

Court File No. \_\_\_\_\_

**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  
(For the Initial Application returnable January 19, 2016)**

Dated: January 19, 2016

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**PART I - OVERVIEW**

1. 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**"), (together, the "**U.S. Primus Entities**") and collectively with Holdco and Primus Canada, the "**Primus Entities**") seek relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), including authorization to apply for recognition of their CCAA proceedings in the United States pursuant to Chapter 15 of the United States Bankruptcy Code, 11 U.S. Code § 1501-1532 (the "**Bankruptcy Code**").

2. The Primus Entities offer telecommunications services in Canada and the United States. For reasons set out in greater detail below and in the Affidavit of Michael Nowlan, sworn January 18, 2016 in support of this CCAA filing (the "**Nowlan Affidavit**"), the Primus Entities have been experiencing and continue to experience liquidity issues due to, *inter alia*, rapidly declining revenues, their customer base transitioning to lower profit margin services, over-leverage, and high capital costs. The Primus Entities' significant fixed costs have hindered their ability to quickly and adequately respond to the causes of their financial difficulties.

Nowlan Affidavit, Application Record at paras 93-105, 108-110, Tab 2.

3. As a result, the Primus Entities do not have the liquidity to meet their payment obligations as they become due and they are unable to satisfy the financial covenants set out in their secured credit agreements. The Primus Entities have defaulted under these credit agreements which, if enforced, the Primus Entities would not be able to satisfy. They have operated under forbearance agreements in respect of these defaults since February 4, 2015. Critically, the Primus Entities have been unable to successfully restructure their business and operations outside of formal insolvency proceedings.

Nowlan Affidavit, Application Record at paras 123, 128, 152-156, Tab 2.

4. The Primus Entities are insolvent. Without the protection of the CCAA, a shut-down of operations is inevitable, which outcome would be extremely detrimental to the Primus Entities' employees, suppliers, customers, and other stakeholders. CCAA protection will allow the Primus Entities to maintain operations while giving them the time necessary to implement their proposed restructuring strategy: the sale of substantially all of their business and assets pursuant to a sale and investor solicitation process commenced in September 2015 and detailed herein.

Nowlan Affidavit, Application Record at paras 10, 130, 155, Tab 2.

## **PART II - THE FACTS**

5. The facts with respect to this application are more fully set out in Nowlan Affidavit. All capitalized terms used but not defined herein have the meaning ascribed to them in the Nowlan Affidavit.

### **A. Overview of the Primus Entities' Business and Corporate Structure**

6. The Primus Entities' principal business is the re-selling of residential and commercial telecommunications services within the United States and Canada. Re-sellers are telecommunications service providers ("TSPs") who acquire services wholesale from major telecommunications service industry carriers (the "Major Carriers") to offer

telecommunications services to their own customers. The Major Carriers own and operate the equipment required to provide these services.<sup>1</sup>

Nowlan Affidavit at paras 18, 20-23, 27, Application Record, Tab 2

*i. The Primus Entities Integrated North American Operations*

7. The Primus Entities' North American operations are thoroughly integrated. The Primus Entities share networks, platforms, infrastructure and personnel (including senior management). For example, the Primus Entities' executive management, which is located in Canada, is responsible for the U.S. Primus Entities' strategic direction, and employees of the U.S. Primus Entities generally support the Canadian operations.

Nowlan Affidavit, at paras 50-52, Application Record, Tab 2.

*ii. The Primus Entities' Corporate Structure*

8. Holdco is the principal holding company of the Primus Entities, with PTUS and Primus Canada the wholly owned subsidiaries of Holdco. PTUS is the holding company for PTI and Lingo, which are the Primus Entities' U.S. operating companies. Primus Canada is the Primus Entities' Canadian operating company.

Nowlan Affidavit, paras 12-16, Application Record, Tab 2.

9. Holdco and Primus Canada are private companies incorporated under the *Business Corporations Act*, RSO 1900, c B 16, with registered head offices in Toronto, Ontario. PTUS, PTI, and Lingo are private companies incorporated under the laws of Delaware, with registered head offices in Wilmington, Delaware.

Nowlan Affidavit, paras 12-16, Application Record, Tab 2.

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<sup>1</sup> The major carriers are BCE Inc., Rogers Communications Inc., Telus Corporation, MTS Inc./Allstream Inc. and Shaw Communications Inc.

10. The Primus Entities corporate structure is set out in an organizational chart included in the Nowlan Affidavit.

Nowlan Affidavit, para 17, Application Record, Tab 2.

## **B. The Primus Entities' Business and Operations**

### *i. Canada*

#### **Services**

11. The Canadian telecommunications industry operates under the supervision of the Canadian Radio-television and Telecommunications Commission ("CRTC") and is regulated by the *Telecommunications Act*, S.C. 1993, c. 38. The CRTC regulates matters such as the rates, the terms under which carriers provide services, the exchange of telecommunications traffic between carriers, and inter-carrier arrangements. The CRTC obligates Major Carriers to make space at certain of their facilities available for rent by secondary carriers at a fixed cost ("co-location arrangement"), which permits secondary carriers to offer certain services at higher margins than Re-Sell Services (defined below).

Nowlan Affidavit, paras 19, 28-29, Application Record, Tab 2.

12. Primus Canada offers a broad selection of residential and commercial telecommunications services. Residential services include: VoIP<sup>2</sup>, residential internet services, traditional local phone, long distance phone, and pre-paid calling cards. Business services include H-PBX<sup>3</sup>, local line, long distance, internet and data access services to small-to-medium-sized businesses. Commercial services include wholesale long distance capacity and ancillary services offered to smaller TSPs.

