminary issues in connection with the indemnity claims made by Hary Gandy, James Gandy and Trent Garmoe (the "Claimants") against all of the Gandi Group.

2 The Monitor was successful and seeks costs of the motion on a partial indemnity basis. The position of the Monitor was supported by TA Associates, Inc. ("TA Associates ") which also seeks costs on a partial indemnity basis. The cost orders are opposed by the Claimants.

3 The usual rule is that absent some special circumstance, costs follow the event. In this case, the Claimants assert that costs are rarely made in a CCAA proceeding and should not be made in this case. Reliance is placed on the following statement of the Ontario Court of Appeal in *Indalex Ltd., Re* (2011), 81 C.B.R. (5th) 165 (Ont. C.A.):

> 4. We make no order as to costs of the underlying motions. We understand that the conventional approach in CCAA proceedings is to rarely make costs orders, with the result that each party bears its own costs. There are sound policy reasons that underlie this approach, which include the reality that as a result of the situation of the insolvent company, the amount of funds available for distribution is limited and parties ought not to expect to recover their litigation costs: see *Canadian Asbestos Services Ltd. v. Bank of Montreal*, [1993] O.J. No. 1487, at para. 31 (Gen. Div.) and *Re Calpine Canada Energy Limited*, [2008] A.J. No. 965, at para. 1. We see no reason to depart from the usual practice.

4 The statement of the Court of Appeal that cost orders are rarely made in CCAA proceedings is somewhat surprising. Recently, for example, in *Grant Forest Products Inc., Re* (2009), 58 C.B.R. (5th) 127 (Ont. S.C.J. [Commercial List]) in a motion in a CCAA proceeding between the former chairman and the secured lenders, I ordered costs to be paid to the former chairman. That decision was affirmed by the Court of Appeal (2010), 101 O.R. (3d) 383 (Ont. C.A.) in which costs were also awarded for the appeal. See also my comments in *Thomas Cook Canada Inc. v. Skyservice Airlines Inc.*, [2011] O.J. No. 4378 (Ont. S.C.J. [Commercial List]) in a case dealing with costs in a receivership matter.

5 I do not read the decision of the Court of Appeal as laying down a principle that costs should rarely be ordered in CCAA proceedings. The statement is "We understand that..." and indicates that the court was essentially passing on what it was told, which I think was an overstatement. The cases cited do not stand for any general principle that costs are rarely ordered. In *Canadian Asbestos Services Ltd. v. Bank of Montreal* [1993 CarswellOnt 226 (Ont. Gen. Div.)], Chadwick J. in declining costs in a CCAA proceeding stated:

> I appreciate SGB 2000 Inc. has incurred a large number of legal costs in disputing these various applications. However, it was apparent very early in these proceedings that there was going to be limited funds available for distribution. As such counsel should have considered the cost to the client, and the likelihood they would not recover costs.

6 In *Calpine Canada Energy Ltd., Re* [2008 CarswellAlta 1163 (Alta. Q.B.)] Romaine J. ordered costs to be paid in a CCAA proceeding. Regarding the issue of whether costs are ordered in CCAA proceedings, she did not state that costs are rarely made, but rather that it was often that cost orders were not made. She stated:

> Often in proceedings under the Companies' Creditors Arrangement Act, costs are not awarded against unsuccessful parties.

7 I agree with Romaine J. that cost orders are often not made in CCAA proceedings. I do not agree that they are rarely made and, as I said, I do not read the decision in *Re Calpine* as dictating otherwise.

8 The Claimants contend that in CCAA proceedings, Monitors are officers of the court with an obligation to act independently and to consider the interests of the debtor and creditors, with a duty to remain neutral as between the various stakeholders in the CCAA proceedings. Thus it is claimed that the Monitor should not be entitled to costs for taking a position that was contrary to the interests of the Claimants.

9 While Monitors are officers of the court and intended normally to provide neutral services and neutral advice, BDO in this case had obligations beyond that of a typical Monitor. By order of Cameron J. dated March 9, 2010, BDO as Monitor was empowered and authorized to do a number of things on behalf of the Gandi companies, including being authorized to file a plan of compromise or arrangement. This order was necessitated because under the CCAA process, all of the business and assets of the Gandi companies had been sold and all of the directors and officers had resigned and there was no functioning board of directors. Proceeds from the sale were sufficient to pay off secured creditors and on the same day, BDO was authorized by Cameron J. to establish a claims procedure to distribute the available cash from the sale of assets among the unsecured creditors.

10 The claims process was substantially completed by November 2010 and the Monitor prepared a consolidated plan of compromise and arrangement and scheduled a motion for approval to file the plan. On December 20, 2010 the Claimants filed proofs of claim in excess of $76 million. The basis for their claim is set out in my endorsement of August 25, 2011. On February 18, 2011 the Claimants brought a motion for leave to file their claims. At that time the Monitor raised concerns regarding the evidence supporting the claims and the fact that a portion of them appeared to constitute equity claims. Morawetz J. granted the Claimants leave to file their claims late and noted that the Monitor could apply to the court regarding preliminary issues that had been identified.

11 The Claimants alleged that they were *de jure* directors and officers of the corporate entities in the Gandi Group. TA Associates had advanced $75 million to the Gandi Group by way of $25 million of debt and $50 million of equity. In January 2009, TA Associates commenced an arbitration proceeding against the Claimants. In the arbitration TA Associates claimed damages against the Claimants in an amount of US $75 million with interest, being the total amount of TA Associates' investment in the Gandi Group. The arbitration has not yet been heard on its merits.

12 The Claimants asserted an entitlement to indemnification by the Gandi Group in respect of any award of damages which may be made against them in the arbitration together with all legal fees incurred by the Claimants in defending the arbitration. Their right to be indemnified was hotly contested as was the question of whether their claim was an equity claim has to $50 million. The Claimants were thus not normal creditors in a CCAA proceeding, but rather sophisticated individuals seeking to put themselves in a position to substantially dilute the unsecured creditors on an indemnity that had to be determined, one way or the other. The indemnity claims of the Claimants, if permitted, would have delayed distributions to all creditors for a considerable period of time.

