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.

Applicants

RESPONDING FACTUM OF THE APPLICANTS
(Returnable August 9, 2016)

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Maria Konyukhova LSUC#: 52880V
Tel: (416) 869-5230
Email: mkonyukhova@stikeman.com

Vlad A. Calina LSUC#: 69072W
Tel: (416) 869-5202
Email: vcalina@stikeman.com
Fax: (416) 947-0866

Lawyers for the Applicants

TO: THE SERVICE LIST

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.

Applicants

FACTUM OF THE RESPONDING APPLICANTS
(Returnable August 9, 2016)

PART I - OVERVIEW

1. In this motion, Zayo Canada Inc. ("**Zayo**"), a sophisticated commercial party, is asking this Court to revisit and reopen (not simply rescind) a two-page consent agreement it entered into freely, with the benefit of advice of its in-house counsel and opportunity to consult with external counsel and for which it received a corresponding benefit. Zayo asks this Court to rewrite the agreement it entered into and deem it to be subject to the payment of all pre-filing arrears owing to Zayo by the Applicants in the full amount of $1,228,779.81 (i.e., exactly what it failed to bargain for).

2. The relief, if granted, will result in a preferential payment to Zayo ahead of the Primus Entities' secured creditors which is contrary to the statutory priority scheme and will result in significant unfairness to the Primus Entities and their secured creditors.

3. There is no jurisdiction for such relief, whether in the provisions of the *Companies Creditors' Arrangement Act*, RSC 1985, c C-36 ("**CCAA**") or at common law.

4. The main thrust of Zayo's submissions on this motion is that it would be "unfair" and contrary to the policy of the CCAA for Zayo to be in a "worse position" if it consented to an assignment than if it had intransigently refused to provide its consent. This submission is predicated on the mistaken notion that Zayo has a "right" (or "entitlement") to recover its pre-filing arrears and, particularly, that it could have guaranteed payment in full of such pre-filing arrears by simply refusing consent to assignment (i.e., by "forcing" the Primus Entities to bring a motion under section 11.3 and thereby recover its pre-filling arrears under section 11.3(4)).

5. There is no mechanism under the APA or the CCAA by which Zayo could "force" the Primus Entities to bring a motion pursuant to section 11.3 of the CCAA. Assignment of the Essential Contracts (including all of the contracts between the Primus Entities and Zayo) was subject to waiver by the Purchaser and the Purchaser could have refused to take assignment of the Zayo contracts if Zayo insisted on full payment of its pre-filing arrears. Accordingly, there is no guarantee that Zayo would have recovered any amount whatsoever if it refused to consent to the assignment.

6. It would also have been open to the Primus Entities and the Purchaser to negotiate with Zayo with respect to the quantum of payment that would have secured its consent. In this case, Zayo would have been faced with the choice of accepting some proportion of its pre-filing arrears as consideration for its consent to assignment or face its contract being stranded with an insolvent debtor and (as an unsecured creditor) thereby recovering nothing at all.

7. In addition, the process for obtaining Zayo's consent was fair and the allegations of unfairness by Zayo are unfounded. The fact that Zayo failed to vigilantly safeguard its interests and seek payment of its pre-filing arrears does not mean that it was subject to an unfair process.

It is not the obligation of the debtor in an insolvency to advise its sophisticated suppliers of their statutory rights. It is not the role of the Court to intervene and provide such a sophisticated party with the very benefit it failed to secure for itself.

PART II - THE FACTS

8. The facts underlying this motion are more fully set out in the Affidavit of Michael Nowlan, dated July 19, 2016 (the "**Nowlan Affidavit**") and the Affidavit of Kyle Mitchell, dated July 18, 2016 (the "**Mitchell Affidavit**"). All capitalized terms used but not defined herein have the meaning ascribed to them in the Nowlan Affidavit.

A. Background

i. The Primus Entities Seek CCAA Protection

9. Prior to the sale of substantially all of their assets through the CCAA, the Primus Entities carried on business reselling telecommunications services in Canada and the United States. In late 2014, as a consequence of severe and ongoing liquidity issues, the Primus Entities became unable to satisfy their obligations to their first-ranking secured lenders (the "**Syndicate**").[1]

10. With the benefit of the Syndicate's forbearance, the Primus Entities explored a variety of restructuring options. Ultimately, the Primus Entities conducted a sale and investor solicitation process ("**SISP**"). The Purchaser emerged as the successful bidder. On January 19, 2016, certain Primus Entities (in such capacity, "**Vendors**") and the Purchaser entered into an

---

[1] Nowlan Affidavit, Responding Motion Record of the Applicants, Tab 1 at paras. 4-5. The Bank of Montreal ("**BMO**") is the administrative agent for the Syndicate (the "**Agent**").

asset purchase agreement ("**APA**") conditional on court approval. Shortly thereafter, the Primus Entities obtained protection from their creditors by the order of Justice Penny ("**Initial Order**").[2]

ii. Notice and Service in the Primus Entities' CCAA Proceedings

11. The Initial Order wholly governs with respect to notice and service in the Primus Entities' CCAA Proceedings. As regards service, the Initial Order adopts the E-Service Protocol of the Commercial List (the "**E-Service Protocol**").[3]

12. The E-Service Protocol provides that e-mail "will be the required mechanism to serve documents to be filed in court ("**Court Documents**") in Commercial List Proceedings" (emphasis in original). The Primus Entities developed and maintained an e-mail service list (the "**Service List**") in accordance with the E-Service Protocol and created supplementary Service Lists for discrete motions as necessary.[4]

13. The Primus Entities added parties to the Service List on request in accordance with the E-Service Protocol, which provides that it is incumbent on those stakeholders who have an interest in the proceeding to advise diligently and provide a Request for Electronic Service ("**RES**") or otherwise carefully monitor the Monitor's Website.[5]

14. General information with respect to the Primus Entities' CCAA proceeding was disseminated by the Monitor by way of a case website (the "**Monitor's Website**").[6] On January 26, 2016, the Monitor mailed out a letter to all known creditors of the Primus Entities ("**Notice**

---

[2] Nowlan Affidavit, Responding Motion Record of the Applicants, Tab 1 at para. 6 8.
[3] *Ibid* at paras. 10-11.
[4] *Ibid.* See also the Guide Concerning Commercial List E-Service (the "**E-Service Guide**") found at Exhibit A to the Nowlan Affidavit, Responding Motion Record of the Applicants, Tab 1A at pp. 30-31.
[5] *Ibid.* Nowlan Affidavit, Responding Motion Record of the Applicants, Tab 1 at para. 12.
[6] Nowlan Affidavit, Responding Motion Record of the Applicants, Tab 1 at para. 12.

to Creditors") including Zayo, advising them that the Primus Entities had obtained the Initial Order and that the Primus Entities had entered into the APA with the Purchaser.[7]