Nowlan Affidavit, paras 5, 25, Application Record, Tab 2.

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<sup>2</sup> "VoIP" refers to the delivery of voice communications and multimedia sessions over the internet.

<sup>3</sup> "H-PBX" refers to phone systems that use cloud-based technology and allow the host (in this case, the Primus Entities) to centrally manage its customers' systems, and without a related capital investment by the customer.

13. Primus Canada does not own sufficient telecommunications network infrastructure to provide telecommunications services without the assistance of a Major Carrier. As a result, Primus Canada purchases services from Major Carriers at wholesale rates determined by the CRTC or through negotiated arrangements (principally, with Major Carriers) to re-sell to its own residential and commercial consumers ("**Re-Sell Services**"). The majority of Primus Canada's gross revenue is earned by providing Re-Sell Services.

Nowlan Affidavit, paras 23-24, 26-27, Application Record, Tab 2.

14. Under a typical re-selling agreement, the wholesaler (e.g., a Major Carrier) is responsible for physical service delivery and the re-seller manages the customer relationship. The wholesalers own and operate all of the necessary infrastructure to provide telecommunications services but the consumers deal exclusively with the re-seller.

Nowlan Affidavit, at para 23, Application Record, Tab 2

15. Primus Canada offers local phone, internet, and VoIP pursuant to CRTC-mandated co-location arrangements from 83 "co-locations" rented from Bell (74), Telus (5), and Allstream (4) ("**Co-Location Services**"). Under its co-location arrangements, Primus Canada first purchases telecommunications services from a Major Carrier and then manages the distribution of that service.

Nowlan Affidavit, paras 28-29, Application Record, Tab 2

16. Primus Canada generates 88% of the Primus Entities' gross revenue, of which 78% is generated in Ontario, with 10% in Quebec, 6% in British Columbia, 4% in Alberta, and 2% in other provinces.

Nowlan Affidavit, para 18, Application Record, Tab 2

## **Suppliers**

17. Primus Canada's business and operations are heavily dependent on the Major Carriers for both the Re-Sell Services and Co-location Services. Primus Canada's largest Re-Sell Services

vendors are Bell, Allstream, Rogers and Telus, which collectively account for approximately 50% of supplier obligations as at November 30, 2015.

Nowlan Affidavit, para 30, Application Record, Tab 2.

18. Primus Canada is also dependent on its credit card processing service provider, Chase Paymentech Solutions, Inc. ("Chase"). Approximately 30% of Primus Canada's customers pay for their services by credit card. Primus Canada could not process credit card transactions without the continued supply of services by Chase.

Nowlan Affidavit, para 31, Application Record, Tab 2.

### **Customers**

19. Primus Canada has approximately 204,000 residential accounts and 23,000 commercial accounts. In 2014, approximately 56% of Primus Canada's revenue was generated from residential customers, and approximately 44% was generated from commercial customers. Typical residential agreements are for two years or less. Typical commercial agreements range between two to three years.

Nowlan Affidavit, paras 32-33, Application Record, Tab 2.

### **CRTC Regulatory Environment**

20. On July 22, 2015, the CRTC revised its wholesale wireline services and associated policies, which revised the rates, terms and conditions under which the Major Carriers are required to make their infrastructure available to secondary carriers. The principal aim was to provide Canadians with more diverse choice for high-speed internet connectivity. The effect of the CRTC ruling is to increase access for secondary carriers to the Major Carriers' high-speed internet infrastructure and to remove regulations that restricted secondary carriers from selling high speed internet services from co-locations.

Nowlan Affidavit, para 40-42, Application Record, Tab 2.

21. In the short term, the favourable CRTC ruling does not substantially impact nor remedy the Primus Entities' ongoing financial difficulties. It is true that, if the changes contemplated in the CRTC ruling are implemented, Primus Canada would be able to offer higher margin residential high-speed internet services, which would result in an increase in profitability. However, and only provided that the CRTC ruling will withstand a pending appeal by Bell Canada to the Federal Cabinet, the implementation of the CRTC ruling is 12 to 18 months away. Moreover, even if the CRTC ruling withstands an appeal, the manner in which it will be implemented remains uncertain.

Nowlan Affidavit, paras 42-43, Application Record, Tab 2.

*ii. The United States*

**Services**

22. The U.S. Primus Entities' revenues accounts for approximately 12% of the Primus Entities' gross revenue. The U.S. Primus Entities primarily offer digital home phone service via VoIP technology and long-distance phone services through PTI and Lingo, respectively (acquired wholesale from other TSPs). The VoIP technology represents 39% of the U.S. Primus Entities' revenue, with the balance attributable to long distance phone services.

Nowlan Affidavit, paras 44-45, Application Record, Tab 2

**Suppliers**

23. The U.S. Primus Entities' largest supplier currently is PTGi International Carrier Services, Inc. ("PTGi-ICS"). PTGi-ICS is the wholesale supplier of long-distance phone service for resale by PTI; however, PTGi-ICS recently gave notice to terminate this agreement effective March 31, 2016.<sup>4</sup>

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<sup>4</sup> PTGi-ICS and the Primus Entities were part of the same corporate group until a sale of the Primus Entities in July 2013. The Primus Entities were acquired by PT Investor Limited Partnership, a related party of York Capital Management, for approximately \$129,000,000 ("York Acquisition"). Prior to the York Acquisition, the Primus



Nowlan Affidavit, para 46, Application Record, Tab 2.

