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.

RESPONDING FACTUM OF BANK OF MONTREAL AS AGENT FOR THE SYNDICATE

(Re: Motion of Zayo Canada Inc. Returnable August 9, 2016)

DAVIES WARD PHILLIPS & VINEBERG LLP
155 Wellington Street West
Toronto, ON M5V 3J7

Matthew Milne-Smith (LSUC #44266P)
mmilne-smith@dwpv.com

Natasha MacParland (LSUC #42383G)
nmacparland@dwpv.com

Dina Milivojevic (LSUC #64521U)
dmilivojevic@dwpv.com

Tel: 416.863.0900
Fax: 416.863.0871

Lawyers for Bank of Montreal
as Agent for the Syndicate

Court File No. CV-16-11389-00CL

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FACTUM OF BANK OF MONTREAL AS AGENT FOR THE SYNDICATE

PART I ~ OVERVIEW

1. This motion is an attempt by Zayo Canada Inc. ("**Zayo**"), a large and sophisticated telecommunications provider, to resile from a consent agreement that it entered into willingly, with the benefit of advice from its in-house counsel. Remarkably, Zayo claims that it did not appreciate the legal effect of the consent agreement at the time that it was executed. Zayo asks the Court not to rescind, but rather to rewrite the consent agreement in order to award Zayo, an unsecured creditor, 100% recovery on its trade claims in preference to the Primus Entities' secured lending syndicate.

2. Zayo is the successor-in-interest to Allstream Inc. ("**Allstream**") after acquiring Allstream from MTS Inc. ("**MTS**") on January 15, 2016. For many years, Allstream and MTS had enjoyed the benefit of a number of lucrative contracts with the Primus Entities (as defined below). On January 19, 2016, the Primus Entities sought and obtained protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"). On the same day, the Primus Entities entered into an asset purchase agreement

("**APA**"), subject to court approval, with Birch Communications Inc. ("**Birch**") pursuant to which, among other things, Birch was to assume certain of the Primus Entities' contracts, including its contracts with Allstream.

3. To facilitate the assignment of certain of the Primus Entities' contracts, the Primus Entities prepared a form of letter agreement to the Primus Entities' contractual counterparties (the "**Consent Letter**"). Among other things, the Consent Letter notified counterparties that the Primus Entities had obtained CCAA protection and had entered into the APA with Birch. The Consent Letter also advised that the APA contemplated the assignment of their contracts with the Primus Entities to Birch, and requested their consent to such assignment.

4. The Consent Letter went on to advise that if consents were not received by a certain date, the Primus Entities would bring a motion to compel the assignments, subject to certain terms and conditions set out in section 11.3 of the CCAA. Among other things, section 11.3 expressly provides that a court cannot make an order assigning a contract unless all monetary defaults under the contract have been cured. The same form of Consent Letter was sent to dozens of the Primus Entities' contractual counterparties whose contracts were expected to be assigned.

5. Zayo is a multi-billion dollar, multi-national technology company. It has an in-house legal department and was advised in this matter by an experienced, impressively credentialed veteran of a large Bay Street commercial practice. Primus (as defined below) is a vastly smaller company by comparison. Ultimately, following extensive communications with the Primus Entities and the Monitor (as defined below) relating to the CCAA

proceedings, the APA, and the proposed assignments, Zayo chose to execute the Consent Letter and consented to the assignment of its agreements to Birch.

6. Zayo did not require that its pre-filing arrears be paid as a condition of consenting to assignment of the contracts to Birch. Zayo did, however, ask the Primus Entities to agree to: (1) have MTS assign certain contracts from MTS to Allstream following the January 15, 2016 sale to Zayo; and (2) release any potential claims the Primus Entities may have had against MTS.

7. Zayo now brings this motion for payment of its unsecured claim in the full amount of $1,228,779.81. The crux of Zayo's complaint is that the Primus Entities and the Monitor should have informed Zayo that it would not be entitled to preferential payment of its unsecured trade claims if it agreed to the Consent Letter; but that if it withheld its consent to the assignment of its contracts and the Primus Entities chose to bring a motion under subsection 11.3(4) of the CCAA, it would be paid its debts. In essence, this is an argument by Goliath that David should have explained the law to it.

8. Zayo makes this remarkable claim despite the fact that it was treated in precisely the same manner as all of the other contractual counterparties whose contracts required consents to be assigned. Indeed, of all of the contractual counterparties to whom the Consent Letter was sent, Zayo is the only party to have complained that it was misled by its content. Neither the Primus Entities nor the Monitor made any misrepresentations. Zayo had every opportunity to request that some or all of its unsecured trade claims be paid as a condition of providing its consent. It willingly executed the Consent Letter without doing so. There is no basis at law or in equity to permit Zayo to resile from this agreement.

PART II ~ FACTS

Background – The Sale Process and the Initial Order

9. PT Holdco, Inc. ("**PT Holdco**"), Primus Telecommunications Canada, Inc. ("**Primus**"), PTUS, Inc. ("**PTUS**"), Primus Telecommunications, Inc. ("**PTI**"), and Lingo, Inc. ("**Lingo**" and together with PT Holdco, Primus, PTUS and PTI, the "**Primus Entities**") carried on business in Canada and the United States as a telecommunications provider.[1]

10. The Primus Entities' senior secured credit facilities were provided pursuant to a credit agreement dated July 31, 2013 (as amended, the "**Credit Agreement**") between a predecessor to Primus, as borrower, and Bank of Montreal ("**BMO**"), Alberta Treasury Branches and HSBC Bank Canada (collectively, the "**Syndicate**"), as lenders.[2] Primus's obligations under the Credit Agreement were guaranteed by each of the other Primus Entities. The Primus Entities became unable to satisfy their obligations to the Syndicate in late 2014 and have operated pursuant to forbearance agreements with the Syndicate since February 2015.[3]

11. In late 2015, with the assistance of, among others, the financial advisor FTI Consulting Inc., the Primus Entities conducted a sales and investor solicitation process (the "**SISP**") for a sale of, or investment in, their business. On January 19, 2016, certain of the

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1 Affidavit of Michael Nowlan sworn July 19, 2016 ("**Nowlan Affidavit**") at para. 4; Responding Motion Record of PT Holdco, Inc., Primus Telecommunications Canada, Inc., PTUS, Inc., Primus Telecommunications, Inc., and Lingo Inc. ("**Responding Motion Record**"); Tab 1, p. 2.