15. Also on January 26, 2016, Ms. Wong Barker, on behalf of Zayo, wrote to the Monitor to, *inter alia*, request a copy of the APA. The Monitor advised Ms. Wong Barker that the APA was not yet public and directed her to the Monitor's Website for updates on the CCAA proceeding. Ms. Wong Barker never followed-up on her initial inquiry, nor did she provide a RES or otherwise request that Zayo be added to the Service List in accordance with the E-Service Protocol. The APA was available, as part of the motion record to approve the Transaction, on the Monitor's Website as of February 3, 2016.[8] Ms. Wong-Barker visited the visited the website during that Month but did not open the motion Record in question.[9]

iii. The Asset Purchase Agreement and Assignment of Contracts

16. An overview of the relevant terms of the APA and the sale transaction contemplated therein (the "**Transaction**") is set out in detail in the Nowlan Affidavit and the Third Report.[10] With respect to the present motion, the key terms are as follows:

(a) The Purchaser was to assume certain of the Vendors' contracts and other written agreements (the "**Assumed Contracts**");

(b) The possibility that payment of pre-filing arrears might be required to assign any of the Assumed Contracts was captured in the concept of Cure Costs:

---

[7] "E-Service Guide", Nowlan Affidavit, Responding Motion Record of the Applicants, Tab 1A at para. 23.
[8] Third Report of the Monitor dated July 13, 2016 (the "**Third Report**") at para. 39.
[9] Examination of Julie Wong-Barker held July 20, 2016 ("**Wong-Barker Cross-Examination**"), Qs. 221-228, Supplementary Motion Record of Zayo Canada Inc. ("**Zayo's Supplementary Motion Record**"), Tab 2 at 58-59.
[10] Nowlan Affidavit, Responding Motion Record of the Applicants, Tab 1 at paras. 25-37. Third Report at paras. 17-21.

> "Cure Costs" means in respect of any Assumed Contract, all amounts required to be paid to cure any monetary defaults thereunder, if any, required to effect an assignment thereof from a Vendor to the Purchaser...

(c) The procedure for any negotiations regarding either the payment or the settlement of Cure Costs was set out in the APA and required the participation of each of the Vendor, the Purchaser and the Monitor;

(d) The assignment of certain of the Assumed Contracts was a condition precedent to the Transaction ("**Essential Contracts**") that could be waived by the Purchaser; and

(e) The Purchaser expressly reserved the right to remove contracts from the list of Assumed Contracts or Essential Contracts.

17. The Purchaser had not made a final determination as to which of the Assumed Contracts were Essential Contracts at the time the parties executed the APA and the list underwent extensive revisions throughout the CCAA.[11]

B. The Primus Entities' Contract Assignment Process

18. The parties anticipated that certain of the Assumed Contracts would, by their terms, require counterparties' consent to be assigned ("**Consent Required Contracts**").[12]

19. The Vendors were obligated to use commercially reasonable efforts to assign such contracts. Subject to agreement to the contrary of the Purchaser, the Vendors were only required

---

[11] Nowlan Affidavit, Responding Motion Record of the Applicants, Tab 1 at para. 32.
[12] *Ibid* at paras. 29 and 48. The Consent Required Contracts were voluminous, spanning over a decade of operations. Difficulty occasioned as a result of this volume are set out at paras. 47 and 48 of the Nowlan Affidavit.

to bring a motion under section 11.3 with respect to Essential Contracts whose consent to assignment was not obtained by the service date for the Approval and Vesting Order motion.[13]

20. The process to seek consents to assignment was developed in consultation with the Monitor and carefully tailored to address the volume of contracts to be assigned; minimize cost to stakeholders; and ensure certainty of closing of the Transaction.[14]

21. As set out in the Nowlan Affidavit, the list of Assumed and Essential Contracts was in a state of flux from January 19 to February 29, 2016.[15] This was due, in part, to the volume of contracts to which the Vendors were a party and the continued review by the Purchaser as to which contracts would be Essential Contracts. During that time, the parties, with assistance from the Monitor, reviewed, consolidated and updated each list.

22. The Primus Entities prepared a template letter to be delivered to counterparties requesting their consent to assignment (the "**Consent Letters**"), advising, *inter alia*, that:

(a) the Primus Entities conducted the SISP and entered into the APA;

(b) the APA contemplated assignment of their contract(s) to the Purchaser;

(c) all motion materials would be made available on the Monitor's Website;

(d) only obligations arising under the contract(s) after the closing of the Transaction would be assumed by the Purchaser:

---

[13] Nowlan Affidavit, Responding Motion Record of the Applicants, Tab 1 at paras. 36-37.
[14] *Ibid* at paras. 38-41. Third Report at paras. 17-21.
[15] Nowlan Affidavit, Responding Motion Record of the Applicants, Tab 1 at para. 39.

> Following the assignment, the Purchaser will be responsible for all obligations under the Contract arising after the Closing…

(e) if consent was not received by a specified date, the Primus Entities would seek relief under section 11.3, with respect to only those parties that did not provide consent.

C. The Assignment of the Allstream/Zayo Contracts

23. The relationship between the immediate predecessor to Zayo, Allstream Inc. ("**Allstream**"), and the Primus Entities (or its predecessor) is set out in the Nowlan Affidavit.[16]

24. Prior to its acquisition by Zayo Group Holdings, Inc. ("**Zayo Group**") in January 2016, Allstream was a wholly owned subsidiary of Manitoba Telecom Services Inc. ("**Manitoba Telecom**").[17] In 2004, Manitoba Telecom acquired a predecessor of Allstream (AT&T Canada Corp., "**AT&T Canada**"), which it renamed MTS Allstream Inc. ("**MTS Allstream**"). In 2012, Manitoba Telecom divided MTS Allstream into two separate companies: MTS Inc. ("**MTS**") and Allstream.[18] The Primus Entities (or predecessor thereof) had contracts with each predecessor.[19]

25. The Primus Entities sent Zayo three separate Consent Letters on January 22, January 26, and January 28, 2016.[20] Relying on the written notice provisions of the contracts for which assignment was sought, the Primus Entities mailed the Consent Letters to the attention of different persons and addresses (two which were in Toronto and one which was in Ottawa).[21]

---

[16] *Ibid* at paras. 60-69.
[17] *Ibid* at para.61.
[18] Notably, Manitoba Telecom did not make a formal request for assignment at the time MTS Allstream was subdivided into MTS and Allstream, respectively.
[19] *Ibid* at para.70
[20] A review of the contracts sought to be assigned in each letter is set out in the Nowlan Affidavit at paras. 66-68.
[21] Nowlan Affidavit, Responding Motion Record of the Applicants, Tab 1 at para. 66-68.

26. On January 29, 2016, Ms. Wong Barker provided a letter from Mr. Mark Strople, then President of Allstream, which consented to the assignment of the contracts referred to in the January 22 and 26 Consent Letters (the "**Allstream Consent Letter**").[22]

27. The Allstream Consent Letter requested Primus Canada consent to assign certain contracts between MTS and it to Allstream and provide a release to MTS from all obligations under those contracts in consideration for Allstream assuming the same obligations.[23]

28. On February 5, 2016, the Primus Entities received a further executed consent to assignment to the contracts for the contracts set out in the January 28 Consent Letter.[24]

29. On February 2, 2016, the Primus Entities served their motion materials seeking the Approval and Vesting Order and the Assignment Order on the Service List, which were posted on the Monitor's Website on February 3, 2016. For the reasons set out in the Nowlan Affidavit, the Primus Entities served their Assignment Order motion materials on contract counterparties that had not yet provided their consent to assignment between February 9 to 16, 2016.[25]

30. Zayo, which had already provided an executed consent to assignment for all of the Allstream Contracts by February 8, 2016 and had not delivered either a Notice of Appearance or a Request for Electronic Service, was not served with motion materials.[26]

---

[22] *Ibid.*
[23] *Ibid* at paras. 76.
[24] *Ibid* at para. 77.
[25] *Ibid* at paras. 50-52, 54.
[26] *Ibid* at paras. 54.