### **Customers**

24. The U.S. Primus Entities have about 27,000 residential customers, of which approximately 1,100 are located in Puerto Rico. The balance of the U.S. Primus Entities' customers are located in the United States.

Nowlan Affidavit, para 47, Application Record, Tab 2

### **C. The Primus Entities' Employees**

25. As at January 19, 2016, Primus Canada employs 502 people and the U.S. Primus Entities employ 28 people. Certain of the Primus Entities' employees provide services to both the U.S. and Canadian operations (although formally they are employed by Primus Canada or the U.S. Primus entities). The Primus Entities workforce is non-unionized. The Primus Entities do not have a pension plan for their employees.

Nowlan Affidavit, at paras 53-56, Application Record, Tab 2.

### **D. The Primus Entities' Assets**

26. The Primus Entities prepare financial statements on a consolidated basis. The Primus Entities' assets as set out in Holdco's unaudited consolidated financial statements for the eleven months ended November 30, 2015 reflected total book value for current assets of approximately \$145 million.

Nowlan Affidavit, at paras 72-74, Application Record, Tab 2.

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Entities (or their predecessors) were wholly-owned subsidiaries of Primus Telecommunications Group, Incorporated, an American-based multi-national telecommunications service provider.

## E. The Primus Entities' Liabilities

27. As at November 30, 2015, the Primus Entities had liabilities on a consolidated basis totalling approximately \$101 million. In addition to the principal debt obligations discussed below, as at November 30, 2015, the Primus Entities had approximately \$30.4 million in current liabilities (not including any current liabilities relating to the principal debt obligations).

Nowlan Affidavit, paras 75-77, Application Record, Tab 2.

### *Secured Debt*

#### **The Credit Agreement**

28. Primus Canada is indebted to the Bank of Montreal ("**BMO**"), HSBC Bank Canada ("**HSBC**") and ATB Corporate Financial Services ("**ATB**", together with BMO and HSBC, the "**Syndicate**") in the amount of \$40.7 million pursuant to a credit agreement dated July 31, 2013, as amended by amending agreement dated September 23, 2014 (the "**Credit Agreement**"). The Credit Agreement, which includes both a term and a revolving component, matures on July 31, 2017.

Nowlan Affidavit, paras 78-79, Application Record, Tab 2.

29. Primus Canada has granted a comprehensive first-ranking security to BMO as administrative agent of the Syndicate over all of its assets pursuant to, *inter alia*, a general security agreement (a "**GSA**"). In an event of default, the amounts owing under the Credit Agreement become due and payable on written notice to Primus Canada.

Nowlan Affidavit, paras 80, 82, Application Record, Tab 2.

30. Primus Canada's obligations under the Credit Agreement are separately and independently guaranteed by all of the other Primus Entities (i.e., Holdco, PTUS, PTI and Lingo). The guarantees are secured by substantially all of the Primus Entities' assets pursuant to, *inter alia*, GSAs and a deed of hypothec.

Nowlan Affidavit, paras 81, Application Record, Tab 2.

### **The Swap Agreements**

31. Primus Canada is also a counterparty to three swap agreements (together, the “**Swap Agreements**”) with the individual Syndicate lenders (each being a “**Swap Bank**” and together, “**Swap Banks**”) which mature in the summer of 2017. If terminated as at the date of this affidavit, the Swap Banks would be entitled to a payment in the approximate amount of \$303,003 from Primus Canada.

Nowlan Affidavit, paras 83-84, Application Record, Tab 2.

### **The Subordinate Credit Agreement**

32. Primus Canada is indebted to the Manufacturers Life Insurance Company (“**Manulife**”) and BMO Capital Partners (“**BMOCP**” and together with Manulife, the “**Subordinate Lenders**”) in the principal amount of \$20 million (the “**Subordinate Debt**”) pursuant to a subordinate credit agreement (the “**Subordinate Credit Agreement**”) dated July 31, 2013, as amended by an agreement dated September 23, 2014. The Subordinate Credit Agreement matures on July 31, 2018. As of November 30, 2015 Primus Canada is indebted to the Subordinate Lenders in the amount of approximately \$23 million, inclusive of accrued interest.

Nowlan Affidavit, at paras. 85-86, Application Record, Tab 2.

33. Primus Canada granted a security interest to Manulife as collateral agent of the Subordinate Lenders over all of its assets pursuant to, *inter alia*, a GSA. As with the Credit Agreement, on default any credit issued under the Subordinate Credit Agreement becomes due and payable on written notice to Primus Canada. Primus Canada’s obligations are separately and independently guaranteed by all of the Primus Entities (i.e., Holdco, PTUS, PTI and Lingo). The guarantees are secured by substantially all of the Primus Entities’ assets pursuant to, *inter alia*, GSAs and a deed of hypothec.

Nowlan Affidavit, paras 87-89, Application Record, Tab 2.

34. The priority relationship between the Syndicate and the Subordinate Lenders is governed by an intercreditor agreement dated July 31, 2013 (the “**Intercreditor Agreement**”). The Subordinate Lenders are fully subordinated to the prior repayment in full of all obligations owing to the Syndicate. The security of the Syndicate under the Credit Agreement ranks in priority to the security of the Subordinate Lenders under the Subordinate Credit Agreement to the full extent of the amounts owing thereon. In other words, the Intercreditor Agreement contemplates both lien and payment subordination.

Nowlan Affidavit, paras 90-91, Application Record, Tab 2.

