

**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 GROWTHWORKS CANADIAN FUND LTD.
(motion to direct payment of the Outstanding IAD, returnable September 4, 2015)

September 2, 2015

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PART I - OVERVIEW

1. This court spends much of its time dealing with creditors who are trying to get debtors to pay. This motion presents the curious converse of the usual situation: a debtor wants to pay an undisputed debt but the creditor is blocking payment.
2. Of course there is a backstory to this otherwise perverse situation: the creditor wants leverage on a collateral issue, namely a dispute over an additional fee that it claims (on top of the millions of dollars the creditor has already extracted from the debtor). The issue to be determined on this motion is whether the court should order the creditor to stop impeding the payment to itself.
3. The CCAA debtor is GrowthWorks Canadian Fund Ltd. (the "**Fund**"). The creditor – the Fund's only secured creditor – is Roseway Capital S.a.r.l. ("**Roseway**"). The Fund and Roseway have entered into an investment advisor agreement (the "**IAA**") which affords Roseway significant control over the Fund as long as a debt to Roseway

remains outstanding. Among other controls, the IAA grants Roseway the right to consent to payments out of the Fund's bank account through a blocked account mechanism.

Under the IAA, these controls fall away once the Fund repays the debt.

4. There is no dispute as to the quantum of the debt – it is precisely \$955,404 (the “**Outstanding IAD**”). As a result of some asset sales, the Fund now has sufficient cash to pay the Outstanding IAD, and wishes to do so in order to free itself of the restrictions of the IAA. But Roseway is blocking payment of the Outstanding IAD. Its ground for doing so is a claim to be owed an Additional Fee (as that term is defined in the IAA) of approximately \$450,000.

5. By the clear terms of the IAA, the Additional Fee claimed by Roseway is not payable. In any event, any dispute over the Additional Fee is not a basis for impeding payment of the Outstanding IAD. Roseway's blockage of the payment is a naked attempt to obtain leverage in the Additional Fee dispute and to extend its control under the IAA at a time when that control should be falling away.

6. Accordingly, the Fund is forced to seek uncommon relief of compelling Roseway to authorize payment to itself in satisfaction of an undisputed debt. The court should grant this relief. Any legitimate dispute over the Additional Fee should be dealt with separately in the separate cross-motion filed by Roseway in respect of it.

PART II - THE FACTS

Background to the Dispute

7. The Fund is a labour-sponsored venture capital fund with a diversified portfolio of investments in small and medium-sized Canadian businesses. The Fund has been in creditor protection under the CCAA since September 30, 2013.¹

8. Throughout the course of the CCAA proceedings and in particular since a failed sale and investment solicitation process, the Fund's intention has been to maximize the value of its portfolio of assets and to seek liquidation opportunities in order to generate cash to repay its obligations. To assist it in managing its portfolio, the Fund entered into the IAA on May 9, 2014.

9. The IAA was entered into following the failed sales process. In light of the culmination of the sales process without any viable sale transactions, Roseway, as the Fund's secured creditor, was faced with the prospect that the Fund might not be able to repay its indebtedness to Roseway, which at the time amounted to approximately \$18.9 million.²

10. The IAA was negotiated in this context and under tense circumstances. As the Fund's sole secured creditor, Roseway wished to gain control over the Fund's cash resources and its portfolio and the Fund required an investment advisor to manage its portfolio. Accordingly, the IAA has two aspects: it appoints Roseway as the Fund's investment advisor, and it gives Roseway significant control over the Fund as a creditor.

¹ Affidavit of C. Ian Ross sworn August 21, 2015 (the "Ross Affidavit") at para. 3.

² Ross Affidavit at para. 10.

11. With respect to the control aspect, the IAA enables Roseway to exert significant control over the affairs of the Fund, including (i) to require a reduction in the size of the Fund's board of directors and limit compensation paid to the directors; (ii) prohibiting the Fund from making payments in excess of a budget approved by Roseway and the Monitor; (iii) allowing Roseway the right to make follow-on investments in the Fund's portfolio companies, which right had accrued to the Fund; and (iv) requiring the Fund to deposit funds into a blocked account.

