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 PRIMUS TELECOMMUNICATIONS CANADA INC., PRIMUS TELECOMMUNICATIONS, INC. AND LINGO, INC.

RESPONDING FACTUM OF THE PURCHASER, BIRCH COMMUNICATIONS INC.

(motion returnable on August 9, 2016)

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I. OVERVIEW

1. Zayo Canada Inc. ("**Zayo**"), a large sophisticated company, brings this motion to amend the terms of contractual arrangements that it entered into voluntarily and with the advice of legal counsel. It seeks to change those arrangements not based on any recognized principle of law, but rather, by relying on a general notion of "fairness" under the CCAA. Of course, that is a tautology as all laws are rooted in fairness. Zayo ignores the fact that there is nothing in the CCAA or CCAA jurisprudence that supports its position.

2. As part of its efforts to restructure, Primus Communications Canada Inc. ("**Primus**") entered into a sales and investment solicitation process. That process resulted in Primus and Birch Communications Inc. (the "**Purchaser**") entering into the Asset Purchase Agreement dated January 19, 2016 (the "**APA**"), under which the Purchaser agreed to purchase certain of Primus' assets.

3. Zayo was a supplier to Primus, and consented to the assignment of its contracts from Primus to the Purchaser (the "**Assumed Contracts**"). Zayo alleges there was unfairness in the events leading up to the provision of its consent, and it now asks the Court to pretend that it objected to the assignment and order that it be paid its cure costs just as if a motion was brought under section 11.3 of the CCAA to compel the assignment of the Assumed Contracts. Zayo asks for this despite having repeated its consent to the assignment of the Assumed Contracts on four occasions, having consulted legal counsel, having ample time to retain experienced restructuring counsel, having never requested payment of cure costs, having asked for Primus' consent to effect certain of its own assignments to give effect to the assignment of the Assumed Contracts and having the

ability to withhold its consent. Zayo is merely dissatisfied with the conscious choice it made to consent to assignment of its contracts and is now seeking to "re-do" its decision to the detriment of others.

4. Zayo suggests that "fairness" requires that it receive its full pre-filing claim ahead of other creditors because section 11.3 of the CCAA provides that cure costs are to be paid if the Court compels the assignment of a contact. However, Zayo conveniently ignores the fact that the general law governing the assignment of contracts continues to apply in a CCAA proceeding, and if a party consents to the assignment of a contract, the contract is validly assigned according to the terms of the assignment. Section 11.3 has no bearing on an assignment that is consented to.

5. Moreover, Zayo ignores case law that emphasizes the importance of the finality and certainty of rights obtained during CCAA proceedings. Zayo's reliance upon the general discretion under section 11 of the CCAA to grant orders and general statements of the broad purposes of the CCAA does not override the recognized importance and need for finality of orders granted and rights obtained in CCAA proceedings.

6. Zayo also argues that information was withheld from it when it provided its consent: namely, Zayo alleges that the law was not fully explained to it by Primus or the Monitor, and it complains that the APA was not provided to it. These allegations are either not borne out by the evidence, or are red herrings:

   (a) Zayo had its in-house legal counsel managing this matter on its behalf and had the opportunity to retain counsel with expertise in CCAA matters (yet it chose not to do so).

(b) Primus specifically directed Zayo's attention to section 11.3 and gave it notice of the initial return date for the motion to force the assignment of the contracts if that would be necessary. The Monitor never promised to provide Zayo with a copy of materials or the APA, and instead directed Zayo's in-house counsel to monitor its website for updates.

(c) Zayo's complaint that it did not see the confidential APA is a red herring. If Zayo wanted to see the APA before providing its consent, it should have withheld its consent until it saw the APA, but it did not do so. Instead, with the assistance of its counsel, Zayo provided its consent on January 29, 2016, and over the next few weeks thereafter repeated that consent in various forms and at various times. In any event, Zayo had no right to see the APA as it was confidential at that time so as to ensure that the disclosure of it does not skew parties' bargaining positions. Moreover, the APA only defines the rights as between Primus and the Purchaser, and does not establish Zayo's rights to be paid its pre-filing claim. The fact that Zayo now says that it might have recognized different strategic alternatives if it saw the APA does not vitiate its consent or make the process unfair.

7. Zayo's motion is an ill-conceived and belated attempt to receive a wind-fall by asking this Court to rewrite the parties' agreement or otherwise overturn substantive orders well beyond the applicable appeal periods and without there being any allegation or evidence that the tests to set aside contracts or orders has been met in this case.

II. FACTUAL OVERVIEW

8. The Purchaser repeats and adopts the recitation of the facts set out in the facta of Primus and the Syndicate. However, below is a summary of the key relevant facts.

