

Court File No. CV-13-10279-00CL

**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 PROPOSED PLAN  
OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO  
GROWTHWORKS CANADIAN FUND LTD.

**FACTUM OF THE APPLICANT  
(Distribution, Termination and Discharge Order)  
(Returnable December 13, 2022)**

December 9, 2022

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**PART I—OVERVIEW**

1. Over the course of these successful proceedings (the “**CCAA Proceedings**”) of GrowthWorks Canadian Fund Ltd. (the “**Applicant**” or the “**Fund**”) pursuant to the *Companies’ Creditors Arrangement Act* (the “**CCAA**”),<sup>1</sup> the Fund has:

- (a) realized approximately \$57.5 million through well-timed divestments of its portfolio of investments (the “**Portfolio**”) in early to mid-stage Canadian private companies (each, a “**Portfolio Company**”) and cash balances on hand or recovered from third parties;
- (b) made payments of \$31.7 million to its sole secured creditor, Roseway Capital S.a.r.l (“**Roseway**”), in full and final satisfaction of all amounts owing to it;

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<sup>1</sup> *Companies Creditor’s Arrangement Act*, R.S.C. 1985, c. C-36 (“**CCAA**”).

- (c) successfully defended a \$18 million claim brought against it by the former manager of the Fund, GrowthWorks WV Management Ltd. (the “**Former Manager**”), through trial;
- (d) conducted two court-ordered claims procedures and resolved all other pre-filing and post-filing creditor claims against the Fund, including several other significant unsecured claims filed against it; and
- (e) conducted a formal sale and investment solicitation process, which did not generate any acceptable offers, and various strategic reviews and market checks which consistently indicated that continuing the orderly liquidation of the Portfolio would maximize proceeds for the benefit of the Fund’s stakeholders.

2. The Fund, with the support of the Monitor, has determined that it is now appropriate to commence a dissolution process that will allow the Fund a reasonable period of time to continue to pursue significant divestitures from its remaining Portfolio (estimated to be in excess of approximately \$18 million), make a distribution to its shareholders, complete these CCAA Proceedings and dissolve the Fund.

3. The Fund brings this motion for a stay extension and other relief as set out in the draft order appended at Tab 3 to its Motion Record (the “**Distribution, Termination and Discharge Order**”) to facilitate the Fund carrying out this dissolution process and bringing these successful CCAA Proceedings to a close by no later than December 31, 2024.<sup>2</sup>

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<sup>2</sup> Any capitalized terms used and not otherwise defined herein have the meanings given to them in the Affidavit of C. Ian Ross sworn December 2, 2022 (“**Ross Affidavit**”), Motion Record of GrowthWorks Canadian Fund Ltd. dated December 2, 2022 (“**Motion Record**”), Tab 2.

## PART II—FACTS

### *Background to the CCAA Proceedings*

4. The Fund is a labour-sponsored venture capital fund with a portfolio of investments consisting primarily of minority equity interests in small and midsize private Canadian companies.<sup>3</sup> The Fund raised capital from retail investors by way of annual prospectus offerings of separate series of Class “A” shares (the “**Class A Shares**”) of the Fund.<sup>4</sup>

5. Subsequent to its formation, and prior to the commencement of these proceedings, the Fund elected to outsource the management and day-to-day operations of the Fund to the Former Manager pursuant to an amended and restated management agreement dated July 15, 2006 (the “**Management Agreement**”). The Manager received substantial annual management and administration fees (which amounted to approximately \$14.3 million in the two fiscal years prior to the commencement of these CCAA Proceedings) and was issued a series of Class “C” shares of the Fund (the “**Class C Shares**”, or the “**IPA Shares**”).<sup>5</sup>

6. The Fund commenced these CCAA Proceedings on October 1, 2013 as a result of the following factors, among others:

- (a) The sale of Class A Shares of the Fund declined as a result of, among other things, the collapse of the technology sector in 2000 and the Province of Ontario’s announcement in 2005 that the Ontario labour-sponsored investment fund tax credit would be phased out by 2011, leading to the Fund ceasing to offer Class A

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<sup>3</sup> Ross Affidavit at para. 3, Motion Record, Tab 2.