31. On February 17, 2016, for the reasons described in greater detail in the Nowlan Affidavit, Ms. Wong Barker provided a revised consent to assignment (the "**Revised Allstream Consent Letter**"). The Allstream Consent Letter repeated the request that Primus Canada consent to an assignment of certain of its contracts with MTS to Allstream and a release to MTS on the same terms as had been provided in the Allstream Consent Letter.[27]

32. On March 1, 2016, at 10:59 a.m., Mr. Kyle Mitchell, regulatory counsel for the Primus Entities, e-mailed a letter intended to consolidate and replace the Revised Consent Letter (the "**Consolidated Consent Letter**").[28] Mr. Mitchell and Ms. Wong Barker discussed the Consolidated Consent Letter.[29] Mr. Mitchell explained the Revised Allstream Consent Letter:

(a) was drafted in a confusing manner and did not accord with the standard form of consent approved, *inter alia*, by the Primus Entities and Monitor;

(b) did not specify the assignment was in favour of Birch or an affiliate; and

(c) would be replaced by the Consolidated Consent as the form of consent.

33. Following some further email exchanges and after making minor corrections, Ms. Wong Barker sent the executed Consolidated Consent Letter at 5:17 p.m. on March 1, 2016.[30]

34. The Assignment Order was granted by Justice Wilton-Siegel on March 2, 2016. Between January 22, 2016 and March 1, 2016, Zayo did not make any inquiry of the Primus

---

[27] *Ibid* at para. 78-79.
[28] *Ibid* at paras. 82-83.
[29] Mitchell Affidavit, Responding Motion Record of the Applicants, Tab 1 at paras. 4.
[30] Nowlan Affidavit, Responding Motion Record of the Applicants, Tab 1 at paras. 86.

Entities, the Monitor or their respective counsel with respect to payment for any pre-filing arrears in connection with the assignment of the Allstream Contracts or otherwise.[31]

D. Counterparties Request Payment of Pre-Filing Arrears as a Condition to Assignment

35. The Consent Letters were delivered to counterparties on a rolling basis. Between January 22, 2016 and March 1, 2016, nine counterparties contacted the Primus Entities to advise them that they would be willing to consent to an assignment, but only conditional on the pre-filing arrears owing being paid. The Primus Entities and the Purchaser carried on negotiations with such parties as contemplated in the APA.[32]

E. The Present Status of the Primus Entities' CCAA Proceeding

36. On April 1, 2016, all conditions under the APA were satisfied and the transaction contemplated therein closed. Accordingly, the Monitor came to be in receipt of the Proceeds and commenced disbursing them as set out in the Distribution Order.[33]

37. The current outstanding indebtedness to the Syndicate is $7.5 million. It is expected that the Syndicate will experience a shortfall.[34] It is similarly expected that no distributions will be made to the $20 million indebtedness of the Primus Entities subordinate senior secured creditor, Manufacturers Life Insurance Canada, or to any other creditor of the Primus Entities.[35]

---

[31] *Ibid* at paras. 84-89.Mitchell Affidavit, Responding Motion Record of the Applicants, Tab 1 at paras. 5.Third Report at para. 39
[32] Nowlan Affidavit, Responding Motion Record of the Applicants, Tab 1 at paras. 58-59.
[33] Nowlan Affidavit, Responding Motion Record of the Applicants, Tab 1 at para. 20.
[34] Third Report at paras. 31, 34-35.
[35] *Ibid* at paras. 34-35.

38. On May 12, 2016, Zayo served a Notice of Appearance. On May 13, 2016, more than a month after the Closing Date and more than two months after the Assignment Order was issued, the Primus Entities were served with a notice of motion by Zayo.[36]

PART III - ISSUES

39. The sole issue is whether Zayo is entitled to be paid its pre-filing arrears at this time.

PART IV - THE LAW

A. Absent an Exception to the Statutory Scheme of Priorities, Paying Zayo its Pre-Filing Arrears at this Time is a Preference

40. It is "a fundamental principle of insolvency law" that an unsecured creditor is may only claim a distribution in an insolvency if and only if the indebtedness to all secured creditors is first fully satisfied.[37] It is a similarly well-settled and fundamental principle of insolvency law that "all unsecured creditors receive equal treatment."[38] Accordingly, a preference – a transaction where an insolvent debtor makes a payment for the benefit of one unsecured creditor at the expense of a secured creditor – is repugnant to the core tenants of insolvency law.

41. Zayo is an unsecured creditor. As a result, Zayo has one recourse in the event that the Primus Entities refused to satisfy any or all of the arrears with respect to any of the Allstream Contracts: a common law action (sounding in debt). In the event of the insolvency (or bankruptcy) of the Primus Entities, Zayo (who would be stayed from bringing any action in debt to recover any of its arrears without leave) had a simple entitlement: to share *pro rata* in

---

[36] Nowlan Affidavit, Responding Motion Record of the Applicants, Tab 1 at paras. 12 and 24.
[37] *Shoppers Trust Co. (Liquidator of) v. Shoppers Trust Co.* (2005), 74 O.R. (3d) 652 (C.A.) at para. 25 ["***Shoppers***"], Applicants' Responding Book of Authorities at Tab 1.
[38] *Indalex Ltd. (Re)* (2009), 55 C.B.R. (5th) 64 (Ont. S.C.J.), at para. 16 ["***Indalex***"], Applicants' Responding Book of Authorities at Tab 2.

any distribution made to unsecured creditors (and, in this case, no such distributions are anticipated to be made to unsecured creditors).[39]

42. Accordingly, and without a statutory or other exception to this scheme of priorities, any payment from the Proceeds to Zayo in respect of its pre-filing arrears (to the detriment of the Syndicate, the first-ranking and fulcrum secured creditor) is an impermissible preference.[40]

43. As set out below, there exists no exception entitling Zayo to its pre-filing arrears at this time (whether at common law, on the basis of the APA, or on account of section 11.3).

B. There is No Exception to the Statutory Priority Scheme that Would Justify Payment of Zayo's Pre-filing Arrears

i. Overview

44. In the absence of a motion brought by the Primus Entities pursuant to section 11.3 of the CCAA in respect of the Allstream Contracts, there is no basis for Zayo to claim an entitlement to any Cure Costs. Section 11.3 does not grant parties a "right" to be paid pre-filing arrears if they consent to an assignment in the ordinary course under the law of assignment.

ii. The APA Does Not Entitle Zayo to its Pre-Filing Arrears as Cure Costs

45. By definition in the APA, "Cure Costs" are the amount (if any) of pre-filing arrears that must be paid "to effect an assignment" of an Assumed Contract. Since Zayo consented to

---

[39] *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67 at para. 21, Applicants' Responding Book of Authorities at Tab 3. See also Third Report at paras. 33-35.

