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.

COSTS SUBMISSIONS OF
BANK OF MONTREAL AS AGENT FOR THE SYNDICATE
(RE: MOTION OF ZAYO CANADA INC. RETURNABLE AUGUST 9, 2016)

August 29, 2016

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INDEX

PART I ~ OVERVIEW

1. BMO[1] respectfully submits that an award for partial indemnity costs[2] of $43,374.85, inclusive of disbursements and HST, to BMO as Agent for the Syndicate, is appropriate in the circumstances.

PART II – LAW AND ARGUMENT

2. Under Section 131 of the *Courts of Justice Act* and Rule 57.01 of the *Rules of Civil Procedure*, the costs of the Zayo motion are in the discretion of the Court. The factors under Rule 57.01(1) that are most relevant to this motion are: (a) the amount of costs that Zayo could reasonably expect to pay in light of the amount claimed; (b) the complexity of the motion; and (c) Zayo's serious allegations of misconduct and refusal to make reasonable concessions.[3]

A. The Amount of Costs that Zayo Could Reasonably Expect to Pay

3. On its motion, Zayo sought an order requiring the Monitor to pay $1,228,779.81 from the proceeds of the Primus Entities' asset sale to Birch. Had Zayo's motion been successful, anywhere between 50% and 100% of this amount would ultimately have been borne by the Syndicate. Given that at least $614,389.91 and up to $1,228,779.81 was at stake for the Syndicate, Zayo must reasonably have expected the Syndicate to vigorously protect its interests by, among other things, reviewing in detail the materials filed in connection with the motion, participating in meetings and conference calls, conducting cross-examinations, drafting a

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1 Capitalized terms used but not otherwise defined herein have the meanings given to them in the Factum of Bank of Montreal, as Agent for the Syndicate, dated August 3, 2016.

2 BMO is only claiming for partial indemnity costs at 40% of actual rates despite 60% arguably being appropriate in the circumstances: *Re 4519922 Canada Inc.*, 2016 ONSC 5427 at para. 3; Tab 1.

3 *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 131; *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 57.01; *Davies v. Clarington (Municipality)*, 2009 ONCA 722 at paras. 51-52; Tab 2; *Re 4519922 Canada Inc.*, 2015 ONSC 6829 at para. 2; Tab 3.

detailed responding factum, reviewing extensive case law, and attending at the motion. In the circumstances, $43,374.85 is a reasonable amount that Zayo could expect to pay.

B. The Complexity of the Motion

4. This was not a straightforward or routine motion, and it involved legal issues of first impression. Zayo's reliance on broad principles of fairness and transparency required BMO to analyze the basic principles of the CCAA, unconscionability, mistake and notice, as reflected in BMO's lengthy factum and numerous authorities. The responding parties had distinct interests and co-ordinated their materials to minimize duplication. Given the nature of the arguments made, partial indemnity costs to BMO of $43,374.85 are reasonable.

C. Zayo's Conduct Warrants Significant Costs

5. Zayo attempted to justify the relief it sought by making unfounded allegations of misconduct against both the Primus Entities and the Monitor. At the same time, Zayo refused to concede obvious points, for example by claiming that Zayo asked for consents to assignments and releases from Primus in order to assist Primus, rather than for Zayo's benefit[4]

6. Finally, it must be noted that Zayo was entirely the author of its own supposed misfortune and yet initiated costly, high stakes litigation in its effort to evade responsibility. Zayo declined to seek CCAA counsel despite a lack of internal expertise;[5] failed to review documents it had requested when they became available on the Monitor's website;[6] and even failed to do so much as ask to be put on the Service List in the requisite manner.[7]

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4 *Zayo Inc. v. Primus Telecommunications Canada Inc.*, 2016 ONSC 5251 at para. 64 [Reasons]; Tab 4.

5 Reasons at paras. 27, 48 and 55; Tab 4.

6 Reasons at paras. 31, 57 and 71; Tab 4.

7 Reasons at paras. 71-72; Tab 4.

PART II ~ ORDER REQUESTED

7. BMO respectfully requests that the Syndicate be awarded $43,374.85 in costs, representing an award of partial indemnity costs at approximately 40% of the rates actually charged.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of August, 2016.

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

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Re 4519922 Canada Inc.*, 2016 ONSC 5427
2. *Davies v. Clarington (Municipality)*, 2009 ONCA 722
3. *Re 4519922 Canada Inc.*, 2015 ONSC 6829
4. *Zayo Inc. v. Primus Telecommunications Canada Inc.*, 2016 ONSC 5251

SCHEDULE "B"

STATUTORY PROVISIONS

***Courts of Justice Act*, R.S.O. 1990, c. C.43**

...

Costs

131. (1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid. R.S.O. 1990, c. C.43, s. 131 (1).

...

***Rules of Civil Procedure*, R.R.O. 1990, Reg. 194**

...

Factors in Discretion

57.01 (1) In exercising its discretion under section 131 of the Courts of Justice Act to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,

(0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;

(0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;

(a) the amount claimed and the amount recovered in the proceeding;

(b) the apportionment of liability;

(c) the complexity of the proceeding;

(d) the importance of the issues;

(e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;

(f) whether any step in the proceeding was,

(i) improper, vexatious or unnecessary, or

(ii) taken through negligence, mistake or excessive caution;

(g) a party's denial of or refusal to admit anything that should have been admitted;

(h) whether it is appropriate to award any costs or more than one set of costs where a party,

(i) commenced separate proceedings for claims that should have been made in one proceeding, or

(ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and

(i) any other matter relevant to the question of costs. R.R.O. 1990, Reg. 194, r. 57.01 (1); O. Reg. 627/98, s. 6; O. Reg. 42/05, s. 4 (1); O. Reg. 575/07, s. 1.

TAB A

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.

COSTS OUTLINE OF BANK OF MONTREAL AS AGENT FOR THE SYNDICATE (Re: Motion of Zayo Canada Inc. Returnable August 9, 2016)

	RATE		
	PARTIAL	**SUBSTANTIAL**	**ACTUAL**
Fees (as detailed below):	$36,511.50	$54,767.25	$90,145.70
H.S.T. (13.0%):	$4,746.50	$7,119.74	$11,718.94
Sub Total	$41,258.00	$61,886.99	$101,864.64
Disbursements: (as detailed in the attached Appendix A):	$2,116.85	$2,116.85	$2,116.85
TOTAL:	**$43,374.85**	**$64,003.84**	**$103,981.49**

The experience of the party's lawyers

	Year of Call	Partial Rate	Substantial Rate	Actual Rate
Natasha MacParland	1999	$300.00	$450.00	$725.00
Matthew Milne-Smith	2001	$280.00	$420.00	$688.00
James Bunting	2003	$275.00	$412.50	$638.00
Dina Milivojevic	2013	$170.00	$255.00	$436.00
Samara Zaifman (Student)	n/a	$60.00	$90.00	$243.00

The hours spent, the rates sought for costs and the rate actually charged by the party's lawyers

FEE ITEMS	PERSONS	HOURS	RATE		
			PARTIAL	SUBSTANTIAL	ACTUAL
Fees for, among other things: •Review Motion Records of Applicant and Respondents; •Conduct legal research; •Attendance on scheduling motions; •Prepare for and attendance on cross-examination; •Prepare, serve and file Factum and Brief of Authorities; •Prepare for Motion on August 9, 2016; and •Correspondence and communication with clients, counsel, legal team, and internal meetings with lawyers.	Natasha MacParland	25.8	$7,740.00	$11,610.00	$18,705.00
	Matthew Milne-Smith	47.3	$13,244.00	$19,866.00	$32,542.40
	James Bunting[1]	18.1	$4,977.50	$7,466.25	$11,547.80
	Dina Milivojevic	55.6	$9,452.00	$14,178.00	$24,241.60
	Samara Zaifman (Student)	4.3	$258.00	$387.00	$1,044.90
Attendance at Motion August 9, 2016 (half day)	Matthew Milne-Smith	3.0	$840.00	$1,260.00	$2,064.00
TOTAL FEES:			**$36,511.50**	**$54,767.25**	**$90,145.70**

[1] Mr. Bunting had initial carriage of this matter but was unavailable to argue the motion as he was serving the Canadian Olympic Committee at the Rio Games. BMO is not claiming any of Mr. Bunting's time incurred after Mr. Milne-Smith took carriage of the matter, and has also written off five hours of Mr. Milne-Smith's time to account for any potential duplication.

I CERTIFY that the hours claimed have been spent, that the rates shown are correct and that each disbursement has been incurred as claimed.

Dated: August 29, 2016

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APPENDIX A

DISBURSEMENTS

Description	**Non-Taxable Amount**	**Taxable Amount**	**Total**
Court fee for filing Notice of Appearance	$102.00		
Transcript of cross-examination		$1,605.65	
Copies, printing, tabs and binding		$116.29	
Legal Research		$61.11	
Sub Total	**$102.00**	**$1,783.05**	
H.S.T. (13%)		$231.80	
Sub Total	**$102.00**	**$2,014.85**	
TOTAL			**$2,116.85**

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

Proceeding commended at Toronto

COSTS OUTLINE OF BANK OF MONTREAL AS AGENT FOR THE SYNDICATE

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

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As Agent for the Syndicate

TAB 1

CITATION: Re 4519922 Canada Inc. , 2016 ONSC 5427
COURT FILE NO.: CV-1410791-00CL
DATE: 20160829

SUPERIOR COURT OF JUSTICE – ONTARIO
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 4519922 CANADA INC.

BEFORE: Newbould J.

COUNSEL: *Avram Fishman and Mark E. Meland,* for Fishman Flanz Meland Paquin LLP, Creditors' Committee counsel

Barry H. Bresner, for FCA Canada Inc.