<sup>4</sup> Ross Affidavit at para. 4, Motion Record, Tab 2.

<sup>5</sup> Ross Affidavit at paras. 7-8, Motion Record, Tab 2.

Shares for sale altogether on September 30, 2011 and closing Class A Share redemptions in the Fall of 2011;<sup>6</sup>

- (b) Opportunities for the Fund to divest itself of the relatively illiquid venture investments in the Portfolio became more limited as a result of the 2008 financial crisis and other market constraints;<sup>7</sup>
- (c) The Fund was unable to make payments required to Roseway and was declared in default of its secured obligations to Roseway on October 1, 2013;<sup>8</sup> and
- (d) The Fund terminated the Management Agreement on September 30, 2013 as a result of the Former Manager's material breaches of its obligations thereunder.<sup>9</sup>

7. Pursuant to the order of the Honourable Justice Newbould dated October 1, 2013 (the “**Initial Order**”) a stay of proceedings was granted (the “**Stay Period**”). Since then, the Stay Period has been extended multiple times and is currently set to expire on December 31, 2022.<sup>10</sup>

8. The Fund had to accomplish three major objectives over the course of these CCAA Proceedings in order for a successful outcome to be achieved:

- (a) it had to repay the secured claims of Roseway;
- (b) it had to resolve the material unsecured claims against it, including the claim of the Former Manager; and

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<sup>6</sup> Ross Affidavit at paras. 11, 14-16, Motion Record, Tab 2.

<sup>7</sup> Ross Affidavit at para. 11, Motion Record, Tab 2.

<sup>8</sup> Ross Affidavit at para. 12, Motion Record, Tab 2.

<sup>9</sup> Ross Affidavit at para. 13, Motion Record, Tab 2.

<sup>10</sup> Ross Affidavit at paras. 17, 67, Motion Record, Tab 2.

- (c) it had to realize on its Portfolio of relatively illiquid venture investments, the timing of which is largely dependent on favourable market conditions to provide opportunities for the Fund to exit profitably, typically at the stage of an initial public offering or merger or acquisition involving a Portfolio Company.<sup>11</sup>

9. The Fund has achieved the first two of these objectives and has made considerable progress in respect of the third objective. The ongoing efforts to realize on the remaining Portfolio are described further below.

*All Existing Creditor Claims Have Been Paid or Resolved*

10. On May 22, 2015, the Fund and Roseway entered into a settlement agreement which fixed the amounts payable to Roseway in full and final satisfaction of its secured debt. The Fund made distributions to Roseway totalling \$31.7 million, inclusive of interest, on June 10, 2015 and September 4, 2015 in full satisfaction of its secured debt.<sup>12</sup>

11. The Former Manager filed a claim in the amount of \$18 million against the Fund related to the termination of the Management Agreement (the “**Former Manager Litigation**”). The Former Manager Litigation proceeded to trial on July 17, 2017 for two weeks before the Honourable Justice Wilton-Siegel. On May 18, 2018, Justice Wilton-Siegel issued his reasons for judgment holding, among other things, that the Fund had properly terminated the Management Agreement (the “**Judgment**”). Justice Wilton-Siegel also concluded that the Former Manager was not entitled to its claim for payment of accrued “IPA Dividends”. Neither

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<sup>11</sup> Ross Affidavit at para. 11, Motion Record, Tab 2.

<sup>12</sup> Ross Affidavit at para. 30, Motion Record, Tab 2; Thirtieth Report of the Monitor dated December 9, 2022 at para. 19 (“**Thirtieth Report**”).

party sought leave to appeal and, accordingly, the claims of the Former Manager against the Fund have been finally determined.<sup>13</sup>

12. The Fund and the Monitor undertook a pre-filing claims procedure pursuant to the order of the Honourable Justice McEwen dated January 9, 2014, and a post-filing claims procedure pursuant to the order of the Honourable Justice Penny dated November 30, 2021.<sup>14</sup> All creditor claims filed in either process have been resolved and only equity claims remain for distribution.<sup>15</sup>