13 On March 11, 2011 the Monitor disallowed the indemnity claims of the Claimants and advised them that based on the evidence filed in support of the indemnity claims, any indemnity claim would be solely against Gandi Holdings. The Claimants then served a notice of dispute, which led to the motion before me.

14 In the circumstances of this case, I find no fault with the actions of the Monitor in bringing the matter before the Court and taking the position that it did. It really had no other choice. It was the Monitor who was charged with the responsibility of filing a plan of compromise and arrangement, and the form in which the plan would finally be settled depended on the outcome of the motion.

15 In the circumstances, I am of the view that Monitor is entitled to its costs on a partial indemnity basis as it was successful.

16 The claim for costs by TA Associates is opposed by the Claimants. TA Associates is a substantial creditor and would be severely affected if the indemnity claims of the Claimants were accepted by the Monitor. It participated in the motion. It filed an affidavit of Mr. Johnson who was cross-examined by counsel for the Claimants. TA Associates' counsel examined one of the Claimants on his affidavit and participated fully in the motion. The Claimants oppose any order for costs in favour of TA Associates whose participation they contend was redundant. I do not agree. Whether the indemnities are proper claims in the CCAA proceedings is of importance to TA Associates because the indemnities are said to protect the Claimants in the event that an award is made against them in the arbitration commenced by TA Associates in the U.S. The Claimants had to know that if they succeeded in their position, that would give them some leverage in the arbitration proceedings as TA Associates would be making a claim in the arbitration that if successful would partially end up coming out of its own pocket. The Claimants could not have expected TA Associates to sit back, particularly as it was the Monitor who brought the motion for directions and it was not clear at the outset exactly what the Monitor would do in the motion.

17 In my view TA Associates is entitled to its costs, although some recognition is to be given to the fact of duplication of efforts in considering what a fair and reasonable cost order is to be made against the Claimants.

18 The monitor seeks costs of $45,431.09, inclusive of HST, for fees and disbursements of $10,804.91, inclusive of HST. It also seeks fees and disbursements from BDO of $12,178.99, inclusive of HST. Apart from the usual work done on a motion such as this, because the Claimants alleged they were officers and directors of all members of the Gandi Group, it was necessary to consult U.S. Counsel regarding some of the Gandi companies that were incorporated in Delaware and Texas. In the face of a lack of written indemnities, the Claimants took the position that the indemnities were in the possession, power or control of the Monitor. Because of that position taken by the Claimants, counsel for the Monitor had to attend at the offices of the former solicitors of the Gandi Group to review the corporate governance documents. BDO and its counsel had to review 11 boxes of books and records of the Gandi Group in storage and 29 additional boxes at the Claimants' request. The Monitor was also required to review the books and records of the Gandi Group to disprove the allegations made by the Claimants that the Monitor authorized payment of certain legal fees of the Claimants in the arbitration.

19 The Claimants contend that the work done by counsel for BDO was excessive. While it is not required that the Claimants produce information as to the amount of time spent by its counsel, its failure to do so is something to be taken into account. In *Risorto v. State Farm Mutual Automobile Insurance Co.* (2003), 64 O.R. (3d) 135 (Ont. S.C.J.), Wrinkler J. (as he then was) stated:

> The attack on the quantum of costs, insofar as the allegations of excess are concerned, in the present circumstances is no more than an attack in the air. I note that State Farm has not put the dockets of its counsel before the court in support of its submission. Although such information is not required under Rule 57 in its present form, and the rule enumerates certain factors which would have to be considered in exercising the discretion with respect to the fixing of costs in any event, it might still provide some useful context for the process if the court had before it the

> bills of all counsel when allegations of excess and "unwarranted over-lawyering" are made. In that regard, the court is also entitled to consider "any other matter relevant to the question of costs". (See rule 57.01(1)(i).) In my view, the relative expenditures, at least in terms of time, by adversaries on opposite sides of a motion, while not conclusive as to the appropriate award of costs, is still, nonetheless, a relevant consideration where there is an allegation of excess in respect of a particular matter.

20 In *Frazer v. Haukioja*, 2010 ONCA 249 (Ont. C.A.), it was contended that the trial judge erred in awarding costs against the defendant. LaForme, J.A. for the court stated:

> Dr. Haukioja argued before the trial judge that Grant Frazer's counsel docketed almost twice as much time as his own. This, he says is relevant to Dr. Haukioja's reasonable expectations and establishes that he could not reasonably have expected Mr. Frazer's counsel to have invested so much more time than his own.
>
> The answer to this argument is found in the submissions of Grant Frazer that were made to this court.
>
> In making his finding with respect to the application of that part of rule 57.07(1)(0.b) "the amount of costs that an unsuccessful party could reasonably expect to pay..." the trial judge noted Mr. Haukioja's failure to provide adequate information as to his own legal costs incurred. He also agreed with the observations of Nordheimer J. in *Hague v. Liberty Mutual Insurance Co.*, [2005] O.J. No. 1660at para.16 that, "the failure to volunteer that information may undermine the strength of the unsuccessfully part's criticisms of the successful party's requested costs." In that regard, his decision is entirely consistent with the authorities, and in particular the dicta of the Divisional Court in Andersen, "the inference must be that the [unsuccessful] Defendants devoted as much or more time and money" as did the successful Plaintiffs: *Andersen v. St. Jude Medical Inc.*, [2006] O.J. No. 508 (Ont. S.C.J.) at paras. 24 to 27.

21 In reviewing the cost outline filed on behalf of the Monitor, nothing on the face of it would indicate that excessive time was spent. This was not a straightforward matter by any means and involved some novel issues. Nor do I think that the hourly rates used were excessive, being $350 per hour for Mr. Chaiton who was called in 1982 and $170 for Ms. Poliak who was called in 2007.

22 The Claimants contend that work done by BDO should not be permitted. The work done by BDO was entirely in connection with the motion and was necessitated by the need to review books and records and to supervise the Claimants' review of the record boxes. These costs would not have been incurred but for the position taken by the Claimants. In my view the cost of the work done by BDO was for and incidental to the motion and permissible in accordance with section 131 of the *Courts of Justice Act*.