[40] *Ivorylane Corp. v. Country Style Realty Ltd.*, 2005 CarswellOnt 2516 at paras. 15-16, Applicants' Responding Book of Authorities at Tab 4. *Cinram International Inc. (Re)*, 2012 ONSC 3767 at para. 68, Applicants' Responding Book of Authorities at Tab 5. *Indalex*, at para. 16, Applicants' Responding Book of Authorities at Tab 2.

the assignment without requesting payment of its pre-filing arrears, payment of the same was not required to "effect an assignment" of the Allstream Contracts to the Purchaser.[41]

46. In any case, Zayo is not a party to the APA. Zayo cannot claim a benefit under it. The mechanism set out in the APA for the payment of Cure Costs is solely for the benefit of the Purchaser and Primus Entities. At best, Zayo would be a third-party beneficiary (and then only if payment of its pre-filing arrears was necessary to secure its consent). It is well-settled that a third-party beneficiary has no standing to claim under the contract that coincidentally provides it with a benefit (with limited exceptions, none of which apply to the present circumstances).[42]

iii. Section 11.3 Does Not Grant Zayo the Right to Claim its Pre-Filing Arrears

47. Zayo's motion materials are replete with a reference to a purported "right to be paid Cure Costs" that Zayo ostensibly grounds in section 11.3 of the CCAA.[43] The main thrust of its submission on this point is that "Zayo should not be in a worse position with respect to its right to Cure Costs than if it had not cooperated with the Applicants' request for consent."[44] This submission fundamentally mischaracterizes section 11.3 of the CCAA.

48. Simply, Zayo had no right to be paid its pre-filing arrears even if it intransigently refused to consent to assignment (or indicated it is willing to consent only on the condition that its pre-filing debt is paid in full) unless the Primus Entities chose to bring a motion to force an assignment over its objection. Had Zayo refused to consent to assignment no claim would arise.

---

[41] Nowlan Affidavit, Responding Motion Record of the Applicants, Tab 1 at para. 20.
[42] See *Garfin v. Mirkopoulos*, 2009 ONCA 421 at paras. 23-25, Applicants' Responding Book of Authorities at Tab 6.
[43] See e.g. the Factum of the Moving Party, Zayo Canada Inc. ("**Zayo's Factum**") at paras. 17, 22-23, 34, 42 and 57. See also Zayo's Amended Notice of Motion at paras. 28-30, Motion Record of Zayo Canada Inc. ("**Zayo's Motion Record**") at Tab 2 ("**Amended Zayo's Notice of Motion**"). See also the Affidavit of Julie Wong-Barker sworn June 10, 2016 ("**Wong-Barker Affidavit**"), Zayo's Motion Record, Tab 3 at paras. 5, 25 and 31.
[44] Zayo's Amended Notice of Motion at para. 30. See also Zayo's Factum at para 6.

The Primus Entities would have had the discretion to decide if court-ordered assignment to the Purchaser of some (or all of) the Allstream Contracts was commercially reasonable.

49. It is well-settled law that, absent a motion by the debtor for the court-ordered assignment of contracts over the objection of a counterparty, the common law of assignment applies during the pendency of a CCAA proceeding without modification.[45]

50. Section 11.3, which "codifies what had been the general approach to assignment issues", is a departure from the common law of assignment.[46] It is a narrow, tailored exception to the priority scheme between secured and unsecured creditors. Section 11.3 grants the Court a discretionary power to "interfere with contractual rights in the context of CCAA proceedings" and assign a debtor's contracts to a third party over a counterparty's objection. It reads:

> **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.
>
> [...]
>
> **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;

---

[45] *Re Playdium Entertainment Corp.* (2001), 31 C.B.R. (4th) 302 at paras. 22-23 ["***Playdium***"], as supplemented at 31 C.B.R. (4th) 309 (Ont. S.C.J.), Applicants' Responding Book of Authorities, Tab 7. *Re Nexient Learning Inc.* (2009) 62 C.B.R. (5th) 248 (Ont. S.C.J.), at paras. 51, 53-54 ["***Nexient***"], Applicants' Responding Book of Authorities, Tab 8.

[46] For a review, see *Veris Gold Corp. (Re)*, 2015 BCSC 1204 at paras 53-56 ["***Veris***"], Applicants' Responding Book of Authorities, Tab 9.

> (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.
>
> [Emphasis added.]

51. The purpose of section 11.3 is to maximize value for all stakeholders, not enrich suppliers. Had Parliament intended to enact a provision that granted all suppliers the right to payment in full of pre-filing arrears as a condition to assignment of their contract during an insolvency proceeding, then it would have expressly provided for it.

52. In fact, where the contract does not require the consent of the counterparty to be assigned, the CCAA does not entitle counterparties to any payment at all on account of their pre-filing arrears. Ultimately, section 11.3 provides a framework by which the Court may, in its discretion, exercise its statutory power to interfere with consensual contractual relationships (over the objections of a counterparty) for the purpose of maximizing stakeholder value on application by the debtor and for the narrow purpose of furthering the reorganization.[47]

53. Put differently, section 11.3 does not provide suppliers generally (or counterparties generally) who refuse to consent to an assignment of their contract with a "right" (or entitlement) to be paid pre-filing arrears as a condition of a court-ordered assignment. Rather, it imposes a fundamental restriction on the discretionary power of the Court to forcibly order such an assignment under the CCAA if the debtor requests it. This is apparent in the very phrasing of subsection 11.3(4) of the CCAA, which is simply entitled "Restriction":

---

[47] *Veris* at paras 53-56, Applicants' Responding Book of Authorities, Tab 9. See also Playdium at paras. 22-23, Applicants' Responding Book of Authorities, Tab 7 and *Nexient* at paras. 51, 53-54, Applicants' Responding Book of Authorities, Tab 8.

> Restriction
>
> (4) The court may not make the order [assigning the rights and obligations of the debtor company] 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.[48]

54. Zayo submits that by refusing to consent to the assignment requested in the Consent Letters, the Primus Entities would have been "forced" to bring a motion pursuant to section 11.3 of the CCAA to compel the assignment over the Allstream Contracts and thereby give rise to a claim to pre-filing arrears by operation of section 11.3(4) of the CCAA. The speculative possibility that the Primus Entities would have elected to bring a motion to seek the court-ordered assignment of the Allstream Contracts does not give rise to an entitlement in Zayo to payment of their pre-filing arrears; rather, it is merely one of several possibilities that would follow from Zayo refusing to consent (the others being that its pre-filing debt would be stranded with the Primus Entities if the Purchaser waived assignment, or the payment in part of the pre-filing arrears would suffice to secure Zayo's consent to assignment when faced with the alternative that it would receive no payment and have its contract stranded going forward).

