

Clerk's stamp:

COURT FILE NUMBER

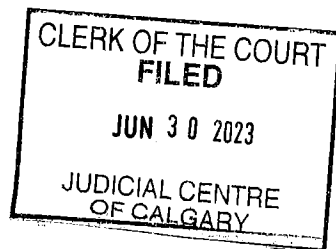
2301-07385

COURT

COURT OF KING'S BENCH OF ALBERTA

JUDICIAL CENTRE

CALGARY



IN THE MATTER OF THE COMPANIES'
CREDITORS ARRANGEMENT ACT, RSC 1985,
c C-36, as amended

AND IN THE MATTER OF CYXTERA
TECHNOLOGIES, INC., CYXTERA CANADA,
LLC, CYXTERA COMMUNICATIONS
CANADA, ULC and CYXTERA CANADA TRS,
ULC

APPLICANTS

CYXTERA TECHNOLOGIES, INC., CYXTERA
CANADA, LLC, CYXTERA
COMMUNICATIONS CANADA, ULC and
CYXTERA CANADA TRS, ULC

DOCUMENT

**BRIEF OF LAW OF THE FOREIGN
REPRESENTATIVE**

ADDRESS FOR SERVICE AND
CONTACT INFORMATION OF PARTY
FILING THIS DOCUMENT

Gowling WLG (Canada) LLP
421 7 Ave SW Suite 1600
Calgary, AB T2P 4K9
Telephone: (403) 298-1946
Email: tom.cumming@gowlingwlg.com /
sam.gabor@gowlingwlg.com /
stephen.kroeger@gowlingwlg.com
File No.: A171290
**Attn: Tom Cumming/Sam Gabor/Stephen
Kroeger**

I. Introduction

1. On June 4, 2023 Cyxtera Technologies, Inc. (“**CTI**” or, the “**Foreign Representative**”), Cyxtera Communications Canada, ULC (“**Communications ULC**”), Cyxtera Canada, LLC (“**Cyxtera LLC**”) and Cyxtera Canada TRS, ULC (“**TRS ULC**”, which together with Communications ULC, “**Cyxtera Canada**”, and together with Cyxtera LLC, the “**Debtors**”) and several other of their affiliates (collectively the “**Chapter 11 Debtors**”) each commenced proceedings pursuant to Chapter 11 of Title 11 of the United States Code (the “**Chapter 11 Cases**”) in the United States Bankruptcy Court for the District of New Jersey (the “**US Bankruptcy Court**”).
2. CTI is a United States corporation incorporated pursuant to the laws of the State of Delaware with its head office in Coral Gables, Florida and its registered office in Wilmington, Delaware. CTI is the ultimate parent corporation of a group of companies operating under the tradename “Cyxtera” that are incorporated in the United States, Canada, United Kingdom, Germany, Australia, Japan, the Netherlands, Hong Kong, Singapore and the Cayman Islands, including the Debtors (collectively the “**Cyxtera**” or the “**Cyxtera Group**”).
3. Contemporaneously with filing the petitions commencing the Chapter 11 Cases, the Chapter 11 Debtors filed first day motions therein (“**First Day Motions**”), which were heard on June 6, 2023 (the “**First Day Hearing**”), where they sought and obtained certain procedural and substantive orders from the US Bankruptcy Court (collectively the “**First Day Orders**”). Certain of the First Day Orders were interim orders and could become final orders on or before a second hearing before the US Bankruptcy Court (the “**Second Day Hearing**”).
4. Pursuant to an originating application to this Honourable Court by the Foreign Representative on behalf of the Debtors under Part IV of the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”, and the proceedings commenced thereby, the “**Recognition Proceedings**”), this Honourable Court on June 7, 2023 granted:

