

**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 September 4, 2015)**

September 2, 2015

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PART I – OVERVIEW

- 1 By this motion, Roseway Capital S.à.r.l. ("**Roseway**") seeks an order:
- (a) that FTI Consulting Canada Inc., in its role as Court-appointed Monitor to GrowthWorks (the "**Monitor**") promptly pay both the Investment Advisor Debt still outstanding under a certain agreement, being an Investment Advisor Agreement dated May 9, 2014 (the "**IAA**") (in the amount of \$955,404), together with an Additional Fee (as defined below) earned by Roseway pursuant to the IAA on a recent transaction relating to PerspecSys Inc. (in the amount of U.S. \$381,000) (this transaction is referred to as the "**PerspecSys Transaction**");
 - (b) that the Monitor pay such other amounts as the Monitor determines are payable to Roseway under Subsections 7.5.1 and 7.5.2 of the IAA; and
 - (c) that if there are any disputes with respect to these other amounts, the Monitor may seek direction of the Court as necessary, as may Roseway or GrowthWorks Canadian Fund Ltd. ("**GrowthWorks**").

2 The motion of Roseway is in response to, and a cross-motion with respect to, a motion brought by GrowthWorks seeking payment of the Investment Advisor Debt only.

PART II – FACTS

3 The facts are set out in the Affidavit of Michael Forer dated August 28, 2015 (the “**Forer Affidavit**”). There is a substantial amount of history relating to the relief sought in this motion; that history has not been reproduced in this Factum at length, but is set out in the Forer Affidavit.

Background

4 GrowthWorks is a Canadian labour-sponsored venture capital corporation operating a fund (the “**Fund**”) that invests in small to medium-sized Canadian venture companies. GrowthWorks has been in these CCAA proceedings (the “**CCAA Proceedings**”) since October 1, 2013.¹

5 Roseway is the sole secured creditor of GrowthWorks, due to an investment of \$20 million in GrowthWorks in 2010. GrowthWorks defaulted in payment of this amount on October 1, 2013. At that time, GrowthWorks filed for protection under the *Companies’ Creditors Arrangement Act* (the “**CCAA**”).²

6 The Fund was managed by a former manager (the “**Former Manager**”) who was terminated by GrowthWorks when it began these CCAA Proceedings. It is Roseway’s view that the Fund was in fact mismanaged by the Former Manager. Prior to these CCAA Proceedings,

¹ Forer Affidavit, Roseway Motion Record, page 7, paragraphs 6 and 7

² Forer Affidavit, Roseway Motion Record, page 7, paragraphs 1 and 6

GrowthWorks was paying the Former Manager in excess of \$7 million per annum in management fees.³

7 At the commencement of the CCAA Proceedings, GrowthWorks intended to complete a transaction that would repay Roseway. As Sales and Investment Solicitation Process (the “SISP”) was authorized by the Court and was conducted in late 2013. The SISP failed to produce a sale or investment transaction.⁴

8 Since the Former Manager had been terminated, the Fund was without a manager. GrowthWorks did not have the internal ability to manage the Fund, and since the SISP had failed it became apparent that the Fund would have to be ‘managed out’ over time, so that realizations (through dispositions of securities in the Fund) could be made as opportunities arose. Accordingly, GrowthWorks and Roseway entered into an agreement whereby Roseway would manage the Fund. Roseway has the expertise and the ability to manage the Fund. GrowthWorks and Roseway entered into the IAA in May of 2014.⁵

9 The IAA is a comprehensive agreement governing the relationship of the parties.

10 Under the IAA, Roseway is entitled to an Annual Fee of \$350,000 and an Additional Fee (the “**Additional Fee**”) equal to 15% of the net amount of the dispositions of securities of the Fund.⁶

11 Particularly relevant to the within motions, the IAA did not give GrowthWorks control over any monies. Two accounts were established. One was a “Blocked Account” and Roseway (and Roseway alone) was to control disbursements from that account. The other was a “GW

³ Forer Affidavit, Roseway Motion Record, pages 8-10 paragraphs 10-13, 17

⁴ Forer Affidavit, Roseway Motion Record, pages 10-12, paragraphs 16,23, 27-29

⁵ Forer Affidavit, Roseway Motion Record, pages 12-14, paragraphs 29-34

⁶ IAA, Roseway Motion Record, Tab 2B, page 52, Sections 7.1 and 7.3

Expenses Account" established to fund GrowthWorks' budgeted expenses during the CCAA Proceedings. The Monitor controls and has always controlled the GW Expenses Account.⁷

12 Under the terms of the IAA, the Monitor and GrowthWorks were to have "read only" access to the Blocked Account. Roseway was entitled to pay monies from the Blocked Account to itself (as a secured creditor), on account of the secured amounts owing to it (the "**Investment Advisor Debt**"). An Order Authorizing Distributions had already been made by this Court in November of 2013, declaring Roseway's secured creditor status.⁸

13 The IAA was approved by an Order of this Court made on May 14, 2014.

14 Under the IAA, all monies from dispositions of the Fund's securities flowed into the Blocked Account. The IAA provided for the limited transfer of monies from the Blocked Account to the GW Expenses Account on a periodic basis, but only (a) of an agreed amount, and (b) "upon dispositions" [emphasis added] of securities in the Fund. The parties agreed in the IAA that "upon [the] disposition" of securities, the GW Expenses Account could be topped up. As noted above, the Fund was being 'managed out' over time, and dispositions were expected to, and have, occurred periodically.⁹

Structure of Blocked Account changed slightly due to