

CITATION: PT Holdco Inc. (Re) 2016 ONSC 495  
COURT FILE NO.: CV-16-11257-00CL  
DATE: 20160121

**SUPERIOR COURT OF JUSTICE – ONTARIO – COMMERCIAL LIST**

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

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

**BEFORE:** Penny J.

**COUNSEL:** *Maria Konyukhova and Vlad Calina* for the Applicants

*Linc Rogers and Aryo Shalviri* for the Monitor

*Brendan O'Neill* for Birch Telecommunications Inc.

*Natasha MacParland* for the Bank of Montreal

*Greg Azeff and Stephanie DeCaria* for Manulife

*D. Magisano* for Origin Merchant Partners

**HEARD:** January 19, 2016

**REASONS**

[1] This is an application for court protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"), including authorization to apply for recognition in the United States pursuant to Chapter 15 of the United States Bankruptcy Code, 11 U.S. Code § 1501-1532 (the "Code").

[2] I granted the initial order on January 19, 2016 with reasons to follow. These are those reasons.

[3] The applicants (collectively Primus) offer telecommunications services in Canada and the United States. Primus' principal business is the re-selling of residential and commercial telecommunications services within the United States and Canada.

[4] Primus has been experiencing rapidly declining revenues, its customer base is being lost to lower profit margin services and, yet, its capital costs remain high. As a result, Primus does not have the liquidity to meet its payment obligations as they become due. Primus is unable to satisfy the financial covenants set out in its secured credit agreements and has defaulted under these credit agreements. If these agreements are enforced, Primus would be unable to satisfy its

obligations. Primus has operated under forbearance agreements in respect of these defaults since February 4, 2015. Primus has been unable to successfully restructure its business outside of formal insolvency proceedings.

[5] The Primus North American operations are thoroughly integrated. Internally, Primus shares networks, platforms, infrastructure and personnel (including senior management).

[6] Holdco is the principal holding company of Primus with PTUS and Primus Canada the wholly owned subsidiaries of Holdco. Primus Canada is the Canadian operating company. PTUS is the holding company for PTI and Lingo, which are Primus' U.S. operating companies.

[7] Holdco and Primus Canada are private companies incorporated under the Ontario *Business Corporations Act*, with registered head offices in Toronto, Ontario. PTUS, PTI, and Lingo are private companies incorporated under the laws of Delaware, with registered head offices in Wilmington, Delaware.

[8] Primus Canada does not own sufficient telecommunications network infrastructure to provide telecommunications services without the assistance of a major carrier. Primus Canada's business and operations are heavily dependent on the major carriers. The largest vendors are Bell, Allstream, Rogers and Telus, which collectively account for approximately 50% of supplier obligations. Primus Canada purchases services from major carriers at wholesale rates determined by the CRTC or through negotiated arrangements to re-sell to its own residential and commercial consumers. The majority of Primus Canada's gross revenue is earned by providing these resale services.

[9] Primus Canada is also dependent on its credit card processing service provider. Approximately 30% of Primus Canada's customers pay for their services by credit card. Primus Canada could not process credit card transactions without the continued supply of credit card services.

[10] Primus Canada generates 88% of the Primus gross revenues of which 78% is generated in Ontario with 10% in Quebec, 6% in British Columbia, 4% in Alberta, and 2% in other provinces.

[11] Primus Canada has approximately 204,000 residential accounts and 23,000 commercial accounts. In 2014, approximately 56% of Primus Canada's revenue was generated from residential customers and approximately 44% was generated from commercial customers.

[12] Typical residential agreements are for two years or less. Typical commercial agreements range between two to three years.

[13] The U.S. Primus entities' revenues account for approximately 12% of the Primus gross revenue. U.S. Primus primarily offers digital home phone services and long-distance phone services.

[14] U.S. Primus has about 27,000 residential customers, of which approximately 1,100 are located in Puerto Rico. The balance of the U.S. Primus customers are located in the United States.

[15] Primus Canada employs 502 people and U.S. Primus employs 28 people. Certain of the Primus employees provide services to both the U.S. and Canadian operations. The Primus workforce is non-unionized. Primus does not have a pension plan for its employees.

[16] Primus' gross revenue decreased from \$229 million in 2012 to \$199 million in 2013, to \$180 million in 2014. Gross revenue is forecasted to drop to \$166 million in 2015. Since 2012, the Primus consolidated revenue has declined an average of 9% per year. During the same period, the Canadian residential business, representing approximately 56% of gross revenue for 2015, has declined an average of 9% year-over-year. At the same time, revenue has declined 18% in Canada and 25% in the United States. Despite these declining revenues, Primus has not been able to reduce capital expenditures due to the capital-intensive nature of its business. Consequently, Primus reported a net loss of \$830,000 in 2014 and has forecast a net loss of \$13,078,000 for 2015.

