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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

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

Applicants

COST SUBMISSIONS OF THE APPLICANTS
(Re: Motion of Zayo Canada Inc., returnable August 29, 2016)

STIKEMAN ELLIOTT LLP
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Lawyers for the Applicants

TO: THE SERVICE LIST

PART I - OVERVIEW

1. On August 18, 2016, this Court dismissed the motion brought by Zayo Canada Inc. ("**Zayo**").[1] The Applicants seek costs of $56,718.38, representing partial indemnity costs at roughly 40% of rates actually charged and inclusive of disbursements and HST.

PART II - LAW AND ARGUMENT

2. The discretion of this Court to award costs is governed by, *inter alia*, the factors set out in Rule 57.01. On this motion, and in addition to the fact that Zayo was utterly without success in obtaining relief, the following factors are relevant: (i) the general amount of costs Zayo could reasonably have expected to pay in the circumstances; (ii) the complexity of the motion; and (iii) Zayo's conduct throughout the litigation, which forced the Applicants to incur substantial costs.

A. Zayo ought to have expected a significant costs award being made against it, especially given the evident fragilities and shortcomings of its claim

3. In this case, Zayo, a sophisticated commercial party, ought to have reasonably expected that its motion would be forcefully resisted by the Applicants and their stakeholders. A sophisticated commercial party, with the benefit of the advice of experienced commercial litigators, is understood to accept the risk of a substantial cost award if it is unsuccessful.[2] This is especially true if the motion has limited merit.[3] Zayo brought this motion despite numerous frailties in its case.[4] Zayo sought over $1.2 million from the proceeds of the Applicants' Court-approved sale without regard for the apportionment of such costs under the court-approved contract. Its lack of success, and the risk of a substantial cost award, were each foreseeable.

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[1] *Zayo Inc. v. Primus Telecommunications Canada Inc.*, 2016 ONSC 5251 at para. 82, Tab 1 ("Reasons").
[2] See e.g. *Apotex v. Egis Pharmaceuticals*, 1991 CarswellOnt 3149 (Gen. Div.) at paras. 7-8. ("***Apotex***"), Tab 2.
[3] *Ibid.* Each of Zayo's arguments was dismissed as without merit: Reasons at paras. 57, 59, 61-64, 72, 75, 84, Tab 1.
[4] Reasons, *ibid.* See also Reasons at paras. 27, 31, 55, 57, 71-72, Tab 1.

B. Zayo's motion was complex and required substantial rebuttal evidence as well as detailed and well-researched responding legal submissions

4. The motion brought by Zayo was not straightforward or routine. Zayo raised novel issues regarding the jurisdiction to award pre-filing arrears, the scope of a debtor's obligations to its suppliers in the midst of its insolvency proceedings, and the entitlement of counterparties to pre-filing arrears under section 11.3 of the *Companies Creditors Arrangement Act* or otherwise. In addition, Zayo impugned the fairness and integrity of the entire assignment process that the Applicants conducted. As a result, the Applicants had to marshal substantial rebuttal evidence regarding the entirety of that process and canvass a substantial body of law. The cost incurred in preparing the responding motion materials – including coordinating with the other parties on the motion with whom the Applicants had a common interest - are thereby reasonable.

C. Zayo's conduct, including its unfounded allegations of misconduct, resulted in this unnecessary proceeding and forced the Applicants to incur substantial costs

5. Despite being treated the same as every other counterparty in the assignment process, and notwithstanding its sophistication and the number of opportunities it had to consider its options and safeguard its interest, Zayo chose to allege misconduct, misrepresentation and impugned the fairness of the Applicants' entire process in seeking consents to assignment. In attempting to avoid responsibility for its failure to safeguard its own interests, Zayo forced the Applicants to incur the unnecessary cost of resisting this needless motion. The Applicants are entitled to their costs on this motion, all of which Zayo could have easily foreseen and avoided.