55. In its submissions and motion materials, Zayo also spends substantial amounts of time on the interpretation by Ms. Wong Barker (who has clearly misinterpreted section 11.3 of the CCAA as providing counterparties with an absolute right to payment of their pre-filing arrears).[49] The (mis)interpretation of counsel of a statutory provision has no bearing on its meaning. This follows from the well-settled and basic principles of statutory interpretation:

---

[48] CCAA, section 11.3(4).

[49] Zayo's Factum at paras. 23, 34, 60-61. Wong-Barker Affidavit, Zayo's Motion Record, Tab 3 at paras 5, 18, 25, 31.

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[50]

56. Ultimately, Zayo effectively seeks to reverse the operation of section 11.3. Rather than a debtor company applying to force an assignment of a contract for the sake of maximizing the recovery for senior creditors and for the benefit of the restructuring as a whole, an unsecured creditor is applying for a forced assignment of its agreement for the sake of its own pecuniary benefit to the detriment of the fulcrum secured creditor, effectively resulting in a reversal of priorities, amounting to a preference in its favour. The result is substantial prejudice to the Primus Entities and Purchaser (who are denied the chance to negotiate a consensual assignment) and Syndicate (who effectively subordinate part of their indebtedness to Zayo).

C. At most, the Court Only Has Jurisdiction to Rescind the Assignment, Not Renegotiate the Bargain the Parties Struck on Terms Favourable to Zayo

i. The Court is Without Jurisdiction to Offer the Relief Sought by Zayo

57. There is no general power in the Courts to protect parties from their improvident or foolish bargains.[51] Accordingly, there is no common law or statutory basis for the jurisdiction to provide Zayo with the relief it seeks: the benefit it wishes it had, but failed, to negotiate for.

58. Zayo does not seek that this Court set aside its consent to the assignment. The relief it seeks is much more radical. In substance, Zayo petitions this Court to revisit and reopen the parties' bargain and deem it to be subject to payment of all pre-filing arrears owing to Zayo (i.e., exactly what it failed to bargain for).

---

[50] *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 SCR 27 at para. 27, Applicants' Responding Book of Authorities at Tab 10.
[51] See e.g., Angela Swan, *Canadian Contract Law*, 3rd Ed. (Markham: LexisNexis, 2012) at §9.100, Applicants' Responding Book of Authorities at Tab 28.

59. It is simply not the role of a Court to renegotiate the parties' clear bargain.[52] The usual remedy for alleged unfairness regardless of the technical doctrine sought to be applied is well-settled: the counterparty who alleges unfairness is relieved from the burden it has assumed, with the consequence being that the contract impugned as unfair is set thereby set aside.[53]

60. In addition, the Courts – only with very limited exceptions – have applied a clear and unequivocal principle: sophisticated parties should be held to bargains they made. Strict rules govern when Courts will exercise their power to release a party from the burden of a binding and valid contract alleged to be unfair (including, but not limited to, unconscionability, misrepresentation or mistake). The mere fact that a bargain proves to be improvident or foolish is no basis to relieve the counterparty under the doctrine of unconscionability (the well-settled basis for which was the interaction of unequal bargaining power and inadequate consideration):

> If the bargain is fair the fact that the parties were not equally vigilant of their interest is immaterial. Likewise if one was not preyed upon by the other, an improvident or even grossly inadequate consideration is no ground upon which to set aside a contract freely entered into. It is the combination of inequality and improvidence which alone may invoke this jurisdiction...[54]
>
> [Emphasis added.]

61. A similar strict burden applies in the case of an alleged mistake. For instance, a mistaken party will be denied a remedy under the doctrine of unilateral mistake except in a case

---

[52] See e.g., *Mascia v. Dixie X-Ray Associates Ltd.*, 2008 CarswellOnt 6759 at para. 14, Applicants' Responding Book of Authorities at Tab 11, *MacMillan v. Kaiser Equipment Ltd.*, 2004 BCCA 270 at para. 45, Applicants' Responding Book of Authorities at Tab 12, and *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426 at 462, Applicants' Responding Book of Authorities at Tab 13.

[53] *Toronto Transit Commission v. Gottardo Construction Ltd.* (2005), 77 O.R. (3d) 269 at paras. 30-32, Applicants' Responding Book of Authorities at Tab 14.

[54] *Mundinger v. Mundinger* (1968), 1 O.R. 606 at 610 ("*Mundinger*"), Applicants' Responding Book of Authorities at Tab 15. See also *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 at para. 45, Applicants' Responding Book of Authorities at Tab 16.

where the non-mistaken party can be considered to have engaged in fraud or the "equivalent of fraud" (which in the cases is broadly defined as some form of unconscionable conduct).[55]

62. Section 11 does not provide a separate or broader grant of jurisdiction. It is a well-settled and trite principle that the common law rule applies to the CCAA without modification "unless, of course, the rule is ousted by the CCAA ... with clear wording."[56] As the Supreme Court set out *Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co* (citations omitted):

> ...[A] Legislature is not presumed to depart from the general system of the law without expressing its intentions to do so with irresistible clearness, failing which the law remains undisturbed...[57]

63. The general power in section 11, while broad, not unlimited. It does not ground the power to offer any relief whatsoever merely on the basis that alleged unfairness has taken place. As the Supreme Court of Canada explains in its unanimous decision in *Century Services*:

> ...[T]he 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.[58]
>
> [Emphasis added.]

---

[55] *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19 at para. 31, Applicants' Responding Book of Authorities at Tab 17.
[56] *Nortel Networks Corporation (Re)*, 2015 ONCA 681 at para. 36, Applicants' Responding Book of Authorities at Tab 18.
[57] *Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co.*, 1956 CarswellNat 247, [1956] S.C.R. 610 at 614, , Applicants' Responding Book of Authorities at Tab 19.
[58] *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 ["***Century Services***"] at para. 70, Applicants' Responding Book of Authorities at Tab 20.

64. The authorities with respect to section 11 are clear that such powers are meant to be exercised to facilitate the restructuring of the debtor and, in the case of a liquidating CCAA, maximize stakeholder returns.[59] Zayo does not seek the payment of its pre-filing arrears as Cure Costs in order to advance such a purpose. Rather, it seeks to provide itself with a preference: to raise its pre-filing debt above a secured claim by means of the fact it thoughtlessly consented to its assignment. It is well-settled that it is not the role of the Court to protect sophisticated parties from their failure to safeguard their own interest or from their own improvident bargains. Section 11 of the CCAA does not vary this well-settled principle of the common law.

65. Section 11 of the CCAA is a gap-filling power.[60] Here, there is no legislative "gap" to fill. Where the common law provides broad jurisdiction with respect to a matter and no statutory term (in the CCAA or otherwise) purports to interfere with that jurisdiction, a broad discretion in one statute (even the CCAA) cannot be used to supplant or override the common law regime, particularly where the remedy does not advance a remedial purpose of the statute.

ii. In Any Event, the Court Should Not Exercise Its Discretion to Set Aside the Assignment as the Assignment Process and the Outcome for Zayo was Fair

(a) The Assignment Process was Fair

66. In any event, and even supposing that the Court has the jurisdiction to force the assignment of the Allstream Contracts and order that the Zayo's pre-filing arrears be paid as

---

[59] *Century Services* at para. 70, Applicants' Responding Book of Authorities at Tab 20. See e.g., *Lehndorff General Partner Ltd. (Re)* (1993), 17 C.B.R. (3rd) 24 (Ont. Gen. Div. [Comm. List]) [***"Lehndorff"***] at para. 7, Applicants' Responding Book of Authorities at Tab 21.