### *Orderly Liquidation of the Portfolio*

13. The Fund's investment advisor, Crimson Capital Inc. ("**Crimson Capital**") has been actively seeking out opportunities to liquidate the Portfolio and maximize value since 2014.<sup>16</sup> At the commencement of these CCAA Proceedings, the Fund held venture investments in 71 Portfolio Companies. The Fund has divested its interest in all but 13 remaining Portfolio Companies, five of which have negligible value.<sup>17</sup> The Fund has realized proceeds of approximately \$57 million from these divestitures and other recoveries from the Portfolio Companies and third parties, which was used in part to fund distributions to creditors, including in respect of the Roseway debt.<sup>18</sup>

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<sup>13</sup> Ross Affidavit at paras. 38-46, Motion Record, Tab 2.

<sup>14</sup> Ross Affidavit at paras. 32-35, 47-49, Motion Record, Tab 2.

<sup>15</sup> Thirtieth Report at para. 27.

<sup>16</sup> Ross Affidavit at para. 53, Motion Record, Tab 2.

<sup>17</sup> Ross Affidavit at para. 54, Motion Record, Tab 2; Thirtieth Report at para. 39.

<sup>18</sup> Ross Affidavit at para. 54, Motion Record, Tab 2.

14. Crimson Capital currently estimates that the disposition of the Fund’s remaining investment positions may generate returns of \$17.65 million in 2023 and \$0.67 million in 2024 and onwards.<sup>19</sup> Crimson Capital has advised that very little is expected to be realized from the Portfolio after 2024.<sup>20</sup>

**PART III—ISSUES AND THE LAW**

15. The issues on this motion, and the position of the Fund with respect to each, are:

- (a) Should the Stay Period be extended? *Yes.*
- (b) Should the Court grant the relief sought related to the liquidation of the Portfolio and the making of distributions to the Fund’s shareholders? *Yes.*
- (c) Should the Court grant the relief sought related to the termination of these CCAA Proceedings, discharge of the Monitor and dissolution of the Fund? *Yes.*
- (d) Should the Court grant the releases and discharges in favour of the Monitor, the Representatives of the Monitor, and the Representatives of the Applicant? *Yes.*

***Appropriate to Extend the Stay Period***

16. Section 11.02(2) of the CCAA gives the court the discretion to grant or extend a stay of proceedings, “for any period that the court considers necessary.”<sup>21</sup>

17. Pursuant to section 11.02(3) of the CCAA, to exercise its discretion to extend the stay of proceedings, the court must be satisfied that (i) circumstances exist that make the order

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<sup>19</sup> Ross Affidavit at para. 55, Motion Record, Tab 2.

<sup>20</sup> Ross Affidavit at para. 65(c), Motion Record, Tab 2.

<sup>21</sup> CCAA, s. 11.02(2).



appropriate, and (ii) the applicant has acted, and is acting, in good faith and with due diligence during the CCAA proceedings.<sup>22</sup>

18. When considering whether to grant an order extending the stay of proceedings, the court must satisfy itself that an extension of the Initial Order and the Stay Period will further the purposes of the CCAA.<sup>23</sup>

19. The purposes of the CCAA include preserving and maximizing the value of a debtor company's assets, maximizing creditor recovery from those assets and ensuring fair and equitable treatment of the claims against the debtor company.<sup>24</sup> CCAA proceedings that involve the liquidation of the debtor company's assets for the purposes of making an equitable distribution to its stakeholders are consistent with these purposes and "are now commonplace in the CCAA landscape."<sup>25</sup>

20. In addition to considering whether an order extending a stay of proceedings is appropriate, the court will also consider, among other factors, whether the debtor company has sufficient available cash resources during the extension of the stay period, and whether the monitor supports the requested stay extension.<sup>26</sup>

21. There is no standard length of time provided in the CCAA for an extension of the Stay Period; the length is determined by the facts of the case.<sup>27</sup> This Court has granted an indefinite

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<sup>22</sup> *U.S. Steel Canada Inc., Re*, [2016 ONSC 3106](#) at para. 2.

<sup>23</sup> *Worldspan Marine Inc. (Re)*, [2011 BCSC 1758](#) at paras. 12-15.

<sup>24</sup> *9354-9186 Québec Inc v Callidus Capital Corp*, [2020 SCC 10](#) at para. 40 [*Callidus*].

