Court File No. CV-12-9656-00CL

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 PCAS PATIENT CARE AUTOMATION SERVICES INC. AND 2163279 ONTARIO INC. (the "Applicants")

APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

FACTUM OF THE APPLICANTS

March 23, 2012

AIRD & BERLIS LLP
Barristers and Solicitors
Brookfield Place
181 Bay Street, Suite 1800
Toronto, Ontario M5J 2T9

Sam Babe (LSUC # 49498B)
Tel: 416.865.7718
Fax: 416.863.1515
Email: sbabe@airdberlis.com

Ian Aversa (LSUC # 55449N)
Tel: 416.865.3082
Fax: 416.863.1515
Email: iaversa@airdberlis.com

Lawyers for the Applicants

TO: **PricewaterhouseCoopers Inc.**
PwC Tower, 18 York Street, Suite 2600
Toronto, Ontario M5J 0B2

Attention: Paul van Eyk

Tel: (416) 687-8101
Fax: (416) 814-3210
Email: paul.vaneyk@ca.pwc.com

Proposed Monitor

AND TO: **Osler, Hoskin & Harcourt LLP**
100 King Street West, 1 First Canadian Place
Suite 6100, P.O. Box 50
Toronto, Ontario M5X 1B8

Attention: Marc Wasserman

Tel: (416) 862-4908
Fax: (416) 862-6666
Email: mwasserman@osler.com

Lawyers for the Proposed Monitor

AND TO: **Goodmans LLP**
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, Ontario M5H 2S7

Attention: Derek Bulas

Tel: (416) 597-5914
Fax: (416) 979.1234
Email: dbulas@goodmans.ca

Lawyers for Castcan Investments Inc.

AND TO: **Minden Gross LLP**
145 King Street West, Suite 2200
Toronto, Ontario M5H 4G2

Attention: Kenneth Kallish

Tel: (416) 369-4124
Fax: (416) 864-9923
Email: kkallish@mindengross.com

Lawyers for Royal Bank of Canada

AND TO: **Grundy, Cass & Campbell**
Professional Corporation
Suite 3150, 100 Wellington Street West
P.O. Box 11, Toronto-Dominion Centre
Toronto, Ontario M5K 1A1

Attention: Douglas Grundy

Tel: (416) 849-8003
Fax: (416) 849-8004
Email: dgrundy@grundycass.com

Lawyers for Forstar Group

Court File No. CV-12-9656-00CL

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 PCAS PATIENT CARE AUTOMATION SERVICES INC. AND 2163279 ONTARIO INC. (the "Applicants")

APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

FACTUM OF THE APPLICANTS

PART I – OVERVIEW

1. PCAS Patient Care Automation Services Inc. ("**PCAS**") and 2163279 Ontario Inc. ("**Touchpoint**" and, together with PCAS, the "**Applicants**") seek this Court's protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"). By this application, the Applicants seek an order pursuant to the CCAA:

(a) declaring that each of the Applicants is a company to which the CCAA applies;

(b) staying all proceedings and remedies taken or which might be taken in respect of the Applicants or any of their property, except upon the leave of the Court being granted, or as otherwise provided;

(c) authorizing the Applicants to prepare and file with the Court a plan of compromise or arrangement with their creditors;

(d) appointing PricewaterhouseCoopers Inc. ("**PwCI**") as monitor (the "**Monitor**") of the Applicants;

(e) approving a debtor-in-possession financing facility (the "**DIP Facility**") with 2310714 Ontario Inc. (the "**DIP Lender**") in the principal amount of $2,800,000 and granting a priority charge (the "**DIP Charge**") over the assets, properties and undertakings of the Applicants (collectively, the "**Property**") to secure repayment of the amounts borrowed by the Applicants under the DIP Facility;

(f) granting a priority charge over the Property in the principal amount of $500,000 to secure the fees and disbursements of counsel to the Applicants, the Monitor and counsel to the Monitor (the "**Administration Charge**"); and

(g) granting a priority charge over the Property in the principal amount of $1,500,000 in order to protect the Applicants' directors and officers from certain potential liabilities (the "**D&O Charge**").

