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

June 4, 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

SERVICE LIST
(current as of June 4, 2012)

TO: **PRICEWATERHOUSECOOPERS INC.**
PwC Tower
18 York Street, Suite 2600
Toronto, ON M5J 0B2

Attention: Paul van Eyk / Tracey Weaver

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

Monitor

AND TO: **OSLER, HOSKIN & HARCOURT LLP**
1 First Canadian Place
100 King Street West, Suite 6100
Toronto, ON M5X 1B8

Attention: Marc Wasserman / Patrick Riesterer

Tel: (416) 862-4908 / (416) 862-5947
Fax: (416) 862-6666
Email: mwasserman@osler.com / priesterer@osler.com

Lawyers for the Monitor

AND TO: **GOODMANS LLP**
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, ON 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, ON M5H 4G2

Attention: Kenneth Kallish / Raymond Slattery

Tel: (416) 369-4124 / (416) 369-4149
Fax: (416) 864-9923
Email: kkallish@mindengross.com / rslattery@mindengross.com

Lawyers for Royal Bank of Canada

AND TO: **GRUNDY, CASS & CAMPBELL PROFESSIONAL CORPORATION**
Toronto-Dominion Centre
100 Wellington Street West, Suite 3150
Toronto, ON M5K 1A1

Attention: Douglas Grundy

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

Lawyers for 2320714 Ontario Inc.

AND TO: **THORNTON GROUT FINNIGAN LLP**
Suite 3200, 100 Wellington Street West
P.O. Box 329, Toronto-Dominion Centre
Toronto, ON M5K 1K7

Attention: Robert Thornton / Alana Shepherd

Tel: (416) 304-0560 / (416) 304-0597
Fax: (416) 304-1313
Email: rthornton@tgf.ca / ashepherd@tgf.ca

Lawyers for 2320714 Ontario Inc.

AND TO: **MINDEN GROSS LLP**
145 King Street West, Suite 2200
Toronto, ON M5H 4G2

Attention: Timothy Dunn

Tel: (416) 369-4335
Fax: (416) 864-9223
Email: tdunn@mindengross.com

Lawyers for 2725312 Canada Inc.

AND TO: **CAVALLUZZO HAYES SHILTON MCINTYRE & CORNISH LLP**
474 Bathurst Street, Suite 300
Toronto, ON M5T 2S6

Attention: Michael D. Wright

Tel: (416) 964-5513
Fax: (416) 964-5895
Email: mwright@cavalluzzo.com

Lawyers for Ken Smith

AND TO: **BAKER & McKENZIE LLP**
Barristers & Solicitors
Brookfield Place
181 Bay Street, Suite 2100
Toronto, ON M5J 2T3

Attention: Chris Besant / Frank Spizzirri / Shaheen Karolia

Tel: (416) 863-1221
Fax: (416) 863-6275
Email: chris.besant@bakermckenzie.com / frank.spizzirri@bakermckenzie.com / shaheen.karolia@bakermckenzie.com

Lawyers for Walgreen Co.

AND TO: **MILLER THOMSON LLP**
Scotia Plaza
40 King St. W., Suite 5800
P.O. Box 1011
Toronto, ON M5H 3S1

Attention: Arthi Sambasivan

Tel: (416) 595-8636
Fax: (416) 595-8695
Email: asambasivan@millerthomson.com

Lawyers for Lanworks Inc.

AND TO: **KOHL & FRISCH LIMITED**
7622 Keele Street
Concord, ON L4K 2R5

Attention: Shaun McDonnell

Tel: (905) 660-7622 ext. 599
Email: smcdonnell@kohlandfrisch.com

AND TO: **MINISTRY OF THE ATTORNEY GENERAL (ONTARIO)**
McMurtry-Scott Building
720 Bay Street, 11th Floor
Toronto, ON M7A 2S9

AND TO: **MINISTRY OF HEALTH AND LONG TERM CARE**
M-1B114, 900 Bay Street
Toronto, ON M7A 2A2

AND TO: **SCIENTIFIC RESEARCH & EXPERIMENTAL DEVELOPMENT**
1 Front Street West, Suite 100
Toronto, ON M5J 2X6

AND TO: **2440 WINSTON PART DRIVE LIMITED PARTNERSHIP**
Sunstone Industrial Advisors Inc.
1250 King Street West, Suite 2420
Toronto, ON M5H 1J9

AND TO: **DEPARTMENT OF JUSTICE**
The Exchange Tower
130 King Street West, Suite 3400
Toronto, ON M5X 1K6

Attention: Diane Winters

Tel: (416) 973-3172
Fax: (416) 973-0810
Email: diane.winters@justice.gc.ca

AND TO: **HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO AS REPRESENTED BY THE MINISTER OF FINANCE**
PO Box 620
33 King Street West, 6th Floor
Oshawa, ON L1H 8E9

Attention: Kevin J. O'Hara

Email: kevin.ohara@ontario.ca

12122303.6

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. 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 Seventh Report of PricewaterhouseCoopers Inc. ("**PwC**"), in its capacity as the Court-appointed monitor of the Applicants (in such capacity, the "**Monitor**") dated June 1, 2012 (the "**Seventh Report**") and approving the actions of the Monitor described therein;

(b) approving the asset purchase agreement (the "**Purchase Agreement**") among the Applicants, as vendor, and DashRx, LLC, as purchaser ("**DashRx**"), dated June 1, 2012, and authorizing the Applicants to complete the transaction contemplated thereby (the "**Transaction**");

(c) vesting in DashRx the Applicants' right, title and interest in and to the assets described in the Purchase Agreement (the "**Purchased Assets**"), free and clear of any claims and encumbrances;

(d) sealing Confidential Appendix "B" to the Seventh Report containing unredacted copies of the Purchase Agreement, competing offer and communications between the Applicants, the Monitor and bidders (the "**Confidential Appendix**") until closing of the Transaction ("**Closing**");

(e) approving occupancy agreements in respect of one or more of the Applicants' leased premises;

(f) terminating the Administration Charge and the Directors' Charge (each as defined in, and established by, the Initial Order (as defined below));

(g) approving a scheme of distribution of the cash proceeds of the transaction contemplated by the Purchase Agreement (the "**Transaction**");

(h) approving the distribution of non-cash proceeds of the Transaction to 2320714 Ontario Inc. (the "**DIP Lender**") and the Applicants, in trust for unsecured creditors;

(i) directing that amount of certain tax refunds be paid to the DIP Lender on receipt;

(j) discharging and releasing the Monitor, upon the filing of a Monitor's discharge certificate with the Court; and

(k) terminating these CCAA proceedings (the "**CCAA Proceedings**"), upon the filing of a Monitor's discharge certificate with the Court.

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 an Order of the Honourable Mr. Justice Morawetz (the "**Initial Order**").