<sup>25</sup> *Callidus* at para. 43-44, 46.

<sup>26</sup> *Canwest Global Communications Corp. (Re)*, [2009 CanLII 63368](#) (ON SC) at para. 43.

<sup>27</sup> *Tepper Holdings Inc. (Re)*, [2011 NBOB 211](#) at para. 54.

stay extension<sup>28</sup> and a stay extension that lasted longer than the maximum 24 months being sought on this motion.<sup>29</sup>

22. The Fund recognizes that these CCAA Proceedings have been atypical in their length. This is been driven by, among other things: (i) the protracted litigation with the Former Manager and other claimants; (ii) the illiquid nature of the Portfolio; and (iii) the desire to maximize recoveries for the stakeholders of the Fund.<sup>30</sup>

23. The Fund is seeking a final extension of the Stay Period up to the earlier of: (i) December 31, 2024, and (ii) the CCAA Termination Time (defined below) (the “**Stay Extension Period**”). The Fund believes that this length of stay extension is appropriate in the circumstances as:

- (a) the Fund has committed that this will be the final stay extension that is sought in these proceedings;
- (b) the Fund has been advised by Crimson Capital that any proceeds of its remaining portfolio investments are anticipated in 2023 or 2024;
- (c) the Fund may end its efforts to liquidate its investment portfolio and conclude the CCAA Proceedings sooner if appropriate, as detailed further below;
- (d) all existing secured and unsecured creditor claims have been resolved and paid;

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<sup>28</sup> [In the Matter of Nortel Networks Corporation et. al., Order of Justice Newbould \(24 January 2017\)](#), Court File No. 09-CL-7950 (Ont SCJ, Toronto), at para. 53.

<sup>29</sup> [In the Matter of Hollinger Canadian Publishing Holdings Co., Order of Justice Campbell \(31 July 2012\)](#), Court File No. 09-8503-00CL (Ont SCJ, Toronto) at para. 21(a).

<sup>30</sup> Thirtieth Report at para. 62.

- (e) in order to minimize the ongoing administration costs of the Fund even further, the Fund intends to further reduce the size of the Board of Directors of the Fund (the “**Board**”) from three directors to one effective December 31, 2022;
- (f) holders of Class A Shares will not suffer any material prejudice from the stay extension as the current liquid assets of the Fund would only result in a distribution of approximately \$40 to each holder of Class A Shares; and
- (g) this will limit the professional fee costs of seeking multiple stay extensions, which are among the largest costs that continue to be incurred by the Fund and would erode the potential recovery to holders of Class A Shares.<sup>31</sup>

24. The Fund has acted and continues to act in good faith and with due diligence, including that it has, among other things:

- (a) continued to engage Crimson Capital to complete an orderly liquidation process;
- (b) continued to consider ways to reduce administration costs, including the further reduction of the Board from three directors to one; and
- (c) developed the dissolution process that it is seeking approval of on this motion.<sup>32</sup>

25. The Fund has sufficient liquidity to continue operating in the ordinary course during the Stay Extension Period.<sup>33</sup> Accordingly, it is appropriate to grant the stay extension sought by the Fund.

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<sup>31</sup> Ross Affidavit at para. 68, Motion Record, Tab 2.

<sup>32</sup> Ross Affidavit at para. 70, Motion Record, Tab 2.

***Completion of Orderly Liquidation***

26. The proposed Distribution, Termination and Discharge Order would authorize the Fund to continue to take such steps as the Fund, in consultation with Crimson Capital and the Monitor, determines is appropriate to effect an orderly liquidation of the Portfolio during the Stay Extension Period.<sup>34</sup>

27. The Fund will continue to evaluate the appropriateness of continuing its efforts to liquidate the Portfolio throughout the Stay Extension Period considering the proceeds likely to be realized, the estimated cost of such efforts and such other factors as the Fund determines relevant in the circumstances. The proposed Order would authorize the Fund to cease that orderly liquidation if it determines that it would be appropriate to do so, in consultation with Crimson Capital and the Monitor.<sup>35</sup>

28. In those circumstances, the proposed Distribution, Termination and Discharge Order would authorize the Fund to donate any security that it continues to hold to one or more charities or otherwise deal with it in the manner determined by the Fund, in consultation with the Monitor.<sup>36</sup> This Court has authorized debtor companies to deal with remnant assets in a manner agreed upon with the monitor in other CCAA proceedings.<sup>37</sup>

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<sup>33</sup> Thirtieth Report at paras. 60-61.