9. Zayo is a large, sophisticated company with its own in-house legal department, and the resources to retain outside legal counsel. In fact, from the outset, Zayo had its (in-house) lawyers handle this claim on its behalf. There is no evidence or suggestion in the record that Zayo was prevented from hiring external restructuring counsel to assist it in dealing with its claim against Primus in the CCAA proceedings or the assignment of the Assumed Contracts.[1]

10. On January 19, 2016, Primus and the Purchaser entered into the APA. That same day Primus commenced these CCAA proceedings. The APA was approved by the Court by the Approval and Vesting Order granted on February 25, 2016. As part of the contemplated transaction, Primus assigned a number of supplier contracts to Primus. On April 1, 2016, the Monitor filed the "Monitor's Certificate", thereby closing the transaction as contemplated by the Approval and Vesting Order.[2]

11. On January 22, 26 and 28, 2016, Primus sent Zayo letters requesting its consent to the assignment of its contracts to the Purchaser (the "**Consent Letters**"). Those letters:

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[1] Affidavit of Michael Nowlan sworn July 19, 2016 ("**Nowlan Affidavit**") at paras 60-63; Responding Motion Record of PT Holdco, Inc., Primus Telecommunications Canada, Inc., PTUS, Inc., Primus Telecommunications, Inc., and Lingo Inc. ("**Responding Motion Record**"), Tab 1, pp. 17-18; Affidavit of Julie Wong Barker sworn June 10, 2016 ("**Wong Barker Affidavit**") at para 7; Motion Record of Zayo Canada Inc. ("**Zayo's Motion Record**"), Tab 3, pp. 11-12.

[2] Nowlan Affidavit at paras 6-9, 16; Responding Motion Record, Tab 1, pp. 2-3, 5; Third Report to the Court dated July 13, 2016 submitted by FTI Consulting Inc. in its Capacity as Monitor of PT Holdco, Inc., Primus Telecommunications Canada, Inc., PTUS, Inc., Primus Telecommunications, Inc., and Lingo Inc. (the "Third Report"), para 35.

(a) were in the same form that was approved by the Monitor and sent to other suppliers;

(b) did not state that cure costs would paid to Zayo if it consented to the assignment;

(c) specifically stated that if Zayo did not consent to the assignment, Primus would bring a motion asking the Court to compel the assignment pursuant to section 11.3 of the CCAA:

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

(d) sought consent for the assignment of the contract and not consent for a court order; and

(e) specifically stated that the Purchaser will only be liable for liabilities arising after the date of the assignment:

> Following the assignment, the Purchaser will be responsible for all obligations under the Contract arising after the Closing and all notice under the Contract should be addressed to…[3]

[3] Nowlan Affidavit at paras. 66-68; Responding Motion Record, Tab 1, pp. 19-20; Wong Barker Affidavit at paras. 16-17; Zayo's Motion Record, Tab 3, p. 14; Letters from Primus to Zayo, dated January 22, 26 and 28, 2016, being

12. Other parties who received the Consent Letter either (i) negotiated for some or all of their cure costs to be paid; or (ii) consented to the assignment (just like Zayo).

13. The Monitor did not promise to provide Zayo with any information regarding the CCAA proceedings, but instead advised Zayo monitor its website for new information.[4] Zayo's in-house counsel you had primary carriage of this matter for Zayo, Julie Wong Barker, testified on cross-examination that she monitored the website intermittently but that she did not bother to review the Motion Record for the sale approval motion or its index, which were available as of February 3, 2016, to look at the APA was contained therein.

14. Zayo did not only consent once, but rather it repeated and reiterated its consent on no less than four occasions: (i) Zayo advised that it was consenting to the assignments by letter dated January 29, 2016;[5] (ii) it then provided a signed consent document on February 5, 2016; (iii) it then consent again on February 17, 2016, in documents it prepared to provide for the assignment of certain of the Assumed Contracts from MTS to Zayo, which Zayo claims was done to give effect to the assignment sought by Primus; and (iv) it then provided yet a further consent on March 1, 2016, when further clarification of the consent documents was requested.[6]

Exhibits "D", "E" and "H" to the Wong Barker Affidavit; Zayo Motion Record, Tabs 3- D, E and H, pp. 45, 49 and 63.

[4] Email dated January 22, 2016; Zayo Motion Record, Tab 3-C, p.42.

[5] "Accordingly, Allstream and MTS, the later as and if applicable, in its/their capacity as party/ies to the Contracts, hereby consent(s) to the assignment of the Contracts to Birch, effective as of and subject to the closing of the Primus-Birch Transaction, and this consent is effective notwithstanding anything in the Contracts to the contrary.", Letter from Allstream to the Monitor, dated January 29, 2016, Wong Barker Affidavit, Exhibit "I"; Zayo Motion Record, Tab 1-I, p. 67.

