

**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.

Applicants

**FACTUM OF THE APPLICANTS
(Re Assignment of Agreements, Returnable March 2, 2016)**

Dated: March 1, 2016

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PART I - INTRODUCTION

1. This motion is brought by the Applicants, PT Holdco, Inc. ("**Holdco**"), Primus Telecommunications Canada Inc. ("**Primus Canada**" and together with Holdco, the "**Canadian Primus Entities**"), PTUS, Inc. ("**PTUS**"), Primus Telecommunications, Inc. ("**PTI**") and Lingo, Inc. ("**Lingo**", and together with PTUS and PTI, the "**U.S. Primus Entities**" and collectively with the Canadian Primus Entities, the "**Primus Entities**").
2. The Primus Entities were granted protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") pursuant to the Initial Order of Justice Penny dated January 19, 2016 (the "**Initial Order**"). FTI Consulting Canada Inc. ("**FTI**") was appointed as monitor of the Primus Entities (in such capacity, the "**Monitor**") in these CCAA proceedings.
3. The Initial Order was recognized in the United States pursuant to Chapter 15 of the United States Bankruptcy Code on January 21, 2016 in the United States Bankruptcy Court for Delaware (the "**Chapter 15 Proceedings**").

4. On February 25, 2016, Justice Hainey granted orders, among other things, approving the Agreement of Purchase and Sale made and entered into as of January 19, 2016 (the "Birch APA") between some of the Primus Entities, as vendors (in such capacity, the "Vendors") and Birch Communications, Inc. (in such capacity, "Birch", and Birch or its permitted assigns pursuant to the Birch APA, as applicable, being the "Purchaser") and, on closing, vesting all of the Purchased Assets in the Purchaser free and clear of any Encumbrances other than Permitted Encumbrances (as defined in the Birch APA).

5. Pursuant to the Birch APA, the Vendors are obligated to use commercially reasonable efforts to obtain certain consents and approvals from counterparties to certain contracts that are to be assigned to the Purchaser. As described in greater detail below, the Vendors have provided consent agreements to the appropriate counterparties and are communicating with representatives of the counterparties in an attempt to secure these consents prior to the return of this motion. To the extent that any of those consents have not been obtained by the return of this motion, the Vendors are obligated under the Birch APA to seek from this Court an order directing assignment of these agreements.

6. Accordingly, the Vendors now seek an order, substantially in the form of the draft order located at Tab 3 of the Second Supplemental Motion Record, assigning their rights and obligations to the agreements in Schedule "A" thereto to the Purchaser and vesting in the Purchaser all rights, title, and interests in such contracts at the closing of the Birch APA. The assignments sought herein are necessary to close the sale transaction that this Court determined was in the best interest of stakeholders on February 25, 2016. The Syndicate (defined below) and Monitor are each supportive of the relief sought herein. No party objects to the relief sought as at the date of this factum.

PART II - THE FACTS

7. The facts with respect to this application are more fully set out in the affidavit of Michael Nowlan, sworn January 18, 2016, in support of the Initial Order (the "Initial

Order Affidavit”), the affidavit of Michael Nowlan, sworn February 2, 2016 in support of, among other things, the order sought herein (the “AVO Affidavit”), the first affidavit of Robert Nice, sworn February 20, 2016 in support of the orders sought and granted on February 25, 2016 (the “Supplementary AVO Affidavit”), and the second affidavit of Michael Nowlan, sworn February 29 2016 (the “Supplemental Assignment Affidavit”), sworn in support of the order sought herein.¹

A. Background

8. The Primus Entities re-sell residential and commercial telecommunications services within Canada and the United States.² Since early 2012, and as a result of economic conditions described in detail in the Initial Order Affidavit, the Primus Entities experienced ongoing, severe liquidity issues due to, among other things, over-leverage, declining revenues, and high capital costs. By late 2014, the Primus Entities were unable to satisfy certain financial covenants in their credit facilities (the “Credit Defaults”).³

AVO Affidavit at paras 4, 8-9, Motion Record, Tab 2.

