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 ROSEWAY CAPITAL S.À.R.L.
(returnable November 4, 2015)

October 26, 2015

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PART I - OVERVIEW

A. The Merits of this Motion

1 GrowthWorks Canadian Fund Ltd. (**GrowthWorks**) is a labour-sponsored venture capital fund in CCAA liquidation proceedings. GrowthWorks hired Roseway Capital s.à.r.l. (**Roseway**), its only secured creditor, to manage and dispose of its remaining investments.

2 The Roseway-GrowthWorks relationship was governed by, among other things:

(a) an Investment Advisor Agreement (the **IAA**); and

(b) a Settlement Agreement (the **Settlement Agreement**), which resolved various disputes between Roseway and GrowthWorks.

3 Under these agreements, GrowthWorks was required to pay Roseway an obligation called the investment advisor debt (the **IAD**) "as soon as reasonably

practicable", taking into account GrowthWorks' "actual and projected liquidity and capital resources."

4 Once the IAD was paid, Roseway would become entitled to a trailing payment called the additional fee (the **Additional Fee**), if and when various investments of GrowthWorks were sold. Those investments included a company called PerspecSys Inc. (**PerspecSys**).

5 In July 2015, there was a pending transaction relating to PerspecSys (the **PerspecSys Transaction**). At the time, GrowthWorks had sufficient cash on hand to pay the IAD before the PerspecSys Transaction closed. Roseway requested payment and the court-appointed monitor (the **Monitor**) consented.

6 Despite the Monitor's consent, GrowthWorks expressly refused to pay the IAD when payment was requested. Instead, it deliberately timed its payment of the IAD to occur after the closing of the PerspecSys Transaction. This timing had the effect of allowing GrowthWorks to avoid payment of the Additional Fee.

7 GrowthWorks argued that closing of the PerspecSys Transaction was uncertain and that it would be left with insufficient cash reserves to deal with its payables. GrowthWorks now asserts that, in its business judgment, it would have been "irresponsible" to pay before closing.

8 GrowthWorks' actions are in breach of the Settlement Agreement. The Settlement Agreement did not entitle GrowthWorks to wait until cash was in hand, with or without an exercise of its business judgment.

9 Rather, the Settlement Agreement required GrowthWorks to consider its actual and projected capital and liquidity, something that it failed to do. Had GrowthWorks

undertaken a true exercise of judgment (as the Monitor did), it would have understood that the PerspecSys Transaction was certain to close – which it did a few days after payment of the IAD was requested.

10 The IAD should have been paid to Roseway on July 28, 2015 when it was requested. Roseway seeks payment of the Additional Fee to remedy GrowthWorks' breach of the Settlement Agreement.

B. Hearing Process

11 The parties and the court have agreed that this motion will proceed as a "mini-trial" as follows:

(a) brief examination in chief of Roseway's witnesses (Michael Forer and Donna Parr) on their affidavits, followed by cross-examination;

(b) brief examination in chief of GrowthWorks' witness (Ian Ross) on his affidavit, followed by cross-examination;

(c) Roseway's argument;

(d) GrowthWorks' argument; and

(e) Roseway's reply, if any.

PART II - THE FACTS

A. Background

12 GrowthWorks is a venture capital fund with a portfolio of investments in Canadian businesses (the **Portfolio**). In May 2010, Roseway provided financing to

GrowthWorks in the amount of $20,000,000 (the **Investment**). GrowthWorks was unable to repay Roseway, its only secured creditor, when payment was due.[1]

13 On October 1, 2013, GrowthWorks obtained court protection pursuant to the *Companies' Creditors Arrangement Act*.[2] GrowthWorks then began to solicit expressions of interest to sell the Portfolio. However, GrowthWorks was unable to locate an investor or buyer for the Portfolio on satisfactory terms.[3]