[6] Nowlan Affidavit, para. 42-49, 60-69; Responding Motion Record, Tab 1

15. During the parties' on-going dialogue between January 26 and March 1, 2016, Zayo never advised Primus or the Monitor that it believed or understood that it would be paid cure costs as part of the consensual assignment.[7]

16. Primus was contractually obliged to try to minimize cure costs under the terms of the APA. The APA provided that Primus was to use "commercially reasonable" efforts to obtain the consents for the assignment of contracts.

17. The record clearly establishes that Zayo's evidence is not credible, and that Zayo's affiant has attempted to tailor her evidence for the purposes of this motion:

(a) During cross-examination, Wong Barker, the in-house counsel who had carriage of this matter for Zayo, testified that the decision to consent was based on both her understanding of section 11.3 and a telephone conversation that she had on March 1, 2016, with Primus' in-house regulatory counsel. However, it is clear that Wong Barker was distorting what actually happened given that by March 1, Zayo had already provided its consent on three other occasions weeks earlier (January 29, February 5 and February 17). It simply cannot be that her telephone conversation on March 1 in any way informed Zayo's decision to consent to the assignment on January 29, February 5 or February 17.[8]

(b) Wong Barker was an English major who completed a Masters in English under a Commonwealth Scholarship. Yet she testified during cross-examination that a key passage of the Consent Letter, which provides the Purchaser is only liable for

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[7] Transcript Wong Barker Cross-examination, Q195; Supplementary Motion Record, Tab 2, p. 50.

[8] Transcript Wong Barker Cross-examination, Q180-184; Supplementary Motion Record, Tab 2, p. 48.

obligations arising after assignment, was a "run on sentence" and therefore she simply read the sentence as if the comma was placed after the word "arising":

(i) *Actual provision*:
Following the assignment, the Purchaser will be responsible for all obligations under the Contract arising after the Closing and all notice under the Contract should be addressed to…

(ii) *Wong Barker's alleged reading*:
Following the assignment, the Purchaser will be responsible for all obligations under the Contract arising, after the Closing and all notice under the Contract should be addressed to…

She also testified that she interpreted this revised sentence to mean that cure costs would be paid to Zayo if it consented to the assignment. That evidence is simply not credible: (i) it is not credible that a lawyer would not, at a minimum, seek clarification of language that she thought was ambiguous;[9] and (ii) it is even less credible that she, being an English major who won a significant merit-based scholarship in English, would read that key sentence as she alleged since that comma would render the entire sentence nonsensical and certainly does not change the sentence to mean that cure costs would be paid.[10]

(c) Lastly, it is clear that, contrary to her evidence, Wong Barker did not believe that by providing the consent voluntarily, Zayo would be entitled to be paid its pre-filing claim in full. By email dated April 19, 2016, Wong Barker wrote to counsel for the Monitor asking how much Zayo might receive on its pre-filing claim and how she could maximize Zayo's recovery:

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[9] Transcript Wong Barker Cross-examination, Q199; Supplementary Motion Record, Tab 2, p. 52.

[10] It is telling that Zayo is not attempting to rely on Wong Barker's evidence in that regard. Transcript Wong Barker Cross-examination, Q142-151; Supplementary Motion Record, Tab 2, p. 38.

> We wish to know, given the nature and priority of Claims, what Zayo may expect to receive on its $1.2M pre-filing claim amount? What steps may be taken by Zayo to maximize it recovering such $1.2M?[11]

During cross-examination, Wong Barker admitted that, by this email, she was acknowledging that Zayo was likely to recover less than its $1.2 million claim, and she wanted to maximize the recovery.[12] This evidence clearly demonstrates that, despite all her evidence now to the contrary, as late as April 2016 Wong Barker did not understand or believe that Zayo's cure costs would be paid as a result of Zayo having consented to the assignment.

III. ISSUES

18. Zayo asks the Court to set aside the substantive rights of the parties that arose upon the closing of the APA because it is dissatisfied with the decision it made, with the benefit of its own counsel, to consent to the assignment of the Assumed Contracts. Accordingly, the issues in this case are that:

(a) the effect of the consensual assignment of the Zayo contracts is governed by the common law and section 53 of the CLPA and not section 11.3 of the CCAA, and there is no basis to set those contractual arrangements aside;

(b) CCAA Courts have always recognized the importance of finality of rights obtained and court orders granted in CCAA proceedings, and that they should not be set aside in cases such as this;

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[11] Email from Wong Barker to Monitor counsel, dated April 19, 2016; Exhibit L to Wong Barker Affidavit; Zayo Motion Record, Tab 3-L, p. 105.