2 BMO is the administrative agent and lead arranger for the Syndicate.

3 Nowlan Affidavit at paras. 5-6; Responding Motion Record, Tab 1, p. 2.

Primus Entities entered into an asset purchase agreement (the "**APA**"), subject to court approval, with Birch Communications, Inc. (together with its permitted assigns, "**Birch**"). The sale price was $44 million, subject to certain adjustments, and the assumption of certain of the Primus Entities' obligations. Immediately thereafter, the Primus Entities filed for and were granted protection pursuant to an order (the "**Initial Order**") under the CCAA and FTI Consulting Canada Inc. was appointed as the Monitor of the Primus Entities (the "**Monitor**").[4]

The APA and the Consent Letters

12. Pursuant to the APA, Birch was to assume certain agreements to which the certain of the Primus Entities were parties (the "**Assumed Contracts**"), a subset of which were designated to be material and required by Birch to operate the business (the "**Essential Contracts**"). The assignment to Birch of the Essential Contracts was a condition precedent to the closing of the transaction contemplated by the APA (the "**Transaction**"), but Birch had the discretion to remove contracts from the list of Essential Contracts.[5]

13. It was also anticipated that certain Assumed Contracts would, by their terms, require the consent of the counterparties to be assigned to the Purchaser (the "**Consent Required Contracts**"). The APA obliged the Primus Entities to use commercially

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[4] Nowlan Affidavit at paras. 6-9; Responding Motion Record, Tab 1, pp. 2-3; Third Report to the Court dated July 13, 2016 submitted by FTI Consulting Inc. in its Capacity as Monitor of PT Holdco, Inc., Primus Telecommunications Canada, Inc., PTUS, Inc., Primus Telecommunications, Inc., and Lingo Inc. ("**Third Report**") at paras. 19-21.

[5] Nowlan Affidavit at paras. 26-34; Responding Motion Record, Tab 1, pp. 7-10.

reasonable efforts to obtain all such required consents, including by negotiating with the counterparties to the Consent Required Contracts and potentially paying amounts to cure monetary defaults under the Consent Required Contracts (the "**Cure Costs**"). In the event that any consents in respect of Consent Required Contracts that were also Essential Contracts were not forthcoming by the service date for the Approval and Vesting Order (as defined below) motion, the APA obliged the Primus Entities to bring a motion pursuant to section 11.3 of the CCAA for an order compelling such consent. Birch was responsible for half of the Cure Costs over $3 million and therefore had an incentive not to unnecessarily compel the Primus Entities to bring motions under section 11.3 where the services in question could be obtained elsewhere.[6]

14. None of the monetary defaults for which Cure Costs might be required involved secured debts. Moreover, it currently appears that there will be no funds available for unsecured creditors of the Primus Entities. Therefore, being able to receive Cure Costs was a major advantage that allowed unsecured creditors to advance their priority over other unsecured creditors and even certain secured creditors.[7]

15. In order to fulfill their obligations under the APA, the Primus Entities, in consultation with Birch, worked with their professional advisors and the Monitor to prepare the Consent Letter to be sent to counterparties to Consent Required Contracts requesting their consent to assignment. Among other things, the Consent Letter:

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6 Nowlan Affidavit at paras. 27-29 and 35; Responding Motion Record, Tab 1, pp. 10.

7 Third Report at para. 35.

(a) notified counterparties that the Primus Entities had obtained CCAA protection and had conducted a pre-filing sales process that resulted in Birch being selected as the successful bidder and the entering into of the APA;

(b) advised that the APA provided for the assignment of certain of the Assumed Contracts to Birch;

(c) advised that Birch would only be responsible for obligations arising under the Assumed Contracts after the closing of the Transaction;

(d) requested the recipient's consent to the assignment of the relevant Assumed Contract(s);

(e) provided a signature block for the recipient to execute the Consent Letter; and

(f) provided that if consents were not received by a certain date, the Primus Entities would bring a motion to compel the assignments on certain terms and conditions set forth in section 11.3 of the CCAA.[8]

16. As described in greater detail below, subsection 11.3(4) of the CCAA expressly provides that a court cannot make an order assigning an agreement unless all monetary defaults under the agreement have been paid.

The Relationship between Primus and Zayo

17. Zayo is a leader in communications infrastructure, providing customers with fibre and bandwidth connectivity and "cloud" services. On January 15, 2016, Zayo acquired Allstream, which was then a wholly-owned subsidiary of Manitoba Telecom Services Inc., to become the only pan-U.S./Canada fibre network provider. Zayo is a subsidiary of Zayo

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8 Nowlan Affidavit at paras. 42-47; Responding Motion Record, Tab 1, pp. 13-14.

Group Holdings, Inc., a public company listed on the New York Stock Exchange that provides global bandwidth infrastructure services to clients all over the world.[9]

18. Allstream had enjoyed the benefit of a long relationship with Primus pursuant to which Allstream provided various telecommunications services to Primus in exchange for substantial payment by Primus to Allstream. This was an important and presumably profitable relationship that Zayo intended to assume following its acquisition of Zayo. As at the date of the Primus Entities' CCAA filing, Primus and MTS or Allstream were party to a total of 13 agreements and related amendments (collectively, the "**Contracts**"). On cross-examination, Julie Wong Barker, Senior Legal Counsel at Zayo, refused to answer questions regarding the revenues or profits earned by Allstream or MTS from the Contracts. Nevertheless, the Contracts are clearly lucrative for Zayo. For example, Zayo claims an unpaid balance of $655,941.64 on invoices rendered in December 2015 alone. In total, Zayo claims it is owed $1,228,779.81 in pre-filing arrears,[10] and is eager to continue the relationship.