PART II – FACTS

Background to the Applicants and their Business

2. The Applicants are technology companies in the pre-revenue stage of development, and have run out of start-up capital. The most likely scenario in this proceeding is a going concern sale with respect to certain assets. However, there is also the possibility that there could be a restructuring of the Applicants' business. Protection under the CCAA will allow for a sale to happen under the supervision of this Court for the benefit of all stakeholders and also allow for the prospect of a restructuring.

Affidavit of Donald Waugh sworn March 22, 2012 ("Waugh Affidavit"), Application Record of the Applicants ("Application Record"), Tab 4, pg. 2, para. 3

3. PCAS is a privately held corporation incorporated pursuant to the *Canada Business Corporations Act* on March 3, 2006, under the name "PCAS Physician Clinic Automation Services Inc.". On February 16, 2007, articles of amendment were filed to change PCAS' name to its current name.

Waugh Affidavit, Motion Record, Tab 4, pg. 2, para. 4

4. PCAS is a healthcare technology company that has developed and is rapidly commercializing a unique, automated pharmacy dispensing platform poised to revolutionize the way pharmacy is practiced and prescriptions are dispensed. PCAS' principal technology and product is the PharmaTrust MedCentreTM ("**MedCentre**"), a pharmacist-controlled, customer-interactive, prescription dispensing system akin to a "pharmacy in a box" or prescription-dispensing ATM that capitalizes on current healthcare and pharmacy industry trends. Each MedCentre sells for approximately $130,000, and then the purchaser's licensed use of the technology within the MedCentre generates an income stream for the life of the unit.

Waugh Affidavit, Motion Record, Tab 4, pg. 2, para. 5

5. PCAS believes that the MedCentre is currently the only commercial, scalable, platform-enabled and fully-automated remote dispensing solution for pharmaceuticals available today. The MedCentre facilitates live pharmacist counselling via two-way audio-video communication with the ability to dispense prescription medicines under pharmacist control on a 24/7 basis and has the capacity to store over 2,500 items. At scale, the MedCentre value proposition offers the potential to lower the cost of dispensing prescriptions and expand access to care while providing significant improvements in convenience to patients and improving drug utilization, compliance

and patient safety. The MedCentre provides benefits to all major stakeholders in the pharmacy dispensing value chain including patients, pharmacies, physicians, governments and payers.

Waugh Affidavit, Motion Record, Tab 4, pgs. 2-3, para. 6

6. PCAS' second technology and product, which is in early development, is the PharmaTrust MedHomeTM ("**MedHome**"), a personal in-home device that dispenses unit doses to patients at pre-set times and provides patient monitoring and reminders to ensure patient health and safety. This simple and easy-to-use device also enables patients to immediately connect with a pharmacist, physician, caregiver or emergency response at the touch of a button. In a retirement home setting, the in-room MedHome device can be used in concert with a centrally located MedCentre, to deliver a complete on-site medication management system.

Waugh Affidavit, Motion Record, Tab 4, pg. 3, para. 7

7. Touchpoint was incorporated pursuant to the *Business Corporations Act* (Ontario) on February 12, 2008, as "PCAS Newco Pharmacy Inc.". On July 31, 2009, articles of amendment were filed to change Touchpoint's name to "Direct Care Pharmacy Inc.". On June 13, 2011, further articles of amendment were filed to change Touchpoint's name to "Touchpoint Pharmacy Inc.". Finally, on November 11, 2011, articles of amendment were filed to change Touchpoint's name to its current numbered company name.

Waugh Affidavit, Motion Record, Tab 4, pg. 3, para. 8

8. Touchpoint operates a retail pharmacy business in Ontario using MedCentres. Ontario Regulation 58/11, enabling remote dispensing, was ratified on March 18, 2011 and the first MedCentre received approval from the Ontario College of Pharmacists on August 31, 2011. Since that time, Touchpoint has deployed 18 MedCentres in hospitals, medical centres and first nation's communities in Ontario.

Waugh Affidavit, Motion Record, Tab 4, pg. 3, para. 9

9. Under Ontario law, no corporation incorporated after 1954 can own or operate a pharmacy unless the corporation is majority-owned by pharmacists. Touchpoint is therefore 49% owned by PCAS and 51% owned by three pharmacists who are selected and employed by PCAS. PCAS does, however, under the Touchpoint shareholders' agreement, hold veto power over any changes to the board of Touchpoint and over most other board-level decisions other than those relating to safety. PCAS also has a "call right" under the Touchpoint shareholders' agreement which effectively means the three pharmacists hold their shares at PCAS' leisure.