35. The lien and payment subordinations unequivocally set out in the Intercreditor Agreement survive the commence of insolvency proceedings as contemplated herein. This is evidenced by Section 3.12, which provides as follows:

All allocations of payments between the Senior Lenders and the Subordinate Lenders shall, subject to any court order to the contrary, continue to be made after the commencement of any Insolvency Proceeding, on the same basis that the payments were to be allocated hereunder prior to the date of such filing. The Subordinate Lenders hereby agree that the priorities and subordination agreed to in this Agreement shall, as between the creditors, be paramount to any plan, proposal, compromise, arrangement, or similar transaction in connection with [Primus Canada] or any [other Primus Entity] ... [T]he Subordinate Lenders hereby agree that this Agreement be deemed and hereby is a subordination under Section 510(a) of the Bankruptcy Code and effective in any Insolvency Proceeding.

Exhibit A to the Nowlan Affidavit, Application Record, Tab 2A.

#### **F. The Primus Entities are Insolvent**

36. The Primus Entities have experienced and are expected continue to experience substantial financial difficulties and liquidity issues due to, among other things:

- a. network and wireless technology advances decreasing demand for long-distance, local phone, and pre-paid calling cards ("**Legacy Services**");
- b. consumer preferences shifting towards mobile technology and high-speed internet, which the Primus Entities lack the ability to provide;
- c. rapid growth in bundled TV, internet, and voice services offered by the Major Carriers, which the Primus Entities also lack the ability to provide, exerting considerable margin price pressures;
- d. rapid growth in the Primus Entities retail non-Legacy Services customer base, the high associated upfront costs of which cannot be not recouped until 4 to 12 months into the life of a consumer's contract; and
- e. high fixed overhead costs that cannot be materially reduced as they relate to functions that are necessary to run the Primus Entities' business.

Nowlan Affidavit, paras 93, 96-97, 99-101, 103, Application Record, Tab 2.

37. The Primus Entities' gross revenue decreased from \$229 million in the fiscal year ended 2012 ("**FY2012**") to \$199 million in the fiscal year ended 2013 ("**FY2013**"), to \$180 million in the fiscal year ended 2014 ("**FY2014**") and is forecasted to drop to \$166 million in the fiscal year ended 2015 ("**FY2015**"). Since 2012, the Primus Entities' consolidated revenue has declined an average of 9% per year. During the same period, the Primus Entities' Canadian residential business, representing approximately 56% of their gross revenue for 2015, has declined an average of 9% year-over-year ("**YOY**"). At the same time, revenue from Legacy Services has declined 18% YOY in Canada and 25% YOY in the United States. Despite these sharply declining revenues, the Primus Entities have not been able to concurrently reduce their capital expenditures due to the capital-intensive nature of their business. Consequently, the Primus Entities reported a net loss of \$830,000 in FY 2014 and forecast a net loss of \$13,078,000 for FY2015.

Nowlan Affidavit, para 95, 102, 104-105, 110, Application Record, Tab 2.

38. As a result of the foregoing financial difficulties, the Primus Entities' earnings before interest, taxes, depreciation and amortization ("EBITDA") have been generally declining since 2012. Critically, the Primus Entities are required to maintain certain debt to EBITDA ratios under their secured loans. Due to their high debt load and decreasing EBITDA, they have not been able to maintain these ratios since late 2014 and have accordingly been in default under the Credit Agreement and the Subordinate Credit Agreement since then. Since February 2015, the Primus Entities have been operating under forbearance agreements with the Syndicate and the Subordinate Lenders.

Nowlan Affidavit, paras 94, 108-109, 121-124, 128-129, Application Record, Tab 2.

39. As a result of their financial difficulties and resulting defaults with their lenders, the Primus Entities are insolvent and unable to meet their obligations as they come due.

#### **G. The Primus Entities' Responses to Liquidity Difficulties**

40. In response to the defaults under the Credit Agreement, the Syndicate and the Primus Entities began discussing the saleability of all or substantially all of the Primus Entities' business.

Nowlan Affidavit, paras 126 and 131, Application Record, Tab 2.

41. The Primus Entities elected to pursue a pre-filing sales process out of concern that, *inter alia*, the extensive period of CCAA protection necessary to implement a post-filing sales process would have a serious and detrimental impact on the Primus Entities' business and its customers.

Nowlan Affidavit, para 131, Application Record, Tab 2.

42. On August 31, 2015, following extensive and careful arms-length negotiation, Primus Canada entered into a support agreement with the Syndicate (the "**Support Agreement**") further to which the Syndicate agreed to support a sale and investor solicitation process (the "**SISP**") on a going concern basis. The Support Agreement was a product of a meticulous balancing of interests of the Primus Entities' various stakeholders.

Nowlan Affidavit, paras 131, Application Record, Tab 2.

43. In entering into the Support Agreement, the Syndicate lenders covenanted, *inter alia*, to continue to forbear from exercising their rights and remedies as creditors and to support the court approval of any eventual SISP transaction(s) as promptly as practicable possible. Primus Canada covenanted, *inter alia*, to comply with certain monitoring and reporting obligations and to adhere to a specific timeline for implementing the SISP. The forbearance period expires January 19, 2016.

Nowlan Affidavit, paras 132-133, Application Record, Tab 2.

44. Following a competitive process, the Primus Entities have selected a Successful Bidder (as that term is defined in the SISP). Subject to obtaining the Initial Order sought herein, the Primus Entities intend to return on a motion seeking approval of the asset purchase agreement and associated sale transaction and ancillary relief, including, if necessary, an assignment of certain essential contracts.