12. With respect to the investment advisor aspect, the IAA provides that Roseway will act as an investment advisor to the Fund and will provide it with investment management and administrative services.³ Roseway is entitled to and did delegate its responsibilities to Crimson Capital, a company controlled by Donna Parr.⁴ For the purposes of this motion, there is no distinction drawn between the actions taken and decisions made by Roseway as a party to the IAA and those taken by Ms. Parr as its delegate.

13. The IAA also acknowledges a pre-existing secured debt owed by the Fund to Roseway pursuant to certain participation and security agreements, which at the time amounted to approximately \$18.9 million.⁵

14. Until such time as the outstanding debt – referred to in the IAA as the Investment Advisor Debt – is paid in full, any proceeds from the disposition of any securities in the Fund's portfolio are to be directed to a blocked account (the “**Blocked Account**”). In

³ Investment Advisor Agreement dated May 9, 2015 (“IAA”), s. 2.1, Exhibit A to the Ross Affidavit.

⁴ Ross Affidavit at para. 8.

⁵ IAA, s. 1.1. “Investment Advisor Debt”, Exhibit A to the Ross Affidavit.

order for the Monitor to withdraw funds from the Blocked Account, a signature is required from one of two individuals with signing authority: James Cade, a partner with Norton Rose Fulbright LLP, counsel to Roseway; and Ms. Parr.⁶ The Fund has no independent recourse to its cash resources while they remain in the Blocked Account.

15. The payment of the Investment Advisor Debt in full will trigger a number of provisions in the IAA and the Settlement Agreement and release the Fund from a number of its obligations under the IAA and the security agreement in favour of Roseway. Once the Investment Advisor Debt is paid in full, the Fund will no longer be subject to these restrictions. Repayment of the Investment Advisor Debt is also a pre-condition to the Fund's right to terminate the entire IAA.⁷

The Settlement Agreement

16. In late 2014, the Fund initiated discussions with Roseway to settle the quantum of the Investment Advisor Debt and with a view to eventually repaying obligations owed to Roseway and concluding the debtor-creditor relationship between the Fund and Roseway.⁸ A settlement was reached and the parties entered into a settlement agreement (the "**Settlement Agreement**"), which was approved by this court on June 8, 2015.⁹

17. The Settlement Agreement fixes the amount of the Investment Advisor Debt (which amount is referred to as the Outstanding IAD in the Settlement Agreement) and

⁶ Ross Affidavit at para. 12.

⁷ IAA, s. 9.3.

⁸ Ross Affidavit at para. 17.

⁹ Ross Affidavit at para. 18.

provides that payment in full of the Outstanding IAD will satisfy the Fund's obligation to repay the Investment Advisor Debt for all purposes of the IAA.¹⁰

18. The Settlement Agreement further provides that the Fund, with the consent of the Monitor, shall pay the Outstanding IAD as soon as reasonably practicable, taking into account the Fund's commercially reasonable estimate of its actual and projected liquidity, capital resources and expenditures.¹¹

19. The Fund has made efforts to repay the Outstanding IAD, subject to these considerations. The Fund has, in good faith, made partial payment to Roseway and has reduced the amount of the Outstanding IAD to \$955,404. This quantum is undisputed. The remaining amount of the Outstanding IAD has not been paid to date, due to the Fund's and Monitor's concerns over the Fund's limited cash resources and uncertainty as to the amount and timing of future revenues.

The Fund secures the cash to pay the Outstanding IAD

20. On July 30, 2015 – just before the August long weekend – the Fund completed a disposition of its shares in PerspecSys Inc. (the "**PerspecSys Disposition**") for initial cash proceeds of approximately \$2.45 million USD.

21. Despite the requirement in the Settlement Agreement that the Fund shall repay the Outstanding IAD as soon as reasonably practicable and a request by Roseway for payment in late July 2015, the Fund learned on July 31, 2015 that Mr. Cade, Roseway's

¹⁰ Ross Affidavit at para. 20.