14 As part of the events leading up to the CCAA filing, GrowthWorks had terminated its existing investment manager for, among other things, poor performance. With the failure of the Portfolio sale, GrowthWorks needed to hire a new manager to realize on its assets while in CCAA proceedings. It was therefore necessary for GrowthWorks to retain an investment advisor to manage the Portfolio.[4]

15 On May 9, 2014, GrowthWorks and Roseway entered into the IAA, and Roseway was appointed investment advisor to manage the Portfolio. Roseway was chosen because (i) it was owed $21 million, (ii) it had the most to gain from good (and the most to lose from bad) management, and (iii) it had the requisite expertise.[5]

16 The IAA provides for two types of fees payable to Roseway to compensate it for the significant effort and expertise involved in managing the Portfolio: (i) an "Annual Fee" in the amount of $350,000 (a mere fraction of the more than $4 million that GrowthWorks had been paying its former manager annually prior to the CCAA

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[1] Affidavit of Michael Forer sworn October 1, 2015 (**Forer Affidavit**), paras. 15-19, Motion Record, Tab 2, pp. 9-10.
[2] R.S.C. 1985, c. C-36 (**CCAA**).
[3] Forer Affidavit, paras. 20-22, 24-26, Motion Record, Tab 2, pp. 10-11.
[4] Forer Affidavit, paras. 27-29, Motion Record, Tab 2, p. 12.
[5] Forer Affidavit, paras. 30-32, Exhibits "B"-"C", Motion Record, Tabs 2, 2B-2C, pp. 12-13, 27-52.

proceedings), and (ii) an "Additional Fee", payable to Roseway once the IAD had been repaid.[6] Section 7.3.1 of the IAA provides as follows:

> 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 [...] payable upon the disposition of any Portfolio Securities.[7]

17 Roseway is not located in Canada. It retained a sub-contractor, Donna Parr and her company, Crimson Capital Inc. (**Crimson Capital**), to help manage the Portfolio. Ms. Parr has over 30 years of experience in venture and private equity, investing and fund raising, and corporate finance. Following Roseway's appointment, Ms. Parr became active on the boards of five venture capital companies within the Portfolio and has actively managed several others.[8]

18 At the outset, Ms. Parr found that the affairs of many of the companies in the Portfolio (and certainly GrowthWorks' involvement with them) were in disarray. However, due to her efforts, and those of Roseway, realizations from the Portfolio were better than anticipated.[9]

19 There is no dispute that Crimson Capital worked diligently and hard to preserve value in many of the businesses which remain in the Portfolio, but which have had significant challenges. Indeed, Ms. Parr is currently in negotiations with GrowthWorks, which has proposed to retain Crimson Capital directly as its investment advisor.[10] The

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[6] Forer Affidavit, paras. 60-62, Exhibit "B", Motion Record, Tabs 2, 2B, pp. 19, 38.
[7] Forer Affidavit, para. 63, Exhibit "B", Motion Record, Tabs 2, 2B, pp. 19-20, 38.
[8] Affidavit of Donna Parr sworn September 30, 2015 (**Parr Affidavit**), paras. 2-3, 7, Motion Record, Tab 3, pp. 111-112; Forer Affidavit, para. 39, Motion Record, Tab 2, p. 15.
[9] Forer Affidavit, paras. 33-38, Motion Record, Tab 2, pp. 13-14; Parr Affidavit, paras. 8-14, Motion Record, Tab 3, pp. 112-114.
[10] Parr Affidavit, para. 15, Motion Record, Tab 3, p. 114.

PerspecSys Transaction and GrowthWorks' ability to pay the IAD and Additional Fee are a direct result of Roseway's and Crimson Capital's efforts.