Communications with Zayo during the CCAA Proceedings

19. In accordance with the E-Service Protocol of the Commercial List, which was adopted pursuant to the Initial Order, any party wishing to receive electronic service of documents filed in a proceeding is required to file a duly completed Request for Electronic

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[9] Nowlan Affidavit at paras. 60-63; Responding Motion Record, Tab 1, pp. 17-18; Affidavit of Julie Wong Barker sworn June 10, 2016 ("**Wong Barker Affidavit**") at para. 7; Motion Record of Zayo Canada Inc. ("**Zayo's Motion Record**"), Tab 3, pp. 11-12.

[10] Wong Barker Affidavit at paras. 8-9 and 41-43; Zayo's Motion Record, Tab 3, pp. 3 and 10-11; Cross-Examination of Julie Wong Barker held July 20, 2016 ("**Wong Barker Cross**"), Q. 112-115; Supplementary Motion Record of Zayo Canada Inc. ("**Zayo's Supplementary Motion Record**"), Tab 2, p. 35-36.

Service ("**RES**"). On January 21, 2016, two days after the Primus Entities were granted protection under the CCAA, Ms. Wong Barker wrote to the Monitor to request that Zayo be added to "any creditors' list" and be provided with "all required notices". Ms. Wong Barker also asked when proof of claim forms would be available. However, Ms. Wong Barker did not file a Notice of Appearance or RES on behalf of Zayo, nor did she ask that Zayo be added to the electronic service list (the "**Service List**") maintained by the Primus Entities and posted to the Monitor's website in respect of the Primus Entities' CCAA proceedings (the "**Monitor's Website**") under the heading "Service List".[11]

20. On January 22, 2016, the Monitor replied and advised that Zayo was included in the list of known creditors and would receive a "Notice to Creditors" document in the mail in the coming days. The Monitor also advised that, at that time, no claims process had been approved by the Court so no proof of claim form needed to be submitted. The Monitor also provided a link to the Monitor's Website and advised that any updates would be posted on the website.[12]

21. On January 26, 2016, the Monitor mailed a "Notice to Creditors" to known creditors of the Primus Entities, including Zayo. Among other things, the Notice to Creditors advised that the Primus Entities had obtained protection under the CCAA, provided a general overview of the conduct of the CCAA proceedings and provided a link to the

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[11] Wong Barker Affidavit at paras. 11-13; Zayo's Motion Record, Tab 3, pp. 12-13; Nowlan Affidavit at para. 12; Responding Motion Record, Tab 1, p. 4.

[12] Wong Barker Affidavit at para. 14; Zayo's Motion Record, Tab 3, p. 13; Nowlan Affidavit at paras. 13-14; Responding Motion Record, Tab 1, p. 4.

Monitor's Website. On the same day, the Monitor advised Ms. Wong Barker that the Notice to Creditors had been mailed to Zayo and was also available on the Monitor's Website.[13]

Zayo Consents to the Assignment of the Contracts and Requests Reciprocal Consent from Primus

22. On January 22, 2016, January 26, 2016 and January 28, 2016, Consent Letters which collectively requested Zayo's consent to the assignment of the Contracts to Birch were mailed to Zayo. As described above, the Consent Letters were identical in substance, and each advised that if consents were not received by a certain date, the Primus Entities reserved the right to bring a motion to compel assignments on the terms and conditions set forth in section 11.3 of the CCAA. Subsection 11.3(4) expressly provides that a court cannot compel an assignment of an agreement unless it is satisfied that all monetary defaults under the relevant agreement will be paid.[14]

23. On January 29, 2016, Ms. Wong Barker sent a letter to the Monitor's email address in respect of the Primus Entities in which Zayo advised that it was consenting to the assignment of the Contracts, but requested a reciprocal consent from Primus to the assignment of the Contracts to Allstream. The Contracts had previously been held by MTS, a wholly-owned subsidiary of Manitoba Telecom Services Inc. and a party related to Allstream prior to its acquisition by Zayo. Zayo sought consents in connection with Zayo's

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[13] Wong Barker Affidavit at para. 15; Zayo's Motion Record, Tab 3, p. 13; Nowlan Affidavit at para. 14; Responding Motion Record, Tab 1, p. 4.

[14] Nowlan Affidavit at paras. 66-68; Responding Motion Record, Tab 1, pp. 19-20; Wong Barker Affidavit at paras. 16-17; Zayo's Motion Record, Tab 3, p. 14.

acquisition of Allstream so that Zayo could ultimately acquire and derive the benefit of the Contracts. The letter also sought a release in favour of MTS.[15]

24. Zayo claims after-the-fact that these consents and releases were requested only to assist the Primus Entities, but this explanation is implausible on its face. Zayo has provided no evidence that MTS could not have fulfilled the Contracts. Nor can Zayo offer any explanation for how releasing MTS was for the benefit of the Primus Entities. Zayo refused all questions about its agreement with MTS, but a plausible inference is that it was a term of the sale that the Contracts be assigned to Allstream and MTS be released from any potential liability.[16] Zayo was quite properly advancing its own self-interest, despite Ms. Wong Barker's far-fetched protestations to the contrary.

25. Between January 29, 2016 and March 1, 2016, various iterations of a consent were circulated by the parties. The parties eventually reached agreement on the form of the letter and on March 1, 2016, Zayo executed the letter (as amended on March 2, 2016, the "**Consent Agreement**"). At no time during these negotiations did Zayo raise the issue of its pre-filing arrears.[17]

26. As with the initial Consent Letters sent to Zayo, the Consent Agreement notified Zayo that: (1) to the extent that any consents to assignment were not received, the Primus Entities would bring a motion to compel assignments on the terms and conditions

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[15] Nowlan Affidavit at paras. 75-76; Responding Motion Record, Tab 1, pp. 22-23; Wong Barker Affidavit at para. 14; Zayo's Motion Record, Tab 3, p. 13

[16] Wong Barker Cross, Q. 218-220; Zayo's Supplementary Motion Record, Tab 2, p. 61.