23 TA Associates claims fees of $37,055 and disbursements of $4,522.11. In reviewing the cost outline filed on behalf of TA Associates, nothing on the face of it would indicate that excessive time was spent. As well, the hourly rates appear reasonable, being $350 per hour for Mr. Halpin who was called in 1986 and $165 per hour for Mr. Cobb who was called in 2008.

24 Taking into account the factors enumerated in rule 57.01, including the time spent, the results achieved, the complexity of the matter, the issue of possible duplication by counsel for the Monitor and for TA Associates, and also considering the amount of costs that an unsuccessful party such as TA Associates in the circumstances of this motion could reasonably expect to pay, I order that costs be paid by the Claimants within 30 days as follows:

1. To the Monitor for its counsel's fees and disbursements, $50,000 inclusive of HST.

2. To the Monitor for its fees and disbursements, $12,000 inclusive of HST.

3. To TA Associates for its counsel's fees and disbursements, $30,000 inclusive of HST.

Order accordingly.

End of Document

TAB 4

CITATION: Zayo Inc. v. Primus Telecommunications Canada Inc., 2016 ONSC 5251
COURT FILE NO.: CV-16-11257-00CL
DATE: 20160818

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

RE: 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.

BEFORE: Justice Penny

COUNSEL: *Maria Konyukhova* and *Vlad Calina* for the Primus Entities

Steve Weisz and *Aryo Shalviri* for FTI Consulting Canada Inc. in its capacity as Monitor of the Primus Entities

Matthew Gottlieb and *Larissa Moscu* for the Moving Party, Zayo Inc.

Jason Wadden for the Purchaser, Birch Communications Inc.

Matthew Milne-Smith and *Natasha MacParland* for the Lending Syndicate (BMO as Agent)

HEARD: August 9, 2016

ENDORSEMENT

Overview

[1] This motion, brought by Zayo Inc., is for an order that FTI Consulting Canada, in its capacity as court-appointed Monitor for the applicants, pay Zayo the amount of $1,228,799.81 from proceeds of sale of the applicants' assets. This amount represents the applicants' (pre-CCAA filing) arrears owed to Zayo in relation to agreements assigned by the applicants, with Zayo's consent, to Birch Communications Inc. in an asset purchase transaction which closed on April 1, 2016. The transaction was approved by orders of this Court made on February 25, 2016 and March 2, 2016 and certified completed by the Monitor on April 1, 2016.

[2] Initially on January 25 and formally no later than March 2, 2016, Zayo unequivocally consented to the assignment of its contracts with the applicants to Birch.

[3] Zayo argues that the process by which its consent to the assignment of its contracts with the applicants was obtained was not transparent or fair. Had the process been transparent and

fair, Zayo says, it would have refused its consent in the absence of full satisfaction of its pre-filing arrears and would, as a result, ultimately have been paid those arrears as a condition of the assignment of its contracts. Zayo relies on s. 11 of the CCAA which provides that the court may, in the context of CCAA proceedings, "make any order that it considers appropriate in the circumstances."

[4] This motion, therefore, engages the application and scope of the discretion of the court under s. 11 of the CCAA. The issue for determination is whether that discretion should be exercised, in the particular circumstances of this case, to order payment out of the proceeds of sale of the applicants' assets, to Zayo of the full amount of its pre-filing arrears under the assigned contracts.

[5] For the reasons that follow, I have concluded that the discretion afforded the court under s. 11 of the CCAA does not encompass an order for the payment of Zayo's pre-filing arrears. Accordingly, Zayo's motion is dismissed.

Background

[6] The applicants (collectively Primus) carried on business in Canada and the United States reselling telecommunications services. Thus, Primus purchased telecommunication services for resale from other (often large) telecommunications companies, including Allstream (now Zayo), Bell, Telus and the like. In late 2014, Primus ran into financial difficulty. It was unable to satisfy its obligations to creditors, including a syndicate of secured creditors represented in these proceedings by the Bank of Montréal. After February 2015, Primus operated under the forbearance of its syndicate of secured lenders.

[7] Primus conducted a privately structured and supervised pre-filing sales and investor solicitation process in consultation with a financial advisor and with the oversight of FTI (in its capacity as the proposed Monitor). Birch emerged as the successful bidder.

[8] On January 19, 2016, Primus entered into an asset purchase agreement with Birch, conditional on court approval. Primus sought and obtained protection under the CCAA pursuant to an Initial Order granted by this Court on the same day.

[9] The APA contemplated that Birch would assume certain Primus contracts with third parties. Because of Primus's financial difficulties, many of these contracts were in arrears. The APA contemplated the possibility that payment of such arrears might be required in order to effect the assignment of some of these contracts. These payments were defined as "cure costs." The APA contemplated that there would be negotiations regarding either the payment or settlement of these cure costs. Those negotiations with counterparties, if they occurred, could only be conducted in the presence of a representative of each of Primus, Birch and the Monitor.

[10] The first $3 million of cure costs were to be treated as a reduction in the purchase price. Cure costs in excess of $3 million were to be split equally between Birch and Primus.

[11] Birch had the right to insist upon the assignment of any contract which it considered essential. Birch also had the right, however, to waive this right at any time and to remove any contract from the list of essential or assumed contracts.

[12] Primus was obliged to use commercially reasonable efforts to obtain consents to the assignment of the identified contracts. The APA set out a two-step process for Primus to follow. First, Primus was obliged to use all commercially reasonable efforts to obtain a counterparty's consent to the assignment of any required contract. Second, Primus was required to bring a motion under s. 11.3 of the CCAA seeking court-ordered assignment of essential contracts, but only with respect to contracts for which *consent* to assignment could not be obtained by a particular date.

[13] Section 11.3 of the CCAA provides that the court may make an order assigning the rights and obligations of the debtor under an agreement to any person who is specified by the court and agrees to the assignment. In deciding to make such an order, the court must consider, among other things:

(a) whether the monitor approved the proposed assignment;

(b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligation; and

(c) whether it would be appropriate to assign the rights and obligations to that person.

[14] Section 11.3(4) of the CCAA imposes a further restriction on a court-ordered assignment. It provides that the court may not make an order requiring an assignment unless it is satisfied that all monetary defaults in relation to the agreement will be remedied.