Nowlan Affidavit, paras 143-151, Application Record, Tab 2.

45. Absent the granting of the Initial Order, the Support Agreement will terminate, entitling the Syndicate and Subordinate Lenders, among other things, to acceleration payment of all amounts due under their respective credit agreements. The Primus Entities do not have sufficient liquidity to satisfy the accelerated payment obligations as they come due. Ultimately, and without the protections sought herein, the Primus Entities will be forced to shut down their operations which would be an extremely detrimental outcome for their employees, secured creditors and other stakeholders.

Nowlan Affidavit, paras 152-155, Application Record, Tab 2.

### **PART III - ISSUES**

46. The issues on this Application are as follows:

- (a) Should this Court grant CCAA protection to the Primus Entities?
- (b) Should this Court grant:

- (i) the Administration Charge; and
  - (ii) the Directors' Charge?; and
- (c) Should this Court authorize and empower FTI Consulting Canada Inc. to act as Foreign Representative?

## PART IV - LAW AND ARGUMENT

### A. The Primus Entities should be Granted Protection under the CCAA

- i. The Primus Entities are either "Debtor Companies" or "Affiliated Debtor Companies" to which the CCAA Applies*

47. The CCAA applies to a "debtor company" or "affiliated debtor companies" where the total of claims against the debtor or its affiliates exceeds \$5 million. As discussed in greater detail below, the CCAA defines a "debtor company" as any company that is insolvent or has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA").

CCAA s. 3(1).

- (a) Each of the Primus Entities is a "Company" under the CCAA*

48. The CCAA defines "company" as, among other things,

Any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province and any incorporated company having assets or doing business in Canada, wherever incorporated (...)

CCAA s. 2(1), "debtor company", "company" and s. 3(1).



49. Primus Canada and Holdco, as companies incorporated under the legislature of a province (Ontario), meet the CCAA definition of “company” and are therefore eligible for CCAA protection in this respect.

Nowlan Affidavit, paras 12-13, Application Record, Tab 2.

50. PTI, PTUS and Lingo are also “companies” within the definition of the CCAA because they are incorporated companies (under the laws of Delaware) having assets in Canada, being funds held on deposit in Canadian bank accounts.

Nowlan Affidavit, paras 14-16 and 66, Application Record, Tab 2.

51. In *Re Cinram*, Morawetz J. (as he then was) unequivocally held that holding funds in a Canadian bank account met the test for being a “company” under the CCAA:

Having only nominal assets in Canada, such as funds on deposit in a Canadian bank account, bring a foreign corporation within the definition of “company”. In order to meet the threshold statutory requirements of the CCAA, an applicant need only be in technical compliance with the plain words of the CCAA.

[Emphasis added.]

*Re Cinram*, 2012 ONSC 3767 (S.C.J. [Comm. List]) [“*Cinram*”], paras 46 and 47, Primus Entities’ Book of Authorities [“*Applicants’ BOA*”], Tab 1.

52. When determining whether an applicant is a debtor company on the basis of having nominal assets in Canada, courts have stated that they will not engage in a qualitative or quantitative analysis of the applicant’s assets, as doing so would undermine the effectiveness of the CCAA. The efficacy of “instant assets” – transactions entered into by the debtor for the purpose of qualifying under the CCAA definition of “company” – is well-established. Here, PTI, PTUS and Lingo are in compliance with the CCAA on the basis of having, at least, nominal deposits in Canadian bank accounts. Thus, they are each “companies” as defined in the CCAA.

*Re Global Light Telecommunications Inc.* (2004), 2 C.B.R. (5th) 210 (B.C.S.C.), at paras. 16-17, Applicants’ BOA, Tab 2.

See also *Cadillac Fairview Inc. (Re)*, [1995] O.J. No. 273 (S.C.J. [Comm. List]) at paras. 5-6, Applicants' BOA, Tab 3. *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4286 (S.C.J. [Comm. List]) at para. 30, Applicants' BOA, Tab 4.

**(b) *The Primus Entities are each "Debtor Companies" under the CCAA***

53. Companies are entitled to CCA protection if they are "debtor companies". As set out above, pursuant to s. 2 of the CCAA, a "debtor company" is defined in the CCAA as, *inter alia*, a company that is "insolvent".

CCAA s. 2(1) "debtor company", "company" and CCAA s. 3(1)

54. Although the CCAA does not define the term "insolvent," the definition of "insolvent person" under section 2(1) of the BIA is well-established to be the governing definition in applications under the CCAA. The definition of "insolvent person" in the BIA is as follows:

... "insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, and whose liability to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

*Stelco Inc. (Re)* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Comm. List]) [*"Stelco"*], paras 21-22, Applicants' BOA, Tab 5.

BIA, s. 2, "insolvent person".

55. In *Stelco*, Justice Farley applied an expanded definition of insolvent in the CCAA context to reflect the “rescue” emphasis of the CCAA, modifying part (a) of the BIA’s definition of “insolvent person” to include a financially troubled corporation that is “reasonably expected to run out of liquidity within a reasonable proximity of time as compared with the time reasonably required to implement a restructuring”.

*Stelco* at paras. 25 and 26, Applicants’ BOA, Tab 5.