[17] Nowlan Affidavit at paras. 78-88; Responding Motion Record, Tab 1, pp. 24-27.

set forth in section 11.3 of the CCAA; and (2) following the assignment, Birch would only be responsible for obligations under the Contracts arising after the closing of the Transaction. In short, the Consent Agreement signalled that Zayo would not be paid its pre-filing arrears if it consented to the assignment.[18]

27. Neither the Primus Entities nor the Monitor ever suggested that Zayo's pre-filing arrears would be paid if Zayo signed the Consent Agreement. On the contrary, as noted above, the Consent Letters and the Consent Agreement all explicitly stated that Birch would be responsible for all obligations arising after the closing of the Transaction. Zayo is a large, sophisticated corporation that was advised by Ms. Wong Barker, its experienced in-house counsel, who testified that:

(a) she has read section 11.3 of the CCAA;

(b) she understands that section 11.3 allows the court to make an order assigning a CCAA debtor's rights and obligations under an agreement to a third party despite the objections of the counterparty to the contract; and

(c) she understands that section 11.3(4) requires payment of monetary defaults under the contract as a condition of obtaining an order section 11.3.[19]

28. In any event, even if Zayo did not appreciate the legal effect of the Consent Agreement on its ability to be paid its pre-filing arrears, Zayo could easily have retained external counsel with more experience in CCAA matters. Ms. Wong Barker conceded that she was not competent to practice CCAA litigation, but that she was aware from her years in Cassels Brock's Financial Services Group that there were specialists who practiced in that

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[18] Consent Agreement, Exhibit Q to the Nowlan Affidavit; Responding Motion record, Tab 1Q, pp. 252-255.

[19] Wong Barker Cross, Q. 154-166; Zayo's Supplementary Motion Record, Tab 2, p. 45-48.

field. Zayo, a multi-billion dollar global company, chose not to retain CCAA counsel and refused to explain why.[20]

29. As with all of the Primus Entities' other contractual counterparties, Zayo had every opportunity to request that its pre-filing arrears be paid as a condition of providing its consent. Indeed, several of the Primus Entities' other contractual counterparties did just that. Between January 22, 2016 and March 1, 2016, nine counterparties contacted the Primus Entities to advise that they were willing to consent to the assignment of their agreements, but only on the condition that their pre-filing arrears be paid. The Primus Entities and Birch negotiated with these counterparties and reached agreements with them as to the quantum of their pre-filing arrears. Many of the Primus Entities' other contractual counterparties whose contracts were deemed essential by Birch simply did not provide consents and were paid their pre-filing arrears pursuant to section 11.3(4) of the CCAA.[21]

30. By contrast, Zayo willingly executed the Consent Agreement without requiring that its pre-filing arrears be paid. The consideration for which Zayo bargained and which it ultimately received was a reciprocal consent by Primus to the assignment of the Contracts to Allstream, and a corresponding release in favour of MTS. This permitted Zayo to continue to receive payment under and enjoy the benefit of these presumably profitable Contracts.

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[20] Wong Barker Cross, Q. 105-110 and 167; Zayo's Supplementary Motion Record, Tab 2, pp. 34-35 and 48.

[21] Nowlan Affidavit at paras. 50-59; Responding Motion Record, Tab 1, pp. 15-17.

The Approval and Vesting Order, the Distribution Order and the Assignment Order

31. On February 25, 2016, the Primus Entities obtained orders that, among other things:

(a) approved the terms of the APA and vested all of the purchased assets in Birch (the "**Approval and Vesting Order**"); and

(b) authorized the Monitor to distribute from the proceeds of sale of the Transaction (the "**Proceeds**") amounts to, among others, the Syndicate (the "**Distribution Order**"). Such a distribution was to occur within five business days from the filing date of the Monitor's certificate certifying that the closing conditions provided for in the APA had been satisfied (the "**Monitor's Certificate**").[22]

32. The Distribution Order also provided for the maintenance of a holdback (the "**Holdback**") in an amount sufficient to satisfy certain priority charges and expenses and, subject to the Holdback, authorized subsequent distributions to the Syndicate from the Proceeds. The Distribution Order did not provide for any payment to Zayo.[23]

33. On March 2, 2016, the Primus Entities obtained an order under section 11.3 of the CCAA assigning the rights and obligations of the Primus Entities under the Essential Contracts for which consents had not been obtained to Birch (the "**Assignment Order**").[24]

34. On April 1, 2016, all of the closing conditions provided for in the APA were satisfied, the Transaction closed and the Monitor delivered the Monitor's Certificate. Shortly thereafter, the Monitor commenced distributing the Proceeds in accordance with the

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22 Nowlan Affidavit at para. 16; Responding Motion Record, Tab 1, p. 5.

23 Third Report at paras. 7 and 32.

24 Nowlan Affidavit at para. 17; Responding Motion Record, Tab 1, p. 6.

payment scheme provided for in the Distribution Order. While the exact amount of the Proceeds has not been finalized, it is currently expected that the Syndicate will suffer a shortfall on the debt owing to it and that no amounts will be available for unsecured creditors.[25]

35. Zayo's motion seeks payment of pre-filing arrears in the amount of $1,228,779.81 from the Proceeds. This is more than Zayo would have been entitled to receive from the Proceeds under the APA, which provided that Birch would be responsible for the first $3 million in Cure Costs, and that Birch and the Primus Entities would split the remainder of the Cure Costs payable equally between them. Given that Cure Costs to date have totaled more than $3 million, the Primus Entities' estate would only have been responsible for half of the amount claimed by Zayo, at most. As such, even if Zayo is successful on this motion, only half of the amount sought by it can be payable from the Proceeds.[26]

PART III ~ ISSUES

36. This motion raises one issue: should Zayo be paid its pre-filing arrears notwithstanding that it chose not to request them as a condition of executing the Consent Agreement?

