

**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

May 3, 2012

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PART I – OVERVIEW

1. By this motion, PCAS Patient Care Automation Services Inc. ("**PCAS**") and 2163279 Ontario Inc. ("**Touchpoint**" and, together with PCAS, the "**Applicants**") seek an order, among other things:

- (a) approving the Third Report of PricewaterhouseCoopers Inc. ("**PwC**"), in its capacity as the Court-appointed monitor of the Applicants (in such capacity, the "**Monitor**") dated May 3, 2012 (the "**Third Report**") and approving the actions of the Monitor described therein;
- (b) extending the Stay Period (as defined in the Initial Order of the Honourable Mr. Justice Morawetz granted on March 23, 2012 in these proceedings (the "**Initial Order**")) to May 8, 2012; and

- (c) increasing the amount the Applicants are currently authorized to borrow under a credit facility (the “**DIP Facility**”) from 2320714 Ontario Inc. (the “**DIP Lender**”) from \$4,370,000 to \$4,525,000.

PART II – FACTS

Background

2. On March 23, 2012, the Applicants made an application under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”) seeking court protection from their creditors, which was granted pursuant to the Initial Order.

Affidavit of Loreto Grimaldi, dated May 3, 2012 (the “**May 3 Affidavit**”),
Motion Record of the Applicants (“**Motion Record**”), Tab 3, pg. 2, para. 3

The Stay Period

3. Pursuant to paragraph 3 the Order of the Honourable Justice Brown made April 20, 2012 (the “**April 20 Order**”), the Stay Period expires on May 4, 2012.

May 3 Affidavit, Motion Record, Tab 3, pg. 2, para. 5

4. An extension of the Stay Period until May 8, 2012 is necessary in order to provide stability to the Applicants’ business while the Applicants, with the assistance of the Monitor, work diligently on formulating a restructuring plan which would maximize long term value for the benefit of all stakeholders, including, without limitation, finalizing the pending financing necessary to conduct a sale and investor solicitation process (a “**SISP**”).

May 3 Affidavit, Motion Record, Tab 3, pg. 2, para. 6

5. Due to increased commitment of the DIP Lender under the DIP Facility, the Applicants now have sufficient funding to continue operations until May 8, 2012, and to conduct a SISP during the same period.

May 3 Affidavit, Motion Record, Tab 3, pgs. 2 and 3, paras. 7 and 12

6. Based on the information available, creditors of the Applicants will not be materially prejudiced by an extension of the Stay Period until May 8, 2012.

May 3 Affidavit, Motion Record, Tab 3, pg. 3, para. 8

7. Since the issuance of the Initial Order, the Applicants have acted, and continue to act, in good faith and with due diligence, and circumstances exist that make granting an extension of the Stay Period until May 8, 2012 appropriate.

May 3 Affidavit, Motion Record, Tab 3, pg. 3, para. 9

8. Subject to finalization of the pending financing discussed in paragraph 13 below, the Applicants intend to return to Court on or before May 8, 2012 to seek a further extension of the Stay Period for a period sufficient to conduct a SISP.

May 3 Affidavit, Motion Record, Tab 3, pg. 3, para. 10

The DIP Facility

9. Pursuant to paragraph 31 of the Initial Order, as amended by the April 20 Order, the Applicants were authorized and empowered to obtain and borrow under the DIP Facility from the DIP Lender in order to finance the Applicants' working capital requirements and other general corporate purposes and capital expenditures, provided that borrowings under such credit facility did not exceed the principal amount of \$4,370,000 unless permitted by further Order of this Court.

May 3 Affidavit, Motion Record, Tab 3, pg. 3, para. 11

10. Pursuant to paragraph of the Order of the Honourable Justice Brown made April 16, 2012 (the “**April 16 Order**”), the DIP Facility is to be on the terms and subject to the conditions set forth in the Amended and Restated DIP Loan Agreement between the Applicants and the DIP Lender (the “**Amended and Restated DIP Loan Agreement**”).