Initial Order Affidavit at paras. 18, 23-27 92-112, 119-128, 152-156, Motion Record, Tab 2B.

9. As a result of their difficulties, by late 2014, the Primus Entities defaulted with respect to their senior secured credit facilities owing to the Bank of Montreal, HSBC Bank Canada and ATB Corporate Financial Service (the “Syndicate”) and their subordinated secured credit facilities owing to the Manufacturer’s Life Insurance Company and BMO

1 All capitalized terms used but not defined herein have the meaning ascribed to them in the AVO Affidavit.

2 Re-sellers are telecommunications service providers who acquire services wholesale from major telecommunications service industry carriers to offer services to their own customers.

3 As described in greater detail in the Initial Order Affidavit, the Vendors were required to maintain certain earnings before interest, taxes, and amortization (“EBITA”) to debt ratios. Due to their high debt load and decreasing EBITA, the Vendors were unable to maintain these ratios.

Capital Partners (the "Subordinate Lenders").⁴ The Primus Entities operated under forbearance arrangements with the Syndicate from February 2015 onwards.

AVO Affidavit at paras 4, 8-9, Motion Record, Tab 2.

Initial Order Affidavit at paras. 92-112, 119-128, Motion Record, Tab 2B.

10. The Primus Entities explored a wide variety of potential restructuring options, all of which were evaluated using financial model forecasts. Without additional support from the Syndicate or the Subordinate Lenders, however, none of the options proved viable. Thus, the Primus Entities evaluated the possibility of a sale of their business.

AVO Affidavit at paras 10-11, Motion Record, Tab 2.

Initial Order Affidavit at paras. 113-118, Motion Record, Tab 2B.

11. As described in detail in the Sale Approval Affidavit, and for the reasons set out therein, the Primus Entities conducted a pre-filing sales and investor solicitation process.

AVO Affidavit at paras 10-13, 30-83 and 101, Motion Record, Tab 2.

Initial Order Affidavit at paras. 113-118, Motion Record, Tab 2B.

12. After extensive deliberations and consultations with their professional advisors, FTI and the Syndicate, the Primus Entities concluded, further to and on the basis of their commercial and business judgement, that it was in the best interest of the Primus Entities' and their stakeholders to enter into the transaction with the Purchaser. On January 18, 2016, the boards of directors of the Primus Entities selected the Purchaser as the Successful Bidder as per the SISP and approved the execution of the Birch APA.

AVO Affidavit at paras 80-83, Motion Record, Tab 2.

⁴ The Syndicate has a first-ranking security interest over all of the Primus Entities assets. The Subordinate Lenders are fully subordinated to the prior repayment in full of all obligations owing to the Syndicate and the security of the Syndicate under the Credit Agreement.

B. The Birch APA

13. On January 19, 2016, the Vendors and the Purchaser executed and delivered a definitive version of the Birch APA, conditional on Court approval.⁵ On February 25, 2016, this Court approved the Birch APA (as may be amended), any ancillary agreement thereto, and the Sale Transaction contemplated therein.

AVO Affidavit at para 82, Motion Record, Tab 2.

Initial Order Affidavit at para 144, Motion Record, Tab 2B.

Supplemental Assignment Affidavit at para. 5, Second Supplementary Motion Record at Tab 1.

14. The Birch APA contemplates that the Vendors will assign to the Purchaser certain contracts (the "Essential Contracts", as defined in the Birch APA). It is a condition precedent to closing that the Essential Contracts, which are listed in Schedule "B" to the Birch APA (as may be amended, "Schedule B") be assigned, either by consent or Court order.⁶

AVO Affidavit at para 93, 134-135, Motion Record, Tab 2.

Supplemental AVO Affidavit at paras. 12-14 , Supplementary Motion Record, Tab 1.

Supplemental Assignment Affidavit at para. 6, Second Supplementary Motion Record at Tab 1.