B. It Was Reasonably Practicable to Pay the IAD on July 28, 2015

i. The Settlement Agreement

20 On May 22, 2015, GrowthWorks and Roseway entered into the Settlement Agreement to resolve certain disputes that had arisen prior to and during the course of these CCAA proceedings. The Settlement Agreement provides that the IAA continues in full force and effect in accordance with its term except as amended or modified by the terms of the Settlement Agreement.[11]

21 Section 2.04(c) of the Settlement Agreement sets out when the IAD must be paid in full:

> with the consent of the Monitor, [GrowthWorks] will pay the Outstanding IAD [the Investment Advisor Debt] **as soon as reasonably practicable**, taking into account [GrowthWorks'] commercially reasonable estimate of the actual **and projected** (i) liquidity and capital resources of [GrowthWorks], and (ii) expenditures of [GrowthWorks].[12] [emphasis added]

ii. Closing of the PerspecSys Transaction Was Imminent

22 In early June 2015, Ms. Parr began to discuss the possibility of an acquisition of PerspecSys with Ian Ross, the chairman and interim CEO of GrowthWorks, and Paul Bishop, a representative of the Monitor. By the end of June, it was very likely that an agreement for the PerspecSys Transaction would be reached (the **Agreement**).[13]

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[11] Forer Affidavit, paras. 41-43, Exhibits "E"-"F", Motion Record, Tabs 2, 2E-2F, pp. 15, 73, 94-97.
[12] Forer Affidavit, para. 45, Exhibit "E", Motion Record, Tabs 2, 2E, pp. 16, 65.
[13] Parr Affidavit, paras. 16-17, Exhibit "A", Motion Record, Tabs 3, 3A, pp. 114, 121.

23 Ms. Parr was Roseway's and GrowthWorks' "point person" on the PerspecSys Transaction. She had regular discussions with PerspecSys and the related transaction professionals, and kept GrowthWorks and the Monitor informed of the status of the deal.[14] Among other things:

(a) on June 29, 2015, Ms. Parr was notified to expect receipt of the "definitive agreement"; and

(b) through the first half of July 2015, Ms. Parr had regular discussions with a PerspecSys board member on the likelihood of closing.[15]

24 On July 16, 2015, Ms. Parr informed Mr. Ross and Mr. Bishop that:

(a) the PerspecSys Transaction would likely close the following week;

(b) GrowthWorks was expected to receive approximately US $2.7 million in proceeds from the sale of its interest in PerspecSys;

(c) the amount of expected proceeds was calculated prior to deduction of the Additional Fee; and

(d) the precise amount of the Additional Fee could not be calculated until after the amount of proceeds was finalized.[16]

25 Neither Mr. Ross nor Mr. Bishop requested any detailed update regarding the finer points of the deal, other than as regards indemnities affecting GrowthWorks.[17] Mr. Ross also responded on July 21, 2015 with a bald statement that he did not believe that

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[14] Parr Affidavit, paras. 16-18, 21-22, 26-28, 33-38, Exhibits "A", "C"-"E", "G"-"I", Motion Record, Tabs 3, 3A, 3C-3E, 3G-3I, pp. 114-119, 121, 126-134, 140-146.
[15] Parr Affidavit, paras. 17-18, Motion Record, Tab 3, pp. 114-115.
[16] Parr Affidavit, para. 19, Exhibit "B", Motion Record, Tabs 3, 3B, pp. 115, 122-125.
[17] Parr Affidavit, para. 20, Motion Record, Tab 3, pp. 115.

the Additional Fee was payable in respect of the PerspecSys Transaction. Ms. Parr asked Mr. Ross to clarify that statement. He has never provided an answer.[18]

26 On July 17, 2015, Ms. Parr was advised that the PerspecSys Transaction was expected to close in a week. On July 21 and 22, 2015, Ms. Parr received further updates from PerspecSys detailing the closing status and a "close to final draft" of the Agreement.[19]

27 On July 24, 2015, Ms. Parr received confirmation that the Agreement had received board approval by PerspecSys and that it had been signed. At this point, closing was virtually certain, and was likely to occur the following week. Closing was also imperative because PerspecSys had little remaining cash – the deal had to close.[20]