- (a) an Initial Recognition Order – Foreign Main Proceeding, *inter alia*, recognizing the Chapter 11 Cases as foreign main proceedings and recognizing the Foreign Representative as foreign representative of the Debtors in the Chapter 11 Cases for the purposes of Part IV of the CCAA; and
 - (b) a Supplemental Order – Foreign Main Proceeding (the “**Supplemental Order**”), *inter alia*, recognizing and giving effect in Canada to the First Day Orders, appointing Alvarez & Marsal Canada Inc. as Information Officer in the Recognition Proceedings (in such capacity, the “**Information Officer**”), granting a super-priority administration charge over the Debtors’ assets in Canada in favour of the Information Officer, counsel to the Information Officer and Canadian counsel to the Chapter 11 Debtors, and granting a super-priority charge over the assets of the Debtors in Canada to secure the super-priority, debtor-in-possession financing provided by certain lenders to the Chapter 11 Debtors.
5. This Bench Brief is submitted on behalf of CTI as the Foreign Representative in support of an application, among other things, for the following Orders:
- (a) an Order (the “**Recognition Order**”) recognizing and giving full force and effect in Canada to the following second day orders granted in the Chapter 11 Cases at, or prior to, the Second Day Hearing (collectively, the “**Second Day Orders**”) Court pursuant to Part IV of the CCAA:
 - (i) Bidding Procedures Order (the “**Bidding Procedures Order**”);
 - (ii) Final Consolidated Creditor List Order;
 - (iii) Final Hedging Order;
 - (iv) Second Interim Cash Management Order;
 - (v) Final Utility Adequate Assurance Order;
 - (vi) Final Critical Vendor Order;

- (vii) Final Customer and Partner Program Order;
 - (viii) Final Employee Compensation Order;
 - (ix) Final Insurance Maintenance Order; and
 - (x) Final Tax Payment Order;
- (b) Orders (the “**Fee Orders**”) approving the fees of Canadian counsel for the Foreign Representative and the Debtors, Gowling WLG (Canada) LLP (“**Gowling**”), the Information Officer and counsel to the Information Officer McMillan LLP (“**McMillan**” and together with Gowling and the Information Officer, the “**Professionals**”).
6. The Foreign Representative’s application is supported by the Affidavit of Eric Koza sworn June 6, 2023 (the “**Koza Affidavit #1**”) and the Affidavit of Eric Koza sworn June 30, 2023 (the “**Koza Affidavit #2**” and with the Koza Affidavit #1, the “**Koza Affidavits**”). The facts in support of this application are more particularly set out in the Koza Affidavits.
7. Capitalized terms not defined herein have the meanings given to them in the Koza Affidavit #2.
8. All references to monetary amounts referenced herein are in United States dollars, unless otherwise stated.

II. LAW AND ARGUMENT

9. The primary issue to be determined on this application is whether this Honourable Court should grant the relief requested which recognizes and gives full force and effect in Canada to the Second Day Orders.

Part IV of the CCAA

10. Part IV of the CCAA establishes the applicable process for addressing the administration of cross-border insolvencies to promote cooperation and coordination with foreign courts.

CCAA, Part IV [Tab 1]

11. The foundational principles are comity and cooperation between courts of various jurisdictions. Section 44 of the CCAA states that the purpose of Part IV is to provide mechanisms for dealing with cases of cross border insolvencies so as to promote cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in such insolvencies, promote the fair and efficient administration of such insolvencies so as to protect the interests of creditors, other interested persons and the debtor companies, protect and maximize the value of the debtor company's property, and permit the rescue of financially troubled businesses to protect investment and preserves employment.

CCAA, s. 44 [Tab 1]

12. Canadian courts should accord respect to the overall thrust of foreign bankruptcy and insolvency legislation in any analysis, unless in substance generally it is so different from the bankruptcy and insolvency law of Canada or perhaps because the legal process that generates the foreign order diverges radically from the process here in Canada."

Babcock & Wilcox Canada Ltd., Re, 2000 CanLII 22482 (ON SC), at para 21(a) [Tab 2]

13. Cooperation between courts under Part IV promotes the "fair and efficient administration of cross-border insolvencies" and the "protection and maximization of the value of the debtors' property." Canadian courts have emphasized the importance of comity and cooperation in cross-border insolvency proceedings to avoid multiple proceedings, inconsistent judgments and general uncertainty. Coordination of international insolvency proceedings is particularly critical in ensuring the equal and fair treatment of creditors regardless of their location.

MtGox Co., Ltd (Re), 2014 ONSC 5811, at paras 10-12 [Tab 3]; *Hollander Sleep Products, LLC (Re)*, 2019 ONSC 3238, at paras 41 & 42 [Tab 4]

Recognition of the Additional Orders is Appropriate

14. Section 49 gives this Honourable Court the authority to grant any order that it considers appropriate, on application by a foreign representative, if the court is satisfied that it is necessary for the protection of a debtor's property or the interests of a creditor or creditors. These include orders recognizing orders granted by the US Bankruptcy Court in the Chapter 11 Cases.