Natasha MacParland, for the Monitor

ENDORSEMENT

[1] On June 6, 2016 I granted a motion by Fishman Flanz Meland Paquin LLP ("FFMP") and directed that Chrysler was required to sign and deliver to FFMP an indemnity agreement and to pay its pro rata share of the cost of the tax advice of $86,061.78 paid by FFMP and the reserve of $28,743.75 for future tax advice. I dismissed a cross-motion by Chrysler and ordered costs to be paid by Chrysler to FFMP on a partial indemnity basis. I have now received cost submissions.

[2] FFMP claims costs of $138,923.68 inclusive of GST and QST. Chrysler says the costs should be no more than $50,000 inclusive of tax. Its cost outline was for fees of $39,672,

although it was restricted to time of BLG and not of Woods LLP whose lawyers spent time on the matter.

[3] The fees claimed by FFMP are $118,131, being 60% of the actual amount billed. The 60% rate is in accordance with current practice. The issue is whether the total cost claim is reasonable.

[4] The motion and cross-motion had its complexities, including indemnification issues and tax issues that needed to be understood. It was obviously very important to FFMP. Prior to the hearing there was a cross-examination of Ms. Siminovitch on her affidavit. The hearing itself took about one-half day

[5] Chrysler is critical of the number of hours docketed for this motion and cross motion by FFMP, being 418 hours, including 138.15 hours for two senior partners, Messrs Fishman and Meland. I think there is something in this criticism. I note that Ms. Siminovitch, a relatively senior lawyer at FFMP, docketed a further 140.3 hours. Chrysler is critical of the fact that both Mr. Fishman and Meland attended on the hearing of the motion. I think this is undue criticism. Chrysler had three lawyers attend on the cross-examination of Ms. Siminovitch on her affidavit, and had two lawyers in court on the argument of the motion. The fact that Chrysler chose not to have Mr. Catanu gowned does not detract from the fact that Chrysler though it important for Mr. Catanu to attend the hearing. The number of lawyers for both sides was an indication of the intricate history of the matter.

[6] I must take into account the factors in rule 57.01 including the amount that the unsuccessful party could reasonably expect to pay. In this case, Chrysler took an unreasonable position and also raised issues that it ought not to have. Chrysler had to understand that the importance of the matter to FFMP meant it would thoroughly defend its position as to the need for an indemnity and the other matters that were raised. I mentioned in my endorsement the unfortunate relationship between Chrysler or its counsel and FFMP and the other Participating Creditors. This has no doubt added to the costs of this motion.

[7] Taking into account all of the factors in rule 57.01, including what an unsuccessful party such as Chrysler could reasonably expect to pay to FFMP, I assess the fees of FFMP at $85,000 and the disbursements as claimed of $2,698.47, to which is to be added the applicable GST and QST taxes. These amounts are to be paid by Chrysler to FFMP within thirty days.

Newbould J.

Date: August 29, 2016

TAB 2

Case Name:

Davies v. Clarington (Municipality)

Between
Bonnie Davies, Plaintiff, and
The Corporation of the Municipality of Clarington, VIA Rail Canada Inc., Canadian National Railway Company, Timothy Garnham, The BLM Group Inc., Apache Specialized Equipment Inc., Apache Transportation Services Inc. Defendants (Appellants), and
Blue Circle Canada Inc., Defendant (Respondent), and
Hydro One Networks Inc., Defendant (Appellant)

[2009] O.J. No. 4236

2009 ONCA 722

312 D.L.R. (4th) 278

254 O.A.C. 356

100 O.R. (3d) 66

77 C.P.C. (6th) 1

2009 CarswellOnt 6185

182 A.C.W.S. (3d) 291

Docket: C49139

Ontario Court of Appeal
Toronto, Ontario

S.T. Goudge, R.J. Sharpe and G.J. Epstein JJ.A.

Heard: June 18, 2009.
Judgment: October 16, 2009.

(58 paras.)

Civil litigation -- Civil procedure -- Costs -- Assessment or fixing of costs -- Whether amount fair or reasonable -- Particular orders -- Solicitor and client or substantial indemnity -- Offers to settle -- Appeal by settling defendants from a costs award in the amount of $509,452 payable by them to non-settling defendant -- The action had been dismissed against the non-settling defendant -- Appeal allowed, and costs of $300,000 substituted -- The award was unreasonable -- The settling defendants could not have expected that they would be faced with an award against them of this magnitude, particularly in the light of the non-settling defendant's limited involvement in the proceedings.

Appeal by settling defendants from a costs award in the amount of $509,452 payable by them to the non-settling defendant Blue Circle. On April 10, 2002, Blue Circle, the respondent in this appeal, delivered a non-severable offer to settle Davies' claim against the defendants, consenting to a dismissal of the claim and all counterclaims and cross-claims, without costs. This offer remained open for acceptance for 30 days. On February 1, 2005, Blue Circle delivered a second offer on the same terms (the "February 2005 offer"). This offer was never revoked and was open for acceptance at the time of trial. The trial, on the issue of liability only, began in April 2005 and continued for almost 11 weeks. In this complex action, eight parties advanced claims, counterclaims, and cross-claims in contract and in tort. Prior to closing arguments, settlement discussions took place, at the end of which a number of defendants settled with Davies. In the course of the settlement discussions, Blue Circle offered to accept $250,000 from the settling defendants in relation to costs it incurred in defending their cross-claims. It subsequently reduced this amount to $200,000. This offer was not accepted and consequently Blue Circle did not participate in the settlement. As a result, the trial judge had to determine Blue Circle's liability, if any. On April 5, 2006, after hearing final arguments, the trial judge dismissed the action against Blue Circle. Blue Circle then sought costs against the settling defendants on a partial indemnity scale from the commencement of the litigation to the February 2005 offer, and on a substantial indemnity basis thereafter. The award granted was notable not only for its considerable quantum, but also for the trial judge's decision to fix a large portion of the costs on a full indemnity basis absent a finding of sanction-worthy conduct on the part of the parties against which the costs order was made. Specifically, full indemnity costs were ordered for the period following the February 2005 offer.

HELD: Appeal allowed, and an award of $300,000 in costs substituted. The award was unreasonable. The settling defendants could not have expected that they would be faced with an award against them of this magnitude, particularly in the light of Blue Circle's limited involvement in the proceedings. Blue Circle did not participate in the examination or cross-examination of any witnesses. In Blue Circle's own costs submissions, it was acknowledged that their case took two hours in total to put in. The parties could not have expected that the trial judge would treat the costs incurred after the February 2005 offer in the manner she did. They could not have expected that, through an elevated costs award, the trial judge would effectively reward Blue Circle for the

assistance its counsel provided during the settlement discussions.

Statutes, Regulations and Rules Cited:

Courts of Justice Act, R.S.O. 1990, c. 43, s. 131

Ontario Rules of Civil Procedure, Rule 49, Rule 57.01, Rule 57.01(4)

Appeal From:

On appeal from the order of Justice J.E. Ferguson of the Ontario Superior Court of Justice dated November 19, 2007, [2007] O.J. No. 4474.

Counsel:

James M. Regan, for the appellants.

Brian J.E. Brock, Q.C., and Roseanna R. Ansell-Vaughan, for the respondent.

The judgment of the Court was delivered by

1 **G.J. EPSTEIN J.A.**:-- The primary issue in this appeal involves the limits of the court's discretion to award costs on either a substantial indemnity or full indemnity scale. This court is asked to consider a costs award in the amount of $509,452.18, payable by a number of defendants in this action to a defendant against which the action was dismissed. The award is notable not only for its considerable quantum, but also for the trial judge's decision to fix a large portion of the costs on a full indemnity basis absent a finding of sanction-worthy conduct on the part of the party against which the cost order was made. Specifically, full indemnity costs were ordered for the period following the delivery of an offer to settle the claims of the plaintiff and other defendants on a without-costs basis.

2 For the reasons that follow, I would grant leave to appeal, allow the appeal, set aside the costs award below, and substitute an award in the amount of $300,000 plus disbursements and Goods and Services Tax.

I. Background Facts

3 This action, commenced on September 5, 2000, arose out of a train derailment that took place in Bowmanville on November 23, 1999.

4 On April 10, 2002, Blue Circle Canada Inc., one of the defendants and the respondent in this appeal, delivered a non-severable offer to settle consenting to a dismissal of the claim and all counterclaims and cross-claims, without costs. This offer remained open for acceptance for 30 days. On February 1, 2005, Blue Circle delivered a second offer on the same terms (the "February 2005 offer"). This offer was never revoked and was open for acceptance at the time of trial.

5 The trial, on the issue of liability only, began in April 2005 and continued for almost 11 weeks. In this complex action, eight parties advanced claims, counterclaims, and cross-claims in contract and in tort. Prior to closing arguments, settlement discussions took place, at the end of which the defendants/appellants in this appeal, the Corporation of the Municipality of Clarington, Via Rail Canada Inc., Canadian National Railway Company, The BLM Group Inc., Timothy Garnham, Apache Specialized Equipment Inc., Apache Transportation Services Inc., and Hydro One Networks Inc. (collectively, the "settling defendants"), settled with the plaintiff.

6 In the course of the settlement discussions, Blue Circle offered to accept $250,000 from the settling defendants in relation to costs it incurred in defending their cross-claims. It subsequently reduced this amount to $200,000. This offer was not accepted and consequently Blue Circle did not participate in the settlement.

7 As a result, the trial judge had to determine Blue Circle's liability, if any, for damages arising from the derailment. On April 5, 2006, after hearing final arguments, the trial judge dismissed the action against Blue Circle.

8 Blue Circle then sought costs against the settling defendants on a partial indemnity scale from the commencement of the litigation to the February 2005 offer and on a substantial indemnity basis thereafter.

9 On November 19, 2007, upon considering written argument, the trial judge ordered the settling defendants to pay Blue Circle's costs in the amount of $509,452.18 plus disbursements of $26,276.77.