Waugh Affidavit, Motion Record, Tab 4, pgs. 3-4, para. 10

10. PCAS presently employs 191 full-time employees, 15 part-time employees, and 5 contract employees in Canada, as well as 2 employees in the United States, and 1 contractor in the United Kingdom.

Waugh Affidavit, Motion Record, Tab 4, pg. 4, para. 11

11. The Applicants' primary operations are conducted out of the following three leases premises in Oakville, Ontario:

(a) 2910 Brighton Road, being the location of the head offices, and the base for all administration, as well as some engineering and warehousing;

(b) 2880 Brighton Road, used for manufacturing, drug warehousing, a licensed pharmacy and a call centre; and

(c) 2440 Winston Park Drive, used by the technology and infrastructure groups.

Waugh Affidavit, Motion Record, Tab 4, pg. 4, para. 12

12. The Applicants' United States and United Kingdom affiliates also have small sales offices in Chicago and London, respectively. The London operations are in the process of being shut down.

Waugh Affidavit, Motion Record, Tab 4, pg. 4, para. 13

Applicants' Current Financial Situation

13. PCAS has raised over $60 million of start-up capital from more than 550 shareholders, including employee shareholders, medical investment professionals, financial experts, entrepreneurs and private investment vehicles. Since the start of this year, PCAS has continued to try to raise money, first with a private placement of up to $100,000,000 in common shares and then, as well, through a private placement of up to $30,000,000 in convertible debentures. These offerings were not successful and, since early March, 2012, the Applicants have been close to running out of cash.

Waugh Affidavit, Motion Record, Tab 4, pgs. 4-5, para. 14

14. On March 7, 2012, PCAS met its payroll only through a last-minute factoring of certain Scientific Research & Experimental Development ("**SR&ED**") investment tax credits, Ontario Innovation Tax ("**OIT**") credits and Harmonized Sales Tax ("**HST**") refund accounts receivable by Castcan Investments Inc. ("**Castcan**"), a company controlled by certain existing shareholders of PCAS.

Waugh Affidavit, Motion Record, Tab 4, pg. 5, para. 15

15. In the past two weeks, PCAS has reduced its salaried employee headcount from 274 to 193 and reduced its contractors from 96 to 5. PCAS is, however, once again out of cash and, without immediate funding, will be wholly unable to fund its payroll of approximately $696,000

on Friday, March 23, 2012. Funding of that payroll to the PCAS' payroll servicer, ADP, was due on Wednesday, March 21, 2012.

Waugh Affidavit, Motion Record, Tab 4, pg. 5, para. 16

16. The Applicants are also in arrears to their communications and wireless providers, certain of whom have threatened to terminate services. If these services were to be cut off, the MedCentres presently deployed in the field would immediately cease to function.

Waugh Affidavit, Motion Record, Tab 4, pg. 5, para. 17

17. PCAS' liabilities total approximately $8,360,000 and Touchpoint's liabilities total approximately $6,800,000 (approximately $6,500,000 of which are liabilities to PCAS).

Waugh Affidavit, Motion Record, Tab 4, pg. 5, para. 18

18. On October 25, 2011, PCAS signed a 5-year customer Memorandum of Understanding (the "**MoU**") with a national pharmacy retail chain in the United States. Assuming successful pilots and adoption rates, the MoU contemplates this chain purchasing up to 2,900 MedCentre units from 2012-2014, representing up to $438 million of revenue in that period.

Waugh Affidavit, Motion Record, Tab 4, pg. 5, para. 19

19. PCAS is currently in active discussions with another 15 large enterprise clients which, combined, could result in similar deployment and revenue numbers as are contemplated by the MoU.

Waugh Affidavit, Motion Record, Tab 4, pgs. 5-6, para. 20

20. PCAS currently has approximately $3,000,000 worth of manufactured MedCentres ready for sale, but will not sell them unless it has the financing (through the DIP Facility or otherwise) necessary to maintain the operations required to support its deployed MedCentres.