<sup>34</sup> Ross Affidavit at para. 72, Motion Record, Tab 2.

<sup>35</sup> Ross Affidavit at para. 73, Motion Record, Tab 2.

<sup>36</sup> Ross Affidavit at para. 73, Motion Record, Tab 2.

<sup>37</sup> [\*In the Matter of Hollinger Canadian Publishing Holdings Co., Order of Justice McEwen \(30 January 2015\), Court File No. 09-8503-00CL \(Ont SCJ, Toronto\)\*](#) at para. 8.

*Distributions to Shareholders*

29. The proposed Distribution, Termination and Discharge Order would authorize the Fund to make certain distributions to its shareholders that that are consistent with their respective entitlements and priorities pursuant to the articles of the Fund upon the occurrence of a “Dissolution Event”, as set out further below.

Class B Shares

30. The holder of the Class B Share of the Fund – the Canadian Federation of Labour – is entitled to receive an amount equal to the purchase price it paid for its Class B Shares, which is a nominal amount. This amount must be paid before any assets of the Fund are distributed to the holders of the Class A Shares and Class C Shares.<sup>38</sup>

Class C/IPA Shares

31. The Former Manager, as the holder of the IPA Shares, is entitled to receive dividends (“**IPA Dividends**”) based on realized gains and income from venture investments held by the Fund in certain circumstances, including if the Former Manager is terminated as the manager of the Fund, or in the case of a Dissolution Event of the Fund an amount equivalent to IPA Dividends in certain circumstances.<sup>39</sup>

32. In the Former Manager Litigation, the Former Manager claimed that it was entitled to payment of IPA Dividends in the amount of \$672,390.61 arising from the termination of the

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<sup>38</sup> Ross Affidavit at para. 80, Motion Record, Tab 2.

<sup>39</sup> Thirtieth Report at para. 50.

Management Agreement. In the Judgment, Justice Wilton-Siegel rejected the Former Manager's claim for that amount.<sup>40</sup>

33. On a Dissolution Event, the Former Manager is entitled to receive an amount equal to the sum of:

- (a) all declared but unpaid dividends on the IPA Shares; and
- (b) an amount equal to the cumulative dividends to which the holder of the IPA Shares would have been entitled pursuant to paragraph 4.2(d) of the IPA Share terms (which sets out the formula for calculating IPA Dividends), whether or not dividends were actually declared by the directors, assuming that all Venture Investments (as described below) had been disposed of as of the date of the Dissolution Event at the estimated fair value of such investments calculated in accordance with the Fund's usual valuation policies.<sup>41</sup>

34. A Dissolution Event is defined in the articles of the Fund as “the liquidation, dissolution or winding-up of the [Fund], whether voluntary or involuntary, or any other distribution of the assets of the [Fund] among its shareholders for the purpose of winding up its affairs.”<sup>42</sup> The making of the Distribution, Termination and Discharge Order by this Court would fall within this definition.

35. With respect to part (a) of the test set out in paragraph 33 above, there are no declared but unpaid dividends on the IPA Shares.

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<sup>40</sup> Ross Affidavit at para. 86, Motion Record, Tab 2; *Growthworks WV Management Ltd. v. Growthworks Canadian Fund Ltd.*, [2018 ONSC 3108](#) at paras. [378-388](#).

<sup>41</sup> Ross Affidavit at para. 88, Motion Record, Tab 2.

<sup>42</sup> Ross Affidavit at para. 76, Motion Record, Tab 2.