Affidavit of Farouk Ahamed sworn June 1, 2012 (the "June 1 Affidavit"), Motion Record of the Applicants ("Motion Record"), Tab 5, pg. 2, para. 3

3. Pursuant to the Initial Order, PricewaterhouseCoopers Inc. was appointed as CCAA Monitor (the "**Monitor**").

June 1 Affidavit, Motion Record, Tab 5, pg. 3, para. 4

4. Pursuant the Order of the Honourable Justice Brown made May 14, 2012 (the "**May 14 Order**"), a sale and investor solicitation process (the "**SISP**") was approved.

June 1 Affidavit, Motion Record, Tab 5, pg. 3, para. 5

5. Pursuant the Order of the Honourable Justice Brown made May 28, 2012 (the "**May 28 Order**"), the Stay Period (as defined in the Initial Order) was extended to June 6, 2012.

June 1 Affidavit, Motion Record, Tab 5, pg. 3, para. 6

The Sale and Investor Solicitation Process

6. The Applicants developed the SISP with the assistance of the Monitor, the Monitor's agent, PricewaterhouseCoopers Corporate Finance Inc. ("**PwCCF**") and the DIP Lender. The

SISP was intended to maximize stakeholder value through either: (a) a going concern sale with respect to the Applicants' business and assets; or (b) new investment and a plan of compromise or arrangement. The SISP set out the procedural and substantive requirements for a qualified purchase or investment bid (a "**Qualified Bid**").

June 1 Affidavit, Motion Record, Tab 5, pg. 3, para. 7

7. A feature of the SISP was the DIP Lender's "stalking horse" bid (the "**Stalking Horse Bid**") pursuant to which the DIP Lender committed to purchasing the property, assets and undertaking of the Applicants, at a price equivalent to the total indebtedness of the Applicants to the DIP Lender (the "**DIP Indebtedness**") plus the total amount of outstanding secured claims ranking senior to the DIP Charge and the DIP Lender's security (the "**Stalking Horse Price**") if no other Qualified Bid offering value in excess of the Stalking Horse Price was received. The DIP Lender would pay the Stalking Horse Price by a release of the DIP Indebtedness and the assumption of the outstanding senior secured claims.

June 1 Affidavit, Motion Record, Tab 5, pg. 3, para. 8

8. The SISP was conducted by the Applicants with the support and assistance of the Monitor. Since before the commencement of these CCAA proceedings, members of the board of directors of PCAS (the "**Board**") had been in separate dialogues with a significant number of parties who were interested in either investing in the DIP Lender to provide financing to the Applicants, purchasing the assets of the Applicants, or buying PCAS itself. Because continuity in these developing relationships would yield the most positive results, the Applicants, with the support of the DIP Lender, lead the SISP.

June 1 Affidavit, Motion Record, Tab 5, pg. 4, para. 9

9. With the assistance of PwCCF and the Monitor, PCAS:

(a) updated and expanded the contents of the Applicants' electronic due diligence data room (the "**Data Room**"), which revamped Data Room came online and was available on May 16, 2012, and was regularly updated with new documents as they became available;

(b) indentified 184 potential bidders from around the globe and contacted 164 of them. The list included 89 potential financial bidders and 75 potential strategic bidders such as pharmacy retailers, pharmaceutical distributors, healthcare companies and automated vending companies;

(c) developed a three-page "teaser" (the "**Teaser**"), which was circulated to 121 of the identified parties;

(d) developed a confidential information memorandum (the "**CIM**") which was posted to the data room and sent to the all of the 18 interested parties who had executed a non-disclosure agreement;

(e) conducted site tours at the Premises, with the Monitor in attendance, for seven potential bidders;

(f) developed a non-reliance letter for Qualified Bidders to sign in order to be able to review third-party review of the PCAS technology prepared for the Board (the "**Technology Review**"), and to speak to the authors of the Technology Review; and

(g) facilitated meetings with the authors of the Technology Review at the requests of two potential bidders.

June 1 Affidavit, Motion Record, Tab 5, pgs. 4 to 5, para. 10

10. Under the terms of the SISP, bids were due by 12:00 p.m. on May 24, 2012 (the "**Bid Deadline**"). Two bids, including the DashRx bid, were received before the Bid Deadline, and one further bid was received on May 24, 2012 but after the BID Deadline. These three bids were reviewed in a series of meetings held by Applicants, the DIP Lender, the Monitor and their respective counsels, on May 24 and May 25, 2012. After consulting with the Monitor and the DIP Lender, the Applicants, through a Board member or their counsel, communicated with all three bidders over the course of that weekend, and selected the DashRx as the Successful Bid under the SISP on Sunday, May 27, 2012.

June 1 Affidavit, Motion Record, Tab 5, pg. 5, para. 11

Seventh Report of the Monitor dated June 1, 2012 ("Seventh Report"), paras. 19 to 21 and Confidential Appendix

11. The SISP has been a fair and reasonable process, conducted in accordance with its approved terms and in close consultation with the DIP Lender and the Monitor.

June 1 Affidavit, Motion Record, Tab 5, pg. 5, para. 13

Seventh Report, para. 52

Unsuccessful Bids

12. Both of the unsuccessful bids came from parties who had been conducting due diligence and expressing interests in making bids for a number of weeks prior to the commencement of the SISP. Throughout that time, the Board was in regular contact with both of these bidders.

June 1 Affidavit, Motion Record, Tab 5, pg. 5, para. 14

13. The bidder who missed the Bid Deadline ("**Unsuccessful Bidder 1**") had been in communication with PCAS, and then both PCAS and the Monitor, since late April, had access to the Data Room, and had attended at the Applicants' premises. Unsuccessful Bidder 1 was offered a meeting with the authors of the Technology Review, but it declined.

June 1 Affidavit, Motion Record, Tab 5, pgs. 5 to 6, para. 15

14. Unsuccessful Bidder 1 had previously written to PCAS and to the Monitor to express its intentions to make a bid, to present some of the expected terms of that bid, and to seek clarification of the requirements for a Qualified Bid in the SISP. Most recently, the Monitor emailed Unsuccessful Bidder 1 on May 22, 2012 to advise how the latter's proposed bid might need to be altered to meet the SISP requirements for a Qualified Bid.

June 1 Affidavit, Motion Record, Tab 5, pg. 6, para. 16

15. The bid submitted by Unsuccessful Bidder 1 was received the evening of May 24. As set out in the Confidential Appendix, the bid provided no cash consideration to the Applicants. On the evening of May 25, 2012, the Applicants' counsel sent a letter to Unsuccessful Bidder 1 advising it that its bid was not a Qualified Bid and that certain additional details, including details regarding the valuation of the non-cash consideration, would need to be provided before it could be considered a Qualified Bid. The deficiencies in the bid were substantially the same potential deficiencies that the Monitor had warned Unsuccessful Bidder 1 about on May 22. The Applicants' counsel advised Unsuccessful Bidder 1 that the Applicants would consider asking the Monitor to consent to a request to waive certain requirements to become a Qualified Bid if the appropriate clarifications were received from Unsuccessful Bidder 1, but reserved the right not to request that the Monitor waive any requirements contained in the SISP. Unsuccessful

Bidder 1 did not respond to the request for clarification or a follow-up email sent by the Applicant's counsel on May 26. This bid was therefore not treated as a Qualified Bid.

