

**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 FIRSTONSITE G.P. INC.

Applicant

**FACTUM OF THE MOVING PARTY 3297167 NOVA SCOTIA LIMITED
(RE: CURE COSTS)**

May 25, 2016

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PART I - OVERVIEW

1 The Moving Party 3297167 Nova Scotia Limited (the “**Purchaser**”) is the purchaser of substantially all of the assets and the disaster restoration business (the “**Purchased Assets**”) of FirstOnSite G.P. Inc. and FirstOnSite Restoration L.P. (collectively the “**Vendor**”) pursuant to an Asset Purchase Agreement (the “**APA**”).

2 The Purchased Assets include a significant number of the Vendor’s existing contracts, and the APA anticipates that these contracts (collectively “**Consent Required Contracts**”) would be transferred to the Purchaser either with the consent of the counterparty or, where the required consent is not obtained, by operation of Section 11.3 of the CCAA.

3 Given the Vendor’s financial circumstances, the Parties specifically recognized the risk that the Vendor might not be current with payments owing under the Consent Required Contracts, and drafted the APA to address this possibility.

4 In fact, it has now emerged that while the Vendor kept current with 65 of the 68 Consent Required Contracts, the remaining three contracts have monetary defaults totalling approximately \$1.2 million.

5 The issue on this Motion is who bears responsibility for these amounts.

6 The Vendor asserts that the monetary defaults constitute “Cure Costs” under the APA .

7 While the Purchaser does not dispute that these amounts are owing, it disagrees that they are “Cure Costs”. The Purchaser’s position is that these amounts are properly accounted for in “Working Capital”.

PART II - THE FACTS

A. The APA

8 The APA was executed on April 20, 2016 after significant negotiation between the Purchaser and the Vendor (collectively the “**Parties**”).

9 The “Purchase Price” under the APA has three key components:

- (a) a base purchase price;
- (b) an adjustment to the base purchase price depending on the Working Capital (the “**Working Capital Adjustment**”); and
- (c) the Purchaser’s assumption of certain liabilities of the Vendor (“**Assumed Obligations**”), including in particular both “Cure Costs” and “all current liabilities included in the definition of Working Capital”.¹

10 This dispute focuses on the Working Capital, Cure Costs, and the Working Capital Adjustment.

i. Working Capital Adjustment

11 “Working Capital” is defined in the APA as the amount by which the current assets of the Vendor exceed its current liabilities.²

¹ Affidavit of Jeff Johnson sworn May 24, 2016 (**Johnson Affidavit**), Exhibit “A”, ss 2.4(c) and 3.1, Public Motion Record, Tab 2A, pp 28-31.

² Johnson Affidavit, Exhibit “A”, s 1.1, Public Motion Record, Tab 2A, p 26.

12 The Parties agreed that at closing there would be an adjustment to the Purchase Price to the extent that the Vendor's actual Working Capital differed from the "Target Working Capital".³

13 Thus, if, on closing, the actual Working Capital was less than the Target Working Capital, the Purchase Price would be reduced by that amount. If the actual Working Capital was greater than the Target Working Capital, the Purchase Price would increase by that amount.

14 The mechanics of the Working Capital Adjustment are set out in Section 3.5 and Schedule "F" of the APA.⁴ These provisions specify that the Vendor bears the risk of diminution to the Working Capital – with the Purchase Price being reduced dollar-for-dollar. This makes good commercial sense since the Vendor has control over the business until closing and is solely responsible for decisions that may affect Working Capital until that time.

ii. Cure Costs

15 "Cure Costs" are defined in Section 1.1 of the APA to be the amounts required to cure monetary defaults in respect of the Consent Required Contracts provided that they are: (a) reasonably incurred by the Vendor and (b) acceptable to the Purchaser acting reasonably:

[T]he amounts to be paid to cure any monetary defaults of the Vendor in relation to the Consent Required Contracts to the extent required to be paid pursuant to Section 11.3 of the CCAA and to otherwise satisfy the requirements of Section 11.3 of the CCAA,

³ Johnson Affidavit, Exhibit "A", s 3.5, Public Motion Record, Tab 2A, p 32-33.

⁴ Johnson Affidavit, Exhibit "A", s 3.5, Public Motion Record, Tab 2A, pp 32-33. Schedule "F" of the APA has been filed under seal and can be found in the Confidential Motion Record in Confidential Exhibit "B" to the Johnson Affidavit, Tab 2B, pp 201-202.

which shall in each case have been reasonably incurred by the Vendor and the quantum of which, having been determined by the Vendor, acting reasonably and in consultation with the Monitor, shall be acceptable to the Purchaser, acting reasonably.⁵
[Emphasis added.]