[17] As a result of their financial difficulties and resulting defaults with their lenders, the Primus entities are insolvent and unable to meet their obligations as they come due.

[18] Primus elected to pursue a pre-filing sales process out of concern that the extensive period of CCAA protection necessary to implement a post-filing sales process would have a detrimental impact on the Primus business and its customers.

[19] Following a SISP, Primus selected a successful bidder. Subject to obtaining the initial order being sought, Primus intends to return on a motion seeking approval of the asset purchase agreement and associated sale transaction and ancillary relief.

***Should the Court grant CCAA Protection to Primus?***

[20] Primus Canada and Holdco, as companies incorporated under Ontario legislation meet the CCAA definition of "company" and are therefore eligible for CCAA protection.

[21] PTI, PTUS and Lingo are also "companies" within the definition of the CCAA because they are incorporated companies (under the laws of Delaware) having assets in Canada, being funds held on deposit in Canadian bank accounts, *Re Cinram*, 2012 ONSC 3767 (S.C.J. [Comm. List]).

[22] Although the CCAA does not define the term "insolvent," the definition of "insolvent person" under section 2(1) of the BIA is well-established as the governing definition in applications under the CCAA.

[23] Primus' precarious financial situation, including the defaults under credit agreements, has rendered Primus insolvent within the definition contemplated in both the BIA and the expanded definition set out in *Stelco Inc. (Re)* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Comm. List]). None of the Primus entities have sufficient liquidity to satisfy their obligations as they come due. The continued forbearance of Primus' lenders is conditional on the granting of the Initial Order. Without this forbearance, the Primus entities' loans will be immediately due. Primus will not have the funds to satisfy these debts.

[24] Finally, the Primus entities, either individually or as a whole, have debts in excess of \$5 million. I find that the Primus entities are “debtor companies” to which the CCAA applies.

[25] Under s. 11.02(3) of the CCAA, on an initial application in respect of a “debtor company”, the Court may make an order on any terms that it considers appropriate where the applicant satisfies the Court that circumstances exist to make the order, including, among other things, staying all proceedings that might be taken in respect of the company under the BIA.

[26] A stay of proceedings is appropriate in liquidating CCAA proceedings such as this one, *Lehndorff General Partner Ltd. (Re)* (1993), 17 C.B.R. (3rd) 24 (Ont. Gen. Div. [Comm. List]), para. 6.

[27] As a result of the financial difficulties and liquidity issues outlined above, Primus requires CCAA protection to maintain operations while allowing it the time necessary to complete the sales process and thereby to maximize recovery for its stakeholders. Without CCAA protection, a shut-down of operations is inevitable. This would be disruptive to Primus’ efforts to maximize recovery.

***Should the Court grant the Administration Charge?***

[28] Primus seeks a charge on its assets in the maximum amount of \$1 million to secure the fees and disbursements incurred in connection with services rendered to Primus both before and after the commencement of the CCAA proceedings by counsel to Primus, the Monitor and the Monitor’s counsel (the “Administration Charge”).

[29] Primus worked with the proposed monitor to estimate the proposed quantum of the Administration Charge to ensure that it was reasonable and appropriate in the circumstances.

[30] The Administration Charge is proposed to rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise held by persons with notice of this application.

[31] Section 11.52 of the CCAA provides statutory jurisdiction to grant such a charge.

[32] In *Re Canwest Publishing Inc.*, (2010), 63 C.B.R. (5th) 115 (Ont. S.C.J. [Comm. List]), in addition to the considerations enumerated in section 11.52, Justice Pepall considered the following factors:

- (a) the size and complexity of the business being restructured;
- (b) the proposed role of the beneficiaries of the charge;
- (c) whether there is an unwarranted duplication of roles;
- (d) whether the quantum of the proposed charge appears to be fair and reasonable;
- (e) the position of the secured creditors likely to be affected by the charge; and

- (f) the position of the monitor.