June 1 Affidavit, Motion Record, Tab 5, pg. 6, para. 17

Seventh Report, para. 27 and Confidential Appendix

16. The one bidder other than DashRx who submitted its bid prior to the Bid Deadline ("**Unsuccessful Bidder 2**") had been in communication with the Board for approximately one month prior to the commencement of the SISP. Unsuccessful Bidder 2 had consistently expressed an intention to purchase PCAS with cash. Because Unsuccessful Bidder 2 was a foreign entity, the Board repeatedly encouraged it to retain Ontario insolvency counsel, and even introduced it to a reputable law firm that is known to provide a significant amount of service to companies from Unsuccessful Bidder 2's home country. The Board also repeatedly encouraged Unsuccessful Bidder 2 to wire funds to Canadian counsel either to serve as an investment in the DIP Facility via the DIP Lender, or as a deposit or purchase price for an eventual bid.

June 1 Affidavit, Motion Record, Tab 5, pg. 6, para. 18

17. The Applicants received a letter from Unsuccessful Bidder 2 on the morning of May 23, 2012, one day before the Bid Deadline, which letter expressed, again, Unsuccessful Bidder 2's intention to make an offer to buy PCAS for cash. It was not clear, however whether this letter formed a binding offer, and it did not contain, nor was it accompanied by, sufficient evidence of Unsuccessful Bidder 2's financial ability to close the transaction it was proposing. As detailed in the Confidential Appendix, the Board member who had been Unsuccessful Bidder 2's primary point of contact wrote by email, on May 23, to advise Unsuccessful Bidder 2 that, and how, the bid would have to be altered to satisfy the requirements of Qualified Bid in the SISP. This email

was followed up by a phone call from the same Board member and the Monitor to Unsuccessful Bidder 2 on the morning of May 24.

June 1 Affidavit, Motion Record, Tab 5, pg. 7, para. 19

Seventh Report, para. 30 and Confidential Appendix

18. When no revised bid was received from Unsuccessful Bidder 2 by the Bid Deadline, the Board, in consultation with the Monitor, wrote, on the evening of May 24, to advise that the May 23 bid was not a Qualified Bid under the SISP, and to highlight some of the deficiencies of the bid. This email reserved the Applicants' rights not to request that the Monitor waive any requirements of the SISP in favour of Unsuccessful Bidder 2.

June 1 Affidavit, Motion Record, Tab 5, pg. 7, para. 20

19. Unsuccessful Bidder 2 responded to the Applicants' inquiries on Sunday, May 27, 2012, but did not provide any material new information. Unsuccessful Bidder 2's bid was therefore not treated as a Qualified Bid under the SISP.

June 1 Affidavit, Motion Record, Tab 5, pg. 7, para. 21

Seventh Report, Confidential Appendix

The Purchase Agreement

20. DashRx submitted an earlier version of the Purchase Agreement prior to the Bid Deadline on May 24, 2012. Although not a requirement, it was the only bid received in the form of a formal asset purchase agreement. At that time DashRx also remitted a cash deposit to the Monitor.

June 1 Affidavit, Motion Record, Tab 5, pg. 7, para. 22

21. As described in the May 27 Affidavit, DashRx is a Delaware limited liability corporation formed by a large, California-based investment fund (the "**Investment Manager**") to purchase the assets of the Applicants. The Investment Manager has approximately US$500 million in assets under management, almost exclusively in the health care and pharmaceutical sectors.

June 1 Affidavit, Motion Record, Tab 5, pgs. 7 to 8, para. 23

22. We are advised by counsel to DashRx and counsel to the major U.S. retail pharmacy chain, Walgreen Co. ("**Walgreen**"), that Walgreen will be participating in the Successful Bid as a substantial investor in DashRx. Walgreen is the potential large U.S. customer identified in previous affidavits as the "U.S. Chain".

June 1 Affidavit, Motion Record, Tab 5, pg. 8, para. 24

23. By the evening of Sunday, May 27, 2012, the material terms of the Purchase Agreement were settled to a point that the Applicants, in consultation with the DIP Lender and the Monitor, were prepared to recognize the Purchase Agreement as a Qualified Bid, as a bid superior to the Staking Horse Bid, and to identify it as the Successful Bid under the SISP, subject to final negotiation of the APA.

June 1 Affidavit, Motion Record, Tab 5, pg. 8, para. 25

24. The consideration to be paid under the Purchase Agreement is a combination of assumption of secured liabilities, cash, and secured and unsecured convertible promissory notes to be issued to the Applicants' creditors, including unsecured creditors. It is not expected there will be any surplus proceeds from the Transaction for PCAS shareholders. The consideration being given by DashRx in the Transaction is reasonable and fair, and reflects the market value of the Applicants' assets, property and undertaking given the large amount of post-Closing funding that will be required to bring the PharmaTrust MedCentre technology to commercialization.

June 1 Affidavit, Motion Record, Tab 5, pgs. 8 to 9, para. 27

Seventh Report, para. 50

25. The conversion features of the promissory notes given by DashRx will ensure that, up to and including the maturity date of such notes, the holders of those notes will be treated no less favourably with respect to the conversion privilege attached to the notes than the initial investors who have committed to provide the initial capitalization and operational funding for DashRx through the acquisition of convertible preferred shares.

June 1 Affidavit, Motion Record, Tab 5, pg. 9, para. 28

26. DashRx also committed to provide $250,000 to fund the Applicants' operations from May 31, 2012 to Closing (no later than June 6, 2012). This funding was received on May 31, 2012.

June 1 Affidavit, Motion Record, Tab 5, pg. 9, para. 28

Distribution

27. Pursuant to the Initial Order, the Administration Charge, ranks ahead of all other security interests in the Applicants property. The Applicants are, therefore, seeking to have the Administration Charge terminated, effective upon Closing, in order to allow distribution of Transaction proceeds to be made to creditors with claims otherwise ranking below the Administrative Charge.

June 1 Affidavit, Motion Record, Tab 5, pg. 9, para. 30

28. Pursuant to the Initial Order, the DIP Charge ranks subordinate to any perfected security interests existing on the date of the Initial Order, namely the secured claims of Royal Bank of Canada ("**RBC**"), Castcan Investments Inc. ("**Castcan**") and IBM Canada Limited ("**IBM**").

DashRx likely will assume the Applicants' obligations to IBM, and the secured claims of RBC and Castcan will be dealt with as detailed in paragraph 29 below.