PART III - ORDER REQUESTED

6. For all of the foregoing reasons, the sum sought by the Applicants as partial indemnity costs is reasonable and appropriate, and ought to be paid to them forthwith.

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

Stikeman Elliott LLP
Lawyers for the Applicants

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Zayo Inc. v. Primus Telecommunications Canada Inc.,* 2016 ONSC 5251

2. *Apotex v. Egis Pharmaceuticals,* 1991 CarswellOnt 3149 (Gen. Div.)

SCHEDULE "B"
RELEVANT STATUTES

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.

...

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.

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

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Applicants

BILL OF COSTS OF THE APPLICANTS
AMOUNTS CLAIMED FOR FEES & DISBURSEMENTS

August 29, 2016

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Lawyers for the Applicants

APPLICANTS' BILL OF COSTS
AMOUNTS CLAIMED FOR FEES

STATEMENT OF EXPERIENCE

A claim for fees is being made with respect to the following lawyers:

Name of lawyer	Years of experience	Year of Call	Rate
Dan Murdoch	13	2003 (New York) 2006 (Ontario)	$700/hr
Maria Konyukhova	10	2006	$700/hr
Kathryn Esaw	6	2010	$550/hr
Vlad Calina	1	2015	$460/hr

I. FEES

Fee Items	Persons	Hours	Rate	Partial	Actual
Initial review of motion materials including attendance at scheduling motion, all internal communications and communications with counsel and client with respect thereto;	D. Murdoch	2.80	$700.00	$784.00	$1,960.00
	M. Konyukhova	9.68	$700.00	$2,710.40	$6,776.00
	K. Esaw	3.92	$550.00	$862.40	$2,156.00
	V. Calina	6.48	$460.00	$1,192.32	$2,980.80
Subtotal		**22.88**		**$5,549.12**	**$11,912.80**
Preparation of responding affidavit and factum for motion, including review of motion materials, legal research, all internal communications and communications with counsel and client with respect thereto;	D. Murdoch	3.25	$700.00	$910.00	$2,275.00
	M. Konyukhova	34.42	$700.00	$9,637.60	$24,094.00
	K. Esaw	0.44	$550.00	$96.80	$242.00
	V. Calina	119.30	$460.00	$21,951.20	$54,878.00
Subtotal		**157.41**		**$32,595.60**	**$79,214.00**
Cross-examination of M. Nowlan, including meeting with client to prepare, attendance on cross-examination, and review of transcript;	D. Murdoch	8.70	$700.00	$2,436.00	$6,090.00
	M. Konyukhova	4.92	$700.00	$1,377.60	$3,444.00
	V. Calina	3.22	$460.00	$592.48	$1,481.20

Subtotal		**16.84**		**$4,406.08**	**$11,015.20**
Preparation for and attendance at motion;	M. Konyukhova	18.25	$700.00	$5,110.00	$12,775.00
	V. Calina	9.38	$460.00	$1,725.92	$4,314.80
Subtotal		**27.63**		**$6,835.92**	**$17,089.80**
Total Fees				**$49,386.72**	**$119,231.80**
HST @ 13%				$6,420.27	$15,500.13
TOTAL FEES				$55,806.99	$134,731.93

II. DISBURSEMENTS

DISBURSEMENTS	TAXABLE
Photocopies	$622.38
Scanning	$61.50
Book Binding	$43.66
Deliveries	$54.00
Agent's Fees	$25.00
Total Disbursements	**$806.54**
HST @ 13%	**$104.85**
TOTAL DISBURSEMENTS	**$911.39**

TOTAL FEES & DISBURSEMENTS
(Including HST)

Partial Indemnity	**$56,718.38**
Actual Rate	**$135,643.32**

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

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST

Proceeding commenced at Toronto

BILL OF COSTS OF THE APPLICANTS

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Lawyers for the Applicants

TAB 1

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.

<u>The Zayo Argument</u>

[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.[1] 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.

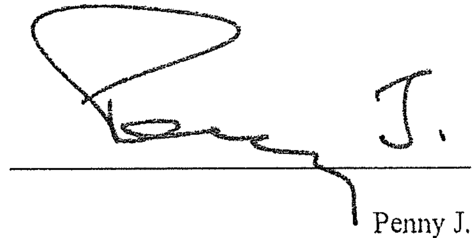
[85] For these reasons, I conclude that prejudice would be suffered by, at the very least, the syndicate of secured lenders and Birch were the relief sought on this motion to be granted.

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

TAB 2

1991 CarswellOnt 3149
Ontario Court of Justice (General Division)

Apotex Inc. v. Egis Pharmaceuticals

1991 CarswellOnt 3149, [1991] O.J. No. 1232, 28 A.C.W.S. (3d) 26, 37 C.P.R. (3d) 335, 4 O.R. (3d) 321

Apotex Inc. v. Egis Pharmaceuticals and Novopharm Ltd.

Henry J.

Judgment: July 5, 1991
Docket: 48784/90

Counsel: *Harry B. Radomski* and *David A. Shiller*, for plaintiff
Charles F. Scott, for defendant Egis Pharmaceuticals
David Stockwood, Q.C., and *Paul H. Le Vay*, for defendant Novopharm Ltd.

Subject: Intellectual Property; Property; Civil Practice and Procedure

Headnote

Practice --- Costs — Particular orders as to costs — Costs on solicitor and client basis

Principles affecting quantum — Ont. R. 57.01, 57.01(3).

Plaintiff sought an interlocutory injunction to prevent a competitor from introducing a product onto the market. The motion was dismissed and costs were awarded against defendant on a solicitor and client basis. The order provided that the quantum of costs would be fixed by the Judge. Parties spoke to the matter of quantum of costs. Plaintiff argued that the matter was to be approached as though it were an assessment of solicitor's accounts submitted to a client. Held, an award was made fully indemnifying respondents for their costs. The first guiding principle underlying the order was that, in a situation where a solicitor and client award was appropriate, successful party was not to be fully indemnified for costs that were reasonably incurred in the process of litigating the matter. The second guiding principle was that the Judge, in fixing the costs of a proceeding, was not to assess costs as if he or she were performing the function of a Master to whom the Court had referred the matter for assessment. Rather, R. 57.01(3) gave the Judge the right to refuse to make an item-by-item assessment according to the tariffs and instead to make a determination as to what the services devoted to the motion or action were worth.

***Henry J.*:**

Reasons

1 At the conclusion of argument on behalf of the plaintiff Apotex on its motion for an interlocutory injunction, I dismissed the motion without calling upon counsel for either of the defendants Egis or Novopharm. I awarded costs to the defendants to be fixed by me on the solicitor and client scale. (See report of this decision at (1991), 2 O.R. (3d) 126)

2 The plaintiff moved for leave to appeal my order as to costs which was dismissed by Austin J. on January 29, 1991. Counsel then made submissions in writing as to the quantum of costs to be fixed as I had invited them to do; the matter was argued at length over the period from February 22 to May 3, 1991, and I am grateful to counsel for their industry and assistance in what is, in my opinion, a very important matter, particularly in view of the current judicial policy, exercised on a case by case basis, to order costs to be fixed by the judge and to be paid forthwith, rather than to

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be referred to an assessment officer. In the case of this interlocutory motion, I decided in the unfettered exercise of my discretion, to fix the costs and order them paid forthwith, as I have said.

Summary of Claims

3 The claims of the two defendants as to quantum of costs for preparation and argument of the motion for interlocutory injunction and costs, as revised to correct errors, are as follows:

Egis	-	Tory, Tory, DesLauriers and Binnington	
		Fees	$ 96,645.00
		Disbursements	10,780.20
			$107,425.20
Novopharm	-	Stockwood, Blair, Spies and Ashby	
		Fees	$ 85,136.50
		Disbursements	3,832.30
			$ 88,968.80

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They also ask for costs of the submissions as to quantum.

4 At the outset I wish to make one or two observations about the burden of expense involved in this type of litigation.

5 First, we are here concerned with what is primarily economic opportunity and marketing strategy. Both the plaintiff Apotex and the defendant Novopharm are candidates for entry to the Canadian market of a pharmaceutical product for which there is a significant Canadian market. Apotex has in fact got there first which its principal claims is a very substantial advantage, and it seeks to delay the entry of Novopharm by resort to this litigation. Its attempt to use the injunctive jurisdiction of the court to effect this purpose has, however, failed.

6 If the plaintiff had succeeded in obtaining the injunction sought, the delay in the ultimate entry to the market of the defendants would have been costly to them in terms of business immediately lost, as well as the handicap over time of "catching up" its loss of market position - an economic prejudice amply highlighted by Dr. Sherman of Apotex. In other words, the cost to the defendants of falling behind the leader Apotex would in business language be incalculable; the financial stakes are high. Clearly the defendants were prepared, and reasonably so, to bear the cost burden of retaining leading firms of solicitors and counsel to oppose the injunction sought.

7 Second, the defendants have been brought before the court unwillingly at the behest of the plaintiff, and have at considerable expense mounted a defence through teams of legal counsel and solicitors whose services have thus far succeeded. The reality of commercial life is that to mount a successful defence against a determined plaintiff is costly, as will be obvious from the summary of costs claimed above. Any individual or corporation attacked in the courts is entitled to retain the legal services that can best submit its cause to the court; it is not expected to shop for cheaper services but is entitled to be represented by counsel of its choice.

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8 Third, the practical effect of this is that the litigant who, as plaintiff or defendant, continues to pursue the litigation willy-nilly, may be saddled not only with the legal charges of his own solicitor and counsel but also with all or part of his adversary's costs if he loses. He is assumed to know and accept this as a business risk and his legal advisers are responsible for so informing him. It is the policy of the judicial system to encourage litigants to settle, which generally means that both parties make a sensible business decision to end the dispute and so cut their losses and avoid the risk of failure and further costs. I refer for example to Rule 49, Rules of Civil Procedure, O. Reg. 560/84, as well as to the pre-trial procedures designed to segregate the real issues for trial and to expose the strengths and weaknesses of the parties' respective positions. An important objective of the system is thus, by an award of costs (among other things) to discourage harassment of another party by the pursuit of fruitless litigation. The award of costs on the solicitor and client scale is an important device that the courts may use to this end, particularly where a party has conducted itself improperly in the view of the court.

9 I make these observations at the outset for a very simple purpose - to reflect the reality of the situation before the court. That reality is that the defendants have been obliged to assert their position against the plaintiff's attack by counsel of their choice; that they have been billed considerable sums for those legal services; that those charges, in my opinion, are reasonable having regard to the factors in rule 57.01, and are also at current rates for the calibre of counsel and solicitors involved; that the defendants were brought into court against their will but, if the plaintiff has its way, will although entirely successful on the motion, nevertheless have to bear a substantial cost burden for defending this interlocutory proceeding. It is to avoid this result that I awarded the defendants their costs of the motion to be fixed on the solicitor and client scale - this scale being attributable to unacceptable conduct by the plaintiff.

The General Rule

10 In awarding and fixing costs, the court is governed by s. 141(1) [am. 1984, c. 64, s. 9] of the *Courts of Justice Act, 1984*, S.O. 1984, c. 11, which provides:

> 141.(1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or 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.

Rule 57.01 [am O. Reg. 786/84, s. 10] sets out the factors to be considered by the court in exercising its jurisdiction, placing emphasis on the result and any written offer to settle. There is no need for present purposes to elaborate except to say that the rule effectively eliminates restrictions on the exercise of discretion under s. 141 (I add that in addition to this statutory authority the court in my opinion retains its equitable jurisdiction to award costs in its discretion unless clearly precluded by statute).

11 Next, we are here dealing with costs *inter partes* awarded by the court to a party to the proceeding to be paid by another party, usually an adversary. Costs as between parties are awarded on two scales - the solicitor and client scale or more usually on the party and party scale. There is a significant difference between these scales although both are intended to compensate to greater or lesser degree the party receiving the award, as I shall indicate shortly. There is another form of costs which is distinct - the bill submitted by a solicitor to his client for services rendered, sometimes also confusingly called "solicitor and client costs". While the *client* is entitled to have his solicitor's charges for services assessed by the court if he disputes it, that is not the function that the court is performing in fixing costs between parties.

12 Furthermore, while the award of costs between parties on the solicitor and client scale has traditionally been reserved for cases where the court wishes to show its disapproval of conduct that is oppressive or contumelious, there is also a factor that frequently underlies the award, that is not necessarily expressed, that the successful party ought not to be put to any expense for costs in the circumstances. That is a factor in my decision in this case.

13 The general principle that guides the court in fixing costs as between parties on the solicitor and client scale, as is provided in my order, is that the solicitor and client scale is intended to be complete indemnification for all costs (fees

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and disbursements) reasonably incurred in the course of prosecuting or defending the action or proceeding, but is not, in the absence of a special order, to include the costs of extra services judged not to be reasonably necessary.

14 This principle flows from the case law which is synthesized in Orkin, *The Law of Costs*, 2nd ed., p. 1-8 (insert October 1990). I refer particularly to the two decisions highlighted by the author - *Magee v. Ottawa (Separate School Board)*, [1962] O.W.N. 83, 32 D.L.R. (2d) 162 (H.C.J.), *per* McRuer C.J.H.C.; and *Re Solicitors*, [1967] 2 O.R. 137 (H.C.J.), *per* Jessup J., which are the main authorities for the foregoing principle. I also have found most helpful the analysis by Master McBride in *Singer v. Singer* (1975), 11 O.R. (2d) 234 (T.O.) [affd (1975), 11 O.R. (2d) 775 (H.C.J.), leave to appeal to Div. Ct. refused (1976), 11 O.R. (2d) 775*n* (Div. Ct.)], wherein he canvasses in depth the development of the case law and the "woolly thinking" and confusing expressions which have characterized it. My statement above of the principle is derived from the headnote in the *Singer* decision. As Orkin puts it at p. 1-9, such an award was described as "costs ... on a scale which would most closely indemnify them [the parties] for their real out-of-pocket expenses". He cites *Janigan v. Harris* (1989), 70 O.R. (2d) 5, 62 D.L.R. (4th) 293 (H.C.J.). The limits on the indemnity are related not to discretion but to the exclusion of services that are not reasonably necessary for the proper presentation of the client's case; for the latter the opposite party ought not in fairness to pay.

15 This brings me to a second guiding principle - the judge in fixing costs of a proceeding is not *assessing* costs as if he were performing the functions of a master or officer to whom the court has referred costs to be assessed. Rule 57.01(3) expressly provides that:

> In awarding costs, the court may fix all or part of the costs with or without reference to the Tariffs, instead of referring them for assessment ...

16 This I understand is what the judges are doing frequently in interlocutory proceedings currently, including myself; it is not an assessment item by item according to the Tariffs as would be done by an assessment officer; it is rather the judge's determination of what the services devoted to the motion or other proceeding are worth according to the submissions of counsel, his own experience and with *some* regard to what could be taxed on the party and party scale. This is done in Weekly Court, Motions Court and Divisional Court and normally involves the party and party scale. It is essentially pragmatic, made on an overall appreciation of the factors in rule 57.01 without reviewing a catalogue of itemized charges. Where the award specifies the solicitor and client scale, the judge's function is to achieve full indemnity for the party for his solicitor's bill except for "extra" charges beyond the reasonable scope of the litigation, and the preparation and presentation of the client's case. That incidentally is also the role of the master or officer to whom the judge refers costs on the solicitor and client scale for assessment subject to any specific instructions the judge may include in his order. In the case at bar I have intended my award of costs to be complete indemnity to the two defendants in respect of the injunction proceeding, including costs thereof, subject only to excluding services billed to them which as a matter of my judgment were not reasonably necessary for preparation and presentation of the defendants' case, and which are therefore judged to be extras or "frills" authorized by the client but falling outside the test of relevance as I have described it above.

17 There is a third guiding principle to which I feel obliged to refer, albeit a negative one, arising from a submission by Mr. Radomski. First of all he disputes the rule of complete indemnity and asserts that the defendants should be entitled to indemnity "more fully than the Tariff scale" or something that "falls short of solicitor and client costs", or "something *approaching* complete indemnification". These are concepts that fall from judges in individual decisions which he cites, but which are overtaken by the general rule that I have stated above.

18 His other submission is to the "formula" concept. He submits that the award *inter partes* of costs on the solicitor and client scale is a function of the party and party scale; as he puts it in argument:

> Just how much above the tariff scale a litigant should be awarded is often difficult to determine. While no longer written in stone, the formula "party and party costs plus one-third" continues to be used as a yardstick against which a solicitor's fee has been measured (see *Re Greenglass and Nefsky* (1988), 32 C.P.C. (2d) 55 at 60 (Ont. H.C.J.).

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19 I do not agree. So far as I can determine there is no such formula or rule of thumb (see *Singer v. Singer*, *supra*). Moreover, the decision of Craig J. in *Re Greenglass*, *supra*, does not appear to me to support the principle contended for in the case at bar. *Greenglass* was a case in which Craig J. was engaged in reviewing an assessment certificate relating to a solicitor's bill of costs rendered to the client Nefsky. Nefsky settled his claim as plaintiff in a personal injury action with the defendant's insurer. The overall settlement of quantum of damages included the plaintiff's party and party costs. Subsequently, Nefsky's solicitor rendered his full bill to which Nefsky objected and it went to assessment. Craig J. refused to confirm the certificate of the assessment officer and decided to assess the bill himself. As I see it he was simply assessing the bill rendered by the solicitor to his client. In increasing the amount allowed by the assessment officer for fees, Craig J. relied on a former rule of thumb or convention that solicitor and client accounts were claimed on the basis of one-third more than party and party costs (p. 60). I do not agree that this decision affects the case at bar. Craig J. was not assessing costs *inter partes*. Whether there be a formula as he found previously existed I do not decide; such a formula does not apply to a judge fixing costs *inter partes* on the solicitor and client scale.

20 By way of recapitulation of the general principle, while in the foregoing analysis I have used several phrases to identify what services the court ought to exclude from the costs to be fixed, I return to the language which I adopted at the outset from the headnote in *Singer v. Singer* as *the* guiding principle: An award of party and party costs as between solicitor and client is intended to result in full indemnity to the beneficiary of such an award, excluding only costs which were not reasonably necessary to fully and fairly prosecute or defend the action.

21 The analysis of Master McBride in that case takes into account the statement of Jessup J. in *Re Solicitors*, *supra*, at p. 142:

> ... taxation of a bill of costs, as between solicitor and client payable by an opposite party, should proceed on the principle that it is intended, so far as is consistent with fairness to the opposite party, to provide complete indemnity to the client as to costs essential to, and arising within, the four corners of litigation ...

22 In my opinion these two statements say it all.

Determination of Quantum

23 Both Mr. Stockwood and Mr. Scott have provided me with the accounts rendered to their clients by their respective firms; they claim full indemnity for the defendants and have supported the accounts in greater or less detail, including rates charged by counsel and hours spent on preparation and argument. Both claims have been adjusted to correct clerical or arithmetical errors pointed out by Mr. Radomski which were obvious.

24 Mr. Radomski in making his submissions approached the matter of quantum as if it were an assessment of the solicitor's accounts rendered to the clients. As I have indicated above that is not the approach that a judge should take in fixing costs. If the judge intends the costs to be assessed he should send them to the assessment officer or master for that purpose; the object of fixing costs is to avoid the delay and added costs of an assessment, and in case of an interlocutory motion such as this, to have the costs aspect of it disposed of at once and "clean the slate" so to speak.

25 Having said this I go to the several heads under which counsel have organized their submissions.

(a) Hourly rates

26 The law firms representing the defendants have charged for the services of solicitors and counsel at their then currently usual rates. Mr. Radomski submits that I should allow much lower rates based upon recent practice of assessment officers in Toronto referred to in Orkin at p. 3-34.4. To exemplify what he asks, I attach the list of hourly rates charged for services of individual counsel and solicitors, together with his version of what should be allowed (Schedule 1).

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27 I say simply that this is not the approach to be taken in applying the guiding principles which I have adopted. It in no way even approaches full compensation. If this is a true reflection of what assessment officers are currently deciding in assessing solicitor and client costs *inter partes* I do not accept it and I am not bound by it.

28 Mr. Radomski makes a particular submission relating to the services of Mr. Takach, a senior solicitor who assisted Mr. Scott (Egis); he asks me not to allow his full hourly rate because he has "no particular expertise in the matter", and moreover in relation to the trip to Hungary in connection with the cross-examination of Dr. Barta, his role was primarily that of a translator. In any event he says a more junior counsel would have been adequate.

29 Again my answer is simple. I do not accept this submission and am quite satisfied that Mr. Scott properly employed Mr. Takach as he did both before and during the hearing of the motion, notwithstanding that he was ungowned. Whether he was required to assist as he did in this matter is a question of judgment for Mr. Scott as leader and I do not presume to override his judgment.

(b) Premium

30 Mr. Scott in addition to charging for straight time docketed, added a premium of $5,995 attributed to the result achieved; Mr. Radomski challenges it. I however see nothing improper about it. See *International Corona Resources Ltd. v. LAC Minerals Ltd.*, Ont. S.C., No. 12209/81, Master Clark, released July 4, 1989, which on this point I adopt.

(c) Allowable time

(i) Egis

31

- Mr. Radomski objects to time spent by Mr. Takach accompanying Mr. Scott to Budapest. I have already rejected this objection.

- Similarly he objects to Mr. Takach being present at the hearing of the motion as a senior solicitor; it is objected that he did not participate in cross-examination. I do not agree; Mr. Scott was entitled to have him present at all times to perform as his instructing solicitor, as Mr. Scott says he did, and his judgment in so doing was prudent and responsible.

- It is also objected that Mr. Scott has charged excessive hours for travel time and for miscellaneous attendances. There is no merit in these objections. While on the matter of travel time, I also reject Mr. Radomski's submission that Mr. Scott's charges for time spent travelling to Budapest and back should be allowed only at half rate (reducing 20 hours to 10) in accordance with recent decisions of assessment officers. I am quite satisfied that it was necessary for Mr. Scott to make the trip to Budapest for the cross-examination of Dr. Barta; there is no indication that Mr. Scott was engaged in any business other than that of his client, or that he took time out for his personal affairs. While travelling, he was engaged in his client's business and was forgoing the business of other clients; this was a major trip and was, as I accept, essential to the preparation of Egis' case. In my opinion Egis should be compensated for it in full.

- Objection is also taken to a series of miscellaneous disbursements principally in relation to the trip to Budapest, including Mr. Takach's expenses which I am asked to disallow entirely. These expenses are not unreasonable and are mostly self-evident, and are satisfactorily explained by Mr. Scott.

- A final objection is made that rule 39.02(4) precludes a charge for cross-examining an adverse party on an affidavit - in particular for cross-examining Dr. Sherman and Stephen Dempsey, for which Mr. Scott dockets 17.8 hours. I do not agree. The rule leaves the matter to the discretion of the court. The cross-examination of these two persons was essential to the case of both defendants. It was essential also to my assessment of the credibility of both Dr.

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Sherman and Mr. Dempsey, and in particular to the assessment by me of the allegation of fraud. It is my intention to include these cross-examinations in recoverable costs as rule 39.02 permits, and to put that intention beyond doubt I make an order accordingly, as contemplated by the rule.

(ii) Novopharm

32

• Mr. Radomski submits that much of the time docketed by Mr. Stockwood is too vague and undetailed to determine its justifiability. He makes the same objection to time spent by other members of Mr. Stockwood's firm; thus the time charged should be reduced. I do not agree. Mr. Stockwood describes how his services were divided with those of Mr. Le Vay in senior/junior fashion, wherein the detail was found in Mr. Le Vay's dockets whereas Mr. Stockwood's services were more general by way of preparation. I am quite satisfied that these charges are relevant and reasonable, including those of the "other" solicitors.

• The charges of cross-examining Dr. Sherman and Stephen Dempsey are objected to as in the case of Egis (rule 39.02) and are similarly ordered to be included in costs.

33 To conclude, instances of arithmetical errors and inadvertent double docketing in both accounts have been acknowledged and corrected as I have said at the outset. Apart from these corrections I find no reason to disallow any services charged by either law firm from full compensation in accordance with the guiding principles.

34 For the sake of clarity I add a postscript. Whether a service is performed or engaged in contemplation of adversarial proceedings in court is essentially a matter of judgment. I have looked for the exercise of judgment, together with prudence, foresight and imagination, in assigning services to the motion in this case as the test of fairness, reasonableness and necessity in applying the guiding principles. It is not appropriate to apply the test of hindsight (20/20 vision) to determine whether a service charged for was an extra service or frill not reasonably necessary to defend the client's position. The time to view the decision to commit services to the project is *before* the hearing or trial - not on the basis of hindsight which might indicate that as it turned out, the service was unnecessary. In the case at bar, I did not even call on counsel for the defendants yet it was essential that they be fully prepared in case I had done so.

35 I cannot leave this matter without a final comment. Apotex used this court by way of an interlocutory proceeding to "play hard ball" against the defendants and lost. It can scarcely complain if it is required to compensate the defendants for their costs accordingly.

Decision

36 I have accordingly allowed costs, inclusive of an amount for these submissions on quantum, as follows:

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To Egis          $108,500.00
To Novopharm     $90,000.00
```

To Egis	$108,500.00
To Novopharm	$90,000.00

APPENDIX 1

Hourly rates suggested by Apotex compared with rates charged by the defendants' solicitors and counsel.

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                   Rate Suggested    Rate Charged
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David Stockwood	$190 per hour	$315 per hour
Paul Le Vay	$100 per hour	$145 per hour
Other Solicitors in		
Mr. Stockwood's office	$100 per hour	$145 per hour
Lorne Morphy	$200 per hour	$390 per hour
Robert Armstrong	$190 per hour	$350 per hour
Charles Scot	$190 per hour	$315 per hour
Gabor Takach	$100 per hour	$300 per hour
Richard Gold	$ 70 per hour	$115 per hour
Students	$ 50 per hour	$ 70 per hour

	Rate Suggested	**Rate Charged**	
David Stockwood		$190 per hour	$315 per hour
Paul Le Vay		$100 per hour	$145 per hour
Other Solicitors in			
	Mr. Stockwood's office	$100 per hour	$145 per hour
Lorne Morphy		$200 per hour	$390 per hour
Robert Armstrong		$190 per hour	$350 per hour
Charles Scot		$190 per hour	$315 per hour
Gabor Takach		$100 per hour	$300 per hour
Richard Gold		$ 70 per hour	$115 per hour
Students		$ 50 per hour	$ 70 per hour

End of Document

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

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

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

COST SUBMISSIONS OF THE APPLICANTS (Re: Motion of Zayo Canada Inc., returnable August 29, 2016)

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