II. The Applicable Rules

10 The award of costs is governed by section 131 of the *Courts of Justice Act* R.S.O. 1990, c.43 and by rules 49 and 57.01 of the *Rules of Civil Procedure* R.R.O. 1990, Reg. 194.

11 The general source of judicial discretion to award costs is found under s.131 of the *Courts of Justice Act*, as expanded by rule 57.01.

12 Section 131 of the *Courts of Justice Act* says:

> Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

13 Rule 57.01 reads as follows:

> In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding *and any offer to settle or to contribute made in writing,*
>
> (0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;
>
> (0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
>
> ...
>
> (c) the complexity of the proceeding;
>
> ...
>
> (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding. (Emphasis added.)

14 Rule 57.01(4) allows for elevated levels of costs:

> 57.01(4) Nothing in this rule or rules 57.02 to 57.07 affects the authority of the court under section 131 of the Courts of Justice Act,
>
> ...
>
> (c) to award all or part of the costs on a substantial indemnity basis;
>
> (d) to award costs in an amount that represents full indemnity.

15 "Substantial indemnity costs" is defined in rule 1.03 as "costs awarded in an amount that is 1.5 times what would otherwise be awarded in accordance with Part I of Tariff A". This part of Tariff A was once the prescribed grid for "partial indemnity costs", but is no longer in effect. "Full indemnity costs" is not a defined term but is generally considered to be complete reimbursement of all amounts a client has had to pay to his or her lawyer in relation to the litigation: see M. Orkin, *The Law of Costs*, looseleaf, 2nd ed. (Aurora, Ont.: Canada Law Book, 1993) at para. 219.05.

16 Rule 49 deals with a specific aspect of costs: it is a self-contained scheme that addresses the

manner in which offers to settle are brought into play. Its objective is to promote an offer of compromise and visit a cost consequence upon an offeree who rejects an offer that turns out to be as favourable as or more favourable than the judgment awarded to a plaintiff at trial. The parts of rule 49 relevant to this analysis are:

> 49.02(1) A party to a proceeding may serve on any other party an offer to settle any one or more of the claims in the proceeding on the terms specified in the offer to settle
>
> ...
>
> COSTS CONSEQUENCES OF FAILURE TO ACCEPT
>
> Plaintiff's Offer
>
> 49.10(1) Where an offer to settle,
>
> (a) is made by a plaintiff at least seven days before the commencement of the hearing;
> (b) is not withdrawn and does not expire before the commencement of the hearing; and
> (c) is not accepted by the defendant,
>
> and the plaintiff obtains a judgment as favourable as or more favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer to settle was served and substantial indemnity costs from that date, unless the court orders otherwise.
>
> Defendant's Offer
>
> (2) Where an offer to settle,
>
> (a) is made by a defendant at least seven days before the commencement of the hearing;
> (b) is not withdrawn and does not expire before the commencement of the hearing; and

(c) is not accepted by the plaintiff,

and the plaintiff obtains a judgment as favourable as or less favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer was served and the defendant is entitled to partial indemnity costs from that date, unless the court orders otherwise.

...

49.13 Despite rules 49.03, 49.10 and 49.11, the court, in exercising its discretion with respect to costs, may take into account any offer to settle made in writing, the date the offer was made and the terms of the offer.

III.

Reasons of the Trial Judge regarding Blue Circle's Costs

17 In her endorsement relating to Blue Circle's costs, the trial judge briefly set out the nature and history of the proceedings.

18 After completing her assessment of Blue Circle's disbursements that were in issue, the trial judge turned to Blue Circle's submissions concerning fees. She noted Blue Circle's two offers to consent to a dismissal of the claims and cross-claims on a without-costs basis and its offers made to the settling defendants during the course of the settlement discussions.

19 The trial judge identified the principles and authorities upon which Blue Circle relied in support of its claim for partial indemnity costs to the date of the February 2005 offer and substantial indemnity costs thereafter. Blue Circle relied upon the wide discretionary power in s. 131 of the *Courts of Justice Act* and rules 49.13 and 57.01(1) and (4) of the *Rules of Civil Procedure* as well as this court's decisions in *S & A Strasser Ltd. v. Richmond Hill (Town)* (1990), 1 O.R. (3d) 243, and the Ontario Court (General Division) decision in *Apotex Inc. v. Egis Pharmaceuticals* (1990), 2 O.R. (3d) 126.

20 In her analysis, the trial judge identified the principles established in the two well-known cases of *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.), and *Moon v. Sher* (2004), 246 D.L.R. (4th) 440 (Ont. C.A.). The principles are that the fixing of costs is not merely a mechanical exercise; that the result of applying the costs grid must be considered, in particular whether in all the circumstances the result is fair and reasonable[1]; and that in deciding what is fair and reasonable, the expectation of the parties is a relevant factor.

21 At para. 22 of her reasons, the trial judge analyzed the factors set out in rule 57.01(1) that she considered relevant to her determination as to costs:

I am now going to look at the 57.01(1) factors applicable to this case:

(0.a) The lawyers were all senior experienced members of the bar - no doubt the best in this area of law. The rates charged and the hours expended are reasonable. There is no reason why there should not be full indemnity following the service of the offer and partial indemnity of the earlier fees.

(0.b) The amount of costs being sought by Blue Circle would have been reasonably expected by the parties.

...

(c) The case was very complex. Even the sole issue which had to be determined in the end was very complex.

...

(e) The conduct of Blue Circle - I agree that counsel for Blue Circle often played a mediating role. Difficult issues erupted at the trial and usually Mr. Brock, who was not involved in the "erupting" issue, offered some practical and helpful thoughts. I was not present in the settlement discussions but have no doubt that he was an integral part in arriving at the settlement.

22 Then, in paras. 23 and 24, the trial judge fixed Blue Circle's costs as follows:

1. "Partial indemnity costs" from the commencement of the action to February 1, 2005, in the amount of $53,867.10; and
2. "Substantial indemnity costs" from February 1, 2005 to the date of the costs decision, in the amount of $455,585.08.

23 In her reasons the trial judge used the terms "substantial" and "full" interchangeably with respect to the scale of costs. However, the $455,585.08 awarded is the aggregate of all of the invoices Blue Circle paid its counsel for fees incurred after February 2005. Thus, while the trial judge appears to have intended to order Blue Circle its costs on a substantial indemnity basis, the amount awarded was on a full indemnity scale. Although this amounts to an error, it has no bearing on my analysis or the outcome of this appeal. For simplicity, throughout the rest of my reasons I will refer to both full and substantial indemnity costs generically as "elevated costs".

IV. The Issues

24 The settling defendants appeal on a narrow basis. They take the position that Blue Circle is

entitled to its costs throughout, on a partial indemnity basis, and to the disbursements awarded by the trial judge. Their complaint lies in the trial judge's having awarded Blue Circle elevated costs from the February 2005 offer to the date of judgment as well as in the overall amount of the award.

25 The settling defendants submit that the trial judge erred in the exercise of her discretion in awarding elevated costs for this period, in two respects:

(a) in effectively treating Blue Circle's February 2005 offer to settle as though it were a rule 49.10 offer; and,
(b) in relying on *Strasser* in support of her conclusion that Blue Circle was entitled to elevated costs from the February 2005 offer forward.

26 The settling defendants further argue that the trial judge erred in ordering costs in an amount that is not "fair and reasonable" according to the principles set out in *Boucher.*

V. Analysis

27 The parties take no issue with the general principles applicable to appellate review of costs decisions. The Supreme Court has made it clear that a costs award should be set aside on appeal only if the trial judge erred in principle or if the award was plainly wrong: see *Hamilton v. Open Window Bakery Ltd.*, [2004] 1 S.C.R. 303, at para. 27.

(1) *The Costs Award on an Elevated Scale*

The Jurisprudential Framework

28 The first issue is whether the trial judge erred in relying on the February 2005 offer as justification for an elevated costs award. This court, following the principle established by the Supreme Court, has repeatedly said that elevated costs are warranted in only two circumstances. The first involves the operation of an offer to settle under rule 49.10, where substantial indemnity costs are explicitly authorized. The second is where the losing party has engaged in behaviour worthy of sanction.

29 In *Young v. Young,* [1993] 4 S.C.R. 3, at p. 134, McLachlin J., described the circumstances when elevated costs are warranted as "only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties."

30 The same principle was expanded upon in *Mortimer v. Cameron* (1994), 17 O.R. (3d) 1 (C.A.), at p.23, where Robins J. A., speaking for the court, set out the restricted circumstances in which a higher costs scale is appropriate with reference to Orkin at para. 219.

> An award of costs on the solicitor-and-client scale, it has been said, is ordered

> only in rare and exceptional cases to mark the court's disapproval of the conduct of a party in the litigation. The principle guiding the decision to award solicitor-and-client costs has been enunciated thus:
>
> > [S]olicitor-and-client costs should not be awarded unless there is some form of reprehensible conduct, either in the circumstances giving rise to the cause of action, or in the proceedings, which makes such costs desirable as a form of chastisement.[2] Further, in considering the expectations of the parties, it is appropriate to compare the costs claimed by and awarded to the various parties. The trial judge awarded Blue Circle an amount in legal fees that was almost double those that were received by the plaintiffs. The settling defendants could not have anticipated a disparity of this nature.

31 The narrow grounds justifying a higher costs scale were further reinforced by Abella J.A. in *McBride Metal Fabricating Corp. v. H. & W. Sales Co.* (2002), 59 O.R. (3d) 97 where, at para. 39, she said:

> Apart from the operation of Rule 49.10 (introduced to promote settlement offers), only conduct of a reprehensible nature has been held to give rise to an award of solicitor-and-client costs. In the cases in which they were awarded there were specific acts or a series of acts that clearly indicated an abuse of process, thus warranting costs as a form of chastisement.