¹¹ Ross Affidavit at para. 21.

counsel, had revoked Roseway's prior approval to repay the Outstanding IAD. As a result, the Monitor no longer had pre-authorization to repay the Outstanding IAD.

22. On Wednesday, August 5, 2015, as soon as the Fund's board of directors could be assembled after the news that the ProspeSys Disposition had occurred and after the August long weekend, the board met to review the Fund's actual and projected liquidity, capital resources and expenditures, cash requirements and expenditures in light of the ProspeSys Disposition. It was determined that the Fund could pay the Outstanding IAD with the proceeds from the ProspeSys Disposition and the board promptly authorized payment by the Fund. Not long thereafter, the Monitor also consented to that payment.

23. The only remaining obstacle to payment is the refusal of Roseway to authorize payment to itself of a portion of the proceeds currently sitting in the Blocked Account. Roseway is doing so because of a spurious demand for an Additional Fee pursuant to the IAA.

The claim for the Additional Fee

24. The IAA provides at Section 7.3.1:

From and after such time as the Investment Advisor Debt has been paid in full, the Investment Advisor shall be entitled to a fee equal to 15% of the aggregate proceeds of disposition of the *remaining* Portfolio Securities (other than the collection of undisputed escrowed proceeds by GW CDN to the extent such proceeds relate to dispositions of assets made by GW CDN prior to the date of this Agreement) (the "**Additional Fee**") payable upon the disposition of any Portfolio Securities. [Emphasis added]

25. Roseway is claiming an Additional Fee in respect of the ProspeSys Disposition – despite the fact that an Additional Fee is only payable “[f]rom and after such time as the

Investment Advisor Debt has been paid in full” and the Investment Advisor Debt has not yet been paid in full.

26. To place Roseway’s demand in context, it is necessary to understand that it has already extracted significant sums from the Fund through the course of these proceedings. According to the Monitor, since the inception of the CCAA proceedings the Fund has made principal repayments to Roseway totalling \$25,700,000 and interest payments totalling \$5,010,323.¹²

27. There is no merit to Roseway’s allegation that the Fund has deliberately manipulated the timing of payments in order to avoid the Additional Fee.

The Fund has Made All Reasonable Efforts to Authorize Expedient Payment of the Outstanding IAD

28. The Settlement Agreement provides that the Outstanding IAD shall be paid by the Fund as soon as reasonably practicable, subject to the Fund’s commercially reasonable estimate of its actual and projected liquidity, capital resources and expenditures. The Fund has always had clear intention to repay the obligations owed to Roseway and has in fact made partial payment of the Outstanding IAD with no objection by Roseway.

29. Roseway has asserted that the Fund ought to have paid the remaining Outstanding IAD sooner, and in any event by July 28, 2015 when its counsel made a demand for payment.

¹² E-mail from Paul Bishop of the Monitor on August 23, 2015.

30. Roseway's position ignores the reality of the Fund's financial situation. The Fund is in CCAA proceedings and, until the proceeds of the PerspecSys Disposition were received, had limited cash resources; and significant uncertainty existed (and continues to exist) as to its future revenues. The Fund is entirely reliant on dispositions of portfolio assets for ongoing liquidity.

31. As late as mid-July 2015, there was no certainty that the PerspecSys Disposition would close. Neither Ms. Parr, the Fund nor the Monitor had any clarity as to the timing of the transaction. Roseway and the Monitor acknowledge that payment of the remaining Outstanding IAD amount prior to receipt of the PerspecSys Disposition proceeds would have left the Fund with only \$387,282 in cash with no guarantee that the transaction would close or that proceeds would actually be received.

32. At all material times, it was imperative that the Fund retain sufficient funds to satisfy its actual and projected cash resources and expenditures. It would not have been prudent for the Fund to authorize payment of the Outstanding IAD without having first received the proceeds of the PerspecSys Distribution.

