

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

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

Applicants

NOTICE OF MOTION

Zayo Canada Inc., formerly known as Allstream Inc. (“Zayo”), will make a motion to a Judge presiding over the Commercial List on a date to be fixed by the Court at the court house, 330 University Avenue, 8th Floor, Toronto, Ontario, M5G 1R7.

PROPOSED METHOD OF HEARING: The Motion is to be heard

- in writing under subrule 37.12.1(1) because it is;
- in writing as an opposed motion under subrule 37.12.1(4);
- orally.

THE MOTION IS FOR

1. An Order that FTI Consulting Canada Inc., in its capacity as Monitor for the Applicants, pay Zayo the sum of \$1,219,549.88 from proceeds of the sale of the Applicants’ assets, on account of the Applicants’ monetary defaults in relation to agreements assigned by Zayo to Birch

Communications, Inc. or its permitted assigns pursuant to the consent assignments dated January 29, February 17, and March 1, 2016;

2. If necessary, an Order varying the order of Mr. Justice Hainey dated February 25, 2016 (the “Approval and Vesting Order”), and the order of Mr. Justice Wilton-Siegel dated March 2, 2016 (the “Assignment Order”), to authorize the payment sought in paragraph 1 above; and

3. Such further and other relief as the Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

1. The moving party was formerly known as Allstream Inc. (“Allstream”). Effective March 15, 2016, Allstream changed its name to Zayo Canada Inc. (“Zayo”). The moving party is referred to as Zayo throughout this notice of motion.

The CCAA Proceeding

2. The Applicants were granted protection from their creditors under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “CCAA”) pursuant to the order of Justice Penny dated January 19, 2016 (the “Initial Order”).

3. Pursuant to the Initial Order, FTI Consulting Canada Inc. was appointed as monitor of the Applicants (the “Monitor”) in these CCAA proceedings.

The APA

4. On January 19, 2016, the same date that the Initial Order was granted, the Applicants, as vendors, entered into an Agreement of Purchase and Sale (the “APA”) with Birch Communications, Inc. (“Birch”) or its permitted assigns, as applicable (the “Purchaser”).

5. Pursuant to the APA, the Applicants were required to use commercially reasonable efforts to obtain consents and approvals from counterparties to certain contracts (the “Essential Contracts”) that were to be assigned to the Purchaser as a condition of closing.

6. The APA requires the Purchaser to pay “Cure Costs”, as defined therein:

in respect of any Assumed Contract, all amounts required to be paid to cure any monetary defaults thereunder, if any, required to effect an assignment thereof from a Vendor to the Purchaser; provided that, in respect of the Business pertaining to U.S. and Puerto Rico customers only and where it is possible to transfer or redesignate Vendor’s customers or network services to contracts of the Purchaser, Cure Costs will include any redesignation or other fees, costs or expenses required to accomplish such redesignation or transfer (“Redesignation Costs”) provided that such Redesignation Costs do not exceed US \$250,000 in the aggregate.

7. Essential Contracts for which consent to assign was given without court order are referred to herein as “Voluntary Assigned Contracts”.

8. To the extent that the Applicants were unable to obtain a counterparty’s consent to assign an Essential Contract, the Applicants agreed to seek from this Court an order directing the assignment of the unassigned Essential Contracts (the “Unassigned Contracts”) pursuant to the CCAA.

Zayo Seeks Information about the APA

9. By email dated January 21, 2016, Julie Wong Barker, counsel for Zayo (“Wong Barker”), wrote to the Monitor advising that Zayo was a significant supplier and creditor to Primus Telecommunications Canada Inc. (“Primus Canada”). Wong Barker asked the Monitor to confirm that Zayo would be added to any creditors’ list and would be provided with all required notices.

10. By email dated January 22, 2016, the Monitor replied to inform Wong Barker that Zayo was on the list of known creditors and would receive a “Notice to Creditors” by mail. The Monitor also informed Wong Barker that status updates would be posted on the Monitor’s website.

11. By email dated January 26, 2016, Wong Barker wrote to the Monitor to ask when the APA would be made available on the Monitor’s website. Wong Barker also asked the Monitor to email the APA to her that day.

12. By reply email sent that same day, the Monitor informed Wong Barker that the APA was not available because it was not yet a public document. Wong Barker was directed to refer to the Monitor’s website for status updates regarding the CCAA proceeding.

13. Although the APA was made available on the Monitor’s website on February 2, 2016, the Monitor did not inform Zayo to this fact or email a copy to Wong Barker as per her January 26, 2016 request.

14. Moreover, although Zayo was added to the list of creditors, it was not added to the original service list for receipt of materials filed in the CCAA proceeding.