See also: *Walker v. Ritchie* (2005), 197 O.A.C. 81 at para. 105, reversed on other grounds, [2006] 2 S.C.R. 428.

32 At para. 14 of the reasons, the trial judge acknowledges the parties' agreement that rule 49 was not applicable to Blue Circle's February offer.

33 This leaves egregious conduct, specifically the question whether in the circumstances of this case the settling defendants engaged in conduct worthy of sanction.

Strasser

34 This takes me to *Strasser,* the case upon which the trial judge relied in awarding an elevated scale of costs following the February 2005 offer to settle and upon which Blue Circle heavily relies in this appeal.

35 In *Strasser*, the plaintiff had originally claimed $1,000,000. After discovery, the defendant offered to pay $30,000. The plaintiff then reduced the claim to $70,000. The action was ultimately dismissed. In those circumstances, the trial judge awarded the defendant solicitor-and-client costs,

throughout.

36 In the plaintiff's appeal of the costs award, Carthy J.A., for the court, noted that although the defendant's offer was not a rule 49.10 offer, the language of rules 49.13 and 57.01 gives the trial judge discretion with respect to costs, and rule 49.13 specifically invites the judge exercising discretion to take into account any offer to settle made in writing. Carthy J.A. went on, however, to hold that the offer in *Strasser* could not, standing on its own, justify an award of solicitor-and-client costs. While the trial judge did not identify any evidence of reprehensible conduct, Carthy J.A., in upholding the award, was careful to note that during the costs submissions the trial judge did say "I think this case, in these circumstances, screams for solicitor-and-client costs:" p. 246.

37 This court sought to clarify *Strasser* in *Scapillati v. A. Potvin Construction Ltd.* (1999), 44 O.R. (3d) 737, a case in which the defendant had served an offer to settle on the basis that the action be dismissed without costs and the trial judge subsequently dismissed the plaintiff's claim. Purportedly following *Strasser*, the trial judge awarded party-and-party costs to the date of the offer and solicitor-and-client costs thereafter.

38 On appeal, this court started its analysis of the defendant's appeal of the costs award by observing, once again, that as the plaintiff's claim had failed, rule 49.10 had no application. Then, at p. 750, turning to *Strasser*, Austin J.A. had this to say:

> [T]he principle upon which solicitor and client costs were awarded in *Strasser* is a very narrow one. The plaintiff had made a claim for $1 million, the defendant made an offer after discovery of $30,000 and the action was dismissed at trial. In the instant case, no similar offer was made. While the trial judge in the instant case made an award of solicitor and client costs, it does not appear from the record that she felt as strongly about it as the trial judge in *Strasser* who said "I think this case, in these circumstances, screams for solicitor and client costs."

39 Thus interpreting *Strasser* as a case where egregious conduct was implicitly found, this court allowed the appeal as to costs, set aside the original costs award and substituted an award of costs on a party-and-party basis. For other cases in which comments have been made on the limited application of *Strasser*, see *St. Louis-Lalonde v. Carlton Condominium Corporation No. 12* (2005), 142 A.C.W.S. (3d) 934 (Ont. S.C.) aff'd 155 A.C.W.S. (3d) 479 (C.A.), at para. 15, *Dyer v. Mekinda Snyder Partnership Inc.* (1998), 40 O.R. (3d) 180 (Ct. J. (Gen. Div.)).

40 In summary, while fixing costs is a discretionary exercise, attracting a high level of deference, it must be on a principled basis. The judicial discretion under rules 49.13 and 57.01 is not so broad as to permit a fundamental change to the law that governs the award of an elevated level of costs. Apart from the operation of rule 49.10, elevated costs should *only* be awarded on a clear finding of reprehensible conduct on the part of the party against which the cost award is being made. As Austin J.A. established in *Scapillati*, *Strasser* should be interpreted to fit within this framework - as a case where the trial judge implicitly found such egregious behaviour, deserving of sanction.

Application to the Facts

41 Here, the circumstances are similar to those found in *Scapillati.* There was no rule 49.10 offer and no finding by the trial judge that the settling defendants conducted themselves in a reprehensible or egregious fashion.

42 Blue Circle submits that notwithstanding the trial judge's failure to make such a finding in her reasons as to costs, her reasons dismissing the claim against it demonstrate that the settling defendants' conduct in relentlessly pursuing their claims against Blue Circle, in the face of the apparent weakness of their position, is conduct that justifiably attracted an elevated scale of costs.

43 I have considerable difficulty with this argument.

44 Blue Circle's submission in this respect is contrary to the principle Dubin J.A. expressed in *Foulis v. Robinson* (1978), 21 O.R. (2d) 769 at p. 776 that "Under our system defendants are entitled to put the plaintiff to the proof, and there is no obligation to settle an action."

45 Of course, a distinction must be made between hard-fought litigation that turns out to have been misguided, on the one hand, and malicious counter-productive conduct, on the other. The former, the thrust and parry of the adversary system, does not warrant sanction: the latter well may. In *Apotex v. Egis Pharmaceuticals* (1991), 4 O.R. (3d) 321 (Ont. C.J.), substantial indemnity costs were justified as a means "to discourage harassment of another party by the pursuit of fruitless litigation...particularly where a party has conducted itself improperly in the view of this court." For other examples of abuses of process leading to elevated costs, see *Dyer* at pp.184 - 85.

46 Here, there is no finding or evidence in the record of "harassment...by the pursuit of fruitless litigation". The settling defendants were entitled to advance their position; they were not required to settle. In the end, the trial judge did not agree with their position but the settling defendants did nothing to abuse the process of the court. In short, there was no wrongdoing on the part of the settling defendants that warranted a rebuke from the court.

47 *Apotex* (1990) does not assist Blue Circle in trying to make out a case for misconduct on the part of the settling defendants. That case involved meritless claims of fraud, deceit, and dishonesty based on pure speculation. First, the trial judge did not make such a link between this case and *Apotex* (1990) on this basis. Second, unsubstantiated allegations of the nature advanced in *Apotex* (1990) represent a form of egregious conduct commonly accepted as a basis for attracting a higher costs award: see *131843 Canada Ltd. V. Double "R" (Toronto) Ltd.* (1992), 7 C.P.C. (3d) 15 (Ont. Ct. (Gen. Div.)); *Réno-Dépôt Inc. v. Wonderland Commercial Centre Inc.*, 2008 ONCA 786 (award of costs on a substantial indemnity basis warranted only from the point in time when allegations of fraud and dishonesty were made). This is not the nature of the allegations made against the settling defendants.

48 Before turning to the settling defendants' second argument, I make one final comment. In

cases such as *Beresford-Last (Litigation Guardian of) v. Dworak* (2000), 101 A.C.W.S. (3d) 696 (Ont. Sup. Ct.), and *Marcella v. Integrated Management and Investments Inc.* (2007), 157 A.C.W.S. (3d) 51 (Ont. Sup. Ct.), trial judges have expressed the view that denying elevated costs to defendants who submit an offer to settle, which is later revealed to be more favourable than the result at trial, acts as a disincentive to defendants to make reasonable offers to settle. This view, while understandable, is contrary to the wording, spirit and intent of rule 49. Rules cannot be incrementally changed through jurisprudence. Any change in the rules to take into account the position of defendants who legitimately try to curtail what turns out to be unnecessary litigation is a matter for the Rules Committee.

49 In my view, there is no basis to justify anything other than a partial indemnity costs award in favour of Blue Circle.

(2) Whether the costs award is "fair and reasonable"

50 While this conclusion is sufficient to set aside the costs award, I would add that, in my view, the award was otherwise not fair and reasonable.

51 In *Andersen v. St. Jude Medical Inc.* (2006), 264 D.L.R. (4th) 557, the Divisional Court set out several principles that must be considered when awarding costs:

1. The discretion of the court must be exercised in light of the specific facts and circumstances of the case in relation to the factors set out in rule 57.01(1): *Boucher*, *Moon,* and *Coldmatic Refrigeration of Canada Ltd. v. Leveltek Processing LLC* (2005), 75 O.R. (3d) 638 (C.A.).
2. A consideration of experience, rates charged and hours spent is appropriate, but is subject to the overriding principle of reasonableness as applied to the factual matrix of the particular case: *Boucher*. The quantum should reflect an amount the court considers to be fair and reasonable rather than any exact measure of the actual costs to the successful litigant: *Zesta Engineering Ltd. v. Cloutier* (2002), 119 A.C.W.S. (3d) 341 (Ont. C.A.), at para. 4.
3. The reasonable expectation of the unsuccessful party is one of the factors to be considered in determining an amount that is fair and reasonable: rule 57.01(1)(0.b).
4. The court should seek to avoid inconsistency with comparable awards in other cases. "Like cases, [if they can be found], should conclude with like substantive results": *Murano v. Bank of Montreal* (1998), 41 O.R. (3d) 222 (C.A.), at p. 249.
5. The court should seek to balance the indemnity principle with the fundamental objective of access to justice: *Boucher*.

52 As can be seen, the overriding principle is reasonableness. If the judge fails to consider the

reasonableness of the costs award, then the result can be contrary to the fundamental objective of access to justice. Rather than engage in a purely mathematical exercise, the judge awarding costs should reflect on what the court views as a reasonable amount that should be paid by the unsuccessful party rather than any exact measure of the actual costs of the successful litigant. In *Boucher,* this court emphasized the importance of fixing costs in an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding at para. 37, where Armstrong J.A. said "[t]he failure to refer, in assessing costs, to the overriding principle of reasonableness, can produce a result that is contrary to the fundamental objective of access to justice."