[15] Initially, the essential contracts list identified by Birch had approximately 300 contracts. From January to the end of February 2016, the list underwent significant reduction. By the end of the review process, the number on the essential contracts list had been reduced to 209 contracts. Ultimately, consents to assign in respect of 117 essential contracts were obtained from 93 contract counterparties, including Zayo. Of these, two parties demanded payment of pre-filing amounts. The assignment order of this court, ultimately obtained on March 2, 2016, provided for the assignment of the remaining 92 contracts with 35 counterparties and for the payment of aggregate cure costs in respect of those contracts of about $4.5 million.

[16] Obtaining consents from what turned out to be over 120 counterparties was a substantial and time-consuming job. A main reason for the pre-filing SISP was to reduce the risk of value erosion as word of the Primus insolvency, and possible service interruptions and other disruptions, got out. Thus, the timeframe for concluding a transaction was necessarily compressed. In consultation with its own professional advisors, the Monitor and the purchaser, Primus drafted a template letter to be delivered to all counterparties to the contracts in respect of which consent was required to be sought.

[17] The consent letters advised the recipient that:

(i) Primus had sought protection under the CCAA;

(ii) Primus ran the SISP and selected Birch as the successful bidder;

(iii) the APA contemplated the assignment of their contract with one of one of the Primus entities to Birch;

(iv) at the time, the transaction was anticipated close in late February; and

(v) the motion materials for the approval investing order would be available on the Monitor's website.

[18] The consent letter requested the recipient's consent to assign its contract to Birch by a specified date and advised that, if consent was not received by that date, Primus would seek relief under s. 11.3 of the CCAA, with motion materials being served only on those parties who did not provide consent. The text of the letter said:

> We hope to have received consents from all counterparties to the Assumed Contracts by January 29, 2016. However, to the extent any consent with respect to any of the Assumed Contracts is not received by January 29, 2016, in order to ensure that all Assumed Contracts are assigned to the Purchaser, the Primus Entities will rely on the provisions of section 11.3 of the CCAA, which gives the court the jurisdiction to order the assignment of a contract without consent on certain terms and conditions set forth in section 11.3 of the CCAA. The Primus Entities will be seeking an order for the assignment of any Assumed Contracts for which consent to assign has not been given at a motion currently scheduled to be heard February 17, 2016. *If we have not received your consent by January 29, 2016, we will serve you with notice of the motion* as well as the motion materials in connection with this request and evidence in support thereof. [emphasis added]

[19] The consent letters also expressly advised all recipients that Birch would only be responsible for obligations arising under the assigned contract arising after the closing of the purchase transaction.

[20] The dates in the consent letter for completion of the assignments had to be changed as a result of circumstances having nothing to do with this motion. The substance of the letter and the process described, however, remained the same.

[21] By April 1, 2016 all conditions under the APA were fully satisfied and the transaction closed. Birch acquired the assets of Primus for about $44 million. Among other things, the Monitor came into receipt of the sale proceeds and delivered a certificate certifying that the transaction had been completed to the satisfaction of the Monitor. The Monitor then commenced dispersing the proceeds in accordance with the payment scheme provided in the distribution order of this court which had been made on February 25, 2016. The exact amount of the proceeds has not been finalized but it is expected that the proceeds will be insufficient to satisfy outstanding obligations owing to the syndicate of secured lenders and that no distributions will be made in respect of $20 million owed to Primus's subordinate secured creditor, Manulife.

[22] This motion for payment of Zayo's pre-filing arrears out of the proceeds of sale was first initiated on May 13, 2016. It is opposed by Primus, Birch, the secured lenders and the Monitor.

The Zayo Consent

[23] Prior to these events, Primus had a lengthy business relationship with Allstream Inc. which spanned over 15 years. Allstream was a wholly-owned subsidiary of Manitoba Telecom Services. Allstream sold wholesale telecommunications services to Primus which Primus then resold as part of its business, including long-distance phone, local internet and voice over internet protocol services. Primus had telecom supply contracts with a number of Allstream entities and for a number of services.

[24] In November 2015, Zayo acquired Allstream from MTS for $465 million. This was only one of about 30 acquisitions made by Zayo between 2007 and 2016.

[25] Because Zayo acquired a number of Allstream entities with Primus contracts, Zayo received three copies of the virtually identical consent request letter; one on January 22, 2016, another on January 26 2016 and a third on January 28, 2016. These consent request letters were sent to three senior Allstream executives, depending on which person or entity was identified in the relevant contract as the point of contact for all notices, etc.

[26] These letters were brought to the attention of Ms. Julie Wong Barker, a lawyer with the Zayo (Allsream) legal department.. Ms. Wong Barker was Senior Legal Counsel at Zayo Canada Inc. She has a B.A. and an M.A. and graduated with distinction from McGill University Law School. She was called to the Bar of Ontario in 2007. She worked for a major Bay Street Toronto law firm for two years and, following a maternity leave, joined Allstream as legal counsel in 2011. She became Senior Legal Counsel a few months later and has worked in the Allstream/Zayo Toronto legal department since then.

[27] Ms. Wong Barker became aware that Primus had filed for CCAA protection on the day the Initial Order was granted, January 19, 2016. Ms. Wong Barker deposed that she is not "well-versed" with the CCAA process and that, as a result, she searched for information on the internet and discovered that the Monitor was FTI.

[28] Ms. Wong Barker sent an email to the Monitor on January 21, 2016, indicating that Allstream was a significant supplier to and creditor of Primus. Her email states:

> Please kindly confirm that we will be added to any creditor's list and provided with all required notices accordingly. Further to that, pls kindly advise when the proof of claim forms will it be available, or kindly email it to me?

[29] On the following day, the Monitor replied, saying:

> Hello Julie,
>
> We confirm that Allstream Inc. is included on the list of known creditors and as such, you will be receiving a "Notice to Creditors" document in the mail in the coming days. At this time, there is no claims process approved by the Court so

there is no proof of claim forms that need to be submitted. Any status updates will be posted on the website listed below.

The Monitor's email provided the URL link to the Monitor's Primus website (containing all the documents filed with the Court) and invited Ms. Wong Barker to feel free to contact him if she had any further questions or wanted to discuss the matter.