36. With respect to part (b) of the test set out in paragraph 33 above, the term “Venture Investments” means the Venture Investments held by the Fund at the time of the dissolution.<sup>43</sup> In order for IPA Dividends to be paid in accordance with paragraph 4.2(d) of the IPA Share terms, among other conditions, the total net realized and unrealized gains and income of the Fund from its portfolio of venture investments must have generated an annualized rate of return greater than a cumulative annualized threshold rate of return equal to the average annual rate of return on a five year guaranteed investment certificate (“GIC”) offered by a major Canadian chartered bank plus 2% (the “Portfolio Test”).<sup>44</sup>

37. The Fund has received a total of \$57.0 million in proceeds from realizations on its portfolio investments since the commencement of these CCAA Proceedings. The sum of those realizations plus the estimated current fair value of the Fund’s remaining portfolio investments (which has been filed as a confidential exhibit), is significantly less than the cost of those investments as set out in the audited financial statements of the Fund for the year ended August 31, 2013 (being the most recent audited financial statements prepared by the Fund).<sup>45</sup> Accordingly, the Portfolio would have a negative annualized rate of return, which is certainly less than the current five-year GIC rate of 4.25%.<sup>46</sup>

38. As a result, no distribution is payable in respect of the Class C/IPA Shares. This conclusion is supported by the Monitor.<sup>47</sup> It is necessary and appropriate for this Court to declare that the holder of the Class C Shares is not entitled to receive any further dividends or payments

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<sup>43</sup> Ross Affidavit at para. 89, Motion Record, Tab 2.

<sup>44</sup> Ross Affidavit at para. 81, Motion Record, Tab 2.

<sup>45</sup> Ross Affidavit at para. 91, Motion Record, Tab 2.

<sup>46</sup> Ross Affidavit at para. 82, Motion Record, Tab 2.

<sup>47</sup> Thirtieth Report at para. 53.

on account of those shares as the IPA Share terms do not include provisions protecting the directors of the Fund from liability related to determinations they make in good faith as to the entitlement of holders of Class C/IPA Shares to dividends or other payments.<sup>48</sup>

Class A Shares

39. The proposed Distribution, Termination and Discharge Order authorizes the Fund to make one or more Distributions from the Class A Distribution Pool to Class A Shareholders in accordance with the respective terms of the various outstanding series of Class A Shares of the Fund.<sup>49</sup>

40. The Class A Distribution Pool is defined as available cash and cash equivalents of the Applicant (the “**Available Cash**”) on the date that is seven Business Days prior to the date upon which a Distribution is made (each, a “**Distribution Record Date**”) less (i) the amount of any Distributions to be made to the holder of the Class B Shares, (ii) any amounts due and owing to creditors of the Applicant on such Distribution Record Date, if any, (iii) the estimated cost of such Distribution, and (iv) a reserve for the estimated costs of the Applicant, the Monitor and their respective Representatives from such Distribution Record Date to the CCAA Termination Time, in each case determined by the Applicant in consultation with the Monitor.<sup>50</sup>

41. The Fund presently has approximately \$5.4 million in liquid assets and estimates further Portfolio realizations of \$18.32 million.<sup>51</sup> The Board obtained a quote from the Fund’s transfer agent, IAS, for the costs of a distribution to the Fund’s 115,859 Class A Shareholders. Based on the

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<sup>48</sup> Ross Affidavit at para. 95, Motion Record, Tab 2.

<sup>49</sup> Ross Affidavit at para. 96, Motion Record, Tab 2.

<sup>50</sup> Ross Affidavit at para. 97, Motion Record, Tab 2.

<sup>51</sup> Ross Affidavit at paras. 55, 100, Motion Record, Tab 2.



quote provided and the Fund's estimate of associated legal and other expenses, the estimated cost of distribution to holders of Class A Shares is approximately \$125,000.<sup>52</sup>

42. Given the significant cost of subsequent distributions, the proposed Distribution, Termination and Discharge Order provides that if the Applicant determines, in consultation with the Monitor, that the costs of making a Distribution are likely to exceed the Available Cash, the Applicant, in consultation with the Monitor, may donate any portion of the Available Cash to one or more charities or otherwise deal with the Available Cash in the manner determined by the Applicant and the Monitor.<sup>53</sup>

***Termination, Discharge and Dissolution***

43. Upon the Fund concluding the liquidation of its investment portfolio, paying all creditor claims, making distributions to shareholders and otherwise completing all matters to be attended to in connection with these CCAA Proceedings to the satisfaction of the Monitor, the Monitor will file with the Court the Monitor's CCAA Completion Certificate, which will designate the "**CCAA Termination Time**".<sup>54</sup>

44. As of the CCAA Termination Time:

- (a) the CCAA Proceedings will be terminated;

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<sup>52</sup> Ross Affidavit at para. 100, Motion Record, Tab 2.