28 On July 27, 2015, Ms. Parr received confirmation that the PerspecSys shareholders had approved the transaction. At this point, there could no longer be any question that the transaction would close. With board approval, a signed agreement, and shareholder approval, the question was no longer "if" (although it had been very likely that the transaction would close for more than a month), but "when".[21]

iii. The IAD Should Have Been Repaid on July 28, 2015

29 On July 27, 2015, closing was imminent – "there was no question in [Ms. Parr's] mind that the transaction would close." Accordingly, given that GrowthWorks was on the verge of receiving approximately US $2.5 million, it was Ms. Parr's view that it was reasonably practicable for GrowthWorks to pay the IAD in full.[22]

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[18] Parr Affidavit, paras. 23, 26, Motion Record, Tab 3, p. 116.
[19] Parr Affidavit, paras. 21-22, Exhibit "C"-"D", Motion Record, Tabs 3, 3C-3D, pp. 115-116, 126-128.
[20] Parr Affidavit, para. 27, Exhibit "E", Motion Record, Tabs 3, 3E, pp. 116-117, 129-134.
[21] Parr Affidavit, paras. 28, 32, Motion Record, Tab 3, pp. 117-118.
[22] Parr Affidavit, para. 32, Motion Record, Tab 3, p. 118.

30 On July 28, 2015, the balance of the IAD was US $955,404 and GrowthWorks had more than US $1.35 million in its bank accounts. In addition to the imminent payment to GrowthWorks from the PerspecSys Transaction in the amount of US $2.5 million, a further US $1.2 million was expected the following month from a previously realized investment called OPKO.[23]

31 As such, and in reliance on the expertise and advice of Ms. Parr – and specifically on Ms. Parr's confirmation that the PerspecSys Transaction was definitely going to close in only a few days – it was also Roseway's view that it was reasonably practicable for GrowthWorks to pay the balance of the IAD.[24]

32 Accordingly, on July 28, 2015, Roseway requested payment of the IAD.[25] The Monitor consented. Mr. Bishop stated that:

> Payment of the remaining IAD would leave us with $387,282 in available funds. I require the Fund's approval to pay out the balance of the IAD and have advised the Fund that this amount, combined with the funds from Perspscys, should be more than sufficient to fund activities through the current extension period and beyond, and that accordingly I would consent to such payment.[26]

33 Both Roseway and the Monitor considered the test and agreed that it was met.

iv. GrowthWorks Blocks Payment

34 Despite the Monitor's approval to pay, on July 29, 2015, through its lawyers, GrowthWorks objected to payment of the IAD on the basis that it had "very limited and unreliable sources of capital" and that its "expenditures are material and [GrowthWorks]

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[23] Forer Affidavit, paras. 44, 46-47, Motion Record, Tab 2, p. 16; Parr Affidavit, para. 35, Motion Record, Tab 3, pp. 118-119.
[24] Parr Affidavit, para. 34, Exhibit "G", Motion Record, Tabs 3, 3G, pp. 118, 140; Forer Affidavit, para. 48, Motion Record, Tab 2, pp. 16-17.
[25] Forer Affidavit, para. 50, Exhibit "H", Tabs 2, 2H, pp. 17, 100.
[26] Forer Affidavit, para. 49, Exhibit "G", Tabs 2, 2G, pp. 17, 98-99.

must continue to be prudent with its limited resources". GrowthWorks also asserted that it would not pay Roseway "unless and until unrestricted cash proceeds of at least US $2,500,000 are actually received by the Monitor on behalf of [GrowthWorks] from the **proposed** PerspecSys sale transaction".[27] [emphasis added]

35 GrowthWorks' also asserted that it needed to maintain a significant cushion of cash for ongoing operations – notwithstanding that it has no ongoing operations.[28] Its only post-filing payables were owed to directors, who did not have a role in management after Roseway became Investment Advisor, and lawyers.[29]

36 Mr. Ross has said that if closing of the PerspecSys Transaction was imminent in late July, this was not communicated to GrowthWorks at the time.[30]

37 Mr. Ross ignores that, on July 29, 2015 – the same day as GrowthWorks objected to payment of the IAD – Ms. Parr met with Mr. Ross and Mr. Bishop to explain, among other things, that the proceeds of the PerspecSys Transaction would be wired to a payment facilitator the following day, July 30, 2015, and then to GrowthWorks that same day, or the next day.[31]

38 On July 30, 2015, as expected, the funds were wired to the payment facilitator. On July 31, 2015, as expected, the funds were received by GrowthWorks.[32]

39 GrowthWorks refused to pay the Additional Fee on the basis that the IAD had not yet been paid – an action wholly within GrowthWorks' hands at that point.