Waugh Affidavit, Motion Record, Tab 4, pg. 6, para. 21

Applicants' Secured Creditors

21. PCAS and Royal Bank of Canada ("**RBC**") are parties to a credit letter agreement dated October 12, 2011 (the "**RBC Credit Agreement**"), pursuant to which RBC agreed to provide a $2,000,000 revolving demand facility margined against accounts receivable ("**RBC Facility #1**"), a $1,000,000 term loan margined against SR&ED and OIT tax credits ("**RBC Facility #2**"), a $500,000 term facility available at RBC's sole discretion ("**RBC Facility #3**"), a $40,000 VISA facility (on which there is approximately $50,000 owing) and a foreign exchange contracts facility (collectively, with RBC Facility #1, RBC Facility #2 and RBC Facility #3, the "**RBC Facilities**").

Waugh Affidavit, Motion Record, Tab 4, pg. 6, para. 23

22. PCAS granted a general security agreement in favour of RBC, registration in respect of which was made pursuant to the *Personal Property Security Act* (Ontario) (the "**PPSA**").

Waugh Affidavit, Motion Record, Tab 4, pg. 6, para. 24

23. Pursuant to a guarantee and postponement of claim dated November 18, 2011, Touchpoint guaranteed all the obligations of PCAS to RBC up to the maximum principal amount of $3,800,000 (the "**Touchpoint RBC Guarantee**"). The Touchpoint RBC Guarantee is secured by a general security agreement dated November 18, 2011, registration in respect of which was made pursuant to the PPSA.

Waugh Affidavit, Motion Record, Tab 4, pg. 6, para. 25

24. PCAS has been offside its financial covenants under the RBC Credit Agreement almost from the start, which covenants include maintaining a cash balance in operating accounts at RBC

in the minimum amount of $3,000,000. RBC Facilities has therefore made only limited advances under RBC Facility #1 and an advance under RBC Facility #2 against 2010 SR&ED and OIT tax credits (which was due and repayable by December 31, 2011). The total indebtedness of PCAS to RBC outstanding is approximately $866,800, which includes $408,374 in principal advanced under RBC Facility #2 against PCAS' 2010 SR&ED and OIT tax credit. RBC also has an $805,108.50 letter of credit outstanding to PCAS' 2440 Winston Park Drive landlord, but this is secured by a GIC in an equivalent amount posted as cash collateral with RBC. PCAS' request to obtain further availability under the RBC Facilities has been denied.

Waugh Affidavit, Motion Record, Tab 4, pg. 7, para. 27

25. Kohl & Frisch Limited ("**KFL**") is a major drug supplier to Touchpoint. PCAS made an inventory purchase money security agreement dated February 26, 2008 in favour of KFL, registration of which was made pursuant to the PPSA. Touchpoint granted a general security agreement dated November 11, 2011 in favour of KFL, with registration having been previously made in favour of KFL pursuant to the PPSA.

Waugh Affidavit, Motion Record, Tab 4, pg. 7, para. 28

26. The Applicants and Castcan (in trust for itself and certain others) entered into a SR&ED/OITC/HST Purchase Agreement dated March 6, 2012 (the "**Castcan Factoring Agreement**") pursuant to which Castcan purchased certain 2009, 2010 and 2011 SR&ED and OIT tax credits and HST credits and all refunds in respect thereof. The Applicants have certain repurchase obligations under the Castcan Factoring Agreement, which obligations are secured by a general security agreement from PCAS and a general security agreement from Touchpoint, each dated March 6, 2012 and duly registered pursuant to the PPSA.

Waugh Affidavit, Motion Record, Tab 4, pg. 8, para. 30

27. PCAS leases certain computer equipment and software from IBM Canada Limited ("**IBM**"), and presently owes IBM approximately $251,614, with scheduled monthly payments of $12,000.

Waugh Affidavit, Motion Record, Tab 4, pg. 9, para. 33

Restructuring Under CCAA Protection

28. The Applicants are insolvent as they are not able to pay their liabilities as they become due. Although there are parties performing due diligence in respect of potential equity investments, the Applicants are unable to raise additional equity financing in time to cover pending payroll and other critical payables.

Waugh Affidavit, Motion Record, Tab 4, pgs. 10-11, para. 45

29. In order for the Applicants to ensure the best possible recovery for their stakeholders, including, without limitation, creditors, employees, customers and landlords, management of the Applicants has determined that a restructuring and/or a sale of its business is required.