15. The Birch APA obligates the Purchaser to pay Cure Costs (as defined therein). The Cure Costs amounts for the Outstanding Essential Contracts are set out in Schedule "A" to the draft Assignment Order.⁷ The Assignment Order contemplates that the Purchaser will not be liable for any other amounts of any kind in respect of any Assigned Contract (as defined therein) other than the Cure Costs listed on Schedule "A" thereto

⁵ Specifically, the Vendors are the operating companies of the Vendors: Primus Canada, PTI and Lingo.

⁶ The Vendors and Purchaser are in discussions to amend the Birch APA to revise the list of Essential Contracts set out in Schedule "B" to the Birch APA to provide a more accurate list of the Essential Contracts to be assumed (including removing duplicates from Schedule "B" and adding the specific contracts contemplated to be added in the preamble language of Schedule "B").

(which shall be paid in accordance with the terms of the APA and the Approval and Vesting Order dated February 25, 2016).

Supplemental Assignment Affidavit at paras. 21-22, Second Supplementary Motion Record at Tab 1.

16. The Vendors and Purchaser are in discussions to amend Schedule B so as to provide a more accurate list of Essential Contracts to be assumed. At the same time, the Purchaser seeks to migrate certain Excluded Contracts (as defined in the Birch APA) to Schedule B.⁸ The Purchaser is of the view that these contracts are necessary for it to carry on the Vendors' business and that it is not prepared to proceed to closing without obtaining their assignment. Due to the way Cure Costs are calculated under section 3.1 of the Birch APA, the economic impact on the Vendors of this latter amendment and migration is a reduction in the Purchase Price of approximately \$600,000.

Supplemental Assignment Affidavit at para. 29-31, Second Supplementary Motion Record at Tab 1.

C. The Vendors' Efforts in Securing Consents to Assignment

17. Between January 26, 2016, and February 8, 2016, the Vendors sent a standard form consent letter to all but Bell Canada (and related entities), Rogers Communications Inc., and TELUS Communications Company (the "Major Carrier Counterparties", and with limited exceptions set out in greater detail in the Supplemental Assignment Affidavit).⁹ At the same time, the Vendors started negotiating the terms of assignment with the in-house counsel of the Major Carrier Counterparties. Generally, the Vendors engaged in

⁷ As described in the Supplemental Assignment Affidavit, the amounts of Cure Costs have been determined based on the books and records of the Vendors and/or discussions with counterparties who have provided the amounts owed to them pursuant to their books and records.

⁸ During the course of these discussions, the Purchaser determined that it considered certain of the agreements that had been listed on the Excluded Contracts schedule to the Birch APA to be essential to the operation of the business, and hence properly Essential Contracts (the "Additional Contracts").

⁹ The Primus Entities did send a standard form of consent for regulatory agreements for which TELUS is a counterparty and received consent to such assignment.

dialogue with all counterparties to the Essential Contracts whose consent is required, including as necessary their legal groups, to procure executed consents to assignment.

Supplemental Assignment Affidavit at paras. 7-13, Second Supplementary Motion Record at Tab 1.

18. As of February 29, 2016, the Vendors either obtained or sent a combined 116 consents and notices; 93 consents remain outstanding (the "Outstanding Essential Contracts"). There are 36 counterparties to the 95 Outstanding Essential Contracts. As described in greater detail in the Supplemental Assignment Affidavit, the Vendors have served their motion materials on all 36 counterparties and have successfully contacted 34 of the 36 counterparties. The Vendors will continue to engage in discussions with them to secure their consent to assignment.

Supplemental Assignment Affidavit at paras. 14-16, 18, Second Supplementary Motion Record at Tab 1.

D. Purchaser's Ability and Willingness to Perform the Assigned Obligations

19. The Purchaser is a highly experienced participant in the telecommunications industry, providing services in all 50 U.S. states, Washington D.C., and Puerto Rico. As at December 31, 2015, Birch employs 1,138 people. The contracts to be assigned pursuant to the Birch APA will be assumed either by Birch or any of the affiliates of Birch as permitted pursuant to the Birch APA.