May 3 Affidavit, Motion Record, Tab 3, pg. 3, para. 12

11. The Applicants’ thirteen-week cash flow projections and the Amended and Restated DIP Loan Agreement both contemplate a DIP Facility as high as \$10,000,000, should the DIP Lender raise sufficient amounts to fund such facility.

May 3 Affidavit, Motion Record, Tab 3, pg. 3, para. 12

12. The DIP Lender has advised that, since the date of the April 20 Order, it has received commitments and/or funding sufficient to increase the DIP Facility to \$4,525,000. The Applicants are therefore seeking to have their authorized borrowing under the DIP Facility increased to \$4,525,000 in the aggregate.

May 3 Affidavit, Motion Record, Tab 3, pgs. 3, para. 13

13. The DIP Lender has also advised that is has a firm, but conditional commitment from a strategic financier for an additional \$3,000,000 in funding for the DIP Facility. The most significant hurdle among the conditions to this new financing is that the DIP Lender must have an additional \$1,000,000 available to commit to the DIP Facility. There are a number of other parties who have made less firm commitments ranging from \$500,000 to \$4,950,000. Some of these are conditional on the DIP Lender receiving a significant investment like the \$3,000,000 commitment it just received, and some are so recent (received within the past 24 hours) that they simply need time to be firmed up. The DIP Lender has been working hard to firm up those other

commitments to satisfy the main condition on the \$3,000,000. The Applicants are hopeful that this can be done prior to May 8.

May 3 Affidavit, Motion Record, Tab 3, pgs. 3 and 4, para. 14

14. The Applicants will not be able to continue their operations, finalize the pending financing necessary to conduct a SISP or initiate any restructuring efforts without an increase in the amount of the DIP Facility to \$4,525,000.

May 3 Affidavit, Motion Record, Tab 3, pg. 4, para. 15

15. Increasing the amount of the DIP Facility \$4,525,000 is favourable to the Applicants having regard to the circumstances and the increase in the amount of the DIP Facility is necessary and reasonable in the circumstances to ensure that the Applicants have a prudent and responsible level of liquidity so that they can meet post-filing obligations as they become due for the current Stay Period and beyond.

May 3 Affidavit, Motion Record, Tab 3, pg. 4, para. 16

PART III – ISSUES

16. The primary issues to be determined on this motion are whether this Honourable Court should:

- (a) extend the Stay Period to May 8, 2012; and
- (b) increase the amount the Applicants are currently authorized to borrow under the DIP Facility from the DIP Lender from \$4,370,000 to \$4,525,000.

PART IV – LAW AND ARGUMENT

A. *THE STAY PERIOD SHOULD BE EXTENDED*

17. The Applicants are seeking the extension of the Stay Period to May 8, 2012.

18. Pursuant to section 11.02 of the CCAA, the Court may extend the stay of proceedings with respect to a debtor company where: (a) circumstances exist that make the order appropriate; and (b) the applicant has acted and is acting in good faith and with due diligence.

CCAA, s. 11.02

19. Pursuant to paragraph 3 of the April 20 Order, the Stay Period expires on May 4, 2012. An extension of the Stay Period is necessary in order to provide stability to the Applicants' business while the Applicants, finalize the pending additional financing discussed in paragraph 13 above, conduct (with the assistance of the Monitor) a SISP and work diligently on formulating a restructuring plan which would maximize long term value for the benefit of all stakeholders. The stability provided by the stay of proceedings is critical to the Applicants in order to be able to continue their daily operations and restructuring efforts.

May 3 Affidavit, Motion Record, Tab 3, pg. 2, paras. 5 and 6

20. In *Canwest Global Communications Corp. (Re)*, Justice Pepall granted an extension of the stay of proceedings for a group of debtors that were continuing to work with their stakeholders. Her Honour found that the extension would provide the necessary stability to allow the debtors to continue working towards a resolution that would result in the continuation of their businesses as a going concern. The factors which supported Her Honour's decision were: (a) the cashflow forecast indicated that the debtors had sufficient cash resources to operate throughout the extension of the stay period; (b) the monitor supported the extension; (c) there

was a lack of opposition to the motion; and (d) the debtors had acted and were continuing to act in good faith and with due diligence.