[60] Janis P. Sarra and Justice Georgina R. Jackson, "Selecting the Judicial Tool To Get The Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" (2008) Ann Rev Insol L 55., Applicants' Responding Book of Authorities at Tab 28. See also Re Metcalfe & Mansfield Alternative Investments II Corp., 2008 ONCA 587 at paras. 46-48, aff'g 2008 CarswellOnt 3523 at paras. 100-101, Applicants' Responding Book of Authorities at Tab 22.

Cure Costs at this time and absent a motion from the CCAA debtors, there is no viable ground to justify exercising such jurisdiction.

67. In essence, Zayo alleges a number of unfair circumstances, each of which falls short of a contractual doctrine for relief from an allegedly unfair bargain - misrepresentation, unilateral mistake, unconscionability, and undue influence - yet submits that taken as a whole these shortcomings suffice to render the transaction unfair. There were no shortcomings in the assignment process that may have resulted in unfairness to Zayo. The facts are simple:

(a) Zayo (and its predecessor, Allstream) is a highly sophisticated and experienced party. Among other things, Allstream: (i) earned approximately $600 in revenue prior to being acquired by Zayo; (ii) advertised itself as having a "multi-billion dollar investment" in its "extensive" network; and (iii) marketed itself as "the only national communications provider focused on exclusively serving Canadian business." Zayo acquired Allstream for $465 million (ten times the value received by the Applicants);[61]

(b) Zayo had more than adequate notice of the Primus Entities CCAA proceeding (including by way of the Notice to Creditors) and of the impending disclosure of the APA (notwithstanding its complaints and submissions to the contrary) yet at no point before it commenced the instant motion did it provide a Notice of Appearance or a Request for Electronic Service to receive service of Court Documents going forward;[62]

---

[61] Nowlan Affidavit, Responding Motion Record of the Applicants, Tab 1 at paras. 70-74. Third Report at paras. 15 and 41-42.

[62] Nowlan Affidavit, Responding Motion Record of the Applicants, Tab 1 at paras. 12 and 51. Third Report at paras. 15 and 41-42.

(c) Zayo had more than adequate time, and more than adequate means, to obtain legal advice from experienced insolvency counsel with respect to the effect of the January 22 and January 26 Consent Letters (particularly given that Ms. Wong Baker was, as she admits in her affidavit, "not well-versed with the CCAA" process);[63]

(d) After being notified of the Primus Entities' CCAA proceedings, Zayo failed to conduct any adequate due diligence with respect to its rights under the CCAA notwithstanding its sophistication and the quantum of pre-filing arrears that were owing to it at the time. In particular, Ms. Wong Barker limited her initial due diligence on the Primus Entities CCAA proceeding to an internet search on the Primus Entities' CCAA and the January 26, 2016 inquiry to the Monitor;[64]

(e) As described in greater detail below, and contrary to its submissions, Zayo was not entitled to receive service of the motion record for the Approval and Vesting Order or the Assignment Order solely by virtue of being a stakeholder the CCAA proceeding;

(f) The APA, to the extent its disclosure is pertinent at all to this motion, was publically available since February 2, 2016 in the form served on all parties to the Approval and Vesting Order motion and/or the Assignment motion (as an Exhibit in the Approval and Vesting Order motion record);[65]

(g) In any event, by Ms. Wong Barker's own admission, service of the Approval and Vesting Order motion record or the Assignment Order motion record would have been

---

[63] Nowlan Affidavit, Responding Motion Record of the Applicants, Tab 1 at para. 20. Third Report at paras. 15 and 41. See also the Wong-Barker Affidavit, Zayo's Motion Record, Tab 3 at para. 12.
[64] Wong-Barker Affidavit, Zayo's Motion Record, Tab 3 at para. 12.
[65] Nowlan Affidavit, Responding Motion Record of the Applicants, Tab 1 at para. 39.

of minimal assistance: she reveals in cross-examination that she had primary (if not sole) carriage of the matter and that she did review the motion record in advance of the date for the Assignment Order motion but did not pay the APA particular attention because it was "buried" as "Exhibit 'L' in a 413 [page] pdf";[66]

(h) Zayo consented to the assignment it now seeks to contest not once, not twice, but thrice in a 39 day period. Notwithstanding that each time it had the opportunity to raise the question of whether it would receive payment with respect to its pre-filing arrears, it failed to take steps to raise the issue with the Monitor or Applicants;[67] and

(i) Other similarly situated (and commercially sophisticated) parties were able to work through the same materials and seek that their pre-filing arrears be paid as a condition to their consent to assignment.[68]

(b) Neither the Primus Entities, the Monitor nor the Court were under a Duty to Protect Zayo from Entering into an Improvident Bargain

68. Zayo contends that it was incumbent on the Primus Entities (in their capacity as CCAA debtors) to alert Zayo to the legal consequences of consenting to an assignment (as opposed to intransigently refusing to offer consent in the hopes of being forced-assigned pursuant to section 11.3 of the CCAA). This submission is fundamentally flawed:

(a) First, it is trite law that commercial parties do not owe an obligation to provide each other with legal advice in the ordinary course of their dealings (but rather are

---

[66] Cross-Examination of Julie Wong-Barker held July 20, 2016 ("**Wong-Barker Cross-Examination**"), Qs. 222 and 225, Supplementary Motion Record of Zayo Canada Inc. ("**Zayo's Supplementary Motion Record**"), Tab 2 at 58.
[67] Nowlan Affidavit, Responding Motion Record of the Applicants, Tab 1 at paras. 89. Mitchell Affidavit, Responding Motion Record of the Applicants, Tab 1 at paras. 5. Third Report at paras 39, 41-42.
[68] Nowlan Affidavit, Responding Motion Record of the Applicants, Tab 1 at paras. 89.

entitled to purse their own economic self-interest to the best of their ability).[69] This obligation cannot change on account of one being insolvent and is particularly true where the complaint of unfairness concerns an alleged failure to explain the legal consequences of a particular course of action; and

(b) Second, as mentioned above, Zayo is a sophisticated party whose business is in orders of magnitude larger than the Primus Entities (Zayo Group, its parent, operates on a global scale and Allstream dwarfed Primus Canada by nearly tenfold in its revenues and its ultimate realizable sale value). Zayo had the means to secure sophisticated and experienced insolvency counsel on a highly expedited basis to provide it with advice as to, *inter alia*, the role of section 11.3. There is no unfairness to it in such circumstances.[70]

69. Zayo, in its submissions, makes reference to the initial timeline in the Consent Letters that it received, with the insinuation being that it was subject to some form of pressure, falling short of duress, that renders it being held to its consent unfair. It is well-settled that it is not "illegitimate for a party to 'bargain hard', and advance its own interest", which includes pressure in negotiations.[71] It is also well-settled that there is no "illegitimate pressure" (or "economic duress") where, *inter alia*, the party "had the opportunity to speak with independent legal counsel" and had "a realistic alternative to entering into the agreement" (or "real

---

[69] With respect to the obligation of groups (including public boards) to provide advice as to the legal consequences of documents and notice, see e.g., *Bongelli v. Ontario (Criminal Injuries Compensation Board)*, 2014 ONSC 5332 at paras. 10-12, Applicants' Responding Book of Authorities at Tab 23. For the general proposition, see e.g., *Haggith v. 33 Parliament Street Inc.* 2002 CarswellOnt 835 at para. 3, Applicants' Responding Book of Authorities at Tab 24.