Affidavit of Vincent M. Oddo, sworn February 29, 2016 (the "Purchaser's Assignment Affidavit"), Tab 2 of the Second Supplementary Motion Record

20. The Purchaser, on a consolidated basis, generates cash flows totalling \$147 million during 2015. As at December 31, 2015, the Purchaser's cash and cash equivalents balance (on a consolidated basis) was approximately \$8.3 million and the Purchaser had \$33.78 million available for borrowing under its existing financial arrangements.

Purchaser's Assignment Affidavit, at para. 7, Tab 2 of the Second Supplementary Motion Record

PART III - ISSUES

21. The sole issue on this motion is the granting of the Assignment Order.

PART IV - LAW AND ARGUMENT

A. The Assignment Order Should be Granted

(i) *The Court Has Jurisdiction to Assign the Outstanding Essential Contracts*

22. Section 11.3(1) of the CCAA authorizes the Court to make an order assigning the rights and obligations of a debtor company under an agreement to any person specified by the Court and agreeable to the assignment, provided that none of the exclusions in Section 11.3(2) apply. The authority granted by Section 11.3(1) is otherwise discretionary.

CCAA, s. 11.3(1)-(2)

23. Accordingly, courts have exercised their discretion pursuant to section 11.3(1) to order the assignment of a debtor company's contractual rights and obligations notwithstanding a restriction or prohibition on assignment in the contract. In addition, courts have ordered that all contractual counterparties are deemed to have waived all existing or previously committed non-monetary defaults under the contracts.

Re TBS Acquireco Inc., 2013 ONSC 4663, Applicants Book of Authorities ("Applicants BOA"), Tab 1 at para. 25

Re White Birch Paper Holding Company (2010), 72 C.B.R. (5th) 63 (Que. S.C.), Applicant's BOA, Tab 2 at para. 16

Re Sterling Shoes Inc. (30 April 2012), Vancouver No. S117081 (B.C.S.C.), Applicant's BOA, Tab 3 at para. 6

(ii) *The CCAA Criteria for Assigning the Essential Contracts are Satisfied*

24. Section 11.3(3) sets out the following non-exhaustive list of factors to consider in determining whether to order the assignment of a debtor company's rights and obligations under an agreement:

- (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.

CCAA, s. 11.3(3)

(a) *The Monitor Approves of the Assignment*

25. The Monitor filed a report stating that, if the Assignment Order is required, and subject to satisfactory evidence provided by the Purchaser of its ability to fulfill the obligations it intends to assume, it supports the Vendors' request that this Court order the assignment of the Outstanding Essential Contracts in accordance with section 11.3 and on the terms of the Assignment Order sought herein.

The second report of the Monitor dated February 19, 2016 (the "Second Monitor's Report") at paras. 13-14, 89-91, 100-103

(b) *The Purchaser is Willing and Able to Perform the Agreements*

26. As set out in greater detail in the Purchaser's Assignment Affidavit, the Purchaser is solvent and adequately capitalized and is able and willing to perform the obligations it will assume under the agreements to be assigned herein.

Purchaser's Assignment Affidavit at paras. 6-10, Tab 2 of the Second Supplemental Motion Record

Second Monitor's Report, at para. 92

(c) *It is Appropriate to Order the Assignment of Agreements*

27. Prior to the enactment of section 11.3, the courts situated their jurisdiction to assign agreements over the objections of counterparties and to permanently stay the termination of the agreement by reason of the assignment or any insolvency defaults that arise in the CCAA proceedings under their general power in section 11. In *Re Veris Gold*

Corp., Justice Fitzpatrick held that the effect of the enactment of section 11.3 was “to codify what had been the general approach to assignment issues”.