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25 Third Report at para. 35.

26 Nowlan Affidavit at para. 35; Responding Motion Record, Tab 1, p. 10; Third Report at paras. 28-29.

PART IV ~ LAW AND ARGUMENT

37. BMO, as agent for the Syndicate, submits that Zayo's motion should be dismissed for the following reasons:

(a) the order sought by Zayo is inconsistent with the principles of certainty, predictability and equitable treatment of similarly-situated creditors that are fundamental to the CCAA; and

(b) Zayo is a sophisticated commercial party that should not be permitted to resile from the Consent Agreement, particularly in circumstances where the Primus Entities' other stakeholders would be prejudiced were it permitted to do so.

A. Zayo's Position is Inconsistent with the Principles of the CCAA

38. The crux of Zayo's complaint is that it has somehow been treated unfairly by the Primus Entities and the Monitor, who should have informed Zayo that it would not have been entitled to payment of its pre-filing arrears if it consented to the assignment of the Contracts. This argument is fundamentally flawed in at least two respects: (1) it ignores the limitations on a court's power to make orders under the CCAA; and (2) it amounts to a preference in favour of Zayo.

1. There are Limitations on a Court's Power to Make Orders under the CCAA

39. Zayo argues that the Court has the power under section 11 of the CCAA, and pursuant to its inherent and equitable jurisdiction, to make the order sought by Zayo. While the Court's power to make orders under the CCAA is broad, it is not unlimited and must be

exercised in a manner consistent with the purposes and provisions of the CCAA. These limitations are reflected in section 11 itself:

> General power of court
>
> 11. Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, **subject to the restrictions set out in this Act**, on notice to any other person or without notice as it may see fit, **make any order that it considers appropriate in the circumstances**.[27] (emphasis added)

In short, section 11, the very provision relied upon by Zayo, provides that the Court cannot make an order that contravenes another section of the CCAA or is inappropriate in the circumstances.

40. The provision of the CCAA that is at the heart of this motion is section 11.3, which provides for the compulsory assignment of the debtor's contracts on certain terms and conditions:

> Assignment of agreements
>
> 11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.
>
> ...
>
> Restriction
>
> (4) **The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement** —

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27 *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [CCAA], s. 11.

> other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — **will be remedied on or before the day fixed by the court**.[28] (emphasis added)

41. In enacting section 11.3, Parliament codified what had been the general approach to assignment issues under the CCAA, while also clarifying certain matters that had been to that time uncertain.[29] Accordingly, one purpose of enacting section 11.3 was to set out the framework to be followed in compelling the assignment of contracts to which the debtor was a party, and to provide certainty and predictability to all stakeholders in an insolvency regarding how that assignment process would unfold.

42. In seeking Zayo's consent to the assignment of the Contracts, the Primus Entities expressly notified Zayo that they would seek an order under section 11.3 only if Zayo's consent were withheld. Subsection 11.3(4) is clear on its face and Zayo's in-house counsel admitted that she read it and understood it. Instead of withholding consent, Zayo chose to ask Primus to consent to the assignment of the Contracts from MTS to Allstream, and to grant MTS a release from all obligations. Zayo did not ask for payment of its pre-filing arrears as a condition of its consent, and was never told it would receive them. Having chosen this path, Zayo should not now be permitted to avoid the consequences of its decision. Such a result would be contrary to the spirit of section 11.3 and should not be ordered by the Court.

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[28] CCAA, *Ibid.*, s. 11.3.

[29] *Re Veris Gold Corp.*, 2015 BCSC 1204, 2015 Carswell 1949 at paras. 53-56 [*Veris Gold*]; Brief of Authorities of Zayo Canada Inc. ("**Zayo's BOA**"), Tab 7.

43. The second restriction on the Court's discretion under the CCAA is that the order must be appropriate in the circumstances. In its factum, Zayo correctly cites *Century Services* as the landmark case interpreting the discretionary authority of the courts to make orders under the CCAA. However, granting Zayo the relief sought would undermine the CCAA's goals of certainty, predictability and equal treatment as described in *Century Services*:

> The general language of the CCAA should not be read as being restricted by the availability of more specific orders. **However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising CCAA authority. Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA.** The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.[30]

44. The order sought by Zayo is neither necessary nor appropriate in the circumstances. It would re-write the common ground achieved by the Primus Entities pursuant to the Approval and Vesting Order, the Distribution Order and the Assignment Order. It would treat Zayo differently than all other creditors insofar as Zayo would have been able to consent to the assignment of the Contracts, extract corresponding

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[30] *Re Ted Leroy Trucking [Century Services] Ltd.*, 2010 SCC 60, [2010] 3 S.C.R. 379 at para. 70; Zayo's BOA, Tab 1. See also *Veris Gold*, *Ibid.* at para. 55; Zayo's BOA, Tab 7; *Re Crystallex International Corp.*, 2012 ONCA 404, 2012 CarswellOnt 7329 at para. 63; Brief of Authorities of the Syndicate ("**Syndicate's BOA**"), Tab 6.

assignments and releases from the Primus Entities, and still receive 100% of its unsecured pre-filing arrears without having to negotiate for such a result.

45. In addition, Zayo has not acted with due diligence. Zayo had every opportunity to withhold its consent. It did not do so. Instead, it waited until after the Assignment Order and the Distribution Order were issued, and distributions pursuant to the Distribution Order were made, to request that its pre-filing arrears be paid. Granting the order would permit Zayo to circumvent the provisions of section 11.3 of the CCAA and would do nothing to promote the objectives of certainty and predictability required by that section. As described in further detail below, granting the order would also effectively permit Zayo, a large and sophisticated commercial entity, to resile from a bargain that it entered into willingly with the benefit of legal advice. Such an order is not appropriate in the circumstances.

2. Zayo was not Treated Unfairly

46. Zayo also argues that it was treated unfairly by the Primus Entities and the Monitor. More specifically, Zayo argues that the Primus Entities and the Monitor should have informed Zayo that it may have been entitled to payment of its pre-filing arrears under section 11.3 of the CCAA had Zayo withheld its consent to the assignment of the Contracts and had the Primus Entities chosen to compel an assignment. This argument is flawed in two respects.