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[27] Forer Affidavit, para. 51, Exhibit "I", Motion Record, Tabs 2, 2I, pp. 17, 102.
[28] Affidavit of C. Ian Ross sworn October 9, 2015 (**Ross Affidavit**), para. 19(b), Responding Motion Record, Tab 1, p. 7.
[29] Forer Affidavit, paras. 52-53, Exhibit "I", Motion Record, Tabs 2, 2I, pp. 17-18, 101-103.
[30] Ross Affidavit, para. 29, Responding Motion Record, Tab 1, p. 11.
[31] Parr Affidavit, paras. 37-38, Exhibit "I", Motion Record, Tabs 3, 3I, pp. 119, 144-145.
[32] Parr Affidavit, para. 39, Motion Record, Tab 3, p. 119; Forer Affidavit, paras. 58-59, Motion Record, Tab 2, p. 19.

PART III - ISSUES AND THE LAW

40 The only issue on this motion is whether it was reasonably practicable for GrowthWorks to pay the IAD on July 28, 2015.

A. GrowthWorks' Misinterpreted and Misapplied the Settlement Agreement

41 The Settlement Agreement provides that the IAD must be paid to Roseway "as soon as reasonably practicable", having regard to certain specific criteria.

42 Section 2.04(c) of the Settlement Agreement states:

> with the consent of the Monitor, [GrowthWorks] will pay the Outstanding IAD [the Investment Advisor Debt] **as soon as reasonably practicable**, taking into account [GrowthWorks'] commercially reasonable estimate of the actual **and projected (i) liquidity and capital resources** of [GrowthWorks], and (ii) expenditures [...][33] [emphasis added]

43 The Settlement Agreement, which was the subject of "long and protracted negotiations",[34] must be interpreted with a view "to determine the intentions of the parties in accordance with the language used in the written document and presumes that the parties have intended what they have said."[35]

44 In determining when it would be "reasonably practicable" to pay the IAD, the parties have made it clear that **projected** liquidity and capital resources must be considered. Had the parties not intended that projected liquidity and capital resources be considered, they would not have used this language.

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[33] Forer Affidavit, para. 45, Exhibit "E", Motion Record, Tabs 2, 2E, pp. 16, 65.
[34] Ross Affidavit, para. 16, Responding Motion Record, Tab 1, p. 6.
[35] *Salah v. Timothy's Coffees of the World Inc.*, [2010] O.J. No. 4336 (C.A.), para. 16, Book of Authorities, Tab 4.

45 The balance of the IAD was US $955,404 and GrowthWorks had US $1.35 million in its bank accounts. Closing of the PerspecSys Transaction was certain: with a definitive agreement, board approval, and shareholder approval, "there was no question in [Ms. Parr's] mind that the transaction would close."[36] A payment of US $2.5 million to GrowthWorks on account of the PerspecSys Transaction would be received within a few days.[37] This far exceeded GrowthWorks' payables of $699,000.[38]

46 GrowthWorks did not consider or apply the correct criteria: actual and projected liquidity and capital resources. Instead, GrowthWorks refused to permit payment of the IAD until "cash had actually been received from dispositions",[39] or put another way by Mr. Ross, "sufficient cash had already been received".[40]

47 Mr. Ross applied the wrong analysis, advising the GrowthWorks board of directors shortly after the proceeds had been received that it had been his "intention to consider such payment [of the IAD] upon receipt of those proceeds".[41]

48 In coming to his conclusion, Mr. Ross effectively asked himself the wrong question: whether it was "reasonably practicable" to pay Roseway because GrowthWorks had actually received the proceeds from the PerspecSys Transaction.