[30] On January 26, 2016, Ms. Wong Barker sent one further email to the Monitor. In this communication, she asked who would be receiving the notice to creditors and at what address. She also asked when the asset purchase agreement between Primus and Birch would be available on the Monitor's website. She asked whether the two documents could be emailed to her and, once again, inquired about whether there would be a claims process.

[31] Later the same day, the Monitor responded that the notice to creditors had been mailed to Allstream's Wellington Street address and that a copy of that document was also available on the Monitor's Primus website. The Monitor went on to indicate that a copy of the asset purchase agreement was not available "as it is not a public document yet." The Monitor reiterated that a claims process had not been initiated as no process had been approved by the court. Finally, the Monitor once again referred Ms. Wong Barker to the website for any status updates regarding the CCAA proceedings and invited any further questions.

[32] The evidence is that these were the only two communications between Ms. Wong Barker and the Monitor and that Ms. Wong Barker made no further inquiries of the Monitor regarding these CCAA proceedings. There is no suggestion, and certainly no evidence, that anything the Monitor said to Ms. Wong Barker in these email communications was in any way incorrect.

[33] On January 25, 2016, Ms. Wong sent to Primus a letter from the Allstream president in which Allstream and MTS advised they were consenting to the assignment of contracts between them and Primus. The Allstream consent letter went on to request a reciprocal consent from Primus in respect of certain contracts between MTS and Primus, so that the MTS contracts could be assigned to Allstream and MTS be released from any future obligation under these contracts.

[34] Further draft consent letters, and negotiations over the consolidation and wording of revised consent letters took place between February 5 and March 2, 2016, at which time Ms. Wong Barker confirmed that a revised and executed form of consent to the assignment had been finalized.

The Zayo Argument

[35] Zayo's argument falls into three basic categories:

(1) the inadequacy of the form of consent request letter sent by Primus to Zayo. The complaint is, in essence, that the consent request letter was misleading because it omitted any explanation of the process under s. 11.3 of the CCAA and failed to disclose the provision for "cure costs" in the APA or to advise Zayo that it might have gained bargaining leverage regarding payment of its pre-filing arrears under s. 11.3(4) if it were to withhold its consent and force Primus to move before the court under s. 11.3(1);

(2) the failure to send Zayo a copy of the APA; and

(3) the failure of the Monitor/Primus to serve Zayo with the s. 11.3 motion materials filed to obtain the assignment order and the related failure to place Zayo on the e-service list for receipt of all Court material.

[36] The starting point for these arguments is the decision of the Supreme Court of Canada in *Ted Leroy Trucking (Century Services) Ltd., Re*, [2010] 3 S.C.R. 379. In that case the court observed that the incremental exercise of discretion under conditions aptly described as "the hothouse of real-time litigation" has been the primary method by which the CCAA has been adapted and has evolved to meet contemporary business and social needs. It is frequently said that the remedial purpose of the CCAA is to avoid or ameliorate the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations by attempting to reorganize the financial affairs of the debtor under court supervision. The Supreme Court held that in pursuing this purpose, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising CCAA authority. The supervising court should be mindful that the chance for successful reorganization is enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

[37] The moving party also relies on the decision of G.B. Morawetz R.S.J. in *Target Canada Co.*, 2016 ONSC 316 where he said (at para. 72):

> It is incumbent upon the court, in its supervisory role, to ensure that the CCAA process unfolds in a fair and transparent manner.

[38] Specifically, under s. 11.3 of the CCAA, the court should consider whether an assignment will meet the twin goals of assisting the reorganization process while also treating the counterparty fairly and equitably, *Veris Goldcorp., Re,* 2015 BCSC 1204.

[39] Zayo argues that in this case, the process for obtaining Zayo's consent to the assignment of its contracts to the purchaser, Birch, was neither transparent nor fair. Zayo says it was a counterparty to a number of essential contracts with Primus and that the business carried on by Primus could not continue as a going concern without these contracts. Birch, it says, therefore needed those contracts and would not have disclaimed them had Zayo not provided its consent to the assignment. In that scenario, Zayo argues that s. 11.3(4) would have required payment in full of its arrears.

[40] Zayo argues that the consent request letters, however, intentionally omitted any reference to "cure costs". In the APA, cure costs are defined as the costs necessary to pay pre-filing arrears in order to compel an assignment of an essential contract under s. 11.3.

[41] Ms. Wong Barker's evidence was that she did not understand that she was waiving any right to be paid Zayo's arrears when Zayo, through her, consented to the assignment of its contracts. Nothing in the consent request letters sent to Zayo even mentioned cure costs and they

did not indicate that cure costs would not be paid to counterparties who consented to the assignment of their contracts. Ms. Wong Barker's evidence is, further, that Zayo would not have consented to the assignment of its contracts had it been aware that it would be considered to be waiving any rights to be paid to its arrears.

[42] Zayo also argues that the APA was unavailable for review before the consent deadline. The APA contemplated payment of pre-filing arrears ("cure costs") for essential contracts assigned by court order on of a motion under s. 11.3 of the CCAA. Zayo argues that it was unfair for Primus to demand that Zayo consent to assign its contracts without providing it with a copy of the APA.

[43] Finally, Zayo argues that it should have been served with the motion material filed in support of the motion for the assignment order. In this regard, Zayo also argues that it ought to have been placed on the e-service list, which would have resulted in all motion materials being served on it.

[44] Zayo relies on the 2015 decision in *Veris Gold*, where Fitzpatrick J. concluded that it was "not apparent" that the counterparties to the contract which was sought to be ordered to be assigned under s. 11.3, did, in fact, receive a copy of the application materials. She held that the "best practice... is to serve all counterparties to the particular contracts that are sought to be assigned, whether they are on the service list or not", *Veris Gold, supra,* paras. 59-61.

[45] In this case, Primus served the motion record for the assignment order on counterparties whose consent was still outstanding as of February 9 to 16, 2016. Because Zayo had delivered its initial consents well before February 9, 2016, it was not named in or served with the motion to require the assignment of the non-consenting parties' contracts.