CCAA, sections 52 and 61 [Tab 1]

15. Section 52 of the CCAA provides that if an order recognizing a foreign proceeding is made, the court shall cooperate to the maximum extent possible with the foreign representative and the foreign court involved in the foreign proceeding. The limits to this cooperation are set out in section 61 of the CCAA, which provides as follows:

“Court not prevented from applying certain rules

61 (1) Nothing in this Part prevents the court, on the application of a foreign representative or any other interested person, from applying any legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives that are not inconsistent with the provisions of this Act.

Public policy exception

(2) Nothing in this Part prevents the court from refusing to do something that would be contrary to public policy.”

CCAA, sections 52 and 61 [Tab 1]

16. Hence, once an order recognizing a foreign proceeding is made by this Court, the Court is mandated to cooperate, to the maximum extent possible, with the foreign representative and the foreign court, so long as the requested relief is not inconsistent with the CCAA and does not raise concerns regarding public policy.

CCAA, sections 49 and 50 [Tab 1]; *Purdue Pharma L.P., Re*, 2019 ONSC 7042 at para 22 [Tab 5]

17. When a Canadian court considers whether it should recognize a foreign order made in foreign proceedings, the following considerations should be taken into account:
- (a) the principles of comity and the need to encourage cooperation between courts of various jurisdictions;
 - (b) the need to accord respect to foreign bankruptcy and insolvency legislation unless in substance generally it is so different from the bankruptcy and insolvency laws of Canada or diverges radically from the processes in Canada;
 - (c) whether stakeholders will be treated equitably, and in particular whether recognition will ensure that, to the extent reasonably possible, stakeholders are treated equally, regardless of the jurisdiction to which they reside;
 - (d) the importance of promoting plans that allow the enterprises to reorganize globally, especially where there is an established interdependence on a transnational basis. To the extent reasonably practical, one jurisdiction should take “charge” of the principal administration of the enterprise’s reorganization, where this approach will facilitate a potential reorganization and which will respect the claims of stakeholders in all jurisdictions and does not detract from the net benefits that may be available from alternative approaches;
 - (e) the appropriate level of court involvement depends to a significant degree upon the court’s nexus to the enterprise;
 - (f) where one jurisdiction is to have an ancillary role, the court in the ancillary jurisdiction should be provided with information on an ongoing basis and be kept apprised of developments regarding the reorganizational efforts in the foreign principal jurisdiction and stakeholders in the ancillary jurisdiction should be afforded appropriate access to the proceedings in the principal jurisdiction; and
 - (g) all affected stakeholders should receive effective notice as is reasonably practicable in the circumstances.

Babcock & Wilcox Canada Ltd., Re, 2000 CanLII 22482 at para 21 [Tab 2]

44. The Foreign Representative seeks recognition orders in respect of the Second Day Orders as the Second Day Orders are expected to be entered by the US Bankruptcy Court on or prior to June 29, 2023 through certificates of no objection.

Koza Affidavit #2, paras 40

18. The central principle governing Part IV of the CCAA is comity, which mandates that Canadian courts should recognize and enforce the judicial acts of other jurisdictions, provided that those other jurisdictions have assumed jurisdiction on a basis consistent with principles of order, predictability and fairness.

Hollander Sleep Products, LLC et al., Re, 2019 ONSC 3238 at para 41 [Tab 4]

19. In furtherance of the principle of comity, Canadian courts should allow a foreign court to exercise principal control over the insolvency process if that other jurisdiction has the closest connection to the proceeding. As noted above, the CCAA requires this Honourable Court to cooperate to the maximum extent possible with the foreign proceeding.
20. Recognition of the Second Day Orders is consistent with Part IV of the CCAA and the principles of comity, is not contrary to public policy and are orders commonly granted in Canadian restructuring proceedings.
21. Recognition is important to ensure the equal treatment of Canadian stakeholders, that the proceedings are coordinated with the Chapter 11 Cases and that Canadian trade creditors and suppliers (if any) receive the benefit of the Second Day Orders as, among other things:
 - a) the Debtors have no business or activity, or senior management structures, or access to debt or equity financing, or administrative structures, that is or could be independent of or separate from the other Chapter 11 Debtors, and therefore the restructuring or other resolution of the Debtors cannot be independent on any

practical level of the restructuring or other resolution of the other Chapter 11 Debtors;