Primus Canada Seeks Zayo’s Consent to Assign Essential Contracts

15. By letter dated January 22, 2016, Primus Canada sought Zayo’s consent to assign one or more contracts, to which Zayo was a counterparty, to the Purchaser.

16. Primus Canada requested a response from Zayo by no later than January 29, 2016. The January 22 letter warned Zayo that for any consent not received by January 29, 2016, the

Applicants would bring a motion to this Court to seek an order assigning the contract without consent on certain terms and conditions set forth in section 11.3 of the CCAA.

17. Primus Canada did not tell Zayo that its contracts were Essential Contracts, that the APA provided for payment of Cure Costs only to counterparties that demanded such payment, or that if it went to court to seek to compel the assignment of Zayo's contracts the court would order payment of Cure Costs to Zayo.

18. On January 26, 2016, Primus Canada sent Zayo two additional letters requesting consent to assign contracts. Those letters warned that a motion would be brought for any consent not received by February 1, 2016.

19. A fourth letter concerning the assignment of contracts was sent by Primus Canada to Zayo on January 28, 2016. This letter requested a response by no later than February 5, 2016.

20. As of January 28, 2016, the APA had still not been made public by the Applicants. Zayo did not know, and had no way to find out, that the Applicants and the Purchaser intended to avoid paying Cure Costs to counterparties who cooperated with the Applicants' request to assign Essential Contracts on consent.

21. The letters from Primus Canada did not inform Zayo that:

- (a) the Applicants, the Applicants' secured creditors, the Purchaser, and the Monitor would take the position that Zayo's consent to the assignment amounted to a waiver of its right to be paid Cure Costs under the Approval and Vesting Order; and

- (b) if Zayo did not cooperate with the Applicants' request to consent to the assignment, it would be paid its Cure Costs.

22. The contracts to which Zayo was a counterparty that Primus Canada sought to assign to the Purchaser were essential to the functioning of Primus Canada's operations as a going concern and Primus Canada's ability to serve its customers. These contracts include mandatory 9-1-1 services and data services that Primus Canada re-sells to its business customers.

23. Primus Canada owes Zayo a total of \$1,219,549.88 under the contracts that it sought to assign to the Purchaser.

24. By letter dated January 29, 2016, Zayo consented to the assignment of the Essential Contracts to which it was a counterparty. The APA was still not publicized by the Applicants or the Monitor by that date. The list of contracts to which Zayo's consent applied was later clarified by Zayo and Primus Canada by subsequent letters exchanged on February 17 and March 1, 2016.

Zayo Not Informed it was not Entitled to Cure Costs

25. On February 2, the Applicants served motion materials in relation to the Approval and Vesting Order.

26. On February 25, 2016, Justice Hainey granted orders, among other things, approving the APA and, on closing, vesting all of the Purchased Assets in the Purchaser free and clear of any Encumbrances other than Permitted Encumbrances (as defined in the APA).

27. On March 2, 2016, the Applicants moved before this Court to seek an order assigning their rights and obligations under the Unassigned Essential Contracts to the Purchaser. Pursuant to the order sought, as required under section 11.3 of the CCAA, the Purchaser was required to

pay Cure Costs as a condition of the Court granting the Assignment Order but was not required to pay Cure Costs for Voluntary Assigned Contracts.

Unfair Process and Outcome if Cure Costs not Paid

28. In its supervisory role, the Court should strive to ensure that the CCAA process unfolds in a fair and transparent manner. That standard was not met by the Applicants in the manner in which they sought consent from suppliers to assign contracts without proper disclosure of the consequences of consenting to assignments as compared to the consequences of having an assignment forced upon them by the Court.

29. In this proceeding, the Applicants' conduct of seeking consent to the assignment of contracts without disclosing to Zayo that Zayo would lose the right to be paid Cure Costs that are otherwise granted to non-consenting counterparties pursuant the CCAA, worked an unfairness in this transaction.

30. The Applicants' communications with Zayo in this proceeding were obfuscatory and should not be permitted to work the unfair result of putting Zayo in a worse position with respect to its right to Cure Costs than if it had not cooperated with the Applicants' request for consent.

31. Sections 11 and 11.3 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended.

32. Rule 37.14 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

33. Such further and other grounds as counsel may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

1. The affidavit of Julie Wong Barker, to be sworn, and the exhibits attached thereto.
2. Such further and other evidence as counsel may advise and this Honourable Court may permit.

May 13, 2016

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TO:
SERVICE LIST

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

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

Applicants

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

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PROCEEDING COMMENCED AT TORONTO

NOTICE OF MOTION

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