Waugh Affidavit, Motion Record, Tab 4, pg. 11, para. 46

30. With the support of PwCI, the Applicants intend to canvass the marketplace to determine whether there are any parties interested in purchasing the business and assets of one or both Applicants as a going concern.

Waugh Affidavit, Motion Record, Tab 4, pg. 11, para. 47

31. In order for the Applicants to ensure the best possible recovery for their stakeholders, including, without limitation, creditors, employees, customers and landlords, management of the Applicants has determined that a restructuring and/or a sale of its business is required.

Waugh Affidavit, Motion Record, Tab 4, pg. 11, para. 48

PART III – ISSUES

32. The primary issues to be determined on this application are whether this Honourable Court should:

(a) grant protection to the Applicants under the CCAA;

(b) grant the Administration Charge;

(c) approve the DIP Facility and grant the DIP Charge; and

(d) grant the D&O Charge.

PART IV – LAW AND ARGUMENT

A. THE APPLICANTS SHOULD BE GRANTED PROTECTION UNDER THE CCAA

The Applicants are "Debtor Companies" to which the CCAA Applies

33. The CCAA applies to a "debtor company" or "affiliated debtor companies" where the total of claims against the debtor or its affiliates exceeds $5,000,000.

CCAA, s. 3(1)

34. The CCAA defines "company" as, *inter alia*, a company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, including an income trust. Pursuant to section 2 of the CCAA, a "debtor company" is defined in the CCAA as, *inter alia*, a company that is insolvent.

CCAA, s. 2(1), "debtor company", "company"

35. PCAS and Touchpoint are corporations established under the laws of Canada and Ontario, respectively, and are therefore "companies" within the definition of the CCAA.

Waugh Affidavit, Motion Record, Tab 4, pgs. 2-3, paras. 4 and 8

36. The CCAA does not define "insolvent", but the definition of "insolvent person" under the *Bankruptcy and Insolvency Act* (the "**BIA**") is commonly referenced in establishing that an applicant is a debtor company in the context of the CCAA. The definition of "insolvent person" in the BIA is as follows:

> "insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, and whose liability to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

***Stelco Inc. (Re)* (2004), 48 C.B.R. (4th) 299 at paras. 21-22 (Ont. S.C.J. [Comm. List]), Applicants' Book of Authorities, Tab 1 ["*Stelco*"]**

***BIA*, s. 2, "insolvent person"**

37. In *Stelco*, Justice Farley applied an expanded definition of "insolvent" in the CCAA context to reflect the "rescue" emphasis of the CCAA, modifying (a) of the BIA's definition of "insolvent person" to include a financially troubled corporation that is "reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring."

***Stelco* at paras. 25-26, Applicants' Book of Authorities, Tab 1**

38. As described above, the Applicants do not have the liquidity necessary to meet their obligations to creditors as they come due.

Waugh Affidavit, Motion Record, Tab 4, pgs. 5-6, paras. 14-22

39. For the purposes of the CCAA, companies are affiliated companies if, *inter alia*, one of them is the subsidiary of the other or both are subsidiaries of the same company or each of them is controlled by the same person. For the purposes of the CCAA, a company is controlled by a person or by two or more companies if: (a) securities of the company to which are attached more than fifty per cent of the votes that may be cast to elect directors of the company are held, other than by way of security only, by or for the benefit of that person or by or for the benefit of those companies; and (b) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the company. For the purposes of the CCAA, a company is a subsidiary of another company if: (a) it is controlled by (i) that other company, (ii) that other company and one or more companies each of which is controlled by that other company, or (iii) two or more companies each of which is controlled by that other company; or (b) it is a subsidiary of a company that is a subsidiary of that other company.

***CCAA*, ss. 3(2), 3(3) and 3(4)**

40. As described above, under Ontario law, no corporation incorporated after 1954 can own or operate a pharmacy unless the corporation is majority-owned by pharmacists. Touchpoint is therefore 49% owned by PCAS and 51% owned by three pharmacists who are selected and employed by PCAS. However, under the Touchpoint shareholders' agreement, PCAS holds veto power over any changes to the board of Touchpoint and over most other board-level decisions other than those relating to safety. PCAS also has a "call right" under the Touchpoint

shareholders' agreement which effectively means the three pharmacists hold their shares at PCAS' leisure.