56. The Primus Entities’ precarious financial situation, including the defaults under the Credit Agreement and Subordinate Credit Agreement, have rendered the Primus Entities insolvent within the definition contemplated in both the BIA and the expanded definition set out in *Stelco*. Neither Primus Canada, as the debtor pursuant to the Credit Agreement and Subordinate Credit Agreement, nor any other Primus Entity, as guarantors under the same, have sufficient liquidity to satisfy their obligations to the Syndicate or Subordinate Lenders as they come due. The continued forbearances currently keeping the Primus Entities’ secured lenders from enforcement are conditional on the granting of the Initial Order. Without the forbearance, the Primus Entities’ loans will be immediately due and the Primus Entities do not have the funds to satisfy these debts. Consequently, the Primus Entities, are “debtor companies” to which the CCAA applies.

Nowlan Affidavit, paras 120-129, 152-155, Application Record, Tab 2.

57. Finally, the Primus Entities, either individually and as a whole, have debts in excess of \$5 million.

Nowlan Affidavit, paras 75-78, 85, Application Record, Tab 2.

58. For all of the foregoing reasons, the Primus Entities are debtor companies to which the CCAA applies and are eligible for protection under the CCAA.

*ii. An Order Granting a Stay of Proceedings is Appropriate*

59. Pursuant to s. 11.02(3) of the CCAA, on an initial application in respect of a “debtor company”, the Court may make an order on any terms that it considers appropriate and where

the applicant satisfies the Court that circumstances exist to make the order, including, among other things, staying all proceedings that might be taken in respect of the company under the BIA.

CCAA, s. 11.02(3).

60. A stay of proceedings is appropriate in liquidating CCAA proceedings such as this one.

*Lehndorff General Partner Ltd. (Re)* (1993), 17 C.B.R. (3rd) 24 (Ont. Gen. Div. [Comm. List]) [*"Lehndorff"*], para 6, Applicants' BOA, Tab 6.

*Nortel Networks Corp. (Re)* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Comm. List]) [*"Nortel Networks"*], para 47, Applicants' BOA, Tab 7.

61. In *Lehndorff General Partner Ltd. (Re)*, Justice Farley expressly recognized one of the purposes of the CCAA to be the facilitation of ongoing operations of a business where the ultimate conclusion was a going concern liquidation. His Honour held that:

The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors.

...It appears to me that the purpose of the CCAA is also to protect the interests of creditors and to enable an orderly distribution of the debtor company's affairs. This may involve a winding-up or liquidation of a company or simply a substantial downsizing of its business operations, provided the same is proposed in the best interests of the creditors generally.

*Lehndorff*, para 6 and 7, Applicants' BOA, Tab 6.

See also *Nortel Networks*, para 47, Applicants' BOA, Tab 7.

62. In *Re Nortel Networks Corp.*, Justice Morawetz also held that the CCAA is intended to be flexible and must be given a broad and liberal interpretation to achieve its objectives and that a sale by the debtor which preserves its business as a going concern is consistent with those objectives.

*Nortel Networks*, para 47, Applicants' BOA, Tab 7.

63. The power to grant a stay of proceedings should be construed broadly in order to facilitate the CCAA's legislative purpose and to enable continuance of the company seeking CCAA protection. The exercise of that power is appropriate in the present case.

*Lehndorff*, para 10, Applicants' BOA, Tab 6.

64. As a result of the substantial financial difficulties and severe liquidity issues detailed above, the Primus Entities require CCAA protection to maintain operations while allowing them the time necessary to complete the sales process and thereby to maximize recovery for their stakeholders. Without CCAA protection, a shut-down of operations is inevitable, which outcome would be extremely detrimental to all of the Primus Entities' employees, suppliers, customers, and other stakeholders.

Nowlan Affidavit, paras 6-9, 93-113, 152-155, Application Record, Tab 2.

65. Ultimately, the Primus Entities meet the criteria of being "debtor companies" or "affiliated debtor companies" to which the CCAA applies and circumstances exist that make an order granting them protection under the CCAA appropriate. For the foregoing reasons, a stay of proceedings should be granted on the terms sought herein.

## **B. The Priority Charges should be Granted**

### *i. The Administration Charge*

66. The Primus Entities seek a charge on the assets, property and undertakings of the Primus Entities (the "**Property**") in the maximum amount of \$1 million to secure the fees and disbursements incurred in connection with services rendered to the Primus Entities both before and after the commencement of the CCAA proceedings by counsel to the Primus Entities, the Monitor (if appointed) and the Monitor's counsel (the "**Administration Charge**").

Nowlan Affidavit, para 160, Application Record, Tab 2.

67. The Primus Entities worked with the proposed monitor to estimate the proposed quantum of the Administration Charge, which is reasonable and appropriate in view of the complexities of the Primus Entities' CCAA proceedings and the services to be provided by the beneficiaries of the Administration Charge.

Nowlan Affidavit, paras 161 and 175, Application Record, Tab 2.

68. The Administration Charge is proposed to rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, the "Encumbrances") held by persons with notice of this application.

Nowlan Affidavit, para 162, Application Record, Tab 2.

69. Section 11.52 of the CCAA provides statutory jurisdiction to grant such a charge:

**11.52(1) Court may order security or charge to cover certain costs**

– On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge – in an amount that the court considers appropriate – in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

**11.52(2) Priority** – This court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

CCAA, s. 11.52.

70. In *Re Canwest Publishing Inc.*, in addition to the considerations enumerated in section 11.52, Justice Pepall considered the following factors:

- (a) the size and complexity of the business being restructured;
- (b) the proposed role of the beneficiaries of the charge;
- (c) whether there is an unwarranted duplication of roles;
- (d) whether the quantum of the proposed charge appears to be fair and reasonable;
- (e) the position of the secured creditors likely to be affected by the charge; and
- (f) the position of the monitor.