Canwest Global Communications Corp. (Re), [2009] O.J. No. 4788 at para. 43 (Ont. S.C.J. [Comm. List]), Applicants' Book of Authorities, Tab 1

21. The cash flow projection attached as Exhibit "A" to the Grimaldi Affidavit projects that the Applicants presently have enough funding to continue operating until May 8, 2012 and to conduct the SISP during that period.

May 3 Affidavit, Motion Record, Tab 3, pgs. 2 and 3, paras. 7 and 12

22. The Monitor supports the motion to extend the Stay Period and the Applicants are unaware of any creditor who opposes this relief being granted. It is not believed that any creditor will suffer any material prejudice if the Stay Period is extended as may be requested.

May 3 Affidavit, Motion Record, Tab 3, pg. 3, para. 8

23. Since the issuance of the Initial Order, the Applicants have acted, and continue to act, in good faith and have been working with due diligence.

May 3 Affidavit, Motion Record, Tab 3, pg. 3, para. 9

24. Accordingly, the Applicants respectfully request that the Court grant an Order extending the Stay Period to May 8, 2012.

B. THE DIP FACILITY SHOULD BE INCREASED

25. The Applicants are seeking approval of an increase in the authorized borrowing under the DIP Facility to the maximum principal amount of \$4,525,000.

26. 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

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

Canwest Publishing Inc. (Re) (2010), 63 C.B.R. (5th) 115 at paras. 42-45 (Ont. S.C.J. [Comm. List]) [*"Canwest Publishing"*], Commercial List Authorities Book, Tab 8

Canwest Global Communications Corp. (Re) (2009), 59 C.B.R. (5th) 72 at paras. 31-35 (Ont. S.C.J. [Comm. List]) [*"Canwest Global"*], Applicants' Book of Authorities, Tab 2

28. The amount of the increased DIP Facility is supported by the Applicants' cash flow projections. The financing will be used to provide time for the management of the Applicants,

with their advisors and in consultation with the Monitor, to conduct the SISP and/or to formulate a plan to restructure the business.

29. 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)

30. In the present case, the following, when considered in relation to the above noted factors, support the granting of approval of an increase to the DIP Facility (and thereby of the indebtedness subject to 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 restructure the business or 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.

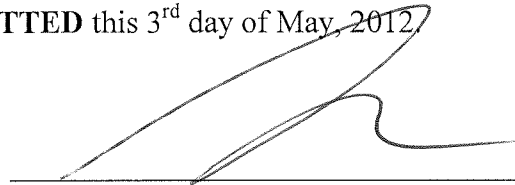
- (b) *The DIP Facility would enhance the prospects of a viable compromise or arrangement being made in respect of the Applicants.* Absent the funding provided for by the increased DIP Facility, the Applicants have no liquidity and will not be able to continue to meet its payroll obligations or have 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 increased DIP Charge does not purport to prime any secured party who has not received notice of this application.
- (d) *The Monitor.* The Monitor supports the granting of the increased DIP Charge.

31. Accordingly, the Applicants respectfully request that the Court grant an Order approving an increase borrowing limit under the DIP Facility to the maximum principal amount of \$4,525,000.

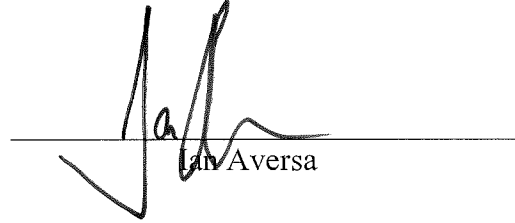
PART V – RELIEF REQUESTED

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of May, 2012.



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TAB "A"

SCHEDULE “A”

LIST OF AUTHORITIES

1. *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4788 (Ont. S.C.J. [Comm. List])
2. *Canwest Publishing Inc. (Re)* (2010), 63 C.B.R. (5th) 115 (Ont. S.C.J. [Comm. List])
3. *Canwest Global Communications Corp. (Re)* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J. [Comm. List])

TAB "B"

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

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

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.

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