53 Here, while the trial judge identified the importance of a reasonableness assessment, with respect, in arriving at a costs award of $509,452.18 her reasons do not indicate that she conducted an assessment or at least a sufficient one, in accordance the requirements set out in Boucher. Furthermore, although the trial judge did find that the parties would have reasonably expected Blue Circle to have *claimed* costs of this magnitude, she was, according to *Boucher* at para. 38, obliged to consider the expectations of the parties concerning the quantum of the costs *award.*

54 It is difficult to accept that the settling defendants would have expected that they would be faced with an award against them of this magnitude particularly in the light of Blue Circle's limited involvement in the proceedings. Blue Circle did not participate in the examination or cross-examination of any witnesses. In Blue Circle's own costs submissions, it is acknowledged that their case took two hours in total to put in. The parties could not have expected that the trial judge would treat the costs incurred after the February 2005 offer in the manner she did. They could not have expected that, through an elevated costs award, the trial judge would effectively reward Blue Circle for the assistance its counsel provided during the settlement discussions.[3]

55 The results of this "fair and reasonable" analysis demonstrate that appellate intervention is warranted.

56 Turning to quantum, taking into consideration the circumstances of this case and applying to them the relevant factors set out in rule 57.01, and the fair and reasonable test expressed in Boucher, in my view the amount of $300,000 would be appropriate.

VI. Disposition

57 I would therefore allow the appeal and set aside the trial judge's cost award in relation to fees only and in its place substitute the amount of $300,000.

58 Upon the agreement of the parties, the settling defendants are entitled to their costs of this appeal and the motion for leave to appeal, fixed in the amount of $10,000 including disbursements and Goods and Services Tax.

G.J. EPSTEIN J.A.
S.T. GOUDGE J.A.:-- I agree.
R.J. SHARPE J.A.:-- I agree.

1 The costs grid has since been removed from the rules, but the general point is clear; the result of a costs award formula must be scrutinized for fairness and reasonableness.

2 Note the discrepancy in language between the former terminology, "solicitor and client costs" and the newer terminology of "substantial indemnity." The two terms indicate the same costs scale. Rule 1.04 identifies the two terms as follows: "If a statute, regulation or other document refers to solicitor and client costs, these rules apply as if the reference were to substantial indemnity costs."

3 While the assistance of counsel for Blue Circle in the discussions that led to the settlement among all but Blue Circle is commendable, it is not, in my view, a basis upon which to make the settling defendants pay Blue Circle's costs on an elevated basis.

TAB 3

CITATION: Re 4519922 Canada Inc. 2015 ONSC 6829
COURT FILE NO.: CV-1410791-00CL
DATE: 20151104

SUPERIOR COURT OF JUSTICE – ONTARIO
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 **4519922 CANADA INC.**

BEFORE: Newbould J.

COUNSEL: *Lou Brzezinski and Alexandra Teodorescu*, for the Gambazzi Group

James Doris and Dina Milivojevic, for the Monitor

Mark E. Meland, for the Creditors' Committee

John Porter and Lee Nicholson, for the Applicants

ENDORSEMENT

[1] I have now received cost submissions following my decision of October 5, 2015 in which I dismissed the motion of the Gambazzi Group for production of certain documents and ordered costs in favour of the Monitor, the Creditors' Committee and the applicants.

[2] Costs are to be reasonable. See *Davies v. Clarington (Municipality)* [2009] ONCA 722. Factors to be taken into account are contained in rule 57.01, including the amount of costs that an unsuccessful party could reasonably expect to pay.

[3] In this case, the Gambazzi Group has filed a bill of costs stating that their partial indemnity fees were $11,753, which seems reasonable. I take these into account when considering the reasonableness of the fees claimed by the successful parties.

[4] The Monitor claims costs of $15,000 plus HST. The Gambazzi Group says they should only be awarded $8,000. Considering the factors in rule 57.01 and what a reasonable fee should be, I assess the Monitor's costs at $14,000 plus HST.

[5] The Creditors' Committee claims costs of approximately $14,000 plus disbursements and tax totalling approximately $17,000. The Gambazzi Group says they should be awarded only $5,000 and that it did not anticipate the participation of the creditors' committee. I cannot see how they could not have expected the creditors' committee to participate taken the extra costs that would have been necessary to deal with the hearing of the claim of the Gambazzi Group had their motion been successful. Considering the factors in rule 57.01 and what a reasonable fee should be, I assess the creditor committee's costs at $16,000 inclusive of taxes.

[6] The applicant claims costs of $7,500. The Gambazzi Group says the applicant should get no costs. I do not agree. The applicant is an active participant in the claims hearing to consider the claim of the Gambazzi Group. Considering the factors in rule 57.01 and what a reasonable fee should be, I assess the applicant's costs at $7,500.

[7] The costs are to be paid within 30 days.

Newbould J.

Date: November 4, 2015

TAB 4

CITATION: Zayo Inc. v. Primus Telecommunications Canada Inc., 2016 ONSC 5251
COURT FILE NO.: CV-16-11257-00CL
DATE: 20160818

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

RE: 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.

BEFORE: Justice Penny

COUNSEL: *Maria Konyukhova* and *Vlad Calina* for the Primus Entities

Steve Weisz and *Aryo Shalviri* for FTI Consulting Canada Inc. in its capacity as Monitor of the Primus Entities

Matthew Gottlieb and *Larissa Moscu* for the Moving Party, Zayo Inc.

Jason Wadden for the Purchaser, Birch Communications Inc.

Matthew Milne-Smith and *Natasha MacParland* for the Lending Syndicate (BMO as Agent)

HEARD: August 9, 2016

ENDORSEMENT

Overview

[1] This motion, brought by Zayo Inc., is for an order that FTI Consulting Canada, in its capacity as court-appointed Monitor for the applicants, pay Zayo the amount of $1,228,799.81 from proceeds of sale of the applicants' assets. This amount represents the applicants' (pre-CCAA filing) arrears owed to Zayo in relation to agreements assigned by the applicants, with Zayo's consent, to Birch Communications Inc. in an asset purchase transaction which closed on April 1, 2016. The transaction was approved by orders of this Court made on February 25, 2016 and March 2, 2016 and certified completed by the Monitor on April 1, 2016.

[2] Initially on January 25 and formally no later than March 2, 2016, Zayo unequivocally consented to the assignment of its contracts with the applicants to Birch.

[3] Zayo argues that the process by which its consent to the assignment of its contracts with the applicants was obtained was not transparent or fair. Had the process been transparent and

fair, Zayo says, it would have refused its consent in the absence of full satisfaction of its pre-filing arrears and would, as a result, ultimately have been paid those arrears as a condition of the assignment of its contracts. Zayo relies on s. 11 of the CCAA which provides that the court may, in the context of CCAA proceedings, "make any order that it considers appropriate in the circumstances."

[4] This motion, therefore, engages the application and scope of the discretion of the court under s. 11 of the CCAA. The issue for determination is whether that discretion should be exercised, in the particular circumstances of this case, to order payment out of the proceeds of sale of the applicants' assets, to Zayo of the full amount of its pre-filing arrears under the assigned contracts.

[5] For the reasons that follow, I have concluded that the discretion afforded the court under s. 11 of the CCAA does not encompass an order for the payment of Zayo's pre-filing arrears. Accordingly, Zayo's motion is dismissed.

Background

[6] The applicants (collectively Primus) carried on business in Canada and the United States reselling telecommunications services. Thus, Primus purchased telecommunication services for resale from other (often large) telecommunications companies, including Allstream (now Zayo), Bell, Telus and the like. In late 2014, Primus ran into financial difficulty. It was unable to satisfy its obligations to creditors, including a syndicate of secured creditors represented in these proceedings by the Bank of Montréal. After February 2015, Primus operated under the forbearance of its syndicate of secured lenders.

[7] Primus conducted a privately structured and supervised pre-filing sales and investor solicitation process in consultation with a financial advisor and with the oversight of FTI (in its capacity as the proposed Monitor). Birch emerged as the successful bidder.

[8] On January 19, 2016, Primus entered into an asset purchase agreement with Birch, conditional on court approval. Primus sought and obtained protection under the CCAA pursuant to an Initial Order granted by this Court on the same day.

[9] The APA contemplated that Birch would assume certain Primus contracts with third parties. Because of Primus's financial difficulties, many of these contracts were in arrears. The APA contemplated the possibility that payment of such arrears might be required in order to effect the assignment of some of these contracts. These payments were defined as "cure costs." The APA contemplated that there would be negotiations regarding either the payment or settlement of these cure costs. Those negotiations with counterparties, if they occurred, could only be conducted in the presence of a representative of each of Primus, Birch and the Monitor.

[10] The first $3 million of cure costs were to be treated as a reduction in the purchase price. Cure costs in excess of $3 million were to be split equally between Birch and Primus.

[11] Birch had the right to insist upon the assignment of any contract which it considered essential. Birch also had the right, however, to waive this right at any time and to remove any contract from the list of essential or assumed contracts.

[12] Primus was obliged to use commercially reasonable efforts to obtain consents to the assignment of the identified contracts. The APA set out a two-step process for Primus to follow. First, Primus was obliged to use all commercially reasonable efforts to obtain a counterparty's consent to the assignment of any required contract. Second, Primus was required to bring a motion under s. 11.3 of the CCAA seeking court-ordered assignment of essential contracts, but only with respect to contracts for which *consent* to assignment could not be obtained by a particular date.

[13] Section 11.3 of the CCAA provides that the court may make an order assigning the rights and obligations of the debtor under an agreement to any person who is specified by the court and agrees to the assignment. In deciding to make such an order, the court must 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 obligation; and

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

[14] Section 11.3(4) of the CCAA imposes a further restriction on a court-ordered assignment. It provides that the court may not make an order requiring an assignment unless it is satisfied that all monetary defaults in relation to the agreement will be remedied.