Koza Affidavit #2, paras 36

- b) the Debtors' centre of main interest is in the United States and therefore potential transactions restructuring or selling the Debtors or their assets will be within the overall Chapter 11 Cases, subject to obtaining any necessary recognition orders by this Honourable Court in these Recognition Proceedings and satisfying this Honourable Court that such relief is appropriate;
 - c) if the Second Day Orders are not recognized and given effect in Canada by this Honourable Court, the Debtors would be required to expend significant resources in seeking Orders from this Honourable Court providing similar or even identical relief to that contained in the Second Day Orders, which would involve significant expense and time without any benefit to the creditors and stakeholders in the Chapter 11 Cases and Recognition Proceedings;
 - d) the recognition and giving effect in Canada of the Second Day Orders ensures the consistency of relief provided by the US Bankruptcy Court in the Chapter 11 Cases and this Honourable Court in the Recognition Proceeds, ensures that creditors and other interested parties in both the United States and Canada are treated fairly because they receive substantively similar treatment in both proceedings, and enhances the chances of the Debtors and other Chapter 11 Debtors being successfully rescued; and
 - e) the Second Day Orders are intended to protect and maximize the value of the Debtors and other Chapter 11 Debtors' property.
22. On the basis of the foregoing factors, CTI requests that this Honourable Court recognize the Second Day Orders.

Recognition of the Bidding Procedures Order is Appropriate

23. The Bidding Procedures approved by the US Bankruptcy Court will enable the Debtors to continue its comprehensive marketing and sale process, followed by an auction if necessary, to determine a successful bidder. The Bidding Procedures are intended to maximize the value of the Debtors' business and assets for the benefit of stakeholders. To this end, Canadian courts frequently recognize bidding procedures approved by U.S. bankruptcy courts in chapter 11 cases.

See *Voyager Digital Ltd.*, Order (recognition of Foreign Orders) granted August 11, 2022, Court File No. CV-22-00683820-00CL (Ont. Sup. Ct. J. [Commercial List]), at para. 3(i) [Tab 6]; Koza Affidavit #2, paras 20 and 22

24. The recognition and approval of the Bidding Procedures Order is in line with Canadian public policy and consistent with relief granted in single jurisdiction CCAA proceedings. In considering whether to approve a sales process the Court will consider the “*Nortel Criteria*” which are as follows:

- (a) is a sale transaction warranted at this time;
- (b) will the sale benefit the whole “economic community”;
- (c) do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business; and
- (d) is there a better alternative?

Re Nortel Networks Corp., 2009 ONSC 4467, at para. 49 [Tab 7]; *Re Brainhunter Inc.*, 2009 ONSC 8207, at para 13 [Tab 8]

25. It is appropriate at this stage of the CCAA proceedings to approve the Bidding Procedures Order for several reasons: (i) the comprehensive marketing process has been ongoing since March 2023; (ii) the Debtors used their business judgment to develop the Bidding Procedures in conjunction with Guggenheim Securities, LLC, their investment bankers and the *ad hoc* group of first lien lenders; and (iii) upon completion of the Bidding Procedures, final acceptance of an offer will be subject to the approval of the US Bankruptcy Court. This Honourable Court will thereafter have the opportunity to

determine whether or not to recognize and give effect in Canada to any Order granted by the US Bankruptcy Court selling assets in Canada.

Re Nortel Networks Corp., 2009 ONSC 4467, at para. 1 [Tab 7]; *Re Brainhunter Inc.*, 2009 ONSC 8207, at para 19 [Tab 8]; Koza Affidavit #2, paras 20-26 and 36

26. The Foreign Representative submits that recognition of the Bidding Procedures Order by this Honourable Court is consistent with Part IV of the CCAA, the principles of comity, and the approval of sale processes commonly granted in Canadian restructuring proceedings. Recognition of the Bidding Procedures Order will enable the Debtors to proceed with the sale process to identify one or more transactions that maximize the value of their business and assets.

Approval of the Accounts of the Professionals

Jurisdiction

27. The jurisdiction of this Court to pass the accounts of the Professionals is confirmed in the Supplemental Order, which directs that, “The Information Officer and its legal counsel, and counsel to the Foreign Representative and Debtors, shall pass their accounts from time to time, and for this purpose the accounts of the Information Officer and its legal counsel, and counsel to the Foreign Representative and Debtors, are hereby referred to a judge of the Commercial List of the Court of Kings Bench of Alberta, and the accounts of the Information Officer and its legal counsel, and counsel to the Foreign Representative and Debtors, shall not be subject to approval in the Foreign Proceeding.”