[12] Transcript Wong Barker Cross-examination, Q198; Supplementary Motion Record, Tab 2, p. 51.

(c) the process was not unfair to Zayo; and

(d) the Purchaser will be prejudiced if the motion is granted.

IV. ARGUMENT

In addition to the arguments below, the Purchaser adopts and repeats the arguments made by Primus and the Syndicate in their respective facta.

A. Zayo's Consent is Governed By Common Law of Assignment of Contracts, Not Section 11.3

19. Zayo is mistaken that section 11.3 of the CCAA has any relevance to the rights that arose when it provided its consent. In particular, Zayo is mistaken that "fairness" requires that the position of a supplier who consented to an assignment of their contracts should be identical to those who are the target of an order under section 11.3.

20. There is nothing in section 11.3 of the CCAA that ousts the continued application of the general law of the assignment of contracts as established by the common law and section 53 of the *Conveyancing and Law of Property Act* ("**CLPA**")[13] with respect to consensual assignments.[14]

21. Under the common law, there are two forms of assignment of contracts: legal assignment and equitable assignment. Legal assignment has been codified by section 53 of the CLPA. Under that section, a legal assignment of a contract will be effective and binding

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[13] *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C.34, as amended, s. 53.

[14] *Re Nexient Learning Inc.*, [2009] O.J. No. 5507 (S.C.J.) at paras 53-54; Applicant's Responding Book of Authorities, Tab 7; *Re Playdium Entertainment Corp.*, [2001] O.J. No. 4252 at paras 22-23, as supplemented at [2001] O.J. No. 4459 (S.C.J.), Applicants' Responding Book of Authorities, Tab 8.

where: (a) it is an absolute assignment of the contract; (b) the assignment is made in writing; and (c) express notice is given to the counterparty.[15] In this case, it cannot be disputed that each of these requirements were met given that Zayo consented to the assignment of the contracts to the Purchaser in writing on several occasions.[16]

22. A contract may be assigned by an equitable assignment where the requirements for a legal assignment of a contract are not present, but equity considers that an assignment was nonetheless effective. Although the case law is not definitive, an equitable assignments may require consideration.[17] In this case, there was a valid equitable assignment since valid consideration was given. Zayo requested, and was granted, a release for MTS when it asked Primus to consent to the assignment of certain of the Assumed Contracts from MTS to Zayo. Moreover, without Primus' consent to the assignment of those contracts, Zayo itself could not have had the benefit of those contracts going forward. Accordingly, the assignment of the Assumed Contracts was supported by sufficient consideration and, therefore, the Assumed Contracts were effectively assigned even under equitable assignment.

23. Neither legal nor equitable assignment requires the payment of cure costs to be effective. As a result, upon Zayo's consents being provided, the assignments of the Assumed Contracts were effective and established new contractual rights.

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[15] CLPA, section 53.

[16] S.M. Waddams, *The Law of Contracts*, 6th ed. Canada Law Book, (Toronto: 2010), p. 194; G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed., Carswell (Toronto: 2011), pp. 652-653.

[17] S.M. Waddams, *The Law of Contracts*, 6th ed., Canada Law Book (Toronto: 2010), p. 192-193; G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed., Carswell (Toronto: 2011), pp. 647-649.

24. Zayo's argument that section 11.3 has any bearing on the terms of a consensual assignment in a CCAA proceeding is wrong for several reasons.

25. First, as noted above, the CCAA does not oust the applications of general principles of commercial or property law unless specifically provided for by the CCAA. Specifically, section 11.3 of the CCAA is a narrow exception to the law of assignment of contracts in the CCAA context, and does not change the requirements for, or the binding nature of, consensual assignments of contract. Rather, section 11.3 only applies where the Court is requested to make, and in fact grants, an order compelling the assignment of a contract despite the lack of consent from the counterparty.[18] The requirement for the payment of arrears under section 11.3(4) of the CCAA is the *quid pro quo* Parliament struck when providing a statutory power to force the assignment of a contract over the objection of the counter-party – to the extent the assignment of the contract against the wishes of the counterparty increases the value of the estate, it should be compensated for being forced to deal with a commercial partner it did not want.[19] In this case, there is no evidence that Zayo expressed any concern about the contracts being assigned to the Purchaser, and the evidence shows that it readily consent to the assignment.

26. Second, section 11.3 is not triggered in every case – if all parties provide their consent to any requested assignments, no motion will ever be brought under section 11.3. Zayo's "fairness" argument leads to the absurd result that if one supplier withholds consent necessitating recourse to section 11.3, then all suppliers would then entitled to cure costs,

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[18] *Re Veris Gold Corp.*, 2015 BCSC 1204 at para. 53-56; Applicants' Responding Book of Authorities, Tab 9.