*Canwest Publishing Inc. (Re)* (2010), 63 C.B.R. (5th) 115 (Ont. S.C.J. [Comm. List]) [*"Canwest Publishing"*] at para 54 , Applicants' BOA, Tab 8.

71. Justice Pepall also noted that estimating the quantum of an administration charge is dependent on the facts.

*Canwest Publishing* at para 52, Applicants' BOA, Tab 8.

72. In the present matter, the following factors support the granting of the Administration Charge as requested:

- (a) the Primus Entities operate a business which is technical in nature, operates across North America, and is subject to regulatory obligations;
- (b) the beneficiaries of the Administration Charge will provide essential legal and financial advice throughout the CCAA proceedings;
- (c) there is no anticipated unwarranted duplication of roles;
- (d) the Syndicate was advised of the anticipated return date of this application, have or will have received or copies of the Primus Entities' application materials, and have not indicated opposition to the granting of the Administration Charge; and

- (e) the proposed Monitor, in its pre-filing report, supports the Administration Charge and its proposed quantum and believes it to be fair and reasonable in view of the complexity of the Primus Entities' CCAA proceedings and the services to be provided by the beneficiaries of the Administration Charge;

Nowlan Affidavit, paras 50-52, 115, 158, 161 and 175, Application Record, Tab 2.

73. The Administration Charge should be granted. Each of the proposed beneficiaries will play a critical role in the Primus Entities' restructuring and it is unlikely that the above-noted advisors will participate in the CCAA proceedings unless the Administration Charge is granted to secure their fees and disbursements.

*ii. The D&O Charge*

74. The Primus Entities seek a charge over the Property in favour of the Primus Entities' former and current directors in the amount of \$3.1 million (the "D&O Charge") in order to protect their directors and officers from the risk of significant personal exposure. The D&O Charge is proposed to rank immediately behind the Administration Charge but in priority to all other Encumbrances held by persons given notice of this application.

Nowlan Affidavit, paras 163-164, 168, 170, Application Record, Tab 2.

75. The Primus Entities maintain directors' and officers' liability insurance ("D&O Insurance") for its directors and officers. The current D&O Insurance policies provide a total of \$15 million in coverage. Under the D&O Insurance, there are deductible for certain claims and the presence of a large number of exclusions creates a degree of uncertainty. In addition, the contractual indemnities which have been given to the directors and officers cannot be satisfied by the Primus Entities as they do not have sufficient funds to satisfy those indemnities should their directors and officers be found responsible for the full amount of the potential directors' liabilities. Adequate indemnification insurance is not otherwise available for the directors and officers at reasonable cost.

Nowlan Affidavit, paras 166-167, Application Record, Tab 2.



76. The CCAA has codified the granting of directors' and officers' charges on a priority basis in section 11.51 which provides as follows:

**11.51(1) Security or charge relating to director's indemnification**

– On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge – in an amount that the court considers appropriate – in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

**11.51(2) Priority** – The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

**11.51(3) Restriction – indemnification insurance** – The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

**11.51(4) Negligence, misconduct or fault** – The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

CCAA, s. 11.51.

77. In *Canwest Global Communications Corp. (Re)*, Justice Pepall applied s. 11.51 at the debtor company's request for a directors' and officers' charge, noting that the Court must be satisfied that the amount of the charge is appropriate in light of obligations and liabilities that may be incurred after the commencement of proceedings. In approving the request, Justice Pepall stated:

The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with

protections against liabilities they could incur during the restructuring: *Re General Publishing Co.* [(2003), 39 C.B.R. (4th) 216)]. Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring.

*Canwest Global Communications Corp. (Re)* (2009), 59 C.B.R. (5th) 72 (S.C.J. [Comm. List]) [“*Canwest Global*”] at para 48, Applicants’ BOA, Tab 9.

78. The Primus Entities require the continued involvement of their directors and officers in order to finalize the sales process already in progress. The directors and officers of the Primus Entities have indicated that, due to the significant personal exposure associated with the Primus Entities’ aforementioned liabilities, they will resign from their positions with the Primus Entities unless the Initial Order grants the sought after D&O Charge.

Nowlan Affidavit, paras 163 and 168, Application Record, Tab 2.

79. The D&O Charge will allow the Primus Entities to continue to benefit from the expertise and knowledge of their directors and officers. The quantum of the requested D&O Charge is reasonable given the complexity of the Primus Entities’ business and the potential exposure of the directors and officers to personal liability.

Nowlan Affidavit, paras 168-169, Application Record, Tab 2.

80. The proposed monitor has advised that it is supportive of the D&O Charge, including the amount thereof.

Nowlan Affidavit, para 175, Application Record, Tab 2.

**C. FTI Consulting Canada Inc. should be Authorized and Empowered to Act as Foreign Representative**

*i. The CCAA Court has the Jurisdiction to Appoint a Foreign Representative*

81. Section 56 of the CCAA grants this Court the unfettered authority to appoint “any person or body” to act as a representative for the purpose of having these CCAA proceedings recognized in any jurisdiction outside of Canada, including but not limited to the United States.

CCAA, s. 56

*ii. A Stay of Proceedings is Required in the United States to Facilitate the Restructuring Strategy Contemplated Herein*

82. In order to enforce the stay of proceedings established under the Initial Order (if it is granted by this Court) in the United States and to facilitate the restructuring strategy contemplated herein, it is necessary to seek recognition of the Initial Order by the United States Bankruptcy Court. Accordingly, the Primus Entities seek authorization in the Initial Order for FTI Consulting Canada Inc., as foreign representative of the Primus Entities, to seek recognition of these proceedings in the United States under Chapter 15 of the Bankruptcy Code.