Re Playdium Entertainment Corp. (2001), 31 C.B.R. (4th) 302, as supplemented at 31 C.B.R. (4th) 309 (Ont. S.C.J.), Applicants’ BOA, Tab 4 at paras. 38 and 42

Re Nexient Learning Inc. (2009) 62 C.B.R. (5th) 248 (Ont. S.C.J.), Applicant’s BOA, Tab 5 [“Nexient”] at paras. 53, 54

Re Hayes Forest Services Ltd., 2009 BCSC 1169, Applicant’s BOA, Tab 6 at paras. 32 and 51

Re Veris Gold Corp., 2015 BCSC 1204, Applicant’s BOA, Tab 8 at paras 53-56

28. In *Nexient*, Justice Wilton-Siegel found it appropriate to approve the assignment of contracts to a purchaser in a CCAA proceeding where it was “important to the reorganization process”, furthering the purpose and spirit of the CCAA proceedings. The assignment of the Outstanding Essential Contracts is such an instance.

Nexient, Applicant’s BOA, Tab 9 at paras. 56 and 59

29. The assignment of the Essential Contracts is a condition precedent to the closing of the Sale Transaction. Without such an assignment, the Vendors would be at risk of being unable to close the Sale Transaction, to the detriment of the stakeholders of the Vendors and other Primus Entities. The Monitor is of the view that the assignment of the Outstanding Essential Contracts is appropriate in the circumstances.

AVO Affidavit at paras 93, 134-135, Motion Record, Tab 2

Second Monitor’s Report at paras. 93-96

30. Furthermore, assignment of the Essential Contracts will allow the Purchaser to carry on the business of the Vendors ensuring a smooth transition for the benefit of counterparties, employees and other stakeholders. It is in the best interest of all of the Vendors’ stakeholders that the Assignment Order be granted, thereby ensuring that the Sale Transaction contemplated pursuant to Birch APA will be closed.

31. The discretion of the court is appropriately exercised where the terms of the assignment are fair to the affected counterparties and interfere with their rights only

as necessary to assist the reorganization. The terms of the Assignment Order ensure simply that the Purchaser will step into the shoes of the Vendors and will cover all outstanding Cure Costs. The Approval and Vesting Order dated February 25, 2016 provides a mechanism to ensure that the Cure Costs will be remedied by the date set out therein.¹⁰

Second Monitor's Report at paras. 99 and 102

Supplemental Assignment Affidavit at paras. 21-22, Second Supplementary Motion Record at Tab 1

32. For the foregoing reasons, it is respectfully requested that this Court make an order assigning the agreements set out in Schedule "A" to the Assignment Order.

PART V - ORDER REQUESTED

33. For all of the foregoing reasons, the Primus Entities submit that it is appropriate for this Court to grant the Assignment Order sought substantially in the forms at Tab 3 of the Second Supplemental Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of March, 2016.



Stikeman Elliott LLP

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¹⁰ Specifically, the Approval and Vesting Order provides for such payment to be made by the Purchaser to the Monitor to be disbursed to the relevant counterparties by no later than the day that is three business days from the date that the Monitor receives wire remittance instructions (or other satisfactory payment instructions) from such counterparty (provided Closing occurred).

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Re TBS Acquireco Inc.*, 2013 ONSC 4663
2. *Re White Birch Paper Holding Company* (2010), 72 C.B.R. (5th) 63 (Que. S.C.)
3. *Re Sterling Shoes Inc.* (30 April 2012), Vancouver No. S117081 (B.C.S.C.)
4. *Re Nexient Learning Inc.* (2009), 62 C.B.R. (5th) 248 (Ont. S.C.J.)
5. *Re Playdium Entertainment Corp.* (2001), 31 C.B.R. (4th) 302, as supplemented at 31 C.B.R. (4th) 309 (Ont. S.C.J.)
6. *Re Hayes Forest Services Ltd.*, 2009 BCSC 1169
7. *Re Veris Gold Corp.*, 2015 BCSC 1204

SCHEDULE "B"

RELEVANT STATUTES

Companies' Creditors Arrangement Act, RSC 1985, c C-36

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

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF PT HOLDCO, INC., PRIMUS
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Proceeding commenced at Toronto

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(RETURNABLE MARCH 2, 2016)**

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