33. The PerspecSys Disposition closed on Thursday, July 30, 2015. At 10:35 p.m. on Friday, July 31, 2015 – the Friday before the August long weekend – the Monitor confirmed receipt of the proceeds.¹³ As soon as possible after the long weekend, on Wednesday, August 5, 2015, the Fund's board of directors met and approved payment of the Outstanding IAD. The timing of the Fund's actions demonstrates the Fund's efforts to comply with the Settlement Agreement's requirement that the Outstanding IAD be

¹³ Ross affidavit, exhibit H.

paid “as soon as reasonably practicable, taking into account GW Cdn’s commercially reasonable estimate of the actual and projected (i) liquidity and capital resources of GW Cdn, and (ii) expenditures of GW Cdn”.

The procedural context

34. This motion was scheduled by Justice Matheson at a chambers appointment on August 19, 2015. In her endorsement, Justice Matheson noted that “Roseway may bring a cross-motion” and directed that “if Roseway concludes it will bring a cross-motion, that motion record shall be delivered by the date set out in the attached schedule [August 31, 2015].” Roseway did in fact serve a cross-motion on August 31, 2015. No provision was made in Justice Matheson’s endorsement for responding materials on the cross-motion, or for argument of the cross-motion on September 4, 2015 along with the Fund’s motion. Nevertheless, at the request of Roseway, Justice Matheson issued a direction on September 2, 2015 that the cross-motion is to be heard on September 4, 2015 along with the Fund’s motion.

35. The Fund remains of the view that the issues of repayment of the Outstanding IAD and Roseway’s claim to the Additional Fee are entirely separate, and that there is no need to proceed with the cross-motion on September 4, 2015. But since it would be manifestly procedurally unfair for the cross-motion to proceed without the Fund being given an opportunity to respond to it, in light of Justice Matheson’s new direction on September 2, 2015 the Fund’s evidence in response to the cross-motion will be placed before the court for September 4, 2015. That evidence will be in a reply affidavit of Ian Ross that will be filed as soon as possible. Roseway has indicated that it will object.

PART III - ISSUES

36. The only issue in this motion is whether Roseway is entitled to withhold its authorization to withdraw proceeds from the Blocked Account to pay the Outstanding IAD where the Fund and Monitor have approved payment.

PART IV - LAW AND ARGUMENT

37. Roseway has an obligation to perform its obligations under the IAA and the Settlement Agreement in good faith.¹⁴ Holding the Fund's ability to repay the Outstanding IAD hostage to Roseway's claim for the Additional Fee is not good faith.

38. The claim for the Additional Fee is without merit. The clear language of the IAA provides that the Additional Fee is payable only "[f]rom and after such time as the Investment Advisor Debt has been paid in full". The Investment Advisor Debt has not yet been paid in full. Ergo no Additional Fee is payable. It is no more complicated than that.

39. Even if it is more complicated than that and there is some basis for Roseway's claim, it is not a ground for holding up payment of the Outstanding IAD. There is no contractual basis for any connection between a dispute over the Additional Fee and the Fund's ability to pay the Outstanding IAD. As a matter of administration of the CCAA, there is no reason to delay the Fund's exit from the strictures of the IAA, and every reason to expedite that exit. Any dispute over the Additional Fee should be dealt with separately and should not cause payment of the Outstanding IAD to be further delayed.

¹⁴ *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 495.

PART V - ORDER REQUESTED

40. The Fund seeks an order directing Roseway to authorize payment of the Outstanding IAD from the proceeds in the Blocked Account, as set out in the notice of motion. The Fund also seeks its costs of this motion, which should not have been necessary.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of
September, 2015.



McCarthy Tétrault LLP
Lawyers for the Applicant

Tab A

SCHEDULE "A" - LIST OF AUTHORITIES

1. *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 495

Tab B

SCHEDULE "B" – TEXT OF STATUTES REFERRED TO

None.

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Proceeding commenced at Toronto

**FACTUM
(MOTION RETURNABLE SEPTEMBER 4, 2015)**

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