June 1 Affidavit, Motion Record, Tab 5, pgs. 9 to 10, para. 31

29. The cash portion of the purchase price is designated for:

(a) distribution in payment of all statutory priority claims, comprised of approximately $235,000 in accrued and unpaid vacation pay;

(b) distribution to the DIP Lender to be used by the DIP Lender:

(i) first, to obtain the consent of RBC and Castcan, or their respective assignees (collectively, the "**Senior Secured Creditors**") to the discharge of their security interests and charges over the Purchased Assets and to obtain their approval of the issuance of an approval and vesting order in respect of the Sale Agreement and the Transaction (the "**Approval and Vesting Order**"); and

(ii) as to the balance, in partial satisfaction of the DIP Indebtedness;

(c) payment of the amounts payable under the key employee retention plan approved by Order of the Honourable Justice Brown made May 14, 2012 (the "**KERP**") upon Closing, as detailed in paragraph 38 below; and

(d) payment of $100,000 to the Applicants, in trust for a trustee in bankruptcy to be appointed in respect of PCAS, Touchpoint and the other direct and indirect subsidiaries of PCAS (the "**Trustee**"), to pay costs of administration in their anticipated bankruptcies.

June 1 Affidavit, Motion Record, Tab 5, pg. 10, para. 32

30. Although the DIP Indebtedness is not being paid out (for reasons discussed in paragraph 36 below), let alone paid out in cash, the DIP Lender has consented to the payments of cash on account of the KERP and the future costs of bankruptcy estate administration. Because the Directors' Charge ranks ahead of the KERP Charge pursuant to the Initial Order, the Applicants are seeking to have the Director's Charge terminated effective upon Closing.

June 1 Affidavit, Motion Record, Tab 5, pg. 10, para. 33

31. The non-cash portion of the purchase price in the Transaction will be comprised of:

(a) the assumption of secured obligations to IBM;

(b) one or more interest bearing promissory notes issued, on direction of the Applicants, in favour of the DIP Lender, secured against the assets of DashRx and ranking junior only to the secured assumed obligations to IBM (each, a "**Secured Note**"); and

(c) one or more interest bearing unsecured promissory notes issued to Applicants, in trust, for the pool of unsecured creditors of the Applicants (each, an "**Unsecured Notes**").

June 1 Affidavit, Motion Record, Tab 5, pg. 11, para. 34

32. The promissory notes to be issued to the DIP Financiers and to the Applicants in trust for the unsecured creditors will likely be issued in two tranches, for reasons described in paragraph 37 below, and will be convertible to common shares of the DashRx and the end of the note term.

June 1 Affidavit, Motion Record, Tab 5, pg. 11, para. 35

33. Upon paying out the claims of the Senior Secured Creditors from cash proceeds it receives on Closing, the DIP Lender will be subrogated to and/or take assignment of Senior Secured Creditor's claims. Scientific Research and Experimental Development ("**SR&ED**") refundable tax credit entitlements, Ontario Innovation Tax Credit ("**OITC**") refunds and harmonized sales tax ("**HST**") refunds are now all excluded assets under the Purchase Agreement and thus the claims thereon will not be vested out by operation of the Approval and Vesting Order. The Applicants are expected to receive sizable SR&ED, OITC and HST receivables within a matter of weeks. When these refunds are received by the Applicants or a Trustee (if appointed), they will be subject to: (a) the assumed and/or subrogated claims of the DIP Lender (subject to the issues discussed in paragraph 34 below); and (b) the DIP Charge to the extent some portion of DIP Indebtedness remains outstanding as discussed in paragraph 36 below. The Applicants are seeking an order authorizing and directing the Applicants and any Trustee appointed to distribute to the DIP Lender amounts equal to any such SR&ED or OITC credits and/or HST refunds received. By such distributions, the DIP Lender is, therefore, expected to recoup at least part of the purchase price cash it will flow through to the Senior Secured Creditors on Closing.

June 1 Affidavit, Motion Record, Tab 5, pg. 11, para. 36

34. The impetus for the this somewhat complicated treatment of the claims of the Senior Secured Creditors is that fact that the Monitor's counsel was unable to give the opinion that Castcan had an enforceable ownership or security interest in the February, 2012 Touchpoint HST refund (the "**HST Refund**") that it ostensibly purchased from the Applicants as part of a factoring arrangement aimed at providing emergency payroll funding to PCAS approximately two weeks prior to the Initial Order. As detailed in the Seventh Report, the Monitor's counsel

has concern that, because of the Section 67 of the *Financial Administration Act* (Canada) ("**FAA**"), the purported sale of the HST Refund may be of no effect and the security granted in respect thereof may not be valid and enforceable. At the same time, however, the intercreditor agreements between the DIP Lender and Castcan embodied in the Pari Passu Priorities Agreement (that was put in place, *inter alia*, to govern the priorities between the financiers of the DIP Lender) prevent the DIP Lender from accepting a distribution until Castcan is paid in full, and require the DIP Lender to hold any such distribution in trust for, and pay it over to, Castcan.

June 1 Affidavit, Motion Record, Tab 5, pg. 12, para. 37

Seventh Report, paras. 60 to 72

35. The Applicants and the DIP Lender wish to preserve the deal that their clients struck with Castcan and recognize the importance of the funding that Castcan provided through its emergency factoring. The Monitor also thinks it would be inequitable to take from Castcan and unjustly enrich the Applicants and their other creditors.

June 1 Affidavit, Motion Record, Tab 5, pg. 12, para. 38

Seventh Report, para. 73 and 82

36. The DIP Lender will not need to rely on the factoring agreement and security it assumes from Castcan for its secured claim to the proceeds of the HST Refund. It can rely on the DIP Charge which will remain in place post-Closing due to the shortfall the DIP Lender will suffer because it is taking its distribution of the proceeds of the Transaction partly in promissory notes. The DIP Lender takes the position that the fair market value of such promissory notes will be less than their face value because there is no secondary market for them, thus putting any holder of the notes at risk that the notes will not hold their value until maturity. The DIP Lender is of

the view that the notes should be discounted by at least the amount of the HST Refund and the Applicants and the Monitor support the DIP Lender's view.

June 1 Affidavit, Motion Record, Tab 5, pg. 12, para. 39

Seventh Report, paras. 79 and 80

37. If the aggregate amount all SR&ED and OITC tax credits and HST refunds received by the Applicants or a Trustee post-Closing (and subsequently distributed to the DIP Lender) end up being less than the aggregate amount that the DIP Lender paid to RBC and Castcan out of the cash proceeds of the Transaction on Closing, then the DIP Lender will be issued an additional Secured Note to cover the difference (the "**Additional Secured Note**"). The amount of the Additional Secured Note will come out of the pool of funds otherwise set aside for the unsecured creditors of the Applicants. The Unsecured Note issued on Closing will therefore be less that the total pool of possible proceeds for unsecured creditors, and an additional Unsecured Note will be issued to the Trustee for the benefit of the unsecured creditors once the face amount of the Additional Secured Note is known.

June 1 Affidavit, Motion Record, Tab 5, pgs. 12 to 13, para. 40

Key Employee Retention Plan

38. Due to employee attrition, and the fact that payment of only 80% of the KERP will have been triggered by Closing, $242,100 will be will be payable from proceeds of the Transaction on account of the KERP, bringing the total amount paid out $322,800 in KERP.