47. First, Zayo was treated in precisely the same manner as other similarly-situated creditors (*i.e.*, the Primus Entities' other contractual counterparties), the vast majority of whom withheld their consent and pursued their rights under section 11.3 without

having been advised to do so by the Primus Entities or the Monitor. The equality of treatment of similarly-situated creditors is a long-standing principle of Canadian insolvency law.[31]

48. Zayo received the same form of Consent Letter that all of the Primus Entities' other contractual counterparties received and was directed to section 11.3 of the CCAA in the same manner as all of the Primus Entities' other contractual counterparties. The Consent Letters explicitly disclosed that an order under section 11.3 would be on "terms and conditions", and the text of that provision plainly discloses that those terms and conditions must include the payment of monetary defaults under the agreements to be assigned. Neither the Primus Entities nor the Monitor ever suggested that monetary defaults under the Contracts would be paid if consent were granted.

49. The difference between Zayo and the Primus Entities' other contractual counterparties is not the manner in which they were treated – it is the manner in which they responded to this treatment. Whereas some of the Primus Entities' other contractual counterparties negotiated Cure Costs, and others withheld their consent and insisted on receiving their pre-filing arrears under section 11.3, Zayo chose neither of these options. Instead, it consented to the assignment of the Contracts in exchange for the assignments and releases it received under the Consent Agreement.

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[31] *Re Clark Martin & Co.*, 1933 CarswellMan 5 at paras. 17-18 (C.A.); Syndicate's BOA, Tab 4; *Ivorylane Corp. v. Country Style Realty Ltd.*, 2005 CarswellOnt 2516 at para. 15 (C.A.); Syndicate's BOA, Tab 11; *Re SemCanada Crude Co.*, 2010 ABCA 403, 2010 CarswellAlta 2459 at paras. 40-41; Syndicate's BOA, Tab 13; *Re League Assets Corp.*, 2015 BCSC 42, 2015 CarswellBC 61 at paras; 94-95; Syndicate's BOA, Tab 12; *Statutory Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (Ottawa: Industry Canada, 2014) at 6; Syndicate's BOA, Tab 20. See also *Re Canadian Airlines Corp.*, 2000 ABCA 149, 2000 CarswellAlta 503; Brief of Authorities of the Syndicate, Tab 2 and its progeny, where it has been held that creditors with similar legal rights should be placed in the same class for the purposes of voting on a plan of compromise or arrangement under the CCAA.

50. Had Zayo requested payment of its pre-filing arrears during the assignment process, this would have allowed the parties to negotiate the quantum of Cure Costs payable to Zayo, if any. It would also have permitted the Primus Entities and Birch to make an informed decision as to whether the Contracts were, in fact, Essential Contracts, or whether it would make more economic sense to seek an alternative provider of the services provided under the Contracts.

51. Second, the Monitor fulfilled its duties to all creditors and cannot be said to have treated Zayo unfairly. It is well-established that the Monitor is an officer of the court whose duty is to impartially represent the interests of *all creditors*.[32] The Monitor "must not be an advocate for the debtor company or any party in the CCAA process. It has a duty to evaluate the activities of the debtor company and comment independently on such actions in any report to the court and the creditors."[33]

52. Zayo's complaints regarding the conduct of the Monitor amount to an argument that the Monitor was somehow obliged to explain the conduct of a CCAA proceeding to a large and sophisticated commercial entity and advise on the best course of action.

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[32] *Re Confederation Treasury Services Ltd.*, 1995 CarswellOnt 1169 at para. 8 (Gen. Div. (In Bankruptcy)); Syndicate's BOA, Tab 5; *Impact Tool & Mould Inc. (Receiver of) v. Impact Tool & Mould Inc. (Trustee of)*, 2016 ONSC 133, 2016 CarswellOnt 21 at paras. 69-74; Syndicate's BOA, Tab 10.

[33] Kevin P. McElcheran, *Commercial Insolvency in Canada* (Markham, Ont.: LexisNexis Butterworths, 2011) at 245; Syndicate's BOA, Tab 19; *Re Winalta Inc.*, 2011 ABQB 399, 2011 CarswellAlta 2237 at para. 68; Syndicate's BOA, Tab 16; *Re Can-Pacific Farms Inc.*, 2012 BCSC 760, 2012 CarswellBC 1528 at para. 19; Syndicate's BOA, Tab 1.

53. The Monitor has fully and adequately discharged its duties to evaluate the activities of the Primus Entities and to comment independently on such activities. The Monitor's role is not to be an advocate for any party in these CCAA proceedings, including Zayo, or to educate any party as to the legal consequences of its actions. As described in further detail below, Zayo's argument is premised on the false assumption that it was entitled to have the Monitor and/or the Primus Entities act as an advisor to it, in circumstances where neither the Monitor nor the Primus Entities were aware of Zayo's mistake. The law does not impose such a duty on the Primus Entities or the Monitor. Rather, the law requires the Monitor to treat all of the Primus Entities stakeholders' fairly and equitably, and to treat similarly-situated creditors in a consistent manner. This is precisely what the Monitor has done in this case.

B. Zayo Should Not be Permitted to Resile from the Consent Agreement

54. Zayo's position is also fundamentally inconsistent with the principles of commercial certainty and stability underlying Canadian contract law insofar as it would essentially permit Zayo to resile from the Consent Agreement. There is no basis at law or in equity to permit Zayo to do so, particularly given that the Primus Entities' other stakeholders would be prejudiced were it permitted to do so.