Supplemental Order, para 17

Fair and Reasonable Test

28. The overarching test for assessing the fees and disbursements of the Monitor and its counsel in a CCAA proceeding is whether they are “fair and reasonable” in all of the circumstances, and are appropriate.

Nortel Networks Corp. (Re), 2017 ONSC 673, para 17 [Tab 9]

29. The Court does not engage in a docket-by-docket or line-by-line assessment of the accounts as minute details of each element of a professional's services may not be instructive when looked at in isolation. In complex cases, detailed assessments are not practical and do not aid in determining the overall value of the services provided. As the Court of Appeal has stated: "The focus of the fair and reasonable assessment should be on what was accomplished, not on how much time it took".

Nortel Networks Corp. (Re), 2017 ONSC 673, paras 15 and 21[**Tab 9**]

30. To aid in the determination of whether a court-appointed officer's fees are fair and reasonable, courts have recognized certain factors as a useful guideline. These factors are not intended to be an exhaustive list and other factors may be material in any particular case. These factors include:

- (a) The nature, extent and value of the assets being handled;
- (b) The complications and difficulties encountered;
- (c) The degree of assistance provided by the company, its officers or its employees;
- (d) The time spent;
- (e) The Monitor's knowledge, experience and skill;
- (f) The diligence and thoroughness displayed;
- (g) The responsibilities assumed;
- (h) The results achieved; and
- (i) The cost of comparable services when performed in a prudent and economical manner.

Nortel Networks Corp. (Re), 2017 ONSC 673, para 14 [**Tab 9**]

31. Applying the foregoing factors to these proceedings, the Foreign Representative submits that the accounts of the Professionals are fair and reasonable in the circumstances and should be approved as, among other things:

- (a) These CCAA proceedings have been complex and intensive. Gowling was formally retained as Canadian restructuring counsel to the Debtors on or about May 26, 2023 and the Information Officer and its counsel shortly thereafter. The Professionals appeared before the Honourable Justice D.B. Nixon on June 7, 2023 following the First Day Hearing. As a result of the truncated timeline the Professionals were required to conduct a rigorous pre-filing review process which included comprehensive due diligence on the Debtors' business and drafting thorough and diligent court materials in support of the Initial Order and the Supplemental Order. The Professionals played critical roles in ensuring that these proceedings were initiated on an urgent basis, for the benefit of the Debtors and their stakeholders; and
- (b) The Professionals are experienced restructuring professionals who have played an integral part in these CCAA proceedings and who have at all times demonstrated diligence and thoroughness.
- (c) The accounts of the Professionals have been reviewed by Cyxtera's chief restructuring officer who has confirmed that they are fair and reasonable.

Koza Affidavit #2, paras 41 and 42

32. Accordingly, for the reasons set out above, it is submitted that when considering the applicable factors in the context of these proceedings, the remuneration of the Professionals is fair and reasonable in the circumstances and should be approved.

III. CONCLUSION AND RELIEF SOUGHT

33. CTI and the Debtors seek the granting of the Recognition Order and the Fee Order under the CCAA substantially in the form as attached to the Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of June, 2023.

GOWLING WLG (CANADA) LLP

Per:

DocuSigned by:
Sam Gabor
6D7F375C8FC044B...

TABLE OF AUTHORITIES

TAB	AUTHORITY
1.	<i>Companies' Creditors Arrangement Act, R.S.C. 1985</i>
2.	<i>Babcock & Wilcox Canada Ltd., Re</i> , 2000 CanLII 22482 (ON SC)
3.	<i>MtGox Co., Ltd (Re)</i> , 2014 ONSC 5811
4.	<i>Hollander Sleep Products, LLC (Re)</i> , 2019 ONSC 3238
5.	<i>Purdue Pharma L.P., Re</i> , 2019 ONSC 7042
6.	<i>Voyager Digital Ltd.</i> , Order (recognition of Foreign Orders) granted August 11, 2022, Court File No. CV-22-00683820-00CL (Ont. Sup. Ct. J. [Commercial List])
7.	<i>Nortel Networks Corp.</i> , 2009 ONSC 4467
8.	<i>Brainhunter Inc</i> , 2009 ONSC 8207
9.	<i>Nortel Networks Corp. (Re)</i> , 2017 ONSC 673