<sup>53</sup> Ross Affidavit at para. 101, Motion Record, Tab 2.

<sup>54</sup> Ross Affidavit at para. 102, Motion Record, Tab 2.

- (b) the Monitor will be discharged and released from its duties, obligations and responsibilities and will be forever released, remised and discharged from any claims against it relating to its activities as Monitor;
- (c) the releases and injunctions provided for in the Distribution, Termination and Discharge Order (detailed below) will become effective; and
- (d) the Administration Charge and Directors' Charge provided for in the Initial Order will be terminated, released and discharged.<sup>55</sup>

45. In addition, the proposed Distribution, Termination and Discharge Order provides that the Fund will be dissolved as of the CCAA Termination Time without any further act or formality, including any approval, consent or authorization of any shareholder or other security holder of the Applicant or any Governmental Authority.<sup>56</sup>

46. The broad scope of powers provided under section 11 of the CCAA allow a Court to make “any order that it considers appropriate in the circumstances”.<sup>57</sup> Courts can “make creative orders in the context of CCAA proceedings” if doing so would further the purposes of the CCAA.<sup>58</sup>

47. Courts have relied on this broad jurisdiction to order the dissolution of a debtor company without a shareholder vote in several previous CCAA cases.<sup>59</sup>

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<sup>55</sup> Ross Affidavit at para. 103, Motion Record, Tab 2.

<sup>56</sup> Ross Affidavit at para. 103(b) , Motion Record, Tab 2.

<sup>57</sup> CCAA, s. 11.

<sup>58</sup> *Ernst & Yonge Inc. v Essar Global Fund Limited*, [2017 ONCA 1014](#), at para. [118](#).

<sup>59</sup> *Boutique Jacob inc. (Arrangement relatif à)*, [2011 QCCS 6030](#) at para. [14](#); *Arrangement relatif à Cirque du Soleil Canada inc.*, [2020 QCCS 4849](#) at para. [53](#); *AbitibiBowater Inc., Re*, [2010 QCCS 4450](#) at para. [11](#); *In the Matter of Smurfit-Stone*

48. The Fund has determined that it is not practicable to seek approval from its shareholders to dissolve the Fund. If the Fund were required to hold a meeting of its shareholders in order to authorize a dissolution, the significant costs associated with calling a meeting of its 115,859 Class A Shareholders would only serve to reduce the recovery available to those shareholders.<sup>60</sup> It is thus appropriate and consistent with the purposes of the CCAA for this Court to order the dissolution of the Fund without requiring a shareholder vote in order to maximize recoveries.

### ***Releases***

49. It is well established that CCAA courts have the jurisdiction to grant third party releases.<sup>61</sup> Courts will generally approve them where the releases are rationally tied to the resolution of the debtor's claims and will benefit creditors generally.<sup>62</sup>

50. The parties to be released have each contributed in a tangible and realistic way to the successful outcome of these CCAA Proceedings.<sup>63</sup> The directors and officers of the Fund, the Monitor and the respective Representatives of the Fund and the Monitor have each played an integral role in these lengthy and complex restructuring proceedings and provided guidance and stability throughout.

51. Furthermore, all creditor claims against the Fund and its directors and officers have been resolved and the only remaining claims against the Fund are shareholder claims. Unlike many insolvency proceedings, it is expected that shareholders in these proceedings will be receiving

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[Container Canada Inc. et al., Order of Justice Pepall \(13 May 2010\), Court File No. 09-7966-00CL \(Ont SCJ, Toronto\)](#) at para. 30.

<sup>60</sup> Ross Affidavit at para. 104, Motion Record, Tab 2.

<sup>61</sup> *Pacific Exploration & Production Corporation (Re)*, [2016 ONSC 5429](#) at para. 23 [*Pacific Exploration*]; *Lydian International Limited (Re)*, [2020 ONSC 4006](#) at para. 53.