[19] *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*, Report of the Standing Senate Committee on Banking, Trade and Commerce, November 2003, at pp. 138-139.

thereby increasing the costs of a restructuring and minimizing the potential recoveries for the general body of creditors.

27. Third, Zayo also incorrectly suggests that Primus was guaranteed to have the Court approve the assignments under section 11.3, and that therefore fairness requires it too should be treated as if it opposed the assignment. However, the assignment of contracts under section 11.3 of the CCAA is not automatic. The Court, which is not a rubber stamp, has to determine whether or not the assignment of the contract is appropriate in the circumstances. The fact is that a consensual assignment under the general law of assignment is different than a forced assignment under section 11.3, and the consequences of the two are different.

28. As Primus and the Syndicate set out in detail in their facta, a consent to an assignment, which gives rise to binding contractual rights, can only be set aside on the same basis that a contract can be set aside. Zayo has not plead or alleged any basis on which a contract could be set aside, nor is there any evidence that would support the setting aside of contractual rights arising by a consent to an assignment. Accordingly, there is no legal basis on which the Court can vary the terms of a consensual assignment that has already taken effect and has already been relied upon by the counterparties.

B. Finality and Certainty of Rights Obtained in CCAA Proceedings

29. In its factum, Zayo relies on section 11 of the CCAA and general and trite statements regarding the remedial nature of the CCAA to suggest that this Court has the power to grant orders to set aside previous orders establishing substantive rights under the CCAA. However, the long-standing concept that the CCAA is to be read purposively having

regard to its remedial nature and the general power to grant orders under section 11 do not give the Court the power to amend or vary substantive rights that have been determined or granted by court order in CCAA proceedings.

30. Indeed, courts considering this issue have recognized the importance of ensuring the finality and certainty of court orders in CCAA and insolvency proceedings, particularly where they determine the substantive rights of parties.

31. In *Extreme Retail (Canada) Inc. v. Bank of Montreal* ("*Extreme Retail*"), Justice Stinson of the Ontario Superior Court of Justice held that an approval and vesting order constitutes a final determination of the rights of parties in a proceeding, that it is not appropriate to revisit such an order, and that the objectives of the CCAA would be seriously undermined if parties were permitted to return to court to undo past court-approved transactions:

> In my view, it is neither appropriate nor desirable to, in effect, open up and revisit the terms of a vesting order, especially one given two and a half years ago, and upon which parties have subsequently acted and conducted their affairs.
>
> . . . . .
>
> In the present case, the Approval and Vesting Order was a final judicial determination of the rights of the parties represented in that proceeding in respect of the assets that were the subject of the sale. The *CCAA* objective of providing a mechanism for the efficient restructuring of corporations that encounter financial difficulty would be seriously undermined if parties who failed to assert or protect their rights at the time of the restructuring were permitted

> subsequently to return to court to undo past transactions. Such an approach should be discouraged. [emphasis added][20]

32. The Court in *Re Canadian Red Cross Society* also recognized the importance of the finality of orders in the context of a sale approval and vesting motion, and held that a purchaser is entitled to know that there will be no future claims against it as a result of the sale:

> [42] In my view, however, the assets either have to be sold free and clear of claims against them - for a fair and reasonable price - or not sold. **A purchaser cannot be expected to pay the fair and reasonable purchase price but at the same time leave it open for the assets purchased to be later attacked and, perhaps, taken back.** In the context of the transfer of the Canadian blood supply operations, the prospect of such a claw back of assets sold, at a later time, has very troubling implications for the integrity and safety of that system. I do not think, firstly, that the argument is a jurisdictional one, and secondly, that it can prevail in any event. [emphasis added][21]

33. In *L&L Tool Inc. v. General Motors Corp.*, the plaintiff sought damages in connection with an agreement approved by a Court in a prior receivership proceeding in which its assets were sold. The defendants moved to strike the statement of claim, arguing the matters were *res judicata*. The Court agreed, concluding the plaintiff's actions were a collateral attack on the Court's previous orders appointing an interim receiver and approving the asset sales.[22]

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[20] *Extreme Retail (Canada) Inc. v. Bank of Montreal*, [2007] O.J. No. 3304 (S.C.J. [Comm. List]) at paras 20-21. See also *Re Allen-Vanguard Corp.*, 2011 ONSC 5017 at paras 108-111; *Royal Bank v. Body Blue Inc.*, [2008] O.J. No. 1628 (S.C.J.) at paras 18-19.

[21] *Canadian Red Cross Society, Re*, [1998] O.J. No. 3306 (Gen. Div. [Comm. List]) at para 42.