16 Under Section 2.2 of the APA, the Parties agreed that Cure Costs: (a) would be paid by the Purchaser; and (b) would be a carve-out from the Working Capital Adjustment. Section 2.2 provides:

With respect to each Consent Required Contract, subject to Closing and to either (i) the consent of the other parties thereto to the assignment thereof, or (ii) in the absence of such consent, the obtaining of an Assignment Order, in addition to its other obligations under this Agreement, the applicable Cure Costs related to such Consent Required Contract on Closing shall be paid by the Purchaser, without any inclusion of such costs in Working Capital.⁶

17 The fact that Cure Costs are carved out of the Working Capital is also seen in Schedule “F” of the APA – the detailed Working Capital calculation. Schedule “F” specifically contemplates that current liabilities include all accounts payable other than Cure Costs, which are expressly excluded.⁷

iii. The interplay of Cure Costs and the Working Capital Adjustment

18 While the Purchaser agrees to assume responsibility for all Cure Costs, this liability is not open-ended since Cure Costs are expressly limited to amounts acceptable to the Purchaser (acting reasonably).

⁵ Johnson Affidavit, Exhibit “A”, s 1.1, Public Motion Record, Tab 2A, p 20.

⁶ Johnson Affidavit, Exhibit “A”, s 2.2, Public Motion Record, Tab 2A, pp 27-28.

⁷ Johnson Affidavit, Confidential Exhibit “B”, Schedule “F”, Confidential Motion Record, Tab 2B, pp 201-202.

19 As a consequence, any amounts required to cure monetary defaults under the Consent Required Contracts that are not acceptable to the Purchaser (acting reasonably) are not Cure Costs and are not exempt from the Working Capital Adjustment. Only Cure Costs benefit from the carve-out to the Working Capital Adjustment.

20 Had the Purchaser agreed to pay all monetary defaults as Cure Costs, the APA would create a classic moral hazard – the Vendor, who remains in control of the business until closing, could simply stop making payments under the Consent Required Contracts and thereby unilaterally increase the Purchase Price.

21 The APA, and the definition of Cure Costs in particular, address this moral hazard by limiting Cure Costs to those costs acceptable to the Purchaser (acting reasonably).

22 Put otherwise, the Purchaser has guarded against the risk of the Vendor simply running up its contractual obligations by negotiating for a right to accept or reject the quantum of any Cure Costs.

23 Under the APA, the counterparties to the Consent Required Contracts are paid for all monetary defaults. The Purchaser satisfies this payment in two ways:

- (a) the Purchaser pays the Cure Costs; and
- (b) any additional amounts (amounts not acceptable to the Purchaser or not reasonably incurred by the Vendor) constitute “Assumed Obligations” as current liabilities under Working Capital. Assumed Obligations that are not Cure Costs are subject to the Working Capital Adjustment.

24 Thus, while the Purchaser may be obliged to pay the defaults under the Consent Required Contracts, only those monetary defaults that are Cure Costs are carved out of the Working Capital Adjustment. Monetary defaults above and beyond Cure Costs are (like every other Assumed Obligation) subject to the Working Capital Adjustment.

25 The APA could have easily provided that the Purchaser is entitled to the assignment of any contract provided it pays all monetary defaults as Cure Costs. It does not.

B. The Purchaser's Expectations

26 In February 2016, during the negotiation of the APA, the Purchaser specifically asked whether there would be any amounts owing under the Consent Required Contracts. The Vendor responded in writing that there "shouldn't be any" Cure Costs and that any such amounts would be "immaterial".⁸

27 At no time during the negotiations was the Purchaser ever told different information about the magnitude of any Cure Costs.⁹

28 The Purchaser made further inquiries about potential Cure Costs orally on April 5, 2016. The Vendor told the Purchaser that the contracts were up-to-date and, consistent with its prior written statements, would be limited to a few thousand dollars. The Purchaser was told not to worry about the issue since "there is nothing there".¹⁰

⁸ Johnson Affidavit at para 14, Public Motion Record, Tab 2, p 7; Johnson Affidavit, Exhibit "C", Public Motion Record, Tab 2C, p 115.

⁹ Johnson Affidavit at para 15, Public Motion Record, Tab 2, p 7.

¹⁰ Johnson Affidavit at para 19, Public Motion Record, Tab 2, pp 8-9.