49 That is not what the Settlement Agreement says. GrowthWorks' interpretation of the Settlement Agreement completely ignores the words "projected (i) liquidity and capital resources" in section 2.04(c) – thereby rendering these words meaningless. In doing so, GrowthWorks breached the express terms of the Settlement Agreement.

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[36] Parr Affidavit, paras. 28, 32, Motion Record, Tab 3, pp. 117-118.
[37] Forer Affidavit, paras. 44, 46-47, Motion Record, Tab 2, p. 16; Parr Affidavit, para. 35, Motion Record, Tab 3, pp. 118-119.
[38] Ross Affidavit, para. 19(d), Responding Motion Record, Tab 1, p. 7.
[39] Ross Affidavit, para. 20, Responding Motion Record, Tab 1, p. 8.
[40] Ross Affidavit, para. 22, Responding Motion Record, Tab 1, pp. 8-9.
[41] Minutes of the Meeting of the Board of Directors of GrowthWorks Canadian Fund Ltd., August 5, 2015.

B. Any Reliance upon the Business Judgment Rule Is Misplaced

50 Mr. Ross states in his affidavit that:

> In my experience and business judgment, both at the time and even now in retrospect, it would have been irresponsible to pay the Outstanding IAD until the PerspecSys Disposition actually closed and proceeds were actually received by the Fund.[42]

51 To the extent that GrowthWorks is attempting to invoke the business judgment rule to protect is refusal to pay the IAD, that reliance is misplaced. The business judgment rule:

(a) does not displace a contractual term or apply to its interpretation;[43] and

(b) in any event, it requires a reasoned and informed decision making process to engage its protection.[44]

52 Mr. Ross gave no serious thought to the actual likelihood of the PerspecSys Transaction closing. Mr. Ross simply decided not to pay based upon "actual" cash as opposed to "projected". He ignored GrowthWorks' contractual obligations – a decision that never attracts the deference of the courts.

53 Had Mr. Ross considered the question of **projected** liquidity and funds, he would have had to follow a considered analytical process regarding the likelihood of the PerspecSys Transaction closing:

> [...] directors are only protected to the extent that their actions actually evidence their business judgment. **The principle of deference presupposes that directors are**

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[42] Ross Affidavit, para. 28, Responding Motion Record, Tab 1, p. 11.
[43] *Renegade Capital Corp. v. Dominion Citrus Ltd.*, [2013] O.J. No. 1467 (Sup. Ct.), paras. 90-93, Book of Authorities, Tab 3.
[44] *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.*, [2002] O.J. No. 2412 (Sup. Ct.), para. 153, Book of Authorities, Tab 5, affirmed [2004] O.J. No. 636 (C.A.), Book of Authorities, Tab 6.

> **scrupulous in their deliberations and demonstrate diligence in arriving at decisions**. Courts are entitled to consider the content of their decision and the extent of the information on which it was based and to measure this against the facts as they existed at the time the impugned decision was made.[45] [emphasis added]

54 By corollary, there is no basis for the courts to defer to a board or management where scrupulous and diligent analysis has not been undertaken:

> In short, the Committee did not have or **seek sufficient information upon which to ground a reasonable judgment** about whether to recommend the Agreement, yet other directors relied upon the assumption that a full review had been done [...] **The point here is that the directors did not engage in any kind of analysis** [...][46] [emphasis added]

55 However, there were other people giving consideration to the proper question – the likelihood of the PerspecSys Transaction closing – the Monitor and Ms. Parr.