June 1 Affidavit, Motion Record, Tab 5, pg. 13, paras. 41 to 43

Occupancy Agreements

39. A condition of the Sale Agreement is that PCAS provide DashRx with post-Closing occupancy and access to the Applicants' leased premises at 2440 Winston Park Drive. DashRx will pay all rent and other occupancy costs, and will appropriately indemnify the Applicants. The Applicants are seeking approval of, and authorization to enter into, an occupancy agreement with DashRx (the "**Occupancy Agreement**") in substantially the form attached as Exhibit "E" to the June 1 Affidavit. It is possible that short-term occupancy post-Closing occupancy of one or both of the Applicants' premises at 2910 and 2880 Brighton Road will also be required, and thus the order sought would also approve, and authorize the Applicants to enter into, an agreement in the same form as the Occupancy Agreement with respect to those other premises.

June 1 Affidavit, Motion Record, Tab 5, pg. 14, para. 44

Sealing Order

40. An order sealing the Confidential Appendix until Closing is required because the Confidential Appendix contains an unredacted copy of the Purchase Agreement, unredacted copies of the unsuccessful bids, and copies of communications between the various bidders and the Applicants and/or the Monitor, all of which contain commercially sensitive information, the release of which would prejudice the stakeholders of the Applicants. Should the Transaction fail to close, and the SISP have to be re-initiated, any disclosure of the information contained in the Confidential Appendix would be harmful to the effectiveness and integrity of the SISP.

June 1 Affidavit, Motion Record, Tab 5, pg. 14, para. 45

Seventh Report, para. 53

Bankruptcy

41. It is the Applicants' intention to file an assignment in bankruptcy immediately post-Closing and to appoint PwC as trustee of their estates. The Applicants are therefore seeking an order terminating the CCAA Proceedings and discharging PwC as Monitor upon the bankruptcies.

42. The bankruptcy proceedings will be used to determine the entitlement of the unsecured creditors to the Unsecured Notes through the statutory claims process provided under the *Bankruptcy and Insolvency Act*.

June 1 Affidavit, Motion Record, Tab 5, pg. 14, paras. 46 to 47

PART III – ISSUES

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

(a) approve the Purchase Agreement and vest the Purchased Assets in the Purchaser;

(b) seal the Confidential Appendix;

(c) approve distribution of the proceeds of the Transaction to employees in respect of super-priority claims, to the DIP Lender, and to the beneficiaries of the KERP (the "**KERP Participants**"); and

(d) direct the Applicant to pay to the DIP Lender an amount equal to the proceeds of the HST Refund, when received.

PART IV – LAW AND ARGUMENT

A. THE APPROVAL AND VESTING ORDER SHOULD BE GRANTED

Disposition of Assets by Debtors in CCAA Proceedings

44. Courts have long recognized that the remedial nature of the CCAA confers on them broad powers to carry out the purpose of the CCAA, which is to facilitate the restructuring of insolvent companies.

> ***Nortel Networks Corp. (Re)* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Comm. List]) ["*Nortel 2009*"], Applicants' Book of Authorities, Tab 1 at para. 30**
>
> ***CCAA*, s. 11**

45. In *Nortel Networks Corp. (Re)*, Justice Morawetz reviewed the jurisdiction of the Court to approve a sales process in the absence of a plan under the CCAA. In finding that CCAA Courts have such jurisdiction, Justice Morawetz focused on the continuation of the business as a going concern, holding that:

> ... the CCAA should be given a broad and liberal interpretation to facilitate its underlying purpose... it should not matter whether the business continues as a going concern under the debtor's stewardship or under new ownership, for as long as the business continues as a going concern, a primary goal of the CCAA will be met. [emphasis added]
>
> ***Nortel 2009*, Applicants' Book of Authorities, Tab 1 at paras. 34, 40 and 47**

46. Justice Morawetz also noted that courts have repeatedly exercised such discretion in asset sales, including in *Consumers Packaging Inc.* (Re), where the Ontario Court of Appeal held that:

> [the approval of an asset sale] is consistent with previous decisions in Ontario and elsewhere that have emphasized the board remedial purpose of flexibility of the CCAA and have approved the sale and disposition of assets during CCAA proceedings prior to a formal plan being tendered.

***Consumers Packaging Inc. (Re)* (2001), 27 C.B.R. (4th) 197 (Ont. C.A.), Applicants' Book of Authorities, Tab 2 at para. 9**

47. The CCAA Courts' power to approve a sale of assets prior to the formulation of a plan of compromise or arrangement was codified in section 36 of the CCAA, which sets out the following list of non-exhaustive factors for the Court to consider in determining whether to approve a debtor's sale of assets outside the ordinary course of business:

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

***CCAA*, s. 36(3)**

48. Section 36 of the CCAA has been considered in *Canwest Publishing Inc. (Re)* where Justice Pepall approved the proposed sale and held, among other things, that:

(a) the monitor's support of the transaction spoke to the reasonableness of the process;

(b) the creditors were sufficiently consulted as they had input or were otherwise involved at various stages in the process; and

(c) the sale would result in a going concern outcome and earn significant recovery for secured and unsecured creditors and therefore the sale had a positive effect.

Canwest Publishing Inc. (Re) (2010), 68 C.B.R. (5th) 233 (Ont. S.C.J. [Comm. List]) ["_Canwest Publishing_"], Applicants' Book of Authorities, Tab 3 at para. 13

49. In making her decision, Justice Pepall also noted that the criteria set out in subsection 36(3) of the CCAA "largely overlap" with the criteria established in *Royal Bank v. Soundair Corp.*, which had been used by Courts to review the reasonableness of proposed sales in CCAA proceedings prior to the enactment of section 36 and which provides that the Courts should consider:

(a) whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;

(b) the interests of all parties;

(c) the efficacy and integrity of the process by which offers have been obtained; and

(d) whether there has been unfairness in the working out of the process.

CCAA, s. 36(3)

Canwest Publishing, Applicants' Book of Authorities, Tab 3 at para. 13

Royal Bank v. Soundair Corp. (1991), 4 O.R. (3d) 1 (C.A.), Applicants' Book of Authorities, Tab 4 at para. 24

50. In *White Birch Paper Holding Company (Re)*, Justice Mongeon approved an asset sale pursuant to section 36 of the CCAA, holding that, while recovery for unsecured creditors would be low, it was not in the best interest of any of the stakeholders for him to refuse the order.

> ***White Birch Paper Holding Company (Re)*, 2010 QCCS 4915, Applicants' Book of Authorities, Tab 5 at paras. 48, 49, 51-52 and 57**

The Applicants Satisfy the Criteria for Approval of the Purchase Agreement

51. The Purchase Agreement meets the criteria for approval of disposition of assets in CCAA proceedings for, *inter alia*, the following reasons:

(a) the Applicants had, for several months, been in negotiations with numerous potential strategic and financial investors to invest in PCAS or purchase the Applicants' assets, and, prior to that, had been attempting several large private-placements with reputable Canadian and U.S. investment banks;

(b) the Applicants worked with the Monitor to identify additional potential purchasers;

(c) the Applicants announced their intention to run the SISP on May 7, 2012, and obtained approval thereof on May 14, 2012;

(d) the sales process was conducted in a competitive manner, including the use of a teaser and confidential information memorandum before the Purchase Agreement was negotiated with the Purchaser; and

(e) the Monitor is of the view that the Purchase Price under the Purchase Agreement is reasonable and supports approval of the Order being sought by the Applicants.