Waugh Affidavit, Motion Record, Tab 4, pgs. 3-4, para. 10

41. Accordingly, the Applicants respectfully submit that, in these particular circumstances, the Applicants should be considered affiliated debtor companies with total claims against them in excess of $5,000,000 who qualify for protection under the CCAA.

The Requested Stay of Proceedings is Appropriate in the Circumstances

42. Section 11.02 of the CCAA provides that the Court may, on an initial application, for a period of not more than thirty days, impose a stay of proceedings in respect of the Applicants if the Applicants satisfy the Court that circumstances exist which make the order appropriate.

***CCAA*, s. 11.02**

43. In *Lehndorff General Partner Ltd. (Re)*, Justice Farley described the CCAA as a statute intended to "facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy" and, as such, is "remedial legislation entitled to a liberal interpretation". Justice Farley stated, *inter alia*:

> The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA.

***Lehndorff General Partner Ltd. (Re)* (1993), 17 C.B.R. (3rd) 24 at para. 6 (Ont. Gen. Div. [Comm. List]) Applicants' Book of Authorities, Tab 2 ["*Lehndorff*"]**

44. Justice Farley also expressly recognized one of the purposes of the CCAA to be the facilitation of ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. Specifically, Justice Farley stated:

> The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors.
>
> ... It appears to me that the purpose of the CCAA is also to protect the interests of creditors and to enable an orderly distribution of the debtor company's affairs. This may involve a winding-up or liquidation of a company or simply a substantial downsizing of its business operations, provided the same is proposed in the best interests of the creditors generally.

***Lehndorff* at para. 7, Applicants' Book of Authorities, Tab 2**

45. More recently, in *Nortel Networks Corp. (Re)*, Justice Morawetz also held that the CCAA is intended to be flexible and must be given a broad and liberal interpretation to achieve its objectives.

***Nortel Networks Corp. (Re)* (2009), 55 C.B.R. (5th) 229 at para. 47 (Ont. S.C.J. [Comm. List]), Applicants' Book of Authorities, Tab 3 ["*Nortel*"]**

46. The power to grant a stay of proceedings should be construed broadly in order to permit the CCAA to accomplish its legislative purpose and to enable continuance of the company seeking CCAA protection.

***Lehndorff* at para. 10, Applicants' Book of Authorities, Tab 2**

47. The Applicants require a stay of proceedings in order to allow them to maintain operations while giving them the necessary time to consult with their stakeholders regarding the future of their business operations and explore the possibility of a going concern sale with respect to certain assets and/or a restructuring of the Applicants' business.

48. Accordingly, the Applicants respectfully submit that it is appropriate in the circumstances to grant the requested stay of proceedings under the CCAA.

B. THE ADMINISTRATION CHARGE SHOULD BE GRANTED

49. The Applicants are seeking an Administration Charge in the amount of $500,000 as security for the fees and disbursements incurred in connection with services rendered to the Applicants both before and after the commencement of the CCAA proceedings by the Applicants' legal counsel, the Monitor and the Monitor's counsel.

50. Section 11.52 of the CCAA provides this Court with the statutory jurisdiction to grant the Administration Charge. It provides:

> 11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> 11.52 (2) This court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> ***CCAA*, s. 11.52**

51. In *Canwest Publishing Inc. (Re)*, Justice Pepall held that, in addition to the considerations provided for in section 11.52 of the CCAA, the following factors should also be considered:

(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.

Canwest Publishing Inc. (Re) (2010), 63 C.B.R. (5th) 115 at para. 54 (Ont. S.C.J. [Comm. List]) ("_Canwest_"), Commercial List Authorities Book, Tab 3

52. In the present case, the following factors support the granting of the Administration Charge:

(a) the beneficiaries of the Administration Charge will provide essential legal and financial advice to the Applicants throughout the CCAA proceedings;

(b) the roles of the Applicants' legal counsel, the Monitor and the Monitor's legal counsel are distinct and there is no anticipated unwarranted duplication;

(c) the Administration Charge does not purport to prime any secured party who has not received notice of this application; and

(d) the proposed Monitor supports the granting of the Administration Charge.

53. Accordingly, the Applicants respectfully submit that this is an appropriate case in which to grant the Administration Charge. Each of the proposed beneficiaries will play a critical role in the Applicants' restructuring and it is unlikely that the above noted advisors will participate in the CCAA proceedings unless the Administration Charge is granted to secure their fees and disbursements.