[22] *L&L Tool Inc. v. General Motors Corp.*, [2004] O.J. No. 2785 (S.C.J.) at paras 51-55. See also *Air Canada Pilots Assn. v. Air Canada Ace Aviation Holdings Inc.*, [2007] O.J. No. 89 (S.C.J.) at paras 44-45, aff'd 2008 ONCA 531.

34. Recently, Regional Senior Justice Morawetz held in *Re: Target Canada Corp.* that "[i]t is essential that Court orders made during CCAA proceedings be respected". Justice Morawetz noted that CCAA proceedings proceed as a series of building blocks that build upon each other toward a restructuring resolution. The Court held that seeking to unwind binding agreements that are supported by binding orders would be contrary to the building block approach underlying CCAA proceedings. Justice Morawetz concluded that "it cannot be fair and reasonable to ignore post-filing agreements concerning the CCAA process after they have been relied upon by counter-parties or to rescind consent orders of the Court without ground to do so".[23]

35. It is also well established that it is not the role of the Courts to rewrite agreements for parties where one of the parties later regrets entering into an particular transaction.[24]

36. These cases demonstrate that Zayo's reliance on the general provisions of section 11 of the CCAA or the general notions of "fairness" as the basis to change the terms of contracts or rights established under the CCAA is, in fact, contrary to the principles of fairness and reasonableness in CCAA proceedings.

37. In this case, the Purchaser's rights are derived from the building blocks of the APA that was approved by the Court under the Approval and Vesting Order, the contractual

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[23] *Re Target Canada Co.*, 2016 ONSC 316 at paras 19, 74, 77, 80, 81 and 85. As recognized by Justice Morawetz in *Re Target Canada Co.*, the importance of the finality of orders is made clear by the very limited circumstances in which an order may be varied or set aside. Under the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended, Rule 59.06 sets out very strict grounds for setting aside a Court Order (fraud, new fact that could not have been discovered previously, etc.), none of which are alleged or plead by Zayo.

[24] *Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust*, [2007] O.J. No. 908 (S.C.J.) at para 46, aff'd 2007 ONCA 205, Applicant's Responding Book of Authorities, Tab 27; *Mascia v. Dixie X-Ray Associates Ltd.*, [2008] O.J. No. 4554 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 Ltd.*, [1989] 1 S.C.R. 426 at 462; Applicants' Responding Book of Authorities at Tab 13.

consents provided by Zayo (and other parties), the compelled consents under the Assignment Order granted March 2, 2016, and the filing of the Monitor's Certificate by the Monitor. As a result, the Purchaser is entitled to the finality and certainty that is to be afforded to the rights granted to it in the CCAA proceedings. Accordingly, it is not appropriate to alter the Purchaser's rights or obligations under the APA because Zayo is now dissatisfied with the choices it made during the proceedings.

38. The consequences to overturning orders granted in CCAA proceedings on vague notions of perceived "fairness", especially where, as here, the moving party had the opportunity to participate in the process in the manner it thought best, will have deleterious effects in future CCAA cases. As Justice Stinson noted in *Extreme Retail*, purchasers, such as Birch, need to have confidence that when a Court approves a sale, the Purchaser will not be subject to having the terms of that sale later changed by the Court that may impose greater liability on it. If Zayo's motion is granted, confidence in the certainty of the process will be greatly eroded, which will have a chilling effect on the quantum of bids as prospective purchasers will have to make an allowance for unknown future costs that might be required by a further court order. This will have wide-ranging adverse impact on recoveries in CCAA proceedings.

C. There Was No Unfairness Suffered by Zayo

39. Zayo suggests that it was forced into providing its consent without all of the information that it wanted to see before providing its consent. Zayo argues that it was denied the opportunity to fully assess its strategic alternatives since it did not receive all the information that it wished to have.

40. However, the evidence clearly establishes that there is no merit to Zayo's submission.

41. First, as noted above, the Consent Letters were clear in their meaning and impact, and Zayo had retained legal counsel to advise it of its rights, and had the ability to retain restructuring specialists if it so desired.

42. Second, Zayo always had the ability to insist on seeing materials that it wished to see before providing its consent. There is no evidence that it was unduly coerced into providing its consent. It was for Zayo's lawyers – whether in-house or otherwise – to advise Zayo of the implications of providing its consent and the other strategic alternatives available to it. The fact that Zayo or its counsel did not fully explore or assess these options is not a basis for undoing contracts and overturning orders.