[70] See e.g., *Ross v. Christian & Timbers Inc.*, 2002 CarswellOnt 1453 at para. 15, Applicants' Responding Book of Authorities at Tab 25.

[71] *Attila Dogan Construction and Installation Co. Inc. v AMEC Americas Limited*, 2014 ABCA 74 at paras. 18-22, Applicants' Responding Book of Authorities, Tab 26.

choice").[72] Zayo had the benefit of independent legal advice, the opportunity and means to seek out advice from experienced, senior insolvency counsel, and clear alternatives to consent.[73]

70. Finally, Zayo further submits that, *inter alia*, "[i]n its supervisory role, the Court should strive to ensure that the CCAA process unfolds in a fair and transparent manner." The general principle, while trite, is misapplied. It is not the role of the Court to protect sophisticated parties (who have access to experienced insolvency counsel) from entering into improvident bargains, or failing to safeguard their pecuniary interests. The relief that Zayo seems is tantamount to rewriting the parties' bargain. It is well-settled that "it is not the role of the courts to rewrite contracts entered into by sophisticated commercial parties."[74]

71. As set out in detail above, Zayo had more than sufficient opportunity to negotiate the payment of some (or all) of its pre-filing debts during the course of the nearly month-long period in which consents to assignment were being exchanged between the parties.[75] It failed to negotiate. It failed to vigilantly safeguard its own interest, despite its sophistication. It is not the role of a CCAA Court to intervene and aid Zayo, a sophisticated party, after it failed to properly safeguard its own pecuniary interest. In short, there is no basis at all for this Court to intervene.

72. In any event, Zayo requested and did receive a corresponding benefit in exchange for granting its consent to assign to the Purchaser: a release in favour of MTS of any potential claims. In the Allstream Consent Letter, Zayo requested as follows::

---

[72] *Ibid.*
[73] Third Report at paras. 41-43.
[74] *Ventas Inc. v Sunrise Senior Living Real Estate Investment Trust* (2007), 29 B.L.R. (4th) 292 (S.C.J.) at para. 46, aff'd 2007 ONCA 205, Applicants' Responding Book of Authorities, Tab 27.
[75] Nowlan Affidavit, Responding Motion Record of the Applicants, Tab 1 at paras. 89.Mitchell Affidavit, Responding Motion Record of the Applicants, Tab 1 at paras. 5. Third Report at para. 39

> ...MTS and Allstream reciprocally request your consent to these assignments and your agreement that, in consideration of Allstream's assumption of MTS's obligation under the Contracts, MTS is released from all obligations under the Contracts arising after the date first noted above (January 29, 2016).
>
> [...]
>
> In addition, but not subject to the closing of the Primus-Birch Transaction, we request that Primus Canada evidence its consent to MTS' assignment to Allstream of the Contracts by countersigning the enclosed and forward the same...[76]

(c) Notice to Zayo in the Primus Entities' CCAA Proceeding was Adequate

73. With respect to notice in particular, it is a well-settled and trite principle that the only parties entitled to service of a motion (particularly with respect to an Assignment Order) are those whose rights are actually being compromised (i.e., those parties whose contracts the debtor seeks to have forced-assigned to a third party). Section 11.3(1) is clear that the only parties who require notice are the parties to an agreement for which assignment is being sought:

> 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.
>
> [Emphasis added.]

74. The very authority cited by Zayo in support of its position – *Veris* – is demonstrative of this interpretation. In that case, the debtor sought to force assign certain counterparties on an *ex parte* basis. Notably, the Court did conditionally approve the *ex parte* assignment on the basis that the counterparties, who were all located in the U.S., would receive notice of the assignment and have an opportunity to make submissions in the course of U.S. recognition proceedings. The "best practice" referenced by the Court in that case was to serve those counterparties whose

---

[76] Nowlan Affidavit, Responding Motion Record of the Applicants, Tab 1 at paras. 76, 78 and 88.

rights would be affected by the assignment motion and not to serve all counterparties generally (i.e., there is no support for the position that counterparties who consented should be served):

> The best practice in these circumstances is to serve all counterparties to the particular contracts that are sought to be assigned, whether they are on the service list or not. Section 11.3(1) specifically provides that the application is to be "on notice to every party to an agreement". Common sense dictates that the person to be directly affected by the assignment should have the ability to consider whether the applicant debtor company has satisfied its burden that the order is appropriate, including the factors set out in s. 11.3(3)...[77]

75. The description of the "best practice" set out by Justice Fitzpatrick is consistent with the mandated by the E-Service Protocol, which provides as follows (and which, as described in greater detail above, the very practice that the Primus Entities followed and Zayo protests):

> During the course of a Commercial List Proceeding, certain motions or applications require service of Court Documents on respondents with an interest in that particular motion or application only; for example, service on lien claimants with an interest only on specific property with respect to a sale approval and vesting order. In such circumstances, the party bringing the motion or application shall prepare a Supplementary E-Service List listing the names and Email addresses of the "one time" respondents that the moving party wishes to serve by Email. The cover Email shall contain the information designated in paragraph 12 and 21 hereof. The affidavit of service with respect to that motion shall include the Supplementary E-Service List.[78]

76. The E-Service Protocol is clear and unequivocal that (contrary to the submission by Zayo in its factum) the mere fact that a party is a stakeholder (indeed, even a substantial supplier) does not give rise to an automatic right to service of all court materials in the CCAA:

> The E-Service List in a Commercial List Proceeding ("**E-Service List**") is a mechanism to facilitate service of Court Documents on stakeholders who should be served with Court Documents ("**Stakeholders**")...The E-

---

[77] *Veris* at para. 61, Applicants' Responding Book of Authorities, Applicants' Responding Book of Authorities, Tab 9.
[78] E-Service Guide, Responding Motion Record of the Applicants, Tab 1A at para. 30.