29 Although the Vendor disputes that these statements were made on April 5, 2016,¹¹ its affidavit evidence on the inquiries made by the Purchaser regarding Cure Costs is demonstrably incorrect.¹²

30 The evidence of Mr. Johnson is completely consistent with the e-mail of February 9, 2016 and in any event, the Vendors do not challenge the Purchaser's assertions that:

- (a) the Purchaser was informed that the Vendors "don't contemplate that they will go into arrears";
- (b) this information was never updated or corrected; and
- (c) the Purchaser reasonably expects that Cure Costs would be insignificant.

C. Quantum of Default Amounts

31 Two weeks after the APA was signed, the Vendor began to provide the Purchaser with its calculation of Cure Costs under the APA. The Vendor reported:

- (a) 48 contracts with no amount owing;
- (b) 3 contracts with amounts owing in the range of \$1 to \$1,000;
- (c) 8 contracts with amounts owing in the range of \$1,000 to \$10,000;
- (d) 6 contracts with amounts owing in the range of \$10,000 to \$25,000;

¹¹ Affidavit of Joshua B. Nevsky, sworn May 25, 2016 at para 12, Responding Motion Record, Tab 2, p 66.

¹² Affidavit of Matthew Bernardo sworn May 25, 2016.

- (e) 1 contract with amounts owing of \$162,768.22.¹³ This contract relates to a Corporate Account Agreement dated November 1, 2013 between the Vendor and Bell Mobility Inc. (the “**Bell Contract**”); and
- (f) 2 contracts with amounts owing totalling over \$1,100,000. These contracts relate to a master lease agreement and fleet maintenance service agreement dated July 28, 2009 between the Vendor and Jim Pattison Industries Ltd. (the “**JPL Contracts**”). The JPL Contracts cover 300 vehicles used by employees to service clients, and are critical to the Vendor’s business.¹⁴

32 The Purchaser was surprised by the significant amounts owing under the Bell Contract and the JPL Contracts given the prior statements by the Vendor that “there shouldn’t be any” amounts owing and “there is nothing there”.¹⁵

D. Quantum of Cure Costs

33 In the circumstances, the Purchaser accepts all amounts owing as Cure Costs in respect of the 65 contracts for which the amounts owing are less than \$25,000.¹⁶

34 However, the Purchaser has advised that it does not accept the amounts outstanding in connection with the Bell Contract and the JPL Contracts as “Cure Costs” for two reasons:¹⁷

¹³ Note that Bell subsequently informed the Purchaser that the Default Amount with respect to the Bell Contract is \$108,000.19: Johnson Affidavit at para 21, Public Motion Record, Tab 2, p 9.

¹⁴ Johnson Affidavit at para 19, Public Motion Record, Tab 2, pp 8-9,

¹⁵ Johnson Affidavit at paras 14-18 and 20, Public Motion Record, Tab 2, pp 7-9.

¹⁶ Johnson Affidavit at para 24, Public Motion Record, Tab 2, p 10.

¹⁷ Johnson Affidavit at para 22, Public Motion Record, Tab 2, p 9.

- (a) the repeated assurances received from the Vendor in writing and orally that there would be no Cure Costs or that any Cure Costs would be insignificant; and
- (b) the addition of approximately \$1.2 million to the Purchase Price represents a significant economic change to the deal.

35 In the circumstances, the Purchaser has advised that it will only accept \$25,000 as the Cure Costs for each of the Bell Contract and the JPL Contracts.¹⁸

PART III - ISSUES

36 The issue before the Court is whether the amounts owing under the Bell Contract and the JPL Contracts are properly "Cure Costs" within the meaning of the APA.

PART IV - LAW

A. The Interpretation of the APA

37 The general principles of contractual interpretation have been considered at length by Canadian courts. A concise summary of the law in the context of commercial contracts was provided by Justice Newbould in *Drosophilinks Consulting Inc et al v Canadian National Railway Company et al*.¹⁹

[15] In interpreting a contract, the goal is to determine the intent of the parties by reference to the words that they chose. The plain meaning of the words is to be given effect, read harmoniously and in the context of other provisions of the contract, and in light of the factual matrix as a whole. Interpretations that give effect to all the terms of a contract should be preferred over interpretations that

¹⁸ Johnson Affidavit at para 24, Public Motion Record, Tab 2, p 10.