[46] Zayo argues that it had an interest in the motion and that, had it been served with the assignment order motion record, it would have become aware of the "cure costs" provisions of the APA and the possibility that withholding its consent might lead to the payment of some or all of its pre-filing arrears. It also argues that, at the very least, it could have attended at the motion and advised the court that its intention had always been to be paid the pre-filing arrears owed by Primus.

[47] On the question of causation, Zayo asserts that, had it withheld its consent to the assignment of the Zayo contracts, then, at the assignment motion, Zayo would have recovered all of the arrears owed by Primus by virtue of the application of s. 11.3(4) of the CCAA. Zayo relies for this argument on the evidence of Primus, embedded in the language of the APA, that Birch regarded the Zayo contracts as "essential". Zayo also relies on the consent request letter, which stated that if consents were not forthcoming, Primus *would* move for an order requiring the assignment of the Zayo contracts under s. 11.3.

[48] While conceding that the consent request letter mentioned s. 11.3 of the CCAA, Ms. Wong Barker deposed that she looked at s. 11.3 at the time but did not understand it to mean that Zayo's consent to the assignment would foreclose any claim to pre-filing arrears.

[49] Finally, Zayo argues that no party will suffer prejudice if the motion is granted. This argument is premised on the assumption that Primus and/or Birch would have known the total

amount of arrears owed by Primus to Zayo as of the date of the CCAA filing and would have paid this entire amount to Zayo had Zayo refused to consent to the assignment and been a party to the assignment order motion. Zayo's submits that it is not prejudicial for a party to be required to pay an amount that otherwise would have been payable. Thus, Zayo argues, there is no substantive prejudice to Primus, Birch or the secured lenders because, had all relevant facts been known to Zayo at the time, the arrears would have been paid and both reflected in the purchase price under the APA and reflected in the amounts received by the Monitor available to satisfy the secured lenders.

[50] Zayo, therefore, argues that this Court should not condone a process that results in a counterparty to an essential contract being financially disadvantaged for having cooperated with the debtor and consented to the assignment of that essential contract.

Analysis

[51] A great deal of the written and oral argument was devoted to the question of whether this Court has the jurisdiction to make the order sought by the Zayo in this case. There is no doubt that s. 11 is a broad grant of discretion. It is not, however, without limits. Specifically, the s. 11 authority is "subject to the restrictions set out in this Act". Further, the common law applies to the CCAA without modification unless the common law rule is "ousted" by the language of the CCAA, *Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co.*, [1956] S.C.R. 610 at 614.

[52] In the view I take of the matter, it is not necessary to resolve the legal question of jurisdiction. I say this because, assuming the jurisdiction is available, I would not exercise it to grant the relief sought by Zayo in the circumstances of this case. I say this for the following reasons.

The Consent Request Letters

[53] The centerpiece of Zayo's argument is that the consent request letters sent by Primus were misleading, or perhaps more precisely, lacked transparency and were unfair. Zayo argues that the consent request letters did not disclose the details of the APA and the "cure costs" regime embedded in the APA. Nor did the letters provide sufficient explanation for the recipient to understand that bargaining leverage vis-à-vis pre-filing arrears might be gained by refusing to consent to the assignment of contracts because of the provisions of s. 11.3(4).

[54] I am not satisfied that the consent request letters were either unfair or lacked transparency. There were over 300 contracts outstanding, with well over 100 counterparties. Most of the counterparties, including Zayo/Allstream, were large, sophisticated telecommunications companies. There is no question Zayo/Allstream was a sophisticated party. Zayo acquired Allstream in late 2015 for $465 million. Allstream's revenues exceeded $640 million. This is more than 10 times what Primus earned. Every counterparty received the same form of letter. No other counterparty appears to have had any difficulty with the consent request letter or the decision to consent or not to consent. A large number of counterparties appear to have consented.

[55] Ms. Wong Barker worked in a legal department at Allstream comprised of about half a dozen lawyers. At least two other lawyers in the department had supervisory or other

involvement in the Primus CCAA proceedings. Ms. Wong Barker, who carried the ball in the Primus CCAA proceedings, was an exceptional student and graduated with distinction from one of Canada's leading law schools. She went to Allstream with experience at a Bay Street law firm, and had worked there for about five years when Primus commenced its CCAA proceedings. Ms. Wong Barker admitted that CCAA litigation is a highly specialized area with which she was not familiar and that she chose not to seek advice from another lawyer with CCAA experience.

[56] Allstream received three consent request letters. The initial consent provided by Zayo on January 25, 2016 was not agreeable to Primus and there were extensive negotiations over various drafts, such that the form of the consent was not actually finalized until March 2, 2016. Part of the negotiation involved Allstream obtaining reciprocal consents from Primus to the assignment of MTS contracts with Primus to Allstream and the release of MTS from further obligation under those contracts. I do not accept Ms. Wong Barker's evidence that these reciprocal consents were just part of the consents requested by Primus. It is clear that Allstream took this opportunity to put its own house in order due to the sale of Allstream by MTS to Zayo just a few months earlier.

[57] Nothing in the consent request letters is incorrect. The APA was not disclosed initially because it was not yet in the public realm. The evidence is that the APA was posted on the Monitor's website no later than February 3, 2016. Zayo was repeatedly advised to check the Monitor's website for new and updated information. Ms. Wong Barker admitted she did not do so until late in the piece and, in any event, did not see the APA when she did so, although it is clear that the APA was, by that time, available.

[58] The consent request letters did make explicit reference to s. 11.3 of the CCAA and a possible motion if consents were not forthcoming. Ms. Wong Barker deposed that she looked at that section of the CCAA. She appears to have misunderstood its meaning and effect. Her review of s. 11.3(4) in particular did not, in any event, cause her to consider whether court-ordered, as opposed to consent, assignments might *require* payment of pre-filing arrears. It is important to remember that contract formation and enforcement is, in essence, an objective, not a subjective, exercise. Ms. Wong Barker's subjective understanding and misconception of the assignment process wa, in any event, not known to Primus, Birch or the Monitor.