> **June 1 Affidavit, Motion Record, Tab 5, pg. 5, para. 13**

Seventh Report, para. 52

52. There was no added liquidity to conduct a longer sale process either within the CCAA Proceedings or through a liquidation in a bankruptcy.

Seventh Report, para. 52

53. The Purchase Agreement preserves the Applicants' business as a going concern. It also provides for continued employment for approximately half of the Applicants' employees.

54. The Applicants' major secured creditors, RBC, Castcan and the DIP Lender, either consent to or do not oppose the Transaction, subject only, in the case of RBC and Castcan, to settling the mechanics of distribution or proceeds.

55. The Applicants chose the DashRx bid and negotiated the Purchase Agreement in consultation with the DIP Lender and the Monitor. The Monitor is supportive of the Transaction and has provided the Court with a report in that regard.

June 1 Affidavit, Motion Record, Tab 5, pg. 8, para. 25

Seventh Report, para. 50

56. Accordingly, the Applicants respectfully submit that the criteria set out in subsection 36(3) of the CCAA are satisfied.

Other Requirements of Section 36 of the CCAA

57. In addition to the factors set out in subsection 36(3), subsection 36(7) of the CCAA sets out the following restrictions on disposition of assets within CCAA proceedings:

> 36 (7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.
>
> ***CCAA*, s. 36(7)**
>
> **Section 36(7) references paragraphs 6(4)(a) and (5)(a), which appears to be a drafting error. It is submitted that this section should read 6(5)(a) and (6)(a)**

58. Justice Pepall considered subsection 36(7) of the CCAA in *Canwest Global Communications Corp. (Re)* where (although she held that section 36 was not applicable to the facts of that case) she was satisfied by confirmation by counsel for the debtors of compliance with section 36(7), and asked the monitor to report to the court on the status of those payments should a compromise or arrangement be made in the future.

> ***Re Canwest Global Communications Corp.* [2009] O.J. No. 4788 (S.C.J.), Applicants' Book of Authorities, Tab 6 at para. 42**

59. The Applicants have been paying the wages, salaries, commissions or compensation to their employees contemplated by paragraph 6(5)(a) of the CCAA in the ordinary course. The exception has been vacation pay which has been accruing. The Purchase Agreement requires the cash proceeds of the Transaction to be used first for payment of all outstanding vacation pay accrued during the CCAA Proceedings and up to $2,000 per employee in vacation pay accrued in the sixth months prior to the Initial Order.

> ***CCAA*, s. 6(5)(a)**
>
> ***BIA*, s. 136(1)(d), s. 81.3 and s. 81.4**
>
> **June 1 Affidavit, Motion Record, Tab 5, pg. 10, para. 32**
>
> **Seventh Report, para. 54**

60. Paragraph 6(6)(a) of the CCAA is not applicable in this case as the Applicants do not sponsor any pension plans.

***CCAA*, s. 6(6)(a)**

Affidavit of Donald Waugh sworn March 22, 2012, Application Record dated March 22, 2012, Tab 4, pg. 10, para. 41

61. Because the Applicants will file assignments in bankruptcy immediately after Closing, those cash proceeds of the Transaction that are not paid on direction to secured creditors will be under the control of the trustee in bankruptcy, who will make the payments required by subsection 36(7) of the CCAA.

June 1 Affidavit, Motion Record, Tab 5, pg. 14, para. 46

62. The additional factors and restrictions under subsection 36(4) and (5) of the CCAA are not applicable in this case as the Applicants and the Purchaser are not related persons within the meaning of the CCAA.

B. THE CONFIDENTIAL APPENDIX TO THE SEVENTH REPORT SHOULD BE SEALED

63. The Applicants are seeking an order sealing the Confidential Appendix, which contains unredacted copies of the Purchase Agreement and the other bids received, as well as copies of communications with the bidders.

64. Subsection 137(2) of the *Courts of Justice Act* provides this Court with the statutory jurisdiction to order that any document filed in a civil proceeding, be treated as confidential, sealed and not form part of the public record.

***Courts of Justice Act*, R.S.O. 1990, c. C-34, as amended, s. 137(2)**

65. In *Sierra Club of Canada v. Canada (Minister of Finance)*, a decision of the Supreme Court of Canada interpreting the sealing provisions of the Federal Court Rules, Iacobucci J. adopted the following test to determine when a sealing order should be made:

> A confidentiality order under Rule 151 should only be granted when:
>
> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which, in this context, includes the public interest in open and accessible court proceedings.
>
> ***Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 at para. 53, Applicants' Book of Authorities, Tab 7**

66. The Confidential Appendix contains the unredacted copies of the Purchase Agreement, other competing bids and communications with bidders. Protecting the disclosure of the purchase price and certain other financial information of this nature, the disclosure of which will cause harm to the Applicants, is an important commercial interest that should be protected.

67. Accordingly, the Applicants respectfully request that the Court grant an Order sealing the Confidential Appendix until Closing.

C. THE PROCEEDS OF THE TRANSACTION SHOULD BE DISTRIBUTED IN ACCORDANCE WITH THE PURCHASE AGREEMENT

68. The scheme of distribution set out in paragraphs 29 and 31 above would ensure distribution of the proceeds of the Transaction to the creditors of the Applicants in accordance with the priorities or their claims, subject to consensual re-orderings. Cash will be paid to the Applicants for super-priority wage claims, which cash will be distributed by the trustee in

bankruptcy post-Closing. The Applicants will direct the Purchaser to pay cash to the DIP Lender directly, who will in turn direct the Purchaser and the Applicant to pay RBC what it is owed directly in cash. Castcan will be paid cash by, or on direction from, the DIP Lender in accordance with an agreement between those parties. The KERP Participants will be paid what they are owed in cash with the consent of the DIP Lender whose higher-ranking DIP Charge is being partially satisfied with a non-cash distribution. Similarly, the $100,000 cash to fund the administration of the bankruptcies is being paid to the Applicants, in trust, with the consent of the DIP Lender.

June 1 Affidavit, Motion Record, Tab 5, pg. 10, para. 33

69. In terms of the non-cash consideration for the Transaction, the Applicants' obligations to IBM will be assumed by the Purchaser with the consent of IBM and the promissory notes will be distributed according to the priorities between the DIP Lender and the unsecured creditors.

June 1 Affidavit, Motion Record, Tab 5, pgs. 9 to 13, paras. 28, 31, 34, 35 and 40

D. AN AMOUNT EQUAL TO THE PROCEEDS OF THE HST REFUND SHOULD BE PAID TO THE DIP LENDER

70. Counsel to the Monitor has raised issues with the assignment of the HST Refund to Castcan because section 67 of the FAA prohibits the assignment of Crown debt and, accordingly, the purported sale of the HST Refund may be of no effect and the security granted in respect thereof may not be valid and enforceable.