¹⁹ 2010 ONSC 3576 (Comm List), Book of Authorities (BOA) Tab 3 (**Drosophilinks**).

render one or more terms superfluous or ineffective. A commercial contract should be interpreted in a manner that accords with sound commercial principles, good business sense and that does not result in absurdities. While evidence of the factual matrix is generally admissible and relevant to the construction of a contract, extrinsic evidence as to the meaning of a contract is inadmissible unless there is an ambiguity.

38 Following this dicta, the Court should examine:

- (a) the plain meaning of the words used in the APA;
- (b) the factual matrix as a whole; and
- (c) commercial reasonableness and good business sense.

i. The Plain Meaning of the APA

39 Under Section 2.2 of the APA, the Purchaser is responsible for Cure Costs, and Cure Costs are not to be included in the Working Capital Adjustment.²⁰ This is not in dispute.

40 However, the parties expressly agreed that not all amounts necessary to cure monetary defaults are Cure Costs. The plain language in the definition of “Cure Costs” is clear – the quantum of any Cure Costs must be acceptable to the Purchaser (acting reasonably):

...which shall in each case have been reasonably incurred by the Vendor and the quantum of which, having been determined by the Vendor, acting reasonably and in consultation with the Monitor, shall be acceptable to the Purchaser, acting reasonably.²¹
[Emphasis added.]

²⁰ Johnson Affidavit, Exhibit “A”, s 2.2, Public Motion Record, Tab 2A, p 27.

²¹ Johnson Affidavit, Exhibit “A”, s 1.1, Public Motion Record, Tab 2A, p 20.

ii. The Factual Matrix and the Commercial Context

41 The context in which the APA was negotiated supports this interpretation:

- (a) the Vendor was facing financial difficulties. The risk that it would run up its payables was obvious and recognized by both parties;
- (b) the Working Capital Adjustment properly allocates the risk of further financial deterioration to the Vendor;
- (c) Cure Costs are a limited carve out to the Working Capital Adjustment;
- (d) no information or representation is given by the Vendor on the quantum of Cure Costs in the APA; and
- (e) a moral hazard existed that would allow the Vendor to stop payments on its contracts, incur monetary defaults and thereby effectively increase the Purchase Price.

42 In these circumstances, the protections negotiated by the Purchaser and embedded in the definition of Cure Costs are commercially reasonable and make good business sense.

B. Disputed Amounts are not Cure Costs

43 In accordance with its rights under Section 1.1 of the APA, the Purchaser has determined that the quantum of Cure Costs proposed by the Vendor is not acceptable.²²

²² Johnson Affidavit at para 22, Public Motion Record, Tab 2, p 9.

i. The Burden is on the Vendor

44 The jurisprudence is clear that the burden is on the Vendor to show that the Purchaser's exercise of discretion is unreasonable.²³ Moreover, in order to discharge its burden, the Vendor must demonstrate that a reasonable person could not have rejected these amounts as Cure Costs. As Justice Cullity observed in the landlord/tenant context:

The burden is on the Tenant to satisfy the court that the refusal to consent was unreasonable. ... In deciding whether the burden has been discharged, the question is not whether the Court would have reached the same conclusion as the Landlord or even whether a reasonable person might have given its consent; it is whether a reasonable person could withhold consent. ...²⁴

45 These principles are equally applicable in the commercial context.²⁵

46 The Vendor has introduced no evidence to suggest that the Purchaser is acting unreasonably.

ii. The Purchaser Acted Reasonably

47 The Purchaser received repeated assurances, both in writing and orally, that there were no Cure Costs or that any Cure Costs would be insignificant and in the range of a few thousand dollars. These statements were made throughout the negotiation process and never corrected.²⁶

48 The Purchaser is entitled to consider these statements by the Vendor in exercising its discretion to accept or reject the Cure Costs proposed by the Vendor.²⁷

²³ *Porton Capital Technology Funds v 3M UK Holdings Ltd*, [2011] EWHC 2895 at paras 223 and 228 (**Porton**), BOA, Tab 4; *1455202 Ontario Inc v Welbow Holdings Ltd*, 2003 CarswellOnt 1761 at para 9 (Sup Ct) (**Welbow**), BOA, Tab 1.

²⁴ *Welbow* at para 9, BOA, Tab 1.

²⁵ *Porton* at paras 223 and 228, BOA, Tab 4.

²⁶ Johnson Affidavit at paras 14-18, Public Motion Record, Tab 2, pp 7-8.

49 The Purchaser recognizes that the APA provides that:²⁸

- (a) the Purchased Assets will be sold “as is, where is” and without any representations; and
- (b) the APA is the entire agreement, which supersedes “all prior negotiations, understandings and agreements”.