[59] Zayo argues that, as a matter of policy, debtors ought not to be given incentives to be stingy with the disclosure of material information. I do not disagree with this proposition. However, by the same token, creditors or other stakeholders ought not to be given incentives to be less than duly diligent in the protection of their commercial interest and the assessment of their options in real-time insolvency proceedings. In any event, I do not find "policy" arguments particularly helpful in the context of this case.

[60] The Supreme Court of Canada in *Century Services* emphasized the importance of appropriateness and good faith in the conduct of CCAA proceedings, to be sure. It is significant, however, particularly given the acknowledged "hothouse of real-time litigation" aspect of CCAA proceedings and the underlying remedial purpose of avoiding bankruptcy liquidation, that "due diligence" is also a baseline consideration, *Century Services, supra*, para. 70.

[61] Commercial parties do not have an obligation to provide each other with legal advice in the ordinary course of their dealings. Rather, they are entitled to pursue their own economic self-interest to the best of their ability. Contract and commercial law assumes that parties are vigilant in the pursuit of their own interests. It is not illegitimate for a party to bargain hard and advance its own interest. The general rule, with very limited exceptions, is that sophisticated parties will be held to the bargains they make. The mere fact that a bargain proves to be improvident is no basis to relieve the counterparty of its contractual obligations absent the application of one of these limited exceptions. Generally speaking, courts will only relieve a party of the consequences of a poor bargain in circumstances of unconscionability, unilateral mistake, misrepresentation or duress.

[62] Here, I have already found as a matter fact that there was no misrepresentation. I also find, as matter of fact, that the preconditions for the application of the doctrine of unilateral mistake are not met. This is because, put simply, neither Primus nor the Monitor were aware of Zayo's misunderstanding of the assignment process and no advantage was taken of Zayo's mistaken understanding. The parties were both clearly sophisticated players in the telecommunications business and had comparable bargaining power. Zayo had every opportunity to speak with independent legal counsel and had realistic alternatives to the consent ultimately given. There was no duress.

[63] The consent request letters were, in my view, both fair and transparent. Every counterparty was given the same information. Every counterparty was advised to check the Monitor's website for new and updated information. The information necessary to put counterparties on notice of the issues was provided. There was no obligation to provide legal advice or to highlight the possible choices counterparties might make to improve their bargaining leverage. All the counterparties had ample time and every opportunity to obtain professional advice and to consider their options. Zayo, with the benefit of a good-sized legal department, in fact did so.

Disclosure of the APA

[64] I have already dealt in substance with the availability of the APA. The Monitor responded promptly to Ms. Wong Barker's request for a copy by advising that it was not yet publicly available. The Monitor did not promise to provide a hard copy of the APA to Ms. Wong Barker when it became available. Ms. Wong Barker was advised to check the Monitor's website on an ongoing basis. Within days of her request, the APA was, in fact, posted on the Monitor's website. Zayo was also invited, repeatedly, to call the Monitor with any additional questions. After January 26, 2016, however, Zayo had no further communication with the Monitor. If Zayo wanted to review the APA before finalizing its consent, it was incumbent upon Zayo to insist upon that step or take the necessary action to ensure that it was able to do so.

Service

[65] Zayo also complains that service was deficient and that it ought to have been served with the assignment order motion record. Had this been done, it argues, it would have discovered all about the cure costs and the fact that a number of counterparties were likely to be paid some or all of their pre-filing arrears.

[66] The proper analysis of this issue begins with the Initial Order, which governs the procedure for notice and service in this CCAA proceeding. The Initial Order adopts the e-service protocol of the Commercial List. Under that protocol, any party that has delivered a notice of appearance, any party that should be served in accordance with the Rules and any party who has filed a request for electronic service must be placed on the e-service list. Stakeholders who wish to be placed on the e-service list in order to receive service of court documents in a timely and efficient manner "shall email to the E-service List Keeper" a duly completed request for electronic service in the prescribed form.

[67] The evidence on this motion is that Zayo at no time filed a notice of appearance in this proceeding or submitted a request for electronic service. Zayo asked the Monitor to be placed on the list of creditors and that was done. Zayo received the relevant notice shortly thereafter. As noted above, the Monitor also, on two occasions, specifically advised Zayo to review the Monitor's website for new and updated information.

[68] The motion material for the approval and vesting order (which contained the APA) was posted on the Monitor's website on February 3, 2016. The motion material for the assignment order appears to have been posted on the Monitor's website on or shortly after February 16, 2016.

[69] Neither of the aforementioned motion records were served on Zayo because the Rules did not require service and Zayo had neither appeared nor asked to be placed on the e-service list. In particular, the assignment order motion was only in respect of counterparties to contracts which Birch insisted be assigned and for which no consent had been obtained. The cutoff date for consent was, ultimately, between February 9 and 16, 20156. Because Zayo/Allstream had already consented to the assignment of its contracts, neither Allstream nor any Allstream contracts were included in the motion for the assignment order. Not being a party to that motion or having asked to be placed on the e-service list, Zayo was not entitled to service and was not served.

[70] Zayo's reliance on the *Veris Gold* case is misplaced. That case involved a failure to serve a counterparty whose contract *was* going to be assigned by virtue of a court order and whose interest under s. 11.3(4) was clearly engaged. Even though the party had not appeared and did not ask to be placed on an e-service list, Fitzpatrick J. held that the party ought to have been served since its interest was directly engaged by the relief sought.

[71] That is, with respect, not the situation here. In the present case, by virtue of its consent, Zayo's contracts did not form any part of the subject matter of the assignment order motion.[1] Ms. Wong Barker was aware of, and presumably read, the Initial Order. It was open to Zayo to request that it be served with all court filings. It did not do so. It was advised to consult the Monitor's website for new and updated material. The motion material in support of the approval and vesting order and the assignment order were posted on the Monitor's website in a timely manner. Specifically, both motion records were posted on the Monitor's website at least several days prior to March 2, 2016 when the consent documents between Zayo and Primus were ultimately finalized and the assignment order was made. Ms. Wong Barker admitted that she looked on the Monitor's website and found this material but it is not clear when she did so.

What is clear is that she did not spend sufficient time with the material to find any of the information that Zayo now says was critical to it.