56 The Monitor accepted the likelihood of the PerspecSys Transaction closing. It consented to the payments of the IAD:

> Jim
>
> Further to our call and your recent emails I have informed the fund of your request that the fund repay the balance of the IAD, and of your agreement to hold funds in trust against the possibility that the Perspecsys funds, for whatever reason, are not received after payment is confirmed, and that in such an event funds would be returned to the Monitor. As you are aware the settlement agreement provides that;
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> with the consent of the Monitor, GW Cdn will pay the Outstanding IAD as soon as reasonably practicable, taking into account GW Cdn's commercially reasonable

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[45] *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.*, [2002] O.J. No. 2412 (Sup. Ct.), para. 153, Book of Authorities, Tab 5, affirmed [2004] O.J. No. 636 (C.A.), Book of Authorities, Tab 6.
[46] *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.*, [2002] O.J. No. 2412 (Sup. Ct.), paras. 127, 134, Book of Authorities, Tab 5, affirmed [2004] O.J. No. 636 (C.A.), Book of Authorities, Tab 6. See also *Itak International Corp. v. CPI Plastics Group Ltd.*, [2006] O.J. No. 2637 (Sup. Ct.), Book of Authorities, Tab 2.

> estimate of the actual and projected (i) liquidity and capital resources of GW Cdn, and (ii) expenditures of GW Cdn
>
> At this point we have in the GW bank accounts the following amounts;
>
> Roseway Account $1,230,248
> GW Expense accounts $122,438
>
> Payment of the remaining IAD would leave us with $387,282 in available funds. I require the Fund's approval to pay out the balance of the IAD and have advised the Fund that this amount, combined with the funds from Perspscys, should be more than sufficient to fund activities through the current extension period and beyond, and that accordingly I would consent to such payment.
>
> I would suggest that timing of the IAD repayment be discussed directly with the Fund
>
> Regards
>
> Paul[47]

57 The Monitor's confidence in the **projected** liquidity and capital resources of GrowthWorks was well placed. It was in receipt of regular updates from Ms. Parr.[48]

58 Ms. Parr had (and still has) an interest in the outcome of the debate. She receives a portion of the Additional Fee, as she should since it is in part attributable to her efforts.[49]

59 Ms. Parr also, however, had the unchallenged experience and information to assess the likelihood of closing. Ms. Parr has over 30 years of experience in venture and private equity, investing and fund raising, and corporate finance. Among other things, Ms. Parr served as the leader of the private equity and venture group at OMERS

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[47] Forer Affidavit, Exhibit "G", Motion Record, Tab 2G, pp. 98-99.
[48] Parr Affidavit, paras. 19, 27, 34-35, Exhibits "B", "E", "G", Motion Record, Tab 3, 3B, 3E, 3G, pp. 115-119, 122-125, 129-134, 140.
[49] Forer Affidavit, paras. 40, 64, Motion Record, Tab 2, pp. 15, 20.

for four years. GrowthWorks was sufficiently satisfied with Ms. Parr's competence that it has been negotiating to retain her directly as its investment advisor.[50]

60 Ms. Parr also had detailed knowledge of the status of the PerspecSys Transaction. She was, among other things: (i) in regular contact with a PerspecSys board member; (ii) liaised with legal counsel on the transaction and received the definitive deal documents; and (iii) was intimately aware of when the PerspecSys Transaction received board and shareholder approval.

61 In the circumstances, Ms. Parr had ample information and experience to reach her unchallenged conclusion that the closing was virtually certain:

> On July 24, 2015, I received confirmation that the Agreement had received board approval and that it had been signed. I immediately informed Mr. Ross and Mr. Bishop by e-mail that the Agreement had been signed. At this point, closing was virtually certain, and was likely to occur the following week [...] Closing was also imperative because PerspecSys had little remaining cash; the deal had to close.
>
> On July 27, 2015, I received confirmation that the requisite percentage of voting shareholders had approved the transaction. As at this date, closing was imminent. With board approval, a signed agreement, and shareholder approval, the question was no longer "if" (although it had been very likely that the transaction would close for more than a month), but "when".
>
> As at July 27, 2015, there was no question in my mind that the transaction would close. In my experience, it would be unreasonable to take any other view in the circumstances.[51]

62 If there is any business judgment to be deferred to here, it is that of Ms. Parr.

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[50] Parr Affidavit, paras. 2-3, 15, Motion Record, Tab 3, pp. 111-112, 114.
[51] Parr Affidavit, paras. 27-28, 32, Motion Record, Tab 3, pp. 116-118.