50 However, these clauses do not affect the Purchaser’s ability to take into account the Vendor’s statements in deciding whether or not to accept the quantum of Cure Costs.

51 The same issue was recently addressed by the English Court of Appeal in *Barclays Bank plc v UniCredit Bank AG*.²⁹ The relevant contract provided that Barclays had a right to withhold consent to early termination of an agreement, acting reasonably. The contract also contained an entire agreement clause.

52 In refusing to grant consent, Barclays relied upon its own understanding of the expected length of the contract, which was not recorded in the contract itself. UniCredit asserted that since the contract had an entire agreement clause, the issue of whether Barclays was acting reasonably in withholding consent must be determined without reference to any expectations or understandings that Barclays may have had unless they were expressly provided in the contract. The Court rejected UniCredit’s argument, stating:

The entire agreement clause is concerned with identifying the terms of the contract. The use of the phrase “constitute the entire

²⁷ *Barclays Bank plc v UniCredit Bank AG*, [2014] EWCA Civ 302 (CA) (*Barclays*), BOA, Tab 2.

²⁸ Johnson Affidavit, Exhibit “A”, ss 2.3 and 10.10, Public Motion Record, Tab 2A, pp 28 and 53.

²⁹ *Barclays*, BOA, Tab 2.

agreement and understanding" is intended to exclude any evidence or argument to the effect that the terms of the contract are to include any mutual understanding that is not recorded in the contract. It is not intended to exclude admissible evidence or argument about the way in which parties exercise rights given to them by the terms of the contract.³⁰

53 The Purchaser is not asking this Court to read any terms into the APA or find any collateral representation enforceable under the APA. Rather, the Purchaser is merely exercising its discretion under the APA in a manner consistent with its reasonable expectations.

54 The entire agreement clause cannot restrict the information the Purchaser is entitled to consider when exercising its contractual rights. Had the Parties intended to restrict the Purchaser's discretion, they would have done so expressly.

55 Moreover, the Cure Costs proposed by the Vendor fundamentally alter the economics of the deal. The amounts owing under the Bell Contract and the JPL Contracts stand out as anomalies and are not consistent with the status of the Vendor's other contracts.

iii. Exclusion of contracts not the sole remedy

56 In its affidavit material, the Vendor further argues that if the Purchaser is not content with the quantum of Cure Costs for any given contract, it has the ability to exclude that contract. The Vendor's affiant makes reference to Section 2.6 of the APA which gives the Purchaser the right at any time to exclude any contract it wishes from the Purchased Assets.³¹

³⁰ *Barclays* at para 26, BOA, Tab 2.

³¹ Affidavit of Adam Zalev sworn May 25, 2016 (*Zalev Affidavit*) at paras 14-16, Responding Motion Record, Tab 1, pp 5-6.

57 The argument that the Purchaser's sole remedy is to exclude contracts where the Cure Costs are unacceptable is incorrect.

58 The structure of the APA is as follows:

- (a) Section 2.1 of the APA requires that the Vendor transfer the Purchased Assets to the Purchaser;³²
- (b) The definition of Purchased Assets (and Schedule A reference therein) make clear that the Purchased Assets include "Assumed Contracts";³³
- (c) In consideration, the Purchaser must pay the Purchase Price, which according to Section 3.1 is subject to the Working Capital Adjustment;³⁴
- (d) All liabilities are taken into account in the Working Capital Adjustment in Schedule F, except Cure Costs which are expressly carved out;³⁵
- (e) Section 2.2 provides that Cure Costs are to be paid by the Purchaser;³⁶ and
- (f) Finally, Cure Costs are limited to what is acceptable to the Purchaser acting reasonably.³⁷

59 Thus, under the APA, the Purchaser has the right to the Vendor's contracts but is only responsible for Cure Costs.

³² Johnson Affidavit, Exhibit "A", s 2.1, Public Motion Record, Tab 2A, p 27.

³³ Johnson Affidavit, Exhibit "A", s 1.1, Public Motion Record, Tab 2A, p 25

³⁴ Johnson Affidavit, Exhibit "A", ss 3.1 and 3.5, Public Motion Record, Tab 2A, pp 30, 32-33.

³⁵ Johnson Affidavit, Confidential Exhibit "B", Schedule F, Confidential Motion Record, Tab 2B, pp 201-202.

³⁶ Johnson Affidavit, Exhibit "A", s 2.2, Public Motion Record, Tab 2A, pp 27-28.