*Nortel Networks Corporation (Re)*, 50 CBR (5th) 77 at para. 43, (S.C.J. [Commercial List]) Applicants’ BOA, Tab 10.

*Cinram*, at paras. 31-35, Applicants’ BOA, Tab 1.

83. Courts have consistently encouraged comity and cooperation between courts in cross-border insolvencies to enable enterprises to restructure on a cross-border basis. To authorize FTI to act as foreign representative and seek recognition of these proceedings in the United States is consistent with and gives full effect to the foregoing principles.

*Caesars Entertainment Operating Company, Inc. (Re)*, 2015 ONSC 712, (S.C.J. [Commercial List]) at para. 38. Applicants’ BOA TAB 11.

*Re Lear Canada* (2009), 55 C.B.R. (5th) 57 (S.C.J. [Commercial List]) at paras. 11 and 17. BOA, Tab 12.

*Re Babcock & Wilcox Canada Ltd.* (2000), 18 C.B.R. (4th) 157, (S.C.J. [Commercial List]) at para. 9. BOA, Tab 13.

84. The commencement of proceedings in the United States is necessary and appropriate under the circumstances because, among other things, the Primus Entities operate a cross-border business that is operationally and functionally integrated in several significant respects. Among other things, the Primus Entities have assets and employees in the United States and many affected creditors are located in the United States. As a result, it is possible that one or more parties in the United States will seek to commence proceedings in respect of one or more of the U.S. Primus Entities.

*Re iMarketing Solutions Group*, 2013 ONSC 2223 (S.C.J. [Commercial List]) at para. 30. Applicants' BOA, Tab 15.

Nowlan Affidavit at paras 50-71, 73, 81, 88, Application Record, Tab 2.

### *iii. Conclusion*

85. For the above reasons, given the scope of cross-border business, operations and assets, it is appropriate for this Court to exercise its jurisdiction further to section 56 of the CCAA to appoint the Monitor as the foreign representative of the Primus Entities with respect to these CCAA proceedings.

## **PART V - ORDER REQUESTED**

86. The Primus Entities request an Order substantially in the form of the draft Initial Order attached as Tab 3 to the Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19<sup>th</sup> day of January, 2016.

  
Stikeman Elliott LLP

Lawyers for the Primus Entities

**SCHEDULE "A"**  
**LIST OF AUTHORITIES**

1. *Re Cinram*, 2012 ONSC 3767 (S.C.J. [Comm. List])
2. *Re Global Light Telecommunications Inc.* (2004), 2 C.B.R. (5th) 210 (B.C.S.C.)
3. *Cadillac Fairview Inc. (Re)*, [1995] O.J. No. 273( S.C.J. [Comm. List])
4. *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4286 (S.C.J. [Comm. List])
5. *Stelco Inc. (Re)* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Comm. List])
6. *Lehndorff General Partner Ltd. (Re)* (1993), 17 C.B.R. (3rd) 24 (Ont. Gen. Div. [Comm. List])
7. *Nortel Networks Corp. (Re)* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Comm. List])
8. *Canwest Publishing Inc. (Re)* (2010), 63 C.B.R. (5th) 115 (Ont. S.C.J. [Comm. List])
9. *Canwest Global Communications Corp. (Re)* (2009), 59 C.B.R. (5th) 72 (S.C.J. [Comm. List])
10. *Nortel Networks Corporation (Re)*, 50 CBR (5th) 77 (S.C.J. [Commercial List])
11. *Caesars Entertainment Operating Company, Inc. (Re)*, 2015 ONSC 712, (S.C.J. [Commercial List])
12. *Re Lear Canada* (2009), 55 C.B.R. (5th) 57 (S.C.J. [Commercial List])
13. *Re Babcock & Wilcox Canada Ltd.* (2000), 18 C.B.R. (4th) 157, (S.C.J. [Commercial List])
14. *Re iMarketing Solutions Group*, 2013 ONSC 2223 (S.C.J. [Commercial List])

**SCHEDULE "B"**  
**RELEVANT STATUTES**

*Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3*

**2. Definitions**

In this Act,

...

**"insolvent person"** means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

- (a) who is for any reason unable to meet his obligations as they generally become due,
- (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
- (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

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

**2. Definitions**

In this Act,

[...]

**"company"** means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, railway or telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies;

[...]

**"debtor company"** means any company that

- (a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or

(d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent;

[...]

### **3(1). Application**

(1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than \$5,000,000 or any other amount that is prescribed.

[...]

## **11. General power of court**

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.

[...]

### **11.02. Stays, etc. – initial application**

(1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.



**Stays, etc. – other than initial application**

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

**Burden of proof on application**

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

**Restriction**

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

**11.51 Security or charge relating to director's indemnification**

(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge – in an amount that the court considers appropriate – in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

**Priority**

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

**Restriction – indemnification insurance**

(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

### **Negligence, misconduct or fault**

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

### **11.52 Court may order security or charge to cover certain costs**

(1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge – in an amount that the court considers appropriate – in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

### **Priority**

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[...]

### **56 Authorization to act as representative of proceeding under this Act**

The court may authorize any person or body to act as a representative in respect of any proceeding under this Act for the purpose of having them recognized in a jurisdiction outside Canada.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Court File No: \_\_\_\_\_

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  
COMMERCIAL LIST**

Proceeding commenced at Toronto

**FACTUM OF THE APPLICANTS**

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