C. The Unfair Effect of GrowthWorks' Conduct

63 The PerspecSys Transaction resulted in payment of US $2.54 million to GrowthWorks. The Additional Fee in respect of that transaction is 15% of that amount (plus 15% of the proceeds to be received in the future).

64 Since the Additional Fee is only payable "from and after such time as the Investment Advisor Debt has been paid in full",[52] the effect of GrowthWorks' refusal to allow the IAD to be paid until after closing of the PerspecSys Transaction was to deprive Roseway of the Additional Fee in respect of the PerspecSys Transaction in the amount of $381,000 – and to keep these funds for itself.

65 GrowthWorks' failure to pay the IAD when reasonably practicable is a breach of the Settlement Agreement. The Additional Fee is the damages of that breach. That alone is sufficient for the disposition of this motion.

66 There is, however, an additional consideration to be applied by this court. GrowthWorks is a debtor in possession under court supervised protection. In exchange for that protection, it does not (if it ever did) maintain unfettered discretion over the execution of its contracts. In particular, the Settlement Agreement was approved by the court pursuant to its jurisdiction under section 11.02 of the CCAA. Pursuant to that provision, it was necessary for the court to be satisfied that GrowthWorks "has acted, and is acting, in good faith."[53] The requirement that an applicant act in good faith is an ongoing obligation within the context of CCAA proceedings.[54]

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[52] Forer Affidavit, paras. 62-63, Exhibit "B", Motion Record, Tab 2, 2B, pp. 19-20, 38.
[53] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, s. 11.02.
[54] *4519922 Canada Inc. (Re)*, [2015] O.J. No. 115 (Sup. Ct.), para. 45, Book of Authorities, Tab 1.

67 GrowthWorks now has the advantage of the proceeds of the PerspecSys Transaction as a direct result of the efforts of Roseway and Crimson Capital. A good faith application of the Settlement Agreement, in all of the circumstances, would have resulted in payment of the IAD when payment was requested. Denying Roseway the Additional Fee is simply unfair, and not an appropriate course of action for a court supervised debtor to take.

PART IV - ORDER REQUESTED

68 Roseway requests an Order that GrowthWorks promptly pay to Roseway the Additional Fee in respect of the PerspecSys Transaction in the amount of US $381,000, plus 15% of the proceeds to be received by GrowthWorks in the future in respect of the PerspecSys Transaction.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of October, 2015.

For: **Alan B. Merskey**
Norton Rose Fulbright Canada LLP

John M. Picone
Norton Rose Fulbright Canada LLP

Lawyers for Roseway Capital s.à.r.l.

SCHEDULE "A"
LIST OF AUTHORITIES

1 *4519922 Canada Inc. (Re)*, [2015] O.J. No. 115 (Sup. Ct.)

2 *Itak International Corp. v. CPI Plastics Group Ltd.*, [2006] O.J. No. 2637 (Sup. Ct.)

3 *Renegade Capital Corp. v. Dominion Citrus Ltd.*, [2013] O.J. No. 1467 (Sup. Ct.)

4 *Salah v. Timothy's Coffees of the World Inc.*, [2010] O.J. No. 4336 (C.A.)

5 *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.*, [2002] O.J. No. 2412 (Sup. Ct.)

6 *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.*, [2004] O.J. No. 636 (C.A.)

SCHEDULE "B"
RELEVANT STATUTES

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

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

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

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

BURDEN OF PROOF ON APPLICATION

(3) The court shall not make the order unless

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

(b) (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

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

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.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

Proceeding commenced at Toronto

FACTUM OF ROSEWAY CAPITAL S.À.R.L.
(returnable November 4, 2015)

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