³⁷ Johnson Affidavit, Exhibit "A", s 1.1, Public Motion Record, Tab 2A, p 20.

60 It does not lie in the Vendor's mouth to argue that the Purchaser should simply exclude a contract if the Cure Costs are unacceptable – that is not the bargain negotiated by the Parties.

61 The business purpose of Section 2.6³⁸ (which allows the Purchaser to exclude contracts at any time) is plain: the Purchaser may decide to do business differently or on more advantageous terms than the Vendor's existing contracts provide.

62 While Section 2.6 of the APA does give the Purchaser the right to exclude a contract, the APA also gives the Purchaser the express and specific right to limit Cure Costs (provided it acts reasonably).

iv. The Parties' Bargain

63 In its affidavit, the Vendor also argues that the Parties are sophisticated – this is true. The sophisticated Parties negotiated a contractual balance whereby the Purchaser is entitled to the Consent Required Contracts and in return must pay Cure Costs. While the Purchaser had no ability to ensure that the Consent Required Contracts were kept current to closing, it specifically negotiated for the right to limit Cure Costs to a quantum acceptable to the Purchaser acting reasonably.

64 The alternative interpretation advocated by the Vendor:

- (a) ignores the plain language of the APA and the express language used by the Parties in the definition of Cure Costs. In particular, it fails to give meaning to a

³⁸ Johnson Affidavit, Exhibit "A", s 2.6, Public Motion Record, Tab 2A, p 30.

clear contractual term in the APA, contrary to the rules of contractual interpretation;³⁹ and

(b) makes no commercial sense.

65 This last point bears emphasis. Under the Vendor's interpretation, the Vendor can (and did) stop payment on critical contracts, running up a significant monetary default. It would then be able to pass those costs on to the Purchaser - despite the agreement between the Parties that there would be a Working Capital Adjustment.

66 Under the Vendor's theory, the Vendor would be sheltered under the definition of Cure Costs (ignoring the actual language of that definition) and the Purchaser's only remedy would be to exclude the JPL Contracts – which are noted in the APA to be two of the four supply agreements listed as “Essential Contracts”.⁴⁰

67 The term “Essential Contracts” properly captures the importance of the JPL Contracts. By virtue of the JPL Contracts, the Purchaser acquires the rights to the vehicles and vehicle services used by the Vendor's approximately 900 employees to provide disaster recovery assistance to homes and businesses across Canada. To suggest that the Purchaser's only remedy is to simply walk away from these two Essential Contracts and make alternative arrangements to procure the hundreds of service vehicles required to conduct the business is specious and not reflective of the bargain reached by the Parties.

³⁹ *Drosophilinks* at para 16, BOA, Tab 3.

⁴⁰ Johnson Affidavit, Exhibit “A”, Appendix 5 to Schedule A, Public Motion Record, Tab 2A, p 78.

68 Ultimately, the Vendor is seeking to alter the economics of the transaction to the detriment of the Purchaser. Cure Costs were clearly intended to be a limited carve out from the Working Capital Adjustment. As the Vendor itself wrote of Cure Costs “there really shouldn’t be any ... we don’t contemplate that they will go into arrears.”⁴¹

69 Now the arrears are substantial and the Purchaser seeks to invoke its express right under the APA to exclude the unexpected arrears from the Cure Costs it must pay. The Purchaser is acting reasonably and there is no suggestion in the evidence otherwise.

PART V - ORDER REQUESTED

70 The Purchaser is acting reasonably and in accordance with its contractual rights in rejecting the significant amounts owing under the Bell Contract and the JPL Contracts. Accordingly, these amounts are not Cure Costs and are not carved out of the Working Capital Adjustment.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of May, 2016.



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Lawyers for the Moving Party

⁴¹ Johnson Affidavit, Exhibit “C”, Public Motion Record, Tab 2C, p 115.

SCHEDULE "A"
LIST OF AUTHORITIES

1. *1455202 Ontario Inc v Welbow Holdings Ltd*, 2003 CarswellOnt 1761 (Sup Ct).
2. *Barclays Bank plc v UniCredit Bank AG*, [2014] EWCA Civ 302.
3. *Drosophilinks Consulting Inc et al v Canadian National Railway Company et al*, 2010 ONSC 3576 (Comm List).
4. *Porton Capital Technology Funds v 3M UK Holdings Ltd*, [2011] EWHC 2895.

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**FACTUM OF THE MOVING PARTY
(CURE COSTS)**

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