54. The Applicants plan to consider the possibility of returning to Court to seek an Order granting super-priority ranking to the Administration Charge ahead of the Applicant's secured creditors.

C. THE DIP FACILITY SHOULD BE APPROVED AND THE DIP CHARGE SHOULD BE GRANTED

55. The Applicants are seeking approval of the DIP Facility in the maximum principal amount of $2,800,000 to be secured by the DIP Charge.

56. Section 11.2 of the CCAA provides this Court with the statutory jurisdiction to grant the DIP Charge. It provides:

> 11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> 11.2 (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> ***CCAA*, s. 11.2**

57. This Court has stressed the importance of meeting the criteria set out in subsection 11.2(1) of the CCAA being:

(a) the DIP Charge does not purport to prime any secured party who has not received notice of this application;

(b) the amount to be advanced under the DIP facility is appropriate and required, having regard to the debtor's cash-flow statement;

(c) the charge does not secure an obligation that existed before the Order was made.

***Canwest* at paras 32-34, Commercial List Authorities Book, Tab 3**

58. The amount of the DIP Facility is supported by the Applicants' cash flow projections. The financing will be used to provide time for the management of the Applicant, with their advisors and in consultation with the Monitor, to formulate a plan to restructure the business and/or effect a going concern sale.

59. The DIP Charge does not secure obligations to the DIP lender that existed before the Order (should it be granted).

60. Subsection 11.2(4) of the CCAA sets out a number of factors to be considered by the Court in determining if it is appropriate to grant a DIP Charge. It states:

> 11.2(4) In deciding whether to make an order, the court is to consider, among other things,
>
> (a) the period during which the company is expected to be subject to proceedings under this Act;
>
> (b) how the company's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the company's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (e) the nature and value of the company's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the monitor's report referred to in paragraph 23(1)(b), if any.

***CCAA*, s. 11.2(4)**

61. In the present case, the following, when considered in relation to the above noted factors, support the granting of the DIP Charge:

(a) *Period during which the Applicants are expected to be subject to the CCAA*. The Applicants are optimistic that CCAA protection will enable them to negotiate a going concern sale. However, given the early stages of this proceeding, the Applicants are not able to estimate with certainty the length of time they will require protection under the CCAA.

(b) *The DIP Facility would enhance the prospects of a viable compromise or arrangement being made in respect of the Applicants*. Absent the funding provided for by the DIP facility, the Applicants have no liquidity and will not be able to continue to meet its payroll obligations or have the opportunity to work with the Monitor and stakeholders to develop a plan to restructure the business and/or effect a going concern sale.

(c) *Material prejudice to any creditor as a result of the security or charge*. The DIP Charge does not purport to prime any secured party who has not received notice of this application.

(d) *The Monitor*. The proposed Monitor supports the granting of the DIP Charge.

D. THE D&O CHARGE SHOULD BE GRANTED

62. The Applicants are seeking a D&O Charge in the amount of $1,500,000 in order to protect their directors and officers from certain potential liabilities.

63. Donald Waugh and Kym Anthony are the directors of PCAS and Donald Waugh, Jim Gay, Bonnie Lewis and Sunny Lalli are the directors of Touchpoint (collectively, the "**Directors**").

Waugh Affidavit, Motion Record, Tab 4, pg. 14, para. 61

64. The Directors, as a condition of their continued involvement with the Applicants, have indicated that their respective involvement is conditional upon the granting of an order under the CCAA which grants a charge on the Applicants' property in the maximum amount of $1,5000,000, approximately equal to three weeks wages plus accrued vacation pay, as security for the Applicants' indemnification for possible liabilities which may be incurred by such Directors and officers.