June 1 Affidavit, Motion Record, Tab 5, pg. 12, para. 37

Seventh Report, paras. 60 to 72

***Financial Administration Act*, R.S.C. 1985, c. F-11 ("*FAA*"), s. 67**

71. Section 67 of the FAA states:

> 67. Except as provided in this Act or any other Act of Parliament,
>
> (a) a Crown debt is not assignable; and
>
> (b) no transaction purporting to be an assignment of a Crown debt is effective so as to confer on any person any rights or remedies in respect of that debt.

***FAA*, s. 67**

72. The Supreme Court of Canada (the "**SCC**") has held that a purported assignment of a Crown debt is rendered absolutely ineffective not only as between debtor (the Crown) and creditor, but also as between assignor and assignee.

> ***Marzetti v. Marzetti*, [1994] 2 S.C.R. 765 ["*Marzetti*"] at para. 99, Applicants' Book of Authorities, Tab 8**

73. The Ontario Court of Appeal (the "**OCA**") has held, following *Marzetti*, that a federal sales tax refund cannot be assigned pursuant to a general security agreement or sold outright.

> ***Profitt v. A.D. Productions Ltd. (Trustee of)* (2002), 32 C.B.R. (4th) 94 (Ont. C.A.) ["*Profitt*"] at paras. 9 and 28, Applicants' Book of Authorities, Tab 9**

74. However, in *obiter dicta*, the Manitoba Court of Appeal (the "**MCA**") stated that once funds were received by a bankrupt from the Crown, they would no longer constitute a debt, and any assignment of rights to such funds could then be enforced against such proceeds. The MCA's reasoning was that such assignments, though not legal pursuant to section 67 of the FAA, could still be equitable, and thus effective against proceeds.

> ***Cargill Ltd. v. Ronald (Trustee of)* (2007), 32 C.B.R. (5th) 169 (Man. C.A.) at paras. 34 and 36, Applicants' Book of Authorities, Tab 10**

75. There is also a line of older jurisprudence, not addressed in *Marzetti* or *Profitt*, which holds that proceeds of Crown debts are subject to general security or general assignments of claims.

McKay & Maxwell, Ltd., Re (1927), 8 C.B.R. 534 (N.S. S.C.), Applicants' Book of Authorities, Tab 11

Christensen, Re (1961), 2 C.B.R. (N.S.) 324 (Ont. S.C.), Applicants' Book of Authorities, Tab 12

Front Iron & Metal Co., Re (1980), 38 C.B.R. (N.S.) 317 (Ont. S.C., In Bankruptcy), Applicants' Book of Authorities, Tab 13

76. It is also worth noting that if, pursuant to the holding of the OCA in *Profitt* that a federal sales tax refund cannot be assigned by way of security pursuant to a general security agreement (for which holding no discussion of reasons is provided), the interest of generally secured creditors are invalidated, the effect is to create a super-priority claim for unsecured creditors to the proceeds of such refunds. That would not seem to be consistent with the priority and distributions schemes of the CCAA or the BIA.

77. It is due to this legal uncertainty that the Monitor's counsel is not able to issue an opinion to support either a distribution of proceeds of the Transaction to Castcan (if the HST Refund was included in the Purchased Assets) or a future distribution by the Trustee if and when the HST Refund was received (if the HST Refund was, as it is, excluded from the Purchased Assets).

78. The DIP Lender intends to take assignment of and/or be subrogated to the secured claims of both RBC and Castcan. *Marzetti* and *Profitt* cast doubt on whether either the RBC security or the Castcan security are effective against the HST Refund. It is for that reason that the DIP Lender also intends to rely on the DIP Charge to claim future proceeds of the HST Refund in the hands of the Trustee.

79. It is respectfully submitted that, as a creation of court order, the DIP Charge is not a not a transaction, therefore not an assignment, and therefore, to extent it might apply to Crown debts, not caught by Section 67 of the FAA. The SCC recently held that the *Personal Property*

Security Act (Ontario) did not apply to lien rights that resulted from a court order because they did not arise from a transaction.

> ***Bank of Montreal v. i Trade Finance Inc.*, [2011] 2 S.C.R. 360 at para. 30, Applicants' Book of Authorities, Tab 14**

80. The Nova Scotia Supreme Court held that a court-appointed receiver's charge for its expenses and the charge securing any borrowing certificate the receiver issued both arose by operation of judge-made law.

> ***Torstar Corp. v. ITI Information Technology Institute Inc.* (2002), 36 C.B.R. (4th) 114 (N.S. S.C.) at paras. 29 and 32, Applicants' Book of Authorities, Tab 15**

81. Having arisen by operation of law, the DIP Charge is not a "transaction purporting to be an assignment", does not fall within the scope of section 67 of the FAA, and is not ineffective as security over the HST Return.

82. The Monitor agrees with the DIP Lender that the shortfall in repayment of amounts secured by the DIP Charge that the DIP Lender is suffering (due to receiving a distribution partly in promissory notes) is at least as large at the amount of the HST Refund. The DIP Charge therefore will remain in place as a first-ranking charge over any amounts in the Trustee's hands by way of proceeds of the HST Refund.

> **Seventh Report, paras. 79 and 80**

83. An Order directing the Applicants and the Trustee to pay to the DIP Lender an amount equal to any of the HST Refund received post-Closing is necessary to give the DIP Lender the comfort it needs to participate in the distribution scheme contemplated by the Purchase Agreement. Without that scheme, the Applicants, the DIP Lender and Castcan are in an impossible situation because the Court cannot approve a distribution to Castcan on account of the

HST in the absence of a supporting opinion, but the DIP Lender cannot accept any proceeds of the Transaction until Castcan is paid out. The DIP Lender, having the benefit of the DIP Charge, is the only creditor with security that can definitively overcome the hurdle created by section 67 of the FAA.

84. The SCC recently commented on the latitude given to the Courts by the CCAA, including by, section 11 which allows the Court to "make any order that it considers appropriate in the circumstances":

> [57] Courts frequently observe that "[t]he CCAA is skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred" (*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 92 O.R. (3d) 513 (Ont. C.A.), at para. 44, per Blair J.A.). Accordingly, "[t]he history of CCAA law has been an evolution of judicial interpretation" (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List])), at para. 10, per Farley J.).
>
> [58] CCAA decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the CCAA has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).
>
> . . .
>
> [61] When large companies encounter difficulty, reorganizations become increasingly complex. CCAA courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the CCAA.
>
> . . .
>
> [68] In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the CCAA. Thus in s. 11 of the CCAA as currently enacted, a court may, "subject to the restrictions set out in this Act, ... make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of CCAA authority developed by the jurisprudence.

. . .