[72] I find, therefore, that Zayo was entitled to request e-service of all court filings but did not do so. Zayo was placed on the creditors list, as it requested, and received all relevant notices in that regard. Zayo, having consented to the assignment of its contracts, was not affected by, and therefore not entitled to notice of, the motion for the assignment order. There was, in the circumstances, no failure of service or notice on the part of the debtor or the Monitor.

Prejudice

[73] Zayo argues, finally, that the order for payment of its $1.2 million out of the proceeds of sale should be made because it would not prejudice anyone. Distribution issues in this case are a zero sum game because, on the evidence, there is certain to be a shortfall. Zayo argues, however, that if it had not consented to the assignment of its contract it would have been a party to the assignment order motion and would have been paid in full. Thus, other parties seeking distribution from the proceeds of sale would be no worse off now, if the order sought is made, than they would have been if the assignment order had been made in respect of Zayo's contracts in the first place.

[74] Given my disposition of the issues above, the fate of Zayo's motion does not turn on this issue. However, because many of the issues are intertwined, it seems appropriate to deal with this issue as well.

[75] The principal flaws in Zayo's argument are the assumptions that:

(a) Zayo had a right to have its contract assigned by a court order; and

(b) Zayo would have been paid its pre-filing arrears in full.

[76] Under the terms of the APA, Birch had the right to add to and take away from the list of essential contracts. The evidence is very clear that the essential contract list was in a state of flux for several weeks and that, in the end, almost 100 contracts were removed from the list of contracts that Birch initially wanted to take on.

[77] The assignment process envisioned under s. 11.3 is a debtor driven, not creditor or counterparty driven process. Section 11.3(1) begins "on application by a debtor company..." Thus, a counterparty cannot require an insolvent debtor to assign its contract to a purchaser. Section 11.3 envisions a market-driven process under which a purchaser, in consultation with the debtor and the monitor, may decide (after possible negotiations with the counterparties) which contracts it wants and needs and which it does not. The APA in this case specifically required that any negotiations with counterparties had to be conducted in the presence of not only the debtor and Monitor but Birch as well.

[78] I agree with the responding parties to this motion that it cannot now be known what Birch might have done, what negotiations might have taken place or what monetary threshold Zayo

and Birch might have had for keeping or disclaiming the contract, if Zayo had declined its consent to the assignment of its contracts.

[79] Zayo argues that this "infinite possibilities" argument is not available to the respondents on this motion because there is no evidence to support it. Zayo argues that the only evidence is that: a) Zayo's contracts *were* on the essential contracts list; b) the consent request letter told Zayo that, in the absence of its consent, a motion *would be* brought for an order assigning its contracts under s. 11.3; and c) the assignment order provided for the assignment of 92 essential contracts with 35 counterparties along with payment of cure costs in the aggregate amount of $4,518,997.51. Neither Birch nor anyone else filed any evidence on what they would have done had Zayo not provided its consent.

[80] Notwithstanding Mr. Gottlieb's forceful argument on this point, I do not think the record is so devoid of evidence as he makes out. Birch did have the right to remove contracts from the list and did so – almost 100 were dropped from the list. Over 90 contract counterparties granted consent to assign without making their consent conditional on payment of pre-filing amounts. The consent request letter, stating that a motion would be brought under s. 11.3 in the absence of consent to the assignment, was a statement of present intention, not an enforceable promise.

[81] There is also evidence that negotiations took place around the amounts of any payment of pre-filing arrears. As the Supreme Court made clear in *Century Services*, much of what actually happens under CCAA proceedings depends upon the parties' negotiations. In those negotiations, parties to service contracts must weigh the risks of insisting upon their desired position (i.e., they may get nothing if the contract is disclaimed) against the benefits of a future income stream due to the assignment of their contract from an insolvent party to a new, more robust, entity.

[82] It is entirely understandable, and fair, for Birch not to have filed evidence purporting to say what it would have done had Zayo not provided its consent. This is because, having been deprived (by virtue of Zayo's consent) of the opportunity to consider that scenario, negotiate with Zayo and weigh the costs and the benefits of each available option, Birch could not now know what it would have done. Any attempt to purport to say otherwise would inevitably involve speculation.

[83] There is a further complication in that the APA sets a ceiling of $3 million on cure costs which are deducted from the purchase price. Above $3 million, the cure costs of court-ordered assignments under s. 11.3 are shared equally between Primus and Birch. This too would have been a relevant factor in Birch's approach to any discussion about payment of Zayo's pre-filing arrears and formed the basis of two prior orders of the Court.

[84] I am unable to agree with Zayo's submission that no amendment of the approval and vesting order or of the assignment order would be required. It seems to me that both orders were premised on Zayo's consent to assignment of its contracts. The relief sought by Zayo on this motion would require a variation of the approval and vesting order as well as the assignment order. Given that the transaction has now closed, and the Monitor has issued its certificate, the additional complication of the allocation of the shortfall resulting from a payment to Zayo as

between Primus and Birch would also have to be resolved. This is a situation, in my view, where the proverbial egg cannot be unscrambled.

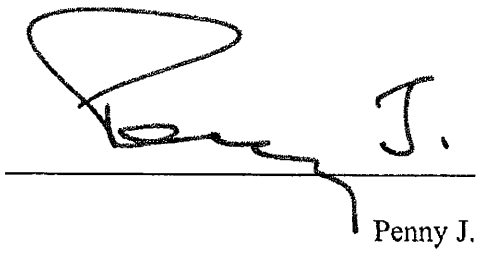
[85] For these reasons, I conclude that prejudice would be suffered by, at the very least, the syndicate of secured lenders and Birch were the relief sought on this motion to be granted.

Conclusion

[86] For the foregoing reasons, Zayo's motion for an order requiring payment by the Monitor of Zayo's pre-filing arrears out of the proceeds of the sale to Birch is dismissed.

Costs

[87] I encourage the parties to seek an accommodation on costs. Failing agreement, any party seeking costs shall do so by filing a brief written submission, not to exceed two typed, double-spaced pages, together with a Bill of Costs within 10 days of the release of these Reasons. Anyone wishing to respond to such a request shall do so by filing a brief written submission, subject to the same page limit, within a further 10 days.



Penny J.

Date: August 18, 2016

Court File No: CV 16-11257-00CL

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.

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

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