Waugh Affidavit, Motion Record, Tab 4, pg. 14, para. 62

65. Section 11.51 of the CCAA provides this Court with the statutory jurisdiction to grant the D&O Charge. It states:

> 11.51 (1) On application by a debtor company and on notice to the secured creditors who are likely to be acted by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.
>
> 11.51 (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> 11.51 (3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.
>
> 11.51 (4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the

> director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.
>
> ***CCAA*, s. 11.51**

66. In *Canwest Global Communications Corp. (Re)*, Justice Pepall applied section 11.51 at the debtor company's request for a directors' and officers' charge, noting that 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. In approving the request, Justice Pepall stated:

> The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protections against liabilities they could incur during the restructuring: *Re General Publishing Co.* [(2003), 39 C.B.R. (4th) 216)]. Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the applicants to keep the experienced board of directors supported by experienced senior management. The proposed Monitor believes that the charge is required and reasonable in the circumstances and also observes that it will not cover all of the directors' and officers' liabilities in the worst case scenario. In all of these circumstances, I approve the request.
>
> ***Canwest Global Communications Corp. (Re)* (2009), 59 C.B.R. (5th) 72 at para. 48 (Ont. S.C.J. [Comm. List]), Applicants' Book of Authorities, Tab 4**

67. The D&O Charge conforms with the requirements of subsection 11.51 of the CCAA in that: (i) it does not apply to obligations and liabilities that were incurred prior to the commencement of the proceedings; (ii) it only applies to obligations and liabilities not covered by the Applicant's current D&O insurance policy; and (iii) it does not apply to any obligation or liability incurred as a result of the applicable director or officer's gross negligence or wilful misconduct.

68. The proposed Monitor supports the granting of the D&O Charge, including the amount thereof.

69. The D&O Charge does not purport to prime any secured party who has not received notice of this application.

70. For these reasons, the Applicants submit that the D&O Charge is reasonable in the circumstances, conforms with the requirements of section 11.51 of the CCAA and should be granted.

PART V – RELIEF REQUESTED

71. The Applicants respectfully request that this Honourable Court grant an Order substantially in the form of the draft Initial Order attached as Tab 2 to the Applicant's Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of March, 2012.

Sam Babe

Ian Aversa

AIRD & BERLIS LLP
Barristers and Solicitors
Brookfield Place
181 Bay Street, Suite 1800
Toronto, Ontario M5J 2T9

Sam Babe (LSUC # 49498B)
Tel: 416.865.7718
Fax: 416.863.1515
Email: sbabe@airdberlis.com

Ian Aversa (LSUC # 55449N)
Tel: 416.865.3082
Fax: 416.863.1515
Email: iaversa@airdberlis.com

Lawyers for the Applicants

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Stelco Inc. (Re)* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Comm. List])

2. *Lehndorff General Partner Ltd. (Re)* (1993), 17 C.B.R. (3rd) 24 (Ont. Gen. Div. [Comm. List])

3. *Nortel Networks Corp. (Re)* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Comm. List])

4. *Canwest Publishing Inc. (Re)* (2010), 63 C.B.R. (5th) 115 (Ont. S.C.J. [Comm. List])

5. *Canwest Global Communications Corp. (Re)* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J. [Comm. List])

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

2. In this Act,

...

"insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

2. (1) In this Act,

...

"company" means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, railway or telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies;

"debtor company" means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or

(d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent;

3. (1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.

(2) For the purposes of this Act,

(a) companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company or each of them is controlled by the same person; and

(b) two companies affiliated with the same company at the same time are deemed to be affiliated with each other.

(3) For the purposes of this Act, a company is controlled by a person or by two or more companies if

(a) securities of the company to which are attached more than fifty per cent of the votes that may be cast to elect directors of the company are held, other than by way of security only, by or for the benefit of that person or by or for the benefit of those companies; and

(b) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the company.

(4) For the purposes of this Act, a company is a subsidiary of another company if

(a) it is controlled by

(i) that other company,

(ii) that other company and one or more companies each of which is controlled by that other company, or

(iii) two or more companies each of which is controlled by that other company; or

(b) it is a subsidiary of a company that is a subsidiary of that other company.

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

(4) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

11.51 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor

company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

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 PCAS PATIENT CARE AUTOMATION SERVICES INC. AND 2163279 ONTARIO INC. (the "Applicants")

Court File No. CV-12-9656-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceedings commenced at Toronto

FACTUM OF THE APPLICANTS

AIRD & BERLIS LLP
Barristers and Solicitors
Brookfield Place
181 Bay Street, Suite 1800
Toronto, Ontario M5J 2T9

Sam Babe (LSUC # 49498B)
Tel: 416.865.7718
Fax: 416.863.1515
Email: sbabe@airdberlis.com

Ian Aversa (LSUC # 55449N)
Tel: 416.865.3082
Fax: 416.863.1515
Email: iaversa@airdberlis.com

Lawyers for the Applicants