[15] Initially, the essential contracts list identified by Birch had approximately 300 contracts. From January to the end of February 2016, the list underwent significant reduction. By the end of the review process, the number on the essential contracts list had been reduced to 209 contracts. Ultimately, consents to assign in respect of 117 essential contracts were obtained from 93 contract counterparties, including Zayo. Of these, two parties demanded payment of pre-filing amounts. The assignment order of this court, ultimately obtained on March 2, 2016, provided for the assignment of the remaining 92 contracts with 35 counterparties and for the payment of aggregate cure costs in respect of those contracts of about $4.5 million.

[16] Obtaining consents from what turned out to be over 120 counterparties was a substantial and time-consuming job. A main reason for the pre-filing SISP was to reduce the risk of value erosion as word of the Primus insolvency, and possible service interruptions and other disruptions, got out. Thus, the timeframe for concluding a transaction was necessarily compressed. In consultation with its own professional advisors, the Monitor and the purchaser, Primus drafted a template letter to be delivered to all counterparties to the contracts in respect of which consent was required to be sought.

[17] The consent letters advised the recipient that:

(i) Primus had sought protection under the CCAA;

(ii) Primus ran the SISP and selected Birch as the successful bidder;

(iii) the APA contemplated the assignment of their contract with one of one of the Primus entities to Birch;

(iv) at the time, the transaction was anticipated close in late February; and

(v) the motion materials for the approval investing order would be available on the Monitor's website.

[18] The consent letter requested the recipient's consent to assign its contract to Birch by a specified date and advised that, if consent was not received by that date, Primus would seek relief under s. 11.3 of the CCAA, with motion materials being served only on those parties who did not provide consent. The text of the letter said:

> 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 Entities 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]

[19] The consent letters also expressly advised all recipients that Birch would only be responsible for obligations arising under the assigned contract arising after the closing of the purchase transaction.

[20] The dates in the consent letter for completion of the assignments had to be changed as a result of circumstances having nothing to do with this motion. The substance of the letter and the process described, however, remained the same.

[21] By April 1, 2016 all conditions under the APA were fully satisfied and the transaction closed. Birch acquired the assets of Primus for about $44 million. Among other things, the Monitor came into receipt of the sale proceeds and delivered a certificate certifying that the transaction had been completed to the satisfaction of the Monitor. The Monitor then commenced dispersing the proceeds in accordance with the payment scheme provided in the distribution order of this court which had been made on February 25, 2016. The exact amount of the proceeds has not been finalized but it is expected that the proceeds will be insufficient to satisfy outstanding obligations owing to the syndicate of secured lenders and that no distributions will be made in respect of $20 million owed to Primus's subordinate secured creditor, Manulife.

[22] This motion for payment of Zayo's pre-filing arrears out of the proceeds of sale was first initiated on May 13, 2016. It is opposed by Primus, Birch, the secured lenders and the Monitor.

The Zayo Consent

[23] Prior to these events, Primus had a lengthy business relationship with Allstream Inc. which spanned over 15 years. Allstream was a wholly-owned subsidiary of Manitoba Telecom Services. Allstream sold wholesale telecommunications services to Primus which Primus then resold as part of its business, including long-distance phone, local internet and voice over internet protocol services. Primus had telecom supply contracts with a number of Allstream entities and for a number of services.

[24] In November 2015, Zayo acquired Allstream from MTS for $465 million. This was only one of about 30 acquisitions made by Zayo between 2007 and 2016.

[25] Because Zayo acquired a number of Allstream entities with Primus contracts, Zayo received three copies of the virtually identical consent request letter; one on January 22, 2016, another on January 26 2016 and a third on January 28, 2016. These consent request letters were sent to three senior Allstream executives, depending on which person or entity was identified in the relevant contract as the point of contact for all notices, etc.

[26] These letters were brought to the attention of Ms. Julie Wong Barker, a lawyer with the Zayo (Allsream) legal department.. Ms. Wong Barker was Senior Legal Counsel at Zayo Canada Inc. She has a B.A. and an M.A. and graduated with distinction from McGill University Law School. She was called to the Bar of Ontario in 2007. She worked for a major Bay Street Toronto law firm for two years and, following a maternity leave, joined Allstream as legal counsel in 2011. She became Senior Legal Counsel a few months later and has worked in the Allstream/Zayo Toronto legal department since then.

[27] Ms. Wong Barker became aware that Primus had filed for CCAA protection on the day the Initial Order was granted, January 19, 2016. Ms. Wong Barker deposed that she is not "well-versed" with the CCAA process and that, as a result, she searched for information on the internet and discovered that the Monitor was FTI.

[28] Ms. Wong Barker sent an email to the Monitor on January 21, 2016, indicating that Allstream was a significant supplier to and creditor of Primus. Her email states:

> Please kindly confirm that we will be added to any creditor's list and provided with all required notices accordingly. Further to that, pls kindly advise when the proof of claim forms will it be available, or kindly email it to me?

[29] On the following day, the Monitor replied, saying:

> Hello Julie,
>
> We confirm that Allstream Inc. is included on the list of known creditors and as such, you will be receiving a "Notice to Creditors" document in the mail in the coming days. At this time, there is no claims process approved by the Court so

there is no proof of claim forms that need to be submitted. Any status updates will be posted on the website listed below.

The Monitor's email provided the URL link to the Monitor's Primus website (containing all the documents filed with the Court) and invited Ms. Wong Barker to feel free to contact him if she had any further questions or wanted to discuss the matter.

[30] On January 26, 2016, Ms. Wong Barker sent one further email to the Monitor. In this communication, she asked who would be receiving the notice to creditors and at what address. She also asked when the asset purchase agreement between Primus and Birch would be available on the Monitor's website. She asked whether the two documents could be emailed to her and, once again, inquired about whether there would be a claims process.

[31] Later the same day, the Monitor responded that the notice to creditors had been mailed to Allstream's Wellington Street address and that a copy of that document was also available on the Monitor's Primus website. The Monitor went on to indicate that a copy of the asset purchase agreement was not available "as it is not a public document yet." The Monitor reiterated that a claims process had not been initiated as no process had been approved by the court. Finally, the Monitor once again referred Ms. Wong Barker to the website for any status updates regarding the CCAA proceedings and invited any further questions.

[32] The evidence is that these were the only two communications between Ms. Wong Barker and the Monitor and that Ms. Wong Barker made no further inquiries of the Monitor regarding these CCAA proceedings. There is no suggestion, and certainly no evidence, that anything the Monitor said to Ms. Wong Barker in these email communications was in any way incorrect.

[33] On January 25, 2016, Ms. Wong sent to Primus a letter from the Allstream president in which Allstream and MTS advised they were consenting to the assignment of contracts between them and Primus. The Allstream consent letter went on to request a reciprocal consent from Primus in respect of certain contracts between MTS and Primus, so that the MTS contracts could be assigned to Allstream and MTS be released from any future obligation under these contracts.

[34] Further draft consent letters, and negotiations over the consolidation and wording of revised consent letters took place between February 5 and March 2, 2016, at which time Ms. Wong Barker confirmed that a revised and executed form of consent to the assignment had been finalized.

The Zayo Argument

[35] Zayo's argument falls into three basic categories:

(1) the inadequacy of the form of consent request letter sent by Primus to Zayo. The complaint is, in essence, that the consent request letter was misleading because it omitted any explanation of the process under s. 11.3 of the CCAA and failed to disclose the provision for "cure costs" in the APA or to advise Zayo that it might have gained bargaining leverage regarding payment of its pre-filing arrears under s. 11.3(4) if it were to withhold its consent and force Primus to move before the court under s. 11.3(1);

(2) the failure to send Zayo a copy of the APA; and

(3) the failure of the Monitor/Primus to serve Zayo with the s. 11.3 motion materials filed to obtain the assignment order and the related failure to place Zayo on the e-service list for receipt of all Court material.

[36] The starting point for these arguments is the decision of the Supreme Court of Canada in *Ted Leroy Trucking (Century Services) Ltd., Re*, [2010] 3 S.C.R. 379. In that case the court observed that the incremental exercise of discretion under conditions aptly described as "the hothouse of real-time litigation" has been the primary method by which the CCAA has been adapted and has evolved to meet contemporary business and social needs. It is frequently said that the remedial purpose of the CCAA is to avoid or ameliorate the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations by attempting to reorganize the financial affairs of the debtor under court supervision. The Supreme Court held that in pursuing this purpose, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising CCAA authority. The supervising court should be mindful that the chance for successful reorganization is enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

[37] The moving party also relies on the decision of G.B. Morawetz R.S.J. in *Target Canada Co.*, 2016 ONSC 316 where he said (at para. 72):

> It is incumbent upon the court, in its supervisory role, to ensure that the CCAA process unfolds in a fair and transparent manner.

[38] Specifically, under s. 11.3 of the CCAA, the court should consider whether an assignment will meet the twin goals of assisting the reorganization process while also treating the counterparty fairly and equitably, *Veris Goldcorp., Re,* 2015 BCSC 1204.

[39] Zayo argues that in this case, the process for obtaining Zayo's consent to the assignment of its contracts to the purchaser, Birch, was neither transparent nor fair. Zayo says it was a counterparty to a number of essential contracts with Primus and that the business carried on by Primus could not continue as a going concern without these contracts. Birch, it says, therefore needed those contracts and would not have disclaimed them had Zayo not provided its consent to the assignment. In that scenario, Zayo argues that s. 11.3(4) would have required payment in full of its arrears.

[40] Zayo argues that the consent request letters, however, intentionally omitted any reference to "cure costs". In the APA, cure costs are defined as the costs necessary to pay pre-filing arrears in order to compel an assignment of an essential contract under s. 11.3.

[41] Ms. Wong Barker's evidence was that she did not understand that she was waiving any right to be paid Zayo's arrears when Zayo, through her, consented to the assignment of its contracts. Nothing in the consent request letters sent to Zayo even mentioned cure costs and they

did not indicate that cure costs would not be paid to counterparties who consented to the assignment of their contracts. Ms. Wong Barker's evidence is, further, that Zayo would not have consented to the assignment of its contracts had it been aware that it would be considered to be waiving any rights to be paid to its arrears.