43. Third, the Monitor never promised to provide Zayo with a copy of materials or the APA, and instead directed Zayo's in-house counsel to monitor its website for updates.[25] The APA was in fact made public on February 2, 2016, and Zayo's counsel had access to it. During cross-examination, Wong Barker testified that she monitored the Monitor's website intermittently and skimmed the website for the APA, that after March 2, 2016, she appreciated that the APA was "buried at Exhibit "L" in a 413 page Motion Record but that she didn't even look at the index of the Motion Record for the motion to approve the sale:

[25] Emails from the Monitor to Wong Barker, dated January 22 and 26, 2016, Exhibits "C" and "G" to the Wong Barker Affidavit; Zayo Motion Record, Tab 3-C and G, respectively.

225 Q. So you would have seen motion materials to approve sale, but you just didn't click through and look at it?

A. To Exhibit "L" of a 413 pdf, no, I didn't find it.

226 Q. Did you open the pdf at all and look at the index?

A. I don't recall doing that, no.[26]

44. Fourth, Zayo's repeated reference to the fact that it did not have the APA is a complete red herring. The APA does not establish the rights of Zayo – whether or not Zayo was entitled to cure costs was not determined by the APA, but rather by the law regarding the assignment of contracts. That law, and how it might impact Zayo's strategic considerations, was determinable regardless of the APA's terms. The APA only addressed who, as between Primus and the Purchaser, pays any cure costs that might otherwise be owing and how they will cooperate together to obtain the consents by the most economical means possible (as in any other acquisition transaction). Those issues do not concern Zayo or affect its rights. Accordingly, Zayo was not deprived of access to any relevant information when it decided to consent to the assignment.

45. Fifth, there was nothing improper in Primus and the Monitor not disclosing the APA while it was confidential. As is common in commercial transactions inside and outside of CCAA proceedings, a term of the APA was that it was to be kept confidential and was not to be publically disclosed until a certain point in time. That confidentiality is important as it preserves an equal playing field in any negotiations, just as they would exist outside the CCAA context. Indeed, the very mischief caused by premature

[26] Transcript Wong Barker Cross-examination, Q225-226; Supplementary Motion Record, Tab 2, p. 58.

disclosure is the "benefit" Zayo alleges it was not given – Zayo states that it would have taken a different negotiating position if it had seen the APA because it says it disclosed the willingness of the Purchaser to pay cure costs. It is because of that very type of unfair change in bargaining posture that sale agreements are typically protected by confidentiality obligations.

46. Lastly, the main theme of Zayo's complaint is that Primus or the Monitor should have explained to Zayo all of Zayo's rights and the consequences for taking certain actions or not others. However, that is exactly the responsibility of Zayo's own lawyers. Indeed, it would have been a breach of Primus' obligations under the APA and the Monitor's obligations generally to have provided advice to Zayo on how to maximize its position as against Primus' other creditors and the Purchaser.[27]

D. The Purchaser Will Be Prejudiced

47. Zayo bears the burden of proving that the Purchaser and the other creditors will not be prejudiced by the orders it seeks now.[28] It cannot do so.

48. The Purchaser would be uniquely prejudiced if Zayo's motion is granted and the Court later finds that the Purchaser is partly liable for the amounts now claimed by Zayo (which is not at issue on this motion). In addition to having to pay amounts it is currently not required to pay, the Purchaser will have been deprived of its opportunity to negotiate or find an alternative supplier before taking the assignment of the Assumed Contracts.

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[27] Houlden, Morawetz and Sarra, *Bankruptcy and Insolvency Analysis*, 4th ed, Carswell (Toronto: 2005) at N115-116; Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed, Carswell (Toronto: 2013) at 266.

[28] *Romspen Investments Corp. v. Edgeworth Properties*, 2014 ONSC 4340 at para 39; *Ashley v. Marlow Group Private Portfolio Management Inc.*, [2006] O.J. No. 1195 (S.C.J. [Comm List]) at para 78.

49. Contrary to Zayo's assertion, the fact that the Zayo contracts were included on the Essential Contracts list is not any evidence that, in the end, the Purchaser would have agreed to pay cure costs for those contracts. Rather, the evidence establishes that the parties were continuing to negotiate which contracts would be included in the "Essential Contracts" list in the APA, and the Purchaser has the right to list any contract in the "Excluded Contracts" list.[29] Those lists were not static, but evolved over time.

50. Had Zayo sought cure costs instead of or as a condition to providing its consent, the parties would then have entered into negotiations to determine whether the Purchaser would pay cure costs, and if so, how much. The amount of cure costs that might have been agreed to, if any, would have depended upon Zayo's desire to keep the on-going revenue from the Assumed Contracts (as is evidenced by their consent to the assignment), and the Purchaser's ability and desire to arrange for alternative services. Contrary to Zayo's argument in its factum, there is no evidence that the services provided by Zayo could not be replaced. The Purchaser could have sought to replace those services outright before the closing, and even if that was not possible, could have subcontracted for the continuation of the services through Primus' estate until its alternative supplier was established.