> Service List is not intended as a mechanism to generally disseminate information with respect to the status of a Commercial List Proceeding.
>
> [...]
>
> The E-Service List must include the following parties:
>
> a. Counsel for the applicant/moving party in the Commercial List Proceeding;
>
> b. The Court Officer appointed in the Commercial List Proceeding and counsel for the Court Officer;
>
> c. Counsel for any party that has delivered a Notice of Appearance under the Rules from time to time;
>
> d. Any party or counsel to any party who should be served with Court Documents in accordance with the Rules and the practice in the Commercial List; and
>
> e. Any Stakeholder or counsel to a Stakeholder who has filed a Request for Electronic Service.[79]

77. The mere fact that Zayo inquired with respect to the claims process in the CCAA does not amount to a request to ongoing service of court materials or, alternatively, notice it would seek the payment in full of its pre-filing arrears by way of some exception to the statutory scheme of priority. The E-Service Protocol expressly provides that the obligation is on the respective stakeholder to inform the debtor that it requires service of court materials (as set out above) and, specifically, to carefully attend to the Monitor's website for updates on the CCAA:

> Stakeholders who wish to be placed on the E-Service List in order to receive service of Court Documents in a timely and efficient manner shall Email to the E-Service List Keeper a duly completed RES in the form attached as Schedule "A" hereto...
>
> [...]
>
> Those persons who are interested in monitoring a Commercial List Proceeding but are not required to be served with Court Documents in accordance with the Rules or the practice in the Commercial List are not

---

[79] *Ibid* at para. 23.

to be placed on the E-Service List. Such parties should monitor the Commercial List Proceeding by accessing the Case Website.[80]

(d) If Zayo Refused to Consent when the Assignment was Requested, it was Not Certain the Primus Entities would have Forced the Assignment

78. Assignment of the Essential Contracts was subject to waiver by the Purchaser (on the basis of its business judgement). Contrary to submissions by Zayo that the Primus Entities could not sell their business as a going concern without assignment of all Essential Contracts:

(a) At all times, the Purchaser had the right and power to waive the condition that any one Essential Contract be assigned to it as a condition to close the Transaction; and

(b) In any case, the Purchaser had the right to deem any Essential Contract an "Excluded Contract" and thereby render its purported assignment wholly nugatory.[81]

79. Had Zayo raised the issue of Cure Costs in a timely fashion during the assignment process, the Primus Entities (and the Purchaser) would have had the opportunity to negotiate over the potential quantum of Cure Cost and, critically, whether, given the magnitude of pre-filing arrears, whether, as a matter of business judgement, it was worthwhile to take assignment over the Zayo contracts (rather than removing the contracts from the Essential Contracts list and seeking alternative arrangements with another carrier). Indeed, even if it was determined that Zayo would be one of the parties to be forced assigned, the magnitude of the Cure Costs may have altered how the parties approach the issue of assignment with other parties (i.e., choosing not to force assign those contracts but rather seek alternative arrangements).

---

[80] *Ibid* at paras. 24 and 26.
[81] Nowlan Affidavit, Responding Motion Record of the Applicants, Tab 1 at paras. 25-37.

D. In any Event, Zayo is Only Entitled to Recover 50% of Its Claim from the Proceeds if It is Successful on this Motion

80. Even if Zayo establishes that it had a right to its payment of its pre-filing arrears and that it was subject to an unfair process and outcome, its motion is still subject to one substantial deficiency: it seeks to claim the entire amount of its pre-filing arrears as Cure Costs to be paid from the Proceeds held by the Monitor. This is inconsistent with the APA, which provides:[82]

(a) The Purchaser is responsible for the first $3 million in Cure Costs; and

(b) Purchaser and Vendors split Cure Costs in excess of $3 million equally between them (the effect being that the Base Purchase Price is reduced by the amount of the Cure Costs for which the Vendors are responsible).

81. Cure Costs to date have totalled $4,518,997.51.[83] Accordingly, the Primus Entities' estate would be responsible only for half of the amount (roughly $614,389.91) sought by Zayo (which would have the effect of reducing the aggregate purchase price).

PART V - ORDER REQUESTED

82. The Primus Entities seek that Zayo's motion be dismissed with costs on a partial indemnity scale.

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

Stikeman Elliott LLP
Lawyers for the Applicants

---

[82] Nowlan Affidavit, Responding Motion Record of the Applicants, Tab 1 at para. 35. Third Report at para. 29.
[83] Third Report at para. 28.

SCHEDULE "A"
LIST OF AUTHORITIES

Jurisprudence

1. *Shoppers Trust Co. (Liquidator of) v. Shoppers Trust Co.* (2005), 74 O.R. (3d) 652 (C.A.)
2. *Indalex Ltd. (Re)* (2009), 55 C.B.R. (5th) 64 (Ont. S.C.J.)
3. *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67
4. *Ivorylane Corp. v. Country Style Realty Ltd.*, 2005 CarswellOnt 2516 (C.A.).
5. *Cinram International Inc. (Re)*, 2012 ONSC 3767
6. *Garfin v. Mirkopoulos*, 2009 ONCA 421
7. *Re Playdium Entertainment Corp.*, (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J.), as supplemented at 31 C.B.R. (4th) 309 (Ont. S.C.J.)
8. *Re Nexient Learning Inc.* (2009), 62 C.B.R. (5th) 248 (Ont. S.C.J.)
9. *Re Veris Gold Corp.*, 2015 BCSC 1204
10. *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 SCR 27
11. *Mascia v. Dixie X-Ray Associates Ltd.*, 2008 CarswellOnt 6759
12. *MacMillan v. Kaiser Equipment Ltd.*, 2004 BCCA 270
13. *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426
14. *Toronto Transit Commission v. Gottardo Construction Ltd.* (2005), 77 O.R. (3d) 269
15. *Mundinger v. Mundinger* (1968), 1 O.R. 606
16. *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423
17. *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19
18. *Nortel Networks Corporation (Re)*, 2015 ONCA 681
19. *Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co.*, 1956 CarswellNat 247, [1956] S.C.R. 610
20. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60
21. *Lehndorff General Partner Ltd. (Re)* (1993), 17 C.B.R. (3rd) 24 (Ont. Gen. Div.)
22. *Re Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, aff'g 2008 CarswellOnt 3523 (S.C.J.)
23. *Bongelli v. Ontario (Criminal Injuries Compensation Board)*, 2014 ONSC 5332

24. *Haggith v. 33 Parliament Street Inc.*, 2002 CarswellOnt 835 (C.A.)

25. *Ross v. Christian & Timbers Inc.*, 2002 CarswellOnt 1453 (S.C.J.)

26. *Attila Dogan Construction and Installation Co. Inc. v AMEC Americas Limited*, 2014 ABCA 74

27. *Ventas Inc. v Sunrise Senior Living Real Estate Investment Trust* (2007), 29 B.L.R. (4th) 292 (S.C.J.), aff'd 2007 ONCA 205

Secondary Sources

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

29. Janis P. Sarra and Justice Georgina R. Jackson, "Selecting the Judicial Tool To Get The Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" (2008) Ann Rev Insol L 55

SCHEDULE "B"
RELEVANT STATUTES

Companies' Creditors Arrangement Act, RSC 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 THE APPLICANTS (RETURNABLE AUGUST 9, 2016)

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Maria Konyukhova LSUC#: 52880V
Tel: (416) 869-5230
Email: mkonyukhova@stikeman.com

Vlad A. Calina LSUC#: 69072W
Tel: (416) 869-5202
Email: vcalina@stikeman.com
Fax: (416) 947-0866

Lawyers for the Applicants