> [70] The general language of the CCAA should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising CCAA authority. Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.
>
> ***Ted Leroy Trucking [Century Services] Ltd., Re*, [2010] 3 S.C.R. 379 at paras. 57, 58, 61, 68 and 70, Applicants' Book of Authorities, Tab 16**

85. The distribution scheme of which the Applicants seek this Court's approval has been designed in good faith and is appropriate and necessary to facilitate the preservation of the business of the Applicants through a going concern sale to DashRx. An integral part of this is the distribution to the DIP Lender of an amount equivalent to any proceeds of the HST Refund and the DIP Lender requires assurance that such distribution will be made by the Trustee.

86. Because the DIP Charge originated by court order and not a transaction, section 67 of the FAA does not make it ineffective as security against the proceeds of the HST Refund, and this Court has the jurisdiction, both inherent and given by the CCAA, to make the Order requested to allow the Transaction to proceed.

PART V – RELIEF REQUESTED

87. The Applicants respectfully request that this Honourable Court grant two Orders substantially in the form of the draft Orders attached as Tab 2 and Tab 4 to the Applicants' Motion Record, as amended.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of June, 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

TAB A

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Nortel Networks Corp. (Re)* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Comm. List])
2. *Consumers Packaging Inc. (Re)* (2001), 27 C.B.R. (4th) 197 (Ont. C.A.)
3. *Canwest Publishing Inc. (Re)* (2010), 68 C.B.R. (5th) 233 (Ont. S.C.J. [Comm. List])
4. *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.)
5. *White Birch Paper Holding Company (Re)*, 2010 QCCS 4915
6. *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4788 (S.C.J. [Comm. List])
7. *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522
8. *Marzetti v. Marz*etti, [1994] 2 S.C.R. 765
9. *Profitt v. A.D. Productions Ltd. (Trustee of)* (2002), 32 C.B.R. (4th) 94 (Ont. C.A.)
10. *Cargill Ltd. v. Ronald (Trustee of)* (2007), 32 C.B.R. (5th) 169 (Man. C.A.)
11. *McKay & Maxwell, Ltd., Re* (1927), 8 C.B.R. 534 (N.S. S.C.)
12. *Christensen, Re* (1961), 2 C.B.R. (N.S.) 324 (Ont. S.C.)
13 *Front Iron & Metal Co., Re* (1980), 38 C.B.R. (N.S.) 317 (Ont. S.C., In Bankruptcy)
14. *Bank of Montreal v. i Trade Finance Inc.*, [2011] 2 S.C.R. 360
15. *Torstar Corp. v. ITI Information Technology Institute Inc.* (2002), 36 C.B.R. (4th) 114 (N.S. S.C.)
16. *Ted Leroy Trucking [Century Services] Ltd., Re*, [2010] 3 S.C.R. 379

TAB B

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

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

Restriction — employees, etc.

6. (5) The court may sanction a compromise or an arrangement only if

(a) the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court's sanction, of

(i) amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(d) of the *Bankruptcy and Insolvency Act* if the company had become bankrupt on the day on which proceedings commenced under this Act, and

(ii) wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company's business during the same period; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Restriction — pension plan

6. (6) If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

(a) the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that was required to be paid by the employer to the fund, and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision,

within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, if the prescribed plan were regulated by an Act of Parliament; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

General power of court

11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Restriction on disposition of business assets

36. (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

36. (2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

36. (3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Restriction — employers

36. (7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.

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

Onus on claimant

81.(3) The onus of establishing a claim to or in property under this section is on the claimant.

Require proof of claim

81. (4) The trustee may send notice in the prescribed manner to any person to prove his or her claim to or in property under this section, and, unless that person files with the trustee a proof of claim, in the prescribed form, within 15 days after the sending of the notice, the trustee may then, with the leave of the court, sell or dispose of the property free of any right, title or interest of that person.

Priority of claims

136. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

(a) in the case of a deceased bankrupt, the reasonable funeral and testamentary expenses incurred by the legal representative or, in the Province of Quebec, the successors or heirs of the deceased bankrupt;

(b) the costs of administration, in the following order,

(i) the expenses and fees of any person acting under a direction made under paragraph 14.03(1)(a),

(ii) the expenses and fees of the trustee, and

(iii) legal costs;

(c) the levy payable under section 147;

(d) the amount of any wages, salaries, commissions, compensation or disbursements referred to in sections 81.3 and 81.4 that was not paid;

(d.01) the amount equal to the difference a secured creditor would have received but for the operation of sections 81.3 and 81.4 and the amount actually received by the secured creditor;

(d.02) the amount equal to the difference a secured creditor would have received but for the operation of sections 81.5 and 81.6 and the amount actually received by the secured creditor;

(d.1) claims in respect of debts or liabilities referred to in paragraph 178(1)(b) or (c), if provable by virtue of subsection 121(4), for periodic amounts accrued in the year before the date of the bankruptcy that are payable, plus any lump sum amount that is payable;

(e) municipal taxes assessed or levied against the bankrupt, within the two years immediately preceding the bankruptcy, that do not constitute a secured claim against the real property or immovables of the bankrupt, but not exceeding the value of the interest or, in the Province of Quebec, the value of the right of the bankrupt in the property in respect of which the taxes were imposed as declared by the trustee;

(f) the lessor for arrears of rent for a period of three months immediately preceding the bankruptcy and accelerated rent for a period not exceeding three months following the bankruptcy if entitled to accelerated rent under the lease, but the total amount so payable shall not exceed the realization from the property on the premises under lease, and any payment made on account of accelerated rent shall be credited against the amount payable by the trustee for occupation rent;

(g) the fees and costs referred to in subsection 70(2) but only to the extent of the realization from the property exigible thereunder;

(h) in the case of a bankrupt who became bankrupt before the prescribed date, all indebtedness of the bankrupt under any Act respecting workers' compensation, under any Act respecting unemployment insurance or under any provision of the Income Tax Act

creating an obligation to pay to Her Majesty amounts that have been deducted or withheld, rateably;

(i) claims resulting from injuries to employees of the bankrupt in respect of which the provisions of any Act respecting workers' compensation do not apply, but only to the extent of moneys received from persons guaranteeing the bankrupt against damages resulting from those injuries; and

(j) in the case of a bankrupt who became bankrupt before the prescribed date, claims of the Crown not mentioned in paragraphs (a) to (i), in right of Canada or any province, rateably notwithstanding any statutory preference to the contrary.

Courts of Justice Act, R.S.O. 1990, c. C-34

137. (1) On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.

137. (2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

137. (3) On payment of the prescribed fee, a person is entitled to see any list maintained by a court of civil proceedings commenced or judgments entered.

137. (4) On payment of the prescribed fee, a person is entitled to a copy of any document the person is entitled to see.

Financial Administration Act, R.S.C. 1985, c. F-11

General prohibition

67. Except as provided in this Act or any other Act of Parliament,

(a) a Crown debt is not assignable; and

(b) no transaction purporting to be an assignment of a Crown debt is effective so as to confer on any person any rights or remedies in respect of that debt.

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