[42] Zayo also argues that the APA was unavailable for review before the consent deadline. The APA contemplated payment of pre-filing arrears ("cure costs") for essential contracts assigned by court order on of a motion under s. 11.3 of the CCAA. Zayo argues that it was unfair for Primus to demand that Zayo consent to assign its contracts without providing it with a copy of the APA.

[43] Finally, Zayo argues that it should have been served with the motion material filed in support of the motion for the assignment order. In this regard, Zayo also argues that it ought to have been placed on the e-service list, which would have resulted in all motion materials being served on it.

[44] Zayo relies on the 2015 decision in *Veris Gold*, where Fitzpatrick J. concluded that it was "not apparent" that the counterparties to the contract which was sought to be ordered to be assigned under s. 11.3, did, in fact, receive a copy of the application materials. She held that the "best practice... is to serve all counterparties to the particular contracts that are sought to be assigned, whether they are on the service list or not", *Veris Gold, supra,* paras. 59-61.

[45] In this case, Primus served the motion record for the assignment order on counterparties whose consent was still outstanding as of February 9 to 16, 2016. Because Zayo had delivered its initial consents well before February 9, 2016, it was not named in or served with the motion to require the assignment of the non-consenting parties' contracts.

[46] Zayo argues that it had an interest in the motion and that, had it been served with the assignment order motion record, it would have become aware of the "cure costs" provisions of the APA and the possibility that withholding its consent might lead to the payment of some or all of its pre-filing arrears. It also argues that, at the very least, it could have attended at the motion and advised the court that its intention had always been to be paid the pre-filing arrears owed by Primus.

[47] On the question of causation, Zayo asserts that, had it withheld its consent to the assignment of the Zayo contracts, then, at the assignment motion, Zayo would have recovered all of the arrears owed by Primus by virtue of the application of s. 11.3(4) of the CCAA. Zayo relies for this argument on the evidence of Primus, embedded in the language of the APA, that Birch regarded the Zayo contracts as "essential". Zayo also relies on the consent request letter, which stated that if consents were not forthcoming, Primus *would* move for an order requiring the assignment of the Zayo contracts under s. 11.3.

[48] While conceding that the consent request letter mentioned s. 11.3 of the CCAA, Ms. Wong Barker deposed that she looked at s. 11.3 at the time but did not understand it to mean that Zayo's consent to the assignment would foreclose any claim to pre-filing arrears.

[49] Finally, Zayo argues that no party will suffer prejudice if the motion is granted. This argument is premised on the assumption that Primus and/or Birch would have known the total

amount of arrears owed by Primus to Zayo as of the date of the CCAA filing and would have paid this entire amount to Zayo had Zayo refused to consent to the assignment and been a party to the assignment order motion. Zayo's submits that it is not prejudicial for a party to be required to pay an amount that otherwise would have been payable. Thus, Zayo argues, there is no substantive prejudice to Primus, Birch or the secured lenders because, had all relevant facts been known to Zayo at the time, the arrears would have been paid and both reflected in the purchase price under the APA and reflected in the amounts received by the Monitor available to satisfy the secured lenders.

[50] Zayo, therefore, argues that this Court should not condone a process that results in a counterparty to an essential contract being financially disadvantaged for having cooperated with the debtor and consented to the assignment of that essential contract.

Analysis

[51] A great deal of the written and oral argument was devoted to the question of whether this Court has the jurisdiction to make the order sought by the Zayo in this case. There is no doubt that s. 11 is a broad grant of discretion. It is not, however, without limits. Specifically, the s. 11 authority is "subject to the restrictions set out in this Act". Further, the common law applies to the CCAA without modification unless the common law rule is "ousted" by the language of the CCAA, *Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co.*, [1956] S.C.R. 610 at 614.

[52] In the view I take of the matter, it is not necessary to resolve the legal question of jurisdiction. I say this because, assuming the jurisdiction is available, I would not exercise it to grant the relief sought by Zayo in the circumstances of this case. I say this for the following reasons.

The Consent Request Letters

[53] The centerpiece of Zayo's argument is that the consent request letters sent by Primus were misleading, or perhaps more precisely, lacked transparency and were unfair. Zayo argues that the consent request letters did not disclose the details of the APA and the "cure costs" regime embedded in the APA. Nor did the letters provide sufficient explanation for the recipient to understand that bargaining leverage vis-à-vis pre-filing arrears might be gained by refusing to consent to the assignment of contracts because of the provisions of s. 11.3(4).

[54] I am not satisfied that the consent request letters were either unfair or lacked transparency. There were over 300 contracts outstanding, with well over 100 counterparties. Most of the counterparties, including Zayo/Allstream, were large, sophisticated telecommunications companies. There is no question Zayo/Allstream was a sophisticated party. Zayo acquired Allstream in late 2015 for $465 million. Allstream's revenues exceeded $640 million. This is more than 10 times what Primus earned. Every counterparty received the same form of letter. No other counterparty appears to have had any difficulty with the consent request letter or the decision to consent or not to consent. A large number of counterparties appear to have consented.

[55] Ms. Wong Barker worked in a legal department at Allstream comprised of about half a dozen lawyers. At least two other lawyers in the department had supervisory or other

involvement in the Primus CCAA proceedings. Ms. Wong Barker, who carried the ball in the Primus CCAA proceedings, was an exceptional student and graduated with distinction from one of Canada's leading law schools. She went to Allstream with experience at a Bay Street law firm, and had worked there for about five years when Primus commenced its CCAA proceedings. Ms. Wong Barker admitted that CCAA litigation is a highly specialized area with which she was not familiar and that she chose not to seek advice from another lawyer with CCAA experience.

[56] Allstream received three consent request letters. The initial consent provided by Zayo on January 25, 2016 was not agreeable to Primus and there were extensive negotiations over various drafts, such that the form of the consent was not actually finalized until March 2, 2016. Part of the negotiation involved Allstream obtaining reciprocal consents from Primus to the assignment of MTS contracts with Primus to Allstream and the release of MTS from further obligation under those contracts. I do not accept Ms. Wong Barker's evidence that these reciprocal consents were just part of the consents requested by Primus. It is clear that Allstream took this opportunity to put its own house in order due to the sale of Allstream by MTS to Zayo just a few months earlier.

[57] Nothing in the consent request letters is incorrect. The APA was not disclosed initially because it was not yet in the public realm. The evidence is that the APA was posted on the Monitor's website no later than February 3, 2016. Zayo was repeatedly advised to check the Monitor's website for new and updated information. Ms. Wong Barker admitted she did not do so until late in the piece and, in any event, did not see the APA when she did so, although it is clear that the APA was, by that time, available.

[58] The consent request letters did make explicit reference to s. 11.3 of the CCAA and a possible motion if consents were not forthcoming. Ms. Wong Barker deposed that she looked at that section of the CCAA. She appears to have misunderstood its meaning and effect. Her review of s. 11.3(4) in particular did not, in any event, cause her to consider whether court-ordered, as opposed to consent, assignments might *require* payment of pre-filing arrears. It is important to remember that contract formation and enforcement is, in essence, an objective, not a subjective, exercise. Ms. Wong Barker's subjective understanding and misconception of the assignment process wa, in any event, not known to Primus, Birch or the Monitor.

[59] Zayo argues that, as a matter of policy, debtors ought not to be given incentives to be stingy with the disclosure of material information. I do not disagree with this proposition. However, by the same token, creditors or other stakeholders ought not to be given incentives to be less than duly diligent in the protection of their commercial interest and the assessment of their options in real-time insolvency proceedings. In any event, I do not find "policy" arguments particularly helpful in the context of this case.

[60] The Supreme Court of Canada in *Century Services* emphasized the importance of appropriateness and good faith in the conduct of CCAA proceedings, to be sure. It is significant, however, particularly given the acknowledged "hothouse of real-time litigation" aspect of CCAA proceedings and the underlying remedial purpose of avoiding bankruptcy liquidation, that "due diligence" is also a baseline consideration, *Century Services, supra*, para. 70.

[61] Commercial parties do not have an obligation to provide each other with legal advice in the ordinary course of their dealings. Rather, they are entitled to pursue their own economic self-interest to the best of their ability. Contract and commercial law assumes that parties are vigilant in the pursuit of their own interests. It is not illegitimate for a party to bargain hard and advance its own interest. The general rule, with very limited exceptions, is that sophisticated parties will be held to the bargains they make. The mere fact that a bargain proves to be improvident is no basis to relieve the counterparty of its contractual obligations absent the application of one of these limited exceptions. Generally speaking, courts will only relieve a party of the consequences of a poor bargain in circumstances of unconscionability, unilateral mistake, misrepresentation or duress.

[62] Here, I have already found as a matter fact that there was no misrepresentation. I also find, as matter of fact, that the preconditions for the application of the doctrine of unilateral mistake are not met. This is because, put simply, neither Primus nor the Monitor were aware of Zayo's misunderstanding of the assignment process and no advantage was taken of Zayo's mistaken understanding. The parties were both clearly sophisticated players in the telecommunications business and had comparable bargaining power. Zayo had every opportunity to speak with independent legal counsel and had realistic alternatives to the consent ultimately given. There was no duress.

[63] The consent request letters were, in my view, both fair and transparent. Every counterparty was given the same information. Every counterparty was advised to check the Monitor's website for new and updated information. The information necessary to put counterparties on notice of the issues was provided. There was no obligation to provide legal advice or to highlight the possible choices counterparties might make to improve their bargaining leverage. All the counterparties had ample time and every opportunity to obtain professional advice and to consider their options. Zayo, with the benefit of a good-sized legal department, in fact did so.