1. The Court Should Give Effect to the Consent Agreement

55. For centuries, courts have affirmed that the freedom to contract is a paramount public policy and that contracts freely entered into must be enforced by the

courts.[34] The circumstances in which a Court will refuse to give effect to the terms of the parties' bargain are rare.[35] Such circumstances certainly do not include a situation where a sophisticated commercial party concludes that it may have been able to negotiate a more favourable agreement.[36] Rather, a bargain between sophisticated commercial parties will be given effect in accordance with the intentions of the parties, evidenced by the words they have used.[37]

56. The Consent Agreement is a contract that Zayo entered into freely, having received the benefit of legal advice from its experienced internal counsel. It is the result of negotiations between the parties, as a result of which Primus agreed to assign the Contracts from MTS to Allstream, and to grant a release in favour of MTS. There is no allegation of duress or unconscionability. Having obtained the benefits of that bargain, Zayo now seeks to have its cake and eat it too, and therefore asks the Court to also award its pre-filing arrears. There is no basis at law or in equity for the Court to do so.

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[34] See Angela Swan, *Canadian Contract Law*, 3rd Ed. (Markham: LexisNexis, 2012) at §9.4, citing *Printing and Numerical Registering Co. v. Sampson* (1875), L.R. 19 Eq. 462 at 465: "...if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred."; Syndicate's BOA, Tab 17.

[35] *Tercon Contractors Ltd. v. British Columbia (Ministry of Transportation & Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69 at para. 117, *per* Binnie J., dissenting on other grounds; Syndicate's BOA, Tab 15.

[36] *Disera v. Liberty Developments Corp.*, 2007 CarswellOnt 2571 at para. 14 (S.C.J.), aff'd 2008 ONCA 34, 2008 CarswellOnt 194; Syndicate's BOA, Tab 7.

[37] *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 at paras. 45-46; Syndicate's BOA, Tab 9.

2. Zayo Cannot Rely on its Unilateral Mistake to Resile from the Consent Agreement

57. Throughout its factum, Zayo argues that it did not know that it would only have been entitled to payment of its pre-filing arrears if it refused to consent to the assignment of the Contracts. Zayo does not, and cannot, claim that the Primus Entities or the Monitor ever represented that pre-filing arrears would be paid if Zayo consented to the assignment of the Contracts. Moreover, Zayo's in-house counsel concedes that she read and understood section 11.3 of the CCAA. If she somehow assumed that pre-filing arrears would be paid even if Zayo consented to the assignments, even though no one ever represented this to be the case, there was no way for the Primus Entities to know of her belief in this regard. This was a unilateral mistake, which cannot entitle Zayo to resile from the Consent Agreement.

58. In his leading text *The Law of Contract in Canada*, Professor G.H.L. Fridman explains a unilateral mistake as follows:

> [I]t is important to distinguish these various kinds of bilateral mistake from unilateral mistake, where only one party is in error. Here it may be vital to the final result whether the party not in error is aware or unaware of the other party's mistake. If the party not in error knows or ought to know of the other's mistake, any purported agreement between them may not be enforceable in equity (whatever its effects may be at common law), on the ground that equity will not permit a party to take advantage of the error in offering or accepting by the other party. **The rationale of such cases is that equity penalizes unconscionable conduct, whether it actually constitutes fraud or involves something amounting to fraud in the view of equity. It must be unfair, unjust or unconscionable to enforce of uphold the contract.**
>
> It is not necessary for the party seeking to avoid the contract on the ground of mistake to prove that the other party caused or induced the mistake (although if such causation is established it might lead to rescission for fraud, or for innocent

> misrepresentation). As long as the unmistaken party knows of the mistake, without having caused it, that party cannot resist a suit for rectification on the grounds of mistake. The same will apply if the other party had good reason to know of the mistake and to know what was intended. The converse of that proposition as to knowledge of the other party's mistake is that **if the unmistaken party is ignorant of the other's mistake the contract will be valid and neither rescission nor rectification will be possible**.[38] (emphasis added)

59. Accordingly, the fact that one party was mistaken when it entered into an agreement is not *per se* a sufficient basis for relief – there must also be conduct on the part of the other party that renders it unconscionable to permit that party to benefit from the agreement.[39]

60. In this case, as a threshold matter it is not even clear if Zayo was operating under a mistaken belief of fact or law. Ms. Wong Barker, Zayo's in-house counsel, admits that she read section 11.3 of the CCAA at the time and understood that it provided for payment of monetary defaults only where the counter-party refuses to consent and the debtor chooses to bring a motion under subsection 11.3(4).[40] If there was any mistake on Zayo's part, it could only be that its pre-filing arrears would also be paid in priority to all other secured or unsecured claims if Zayo executed the Consent Letter. None of Zayo, the Monitor or the Primus Entities ever so much as suggested such an outcome, and the Primus

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[38] G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Scarborough: Carswell, 2011) at 252-254; Syndicate's BOA, Tab 18. See also *Canadian Imperial Bank of Commerce v. Wilson*, 1997 CarswellOnt 3077 at para. 41 (Gen. Div.); Syndicate's BOA, Tab 3.

[39] *Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd.*, [2002] 1 S.C.R. 678 at paras. 38-39; Syndicate's BOA, Tab 14; *Fraser v. Houston*, 2006 CarswellBC 552 at para. 34 (C.A.), leave to appeal refused 2006 CarswellBC 2228 (S.C.C.); Syndicate's BOA, Tab 8.

[40] Wong Barker Cross, Q. 154-166; Zayo's Supplementary Motion Record, Tab 2, p. 45-48.

Entities certainly had no reason to believe Zayo was operating under such a misapprehension.

61. To the contrary, and as described above, the Primus Entities simply advised Zayo that Birch would only be responsible for post-closing obligations if Zayo consented, and that the Primus Entities would seek an order under section 11.3 should Zayo withhold its consent to the assignment of the Contracts. In response, Zayo did not ask for payment of its pre-filing arrears, but instead asked for various counter-assignments in favour of Allstream, and releases in favour of MTS.