51. The Purchaser has been deprived of its opportunity to have that negotiation with Zayo. Zayo, on the other hand, is seeking the best of both worlds – have the certainty of the contracts being assumed (thereby guaranteeing future revenue) and having its pre-filing claims paid.

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[29] Nowlan Affidavit at paras 39-41; Responding Motion Record, Tab 1

52. CCAA courts design orders to ensure a fair environment in which parties can conduct business negotiations. That environment cannot be recreated now and it would be unfair to grant an order that would give Zayo a preferential position as compared to all other creditors.

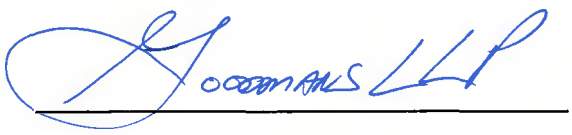
V. RELIEF REQUESTED

53. The Purchaser respectfully requests that Zayo's motion be dismissed, with costs payable to the Purchaser on a substantial indemnity basis.

54. In the alternative, if, and only if, the Court finds that full cure costs ought to have been paid to Zayo and it is later determined that the Purchaser would be liable for a portion of such cure costs, the resulting order should provide that: (i) the Purchaser and Zayo shall have a set amount of time to negotiate what, if any, cure costs are to be paid; and (ii) if a resolution is not reached, the Purchaser has the option to rescind all or certain of the Assumed Contracts upon arranging for an alternative supplier.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

August 3, 2016



Goodmans LLP
Lawyers for the Purchaser,
Birch Communications Inc.

SCHEDULE A
LIST OF AUTHORITIES

1. *Re Nexient Learning Inc.*, [2009] O.J. No. 5507 (S.C.J.)
2. *Re Playdium Entertainment Corp.*, [2001] O.J. No. 4252
3. S.M. Waddams, *The Law of Contracts*, 6th ed. Canada Law Book, (Toronto: 2010)
4. G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed., Carswell (Toronto: 2011)
5. *Re Veris Gold Corp.*, 2015 BCSC 1204
6. *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*, Report of the Standing Senate Committee on Banking, Trade and Commerce, November 2003
7. *Extreme Retail (Canada) Inc. v. Bank of Montreal*, [2007] O.J. No. 3304 (S.C.J. [Comm. List])
8. *Re Allen-Vanguard Corp.*, 2011 ONSC 5017
9. *Royal Bank v. Body Blue Inc.*, [2008] O.J. No. 1628 (S.C.J.)
10. *Canadian Red Cross Society, Re*, [1998] O.J. No. 3306 (Gen. Div. [Comm. List])
11. *L&L Tool Inc. v. General Motors Corp.*, [2004] O.J. No. 2785 (S.C.J.)
12. *Air Canada Pilots Assn. v. Air Canada Ace Aviation Holdings Inc.*, [2007] O.J. No. 89 (S.C.J.), aff'd 2008 ONCA 531
13. *Re Target Canada Co.*, 2016 ONSC 316
14. *Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust*, [2007] O.J. No. 908 (S.C.J.), aff'd 2007 ONCA 205
15. *Mascia v. Dixie X-Ray Associates Ltd.*, [2008] O.J. No. 4554
16. *MacMillan v. Kaiser Equipment Ltd.*, 2004 BCCA 270
17. *Hunter Engineering Co. v. Syncrude Ltd.*, [1989] 1 S.C.R. 426
18. Houlden, Morawetz and Sarra, *Bankruptcy and Insolvency Analysis*, 4th ed, Carswell (Toronto: 2005); Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed, Carswell (Toronto: 2013)
19. *Romspen Investments Corp. v. Edgeworth Properties*, 2014 ONSC 4340

20.	*Ashley v. Marlow Group Private Portfolio Management Inc.*, [2006] O.J. No. 1195 (S.C.J. [Comm List])

SCHEDULE B
RELEVANT STATUTES

***Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, s. 11.3**

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.

***Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, s. 11**

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.

***Conveyancing and Law of Property Act*, R.S.O. 1990, c. C.34, as amended, s. 53**

Assignments of debts and choses in action

53. (1) Any absolute assignment made on or after the 31st day of December, 1897, by writing under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action is effectual in law, subject to all equities that would have been entitled to priority over the right of the assignee if this section had not been enacted, to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor.

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF PRIMUS TELECOMMUNICATIONS CANADA INC., PRIMUS TELECOMMUNICATIONS, INC. AND LINGO, INC.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMOTION RECORD

Proceeding commenced at Toronto

RESPONDING FACTUM OF THE PURCHASER, BIRCH COMMUNICATIONS INC.
(motion returnable on August 9, 2016)

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