Disclosure of the APA

[64] I have already dealt in substance with the availability of the APA. The Monitor responded promptly to Ms. Wong Barker's request for a copy by advising that it was not yet publicly available. The Monitor did not promise to provide a hard copy of the APA to Ms. Wong Barker when it became available. Ms. Wong Barker was advised to check the Monitor's website on an ongoing basis. Within days of her request, the APA was, in fact, posted on the Monitor's website. Zayo was also invited, repeatedly, to call the Monitor with any additional questions. After January 26, 2016, however, Zayo had no further communication with the Monitor. If Zayo wanted to review the APA before finalizing its consent, it was incumbent upon Zayo to insist upon that step or take the necessary action to ensure that it was able to do so.

Service

[65] Zayo also complains that service was deficient and that it ought to have been served with the assignment order motion record. Had this been done, it argues, it would have discovered all about the cure costs and the fact that a number of counterparties were likely to be paid some or all of their pre-filing arrears.

[66] The proper analysis of this issue begins with the Initial Order, which governs the procedure for notice and service in this CCAA proceeding. The Initial Order adopts the e-service protocol of the Commercial List. Under that protocol, any party that has delivered a notice of appearance, any party that should be served in accordance with the Rules and any party who has filed a request for electronic service must be placed on the e-service list. 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 request for electronic service in the prescribed form.

[67] The evidence on this motion is that Zayo at no time filed a notice of appearance in this proceeding or submitted a request for electronic service. Zayo asked the Monitor to be placed on the list of creditors and that was done. Zayo received the relevant notice shortly thereafter. As noted above, the Monitor also, on two occasions, specifically advised Zayo to review the Monitor's website for new and updated information.

[68] The motion material for the approval and vesting order (which contained the APA) was posted on the Monitor's website on February 3, 2016. The motion material for the assignment order appears to have been posted on the Monitor's website on or shortly after February 16, 2016.

[69] Neither of the aforementioned motion records were served on Zayo because the Rules did not require service and Zayo had neither appeared nor asked to be placed on the e-service list. In particular, the assignment order motion was only in respect of counterparties to contracts which Birch insisted be assigned and for which no consent had been obtained. The cutoff date for consent was, ultimately, between February 9 and 16, 20156. Because Zayo/Allstream had already consented to the assignment of its contracts, neither Allstream nor any Allstream contracts were included in the motion for the assignment order. Not being a party to that motion or having asked to be placed on the e-service list, Zayo was not entitled to service and was not served.

[70] Zayo's reliance on the *Veris Gold* case is misplaced. That case involved a failure to serve a counterparty whose contract *was* going to be assigned by virtue of a court order and whose interest under s. 11.3(4) was clearly engaged. Even though the party had not appeared and did not ask to be placed on an e-service list, Fitzpatrick J. held that the party ought to have been served since its interest was directly engaged by the relief sought.

[71] That is, with respect, not the situation here. In the present case, by virtue of its consent, Zayo's contracts did not form any part of the subject matter of the assignment order motion. Ms. Wong Barker was aware of, and presumably read, the Initial Order. It was open to Zayo to request that it be served with all court filings. It did not do so. It was advised to consult the Monitor's website for new and updated material. The motion material in support of the approval and vesting order and the assignment order were posted on the Monitor's website in a timely manner. Specifically, both motion records were posted on the Monitor's website at least several days prior to March 2, 2016 when the consent documents between Zayo and Primus were ultimately finalized and the assignment order was made. Ms. Wong Barker admitted that she looked on the Monitor's website and found this material but it is not clear when she did so.

What is clear is that she did not spend sufficient time with the material to find any of the information that Zayo now says was critical to it.

[72] I find, therefore, that Zayo was entitled to request e-service of all court filings but did not do so. Zayo was placed on the creditors list, as it requested, and received all relevant notices in that regard. Zayo, having consented to the assignment of its contracts, was not affected by, and therefore not entitled to notice of, the motion for the assignment order. There was, in the circumstances, no failure of service or notice on the part of the debtor or the Monitor.

Prejudice

[73] Zayo argues, finally, that the order for payment of its $1.2 million out of the proceeds of sale should be made because it would not prejudice anyone. Distribution issues in this case are a zero sum game because, on the evidence, there is certain to be a shortfall. Zayo argues, however, that if it had not consented to the assignment of its contract it would have been a party to the assignment order motion and would have been paid in full. Thus, other parties seeking distribution from the proceeds of sale would be no worse off now, if the order sought is made, than they would have been if the assignment order had been made in respect of Zayo's contracts in the first place.

[74] Given my disposition of the issues above, the fate of Zayo's motion does not turn on this issue. However, because many of the issues are intertwined, it seems appropriate to deal with this issue as well.

[75] The principal flaws in Zayo's argument are the assumptions that:

(a) Zayo had a right to have its contract assigned by a court order; and

(b) Zayo would have been paid its pre-filing arrears in full.

[76] Under the terms of the APA, Birch had the right to add to and take away from the list of essential contracts. The evidence is very clear that the essential contract list was in a state of flux for several weeks and that, in the end, almost 100 contracts were removed from the list of contracts that Birch initially wanted to take on.

[77] The assignment process envisioned under s. 11.3 is a debtor driven, not creditor or counterparty driven process. Section 11.3(1) begins "on application by a debtor company..." Thus, a counterparty cannot require an insolvent debtor to assign its contract to a purchaser. Section 11.3 envisions a market-driven process under which a purchaser, in consultation with the debtor and the monitor, may decide (after possible negotiations with the counterparties) which contracts it wants and needs and which it does not. The APA in this case specifically required that any negotiations with counterparties had to be conducted in the presence of not only the debtor and Monitor but Birch as well.

[78] I agree with the responding parties to this motion that it cannot now be known what Birch might have done, what negotiations might have taken place or what monetary threshold Zayo

and Birch might have had for keeping or disclaiming the contract, if Zayo had declined its consent to the assignment of its contracts.

[79] Zayo argues that this "infinite possibilities" argument is not available to the respondents on this motion because there is no evidence to support it. Zayo argues that the only evidence is that: a) Zayo's contracts *were* on the essential contracts list; b) the consent request letter told Zayo that, in the absence of its consent, a motion *would be* brought for an order assigning its contracts under s. 11.3; and c) the assignment order provided for the assignment of 92 essential contracts with 35 counterparties along with payment of cure costs in the aggregate amount of $4,518,997.51. Neither Birch nor anyone else filed any evidence on what they would have done had Zayo not provided its consent.

[80] Notwithstanding Mr. Gottlieb's forceful argument on this point, I do not think the record is so devoid of evidence as he makes out. Birch did have the right to remove contracts from the list and did so – almost 100 were dropped from the list. Over 90 contract counterparties granted consent to assign without making their consent conditional on payment of pre-filing amounts. The consent request letter, stating that a motion would be brought under s. 11.3 in the absence of consent to the assignment, was a statement of present intention, not an enforceable promise.

[81] There is also evidence that negotiations took place around the amounts of any payment of pre-filing arrears. As the Supreme Court made clear in *Century Services*, much of what actually happens under CCAA proceedings depends upon the parties' negotiations. In those negotiations, parties to service contracts must weigh the risks of insisting upon their desired position (i.e., they may get nothing if the contract is disclaimed) against the benefits of a future income stream due to the assignment of their contract from an insolvent party to a new, more robust, entity.

[82] It is entirely understandable, and fair, for Birch not to have filed evidence purporting to say what it would have done had Zayo not provided its consent. This is because, having been deprived (by virtue of Zayo's consent) of the opportunity to consider that scenario, negotiate with Zayo and weigh the costs and the benefits of each available option, Birch could not now know what it would have done. Any attempt to purport to say otherwise would inevitably involve speculation.

[83] There is a further complication in that the APA sets a ceiling of $3 million on cure costs which are deducted from the purchase price. Above $3 million, the cure costs of court-ordered assignments under s. 11.3 are shared equally between Primus and Birch. This too would have been a relevant factor in Birch's approach to any discussion about payment of Zayo's pre-filing arrears and formed the basis of two prior orders of the Court.

[84] I am unable to agree with Zayo's submission that no amendment of the approval and vesting order or of the assignment order would be required. It seems to me that both orders were premised on Zayo's consent to assignment of its contracts. The relief sought by Zayo on this motion would require a variation of the approval and vesting order as well as the assignment order. Given that the transaction has now closed, and the Monitor has issued its certificate, the additional complication of the allocation of the shortfall resulting from a payment to Zayo as

between Primus and Birch would also have to be resolved. This is a situation, in my view, where the proverbial egg cannot be unscrambled.

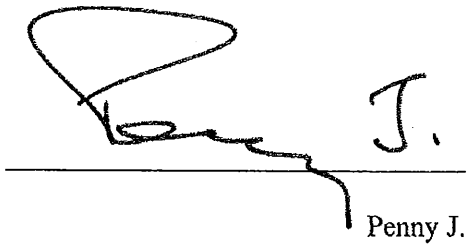
[85] For these reasons, I conclude that prejudice would be suffered by, at the very least, the syndicate of secured lenders and Birch were the relief sought on this motion to be granted.

Conclusion

[86] For the foregoing reasons, Zayo's motion for an order requiring payment by the Monitor of Zayo's pre-filing arrears out of the proceeds of the sale to Birch is dismissed.

Costs

[87] I encourage the parties to seek an accommodation on costs. Failing agreement, any party seeking costs shall do so by filing a brief written submission, not to exceed two typed, double-spaced pages, together with a Bill of Costs within 10 days of the release of these Reasons. Anyone wishing to respond to such a request shall do so by filing a brief written submission, subject to the same page limit, within a further 10 days.



Penny J.

Date: August 18, 2016

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

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.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

COSTS SUBMISSIONS OF BANK OF MONTREAL
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