<sup>62</sup> *Pacific Exploration* at para. 23; *Metcalfe & Mansfield Alternative Investments II Corp., (Re)*, [2008 ONCA 587](#) at para. 70.

<sup>63</sup> Thirtieth Report at para. 56.

recovery on their investment.<sup>64</sup> The Fund provided notice of this motion, and the fact that these releases would be sought, to its shareholder base by publishing a press release on December 2, 2022 and filing that press release on SEDAR.<sup>65</sup> The Fund is not aware of any objection to the releases sought.

52. The Monitor supports the proposed releases and is of the view that they are reasonable, and not overly broad, in the circumstances.<sup>66</sup> Accordingly, it is appropriate to grant the proposed releases in the Distribution, Termination and Discharge Order.

#### **PART IV—ORDER REQUESTED**

53. For the reasons set out above, the Fund requests that this Court grant the Distribution, Termination and Discharge Order. The requested relief is in the best interests of the Fund and its stakeholders, is appropriate in the circumstances and should be granted by the Court.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 9th day of December, 2022.



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McCarthy Tétrault LLP

Lawyers for GrowthWorks Canadian Fund Ltd.

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<sup>64</sup> Thirtieth Report at para. 56.

<sup>65</sup> Press Release: “GrowthWorks Canadian Fund Ltd. Provides Update on CCAA Proceedings” (2 December 2022), Exhibit “Q” to the Ross Affidavit, Motion Record, Tab 2Q.

<sup>66</sup> Thirtieth Report at para. 56.

## SCHEDULE “A” – LIST OF AUTHORITIES

1. *U.S. Steel Canada Inc., Re*, [2016 ONSC 3106](#)
2. *Worldspan Marine Inc. (Re)*, [2011 BCSC 1758](#)
3. *9354-9186 Québec Inc v Callidus Capital Corp*, [2020 SCC 10](#)
4. *Canwest Global Communications Corp. (Re)*, [2009 CanLII 63368](#)
5. *Tepper Holdings Inc. (Re)*, [2011 NBQB 211](#)
6. [In the Matter of Nortel Networks Corporation et. al., Order of Justice Newbould \(24 January 2017\)](#), Court File No. 09-CL-7950 (Ont SCJ, Toronto)
7. [In the Matter of Hollinger Canadian Publishing Holdings Co., Order of Justice Campbell \(31 July 2012\)](#), Court File No. 09-8503-00CL (Ont SCJ, Toronto)
8. [In the Matter of Hollinger Canadian Publishing Holdings Co., Order of Justice McEwen \(30 January 2015\)](#), Court File No. 09-8503-00CL (Ont SCJ, Toronto)
9. *Growthworks WV Management Ltd. v. Growthworks Canadian Fund Ltd.*, [2018 ONSC 3108](#)
10. *Ernst & Yonge Inc. v Essar Global Fund Limited*, [2017 ONCA 1014](#)
11. *Boutique Jacob inc. (Arrangement relatif à)*, [2011 QCCS 6030](#)
12. *Arrangement relatif à Cirque du Soleil Canada inc.*, [2020 QCCS 4849](#)
13. *AbitibiBowater Inc., Re*, [2010 QCCS 4450](#)
14. [In the Matter of Smurfit-Stone Container Canada Inc. et al., Order of Justice Pepall \(13 May 2010\)](#), Court File No. 09-7966-00CL (Ont SCJ, Toronto)
15. *Pacific Exploration & Production Corporation (Re)*, [2016 ONSC 5429](#)
16. *Lydian International Limited (Re)*, [2020 ONSC 4006](#)
17. *Metcalf & Mansfield Alternative Investments II Corp., (Re)*, [2008 ONCA 587](#)

## SCHEDULE “B” – LIST OF STATUTES

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

## 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.

## Stays, etc. — initial application

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.

## Stays, etc. — other than initial application

11.02(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.

## Burden of proof on application

11.02(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.

Restriction

11.02(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(Commercial List)**

Proceeding Commenced at Toronto

**FACTUM OF THE APPLICANT  
(Distribution, Termination and Discharge  
Order)**

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