62. Zayo is a sophisticated commercial party that was at all times represented and advised by its in-house counsel. The Primus Entities had no reason to question Zayo's ability to read and understand section 11.3 of the CCAA, or to believe that Zayo was operating under the mistaken belief that its pre-filing arrears would be paid pursuant to the Consent Agreement. If Zayo was unsure as to the legal effect of entering into the Consent Agreement, it could and should have retained external CCAA counsel. There was no reason for the Primus Entities to suspect that Zayo was operating under any mistake. Accordingly, any unilateral mistake on Zayo's part does not entitle it to resile from the Consent Agreement and to receive payment of its pre-filing arrears.

3. The Order Sought would Prejudice Stakeholders

63. In its factum, Zayo argues that no party will suffer any prejudice if its motion is successful. This is manifestly incorrect. Zayo's motion seeks payment of pre-filing arrears in the amount of $1,228,779.81 from the Proceeds. As described above, this is at least twice as much as Zayo would have been entitled to receive from the Primus Entities under

the APA. Accordingly, if Zayo's motion is successful, any potential distribution available to the Syndicate, which is comprised of the Primus Entities' senior secured lenders, will be reduced by at least twice as much as it would have been reduced had Zayo received payment of its Cure Costs as contemplated by the APA.

64. In addition, the order sought would re-write the common ground achieved by the Primus Entities pursuant to the Approval and Vesting Order, the Distribution Order and the Assignment Order, which have been relied on by various stakeholders in the Primus Entities' CCAA proceedings.

PART V ~ CONCLUSION

65. The process followed by the Primus Entities in obtaining consents was fair, reasonable and consistently applied. Zayo had every opportunity to request that its pre-filing arrears be paid as a condition of executing the Consent Agreement and was even directed to section 11.3 before it did so. Whereas many of the Primus Entities' contractual counterparties withheld their consent and were ultimately paid their pre-filing arrears, Zayo bargained for a different deal. It willingly executed the Consent Agreement in exchange for Primus's reciprocal consent to the assignment of the Contracts and the release of MTS. If Zayo was mistaken as to the legal effect of its actions, it only has itself to blame for this mistake. There is no basis at law or in equity to permit Zayo to resile from the Consent Agreement. Such a result would be contrary to the spirit of section 11.3 of the CCAA and the principles of commercial certainty, stability and predictability that are the cornerstones of Canadian contractual law.

PART VI ~ ORDER REQUESTED

66. For the foregoing reasons, the Syndicate respectfully requests that Zayo's motion be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of August, 2016.

Davies Ward Phillips & Vineberg LLP
Lawyers for Bank of Montreal
as Agent for the Syndicate

SCHEDULE "A"

LIST OF AUTHORITIES

Jurisprudence

1. *Can-Pacific Farms Inc., Re*, 2012 BCSC 760, 2012 CarswellBC 1528
2. *Canadian Airlines Corp. Re*, 2000 ABCA 149, 2000 CarswellAlta 503
3. *Canadian Imperial Bank of Commerce v. Wilson*, 1997 CarswellOnt 3077 (Gen. Div.)
4. *Clark Martin & Co., Re*, 1933 CarswellMan 5 (C.A.)
5. *Confederation Treasury Services Ltd., Re*, 1995 CarswellOnt 1169 (Gen. Div. (In Bankruptcy))
6. *Crystallex International Corp., Re*, 2012 ONCA 404, 2012 CarswellOnt 7329
7. *Disera v. Liberty Developments Corp.* 2007 CarswellOnt 2571 (S.C.J.), aff'd 2008 ONCA 34, 2008 CarswellOnt 194
8. *Fraser v. Houston*, 2006 CarswellBC 552 (C.A.)
9. *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423
10. *Impact Tool & Mould Inc. (Receiver of) v. Impact Tool & Mould Inc. (Trustee of)*, 2016 ONSC 133, 2016 CarswellOnt 21
11. *Ivorylane Corp. v. Country Style Realty Ltd.*, 2005 CarswellOnt 2516 (C.A.)
12. *League Assets Corp. Re*, 2015 BCSC 42, 2015 CarswellBC 61
13. *SemCanada Crude Co., Re*, 2010 ABCA 403, 2010 CarswellAlta 2459
14. *Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd.*, [2002] 1 S.C.R. 678
15. *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379
16. *Tercon Contractors Ltd. v. British Columbia (Ministry of Transportation & Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69
17. *Veris Gold Corp., Re*, 2015 BCSC 1204, 2015 Carswell 1949
18. *Winalta Inc., Re*, 2011 ABQB 399, 2011 CarswellAlta 2237

Secondary Sources

19. Angela Swan, *Canadian Contract Law*, 3rd Ed. (Markham: LexisNexis, 2012)

20. G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Scarborough: Carswell, 2011)

21. Kevin P. McElcheran, *Commercial Insolvency in Canada* (Markham, Ont.: LexisNexis Butterworths, 2005)

22. *Statutory Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (Ottawa: Industry Canada, 2014)

SCHEDULE "B"

STATUTORY PROVISIONS

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

...

General power of court

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

...

Assignment of agreements

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

Exceptions

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

(a) an agreement entered into on or after the day on which proceedings commence under this Act;

(b) an eligible financial contract; or

(c) a collective agreement.

Factors to be considered

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

(a) whether the monitor approved the proposed assignment;

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

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

Restriction

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

Copy of order

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

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF PT HOLDCO, INC., PRIMUS TELECOMMUNICATIONS CANADA, INC., PTUS, INC., PRIMUS TELECOMMUNICATIONS, INC., AND LINGO, INC.	**Court File No. CV-16-11257-00CL**

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
(PROCEEDING COMMENCED AT TORONTO)

RESPONDING FACTUM OF
BANK OF MONTREAL
AS AGENT FOR THE SYNDICATE

Davies Ward Phillips & Vineberg LLP
155 Wellington Street West
Toronto, ON M5V 3J7

Matthew Milne-Smith (LSUC #44266P)
mmilne-smith@dwpv.com
Natasha MacParland (LSUC #42383G)
nmacparland@dwpv.com
Dina Milivojevic (LSUC #64521U)
dmilivojevic@dwpv.com
Tel: 416.863.0900
Fax: 416.863.0871

Lawyers for Bank of Montreal
As Agent for the Syndicate