[33] In the present matter, the following factors support the granting of the Administration Charge as requested:

- (a) Primus operates a business which is technical in nature, operates across North America, and is subject to regulatory obligations;
- (b) the beneficiaries of the Administration Charge will provide essential legal and financial advice throughout the CCAA proceedings;
- (c) there is no anticipated unwarranted duplication of roles;
- (d) the lenders were advised of the anticipated return date of this application, have or will have received copies of the application materials, and have not indicated opposition to the granting of the Administration Charge; and
- (e) the proposed Monitor, in its pre-filing report, supports the Administration Charge and its proposed quantum and believes it to be fair and reasonable in view of the complexity of Primus' CCAA proceedings and the services to be provided by the beneficiaries of the Administration Charge;

[34] Each of the proposed beneficiaries of this charge will play a critical role in the Primus restructuring and it is unlikely that these advisors will participate in the CCAA proceedings unless the Administration Charge is granted to secure their fees and disbursements. Accordingly, the Administrative Charge is granted.

***Should the Court grant the Directors' Charge?***

[35] Primus also seeks a charge over its assets in favour of the Primus former and current directors in the amount of \$3.1 million (the "D&O Charge") in order to protect the directors and officers from the risk of significant personal exposure. The D&O Charge is proposed to rank immediately behind the Administration Charge but in priority to all other encumbrances held by persons given notice of this application.

[36] Primus maintains directors' and officers' liability insurance for its directors and officers. The current D&O insurance policies provide a total of \$15 million in coverage. Under the D&O insurance, there are deductibles for certain claims and a large number of exclusions which create a degree of uncertainty. In addition, contractual indemnities which have been given to the directors and officers cannot be satisfied as Primus does not have sufficient funds to satisfy those indemnities should their directors and officers be found responsible for the full amount of the potential directors' liabilities. Adequate indemnification insurance is not otherwise available for the directors and officers at reasonable cost.

[37] The CCAA has codified the granting of directors' and officers' charges on a priority basis in section 11.51. The Court must be satisfied that the amount of the charge is appropriate in light of obligations and liabilities that may be incurred after the commencement of proceedings, *Re Canwest Global, supra*.

[38] Primus requires the continued involvement of its directors and officers in order to finalize the sales process already in progress. The directors and officers of Primus have indicated that, due to the significant personal exposure associated with Primus' liabilities, they will resign from their positions with Primus unless the Initial Order grants the D&O Charge.

[39] The D&O Charge will allow Primus to continue to benefit from the expertise and knowledge of its directors and officers. The quantum of the requested D&O Charge is reasonable given the complexity of Primus' business and the potential exposure of the directors and officers to personal liability.

[40] Further, the proposed monitor has advised that it is supportive of the D&O Charge, including the amount.

[41] The D&O Charge is therefore granted.

### ***The Proposed Monitor***

[42] FTI Consulting Canada Inc. has consented to act as the court-appointed monitor. FTI is a trustee within the meaning of s. 2 of the BIA and is not subject to any of the restrictions on who may be appointed as a monitor. The monitor has filed a pre-filing report indicating that it is supportive of the relief being sought. The appointment of FTI is granted.

### ***Should the Court Authorize FTI Consulting Canada Inc. to Act as Foreign Representative?***

[43] Section 56 of the CCAA grants the court the unfettered authority to appoint "any person or body" to act as a representative for the purpose of having these CCAA proceedings recognized in any jurisdiction outside of Canada, including but not limited to the United States.

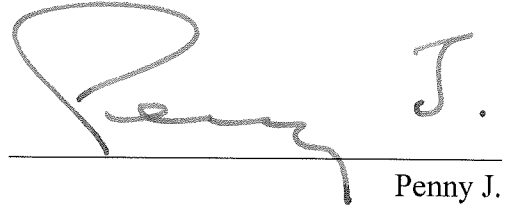
[44] In order to enforce the stay of proceedings established under the Initial Order in the United States and to facilitate the contemplated restructuring strategy, it is necessary to seek recognition of the Initial Order by the United States Bankruptcy Court. Accordingly, Primus seeks authorization for FTI, as foreign representative of Primus, to seek recognition of these proceedings in the United States under Chapter 15 of the Code.

[45] Courts have consistently encouraged comity and cooperation between courts in cross-border insolvencies to enable enterprises to restructure on a cross-border basis. To authorize FTI to act as foreign representative and seek recognition of these proceedings in the United States is consistent with and gives full effect to these principles.

[46] The commencement of proceedings in the United States is necessary and appropriate under the circumstances because, among other things, Primus operates a cross-border business that is operationally and functionally integrated in several significant respects. Among other things, Primus has assets and employees in the United States and many affected creditors are located in the United States. As a result, it is possible that one or more parties in the United States will seek to commence proceedings against one or more of the U.S. Primus entities.

[47] The appointment and authorization of FTI as foreign representative is granted.

[48] For all these reasons, I have granted the initial order in the form sought.

  
Penny J.

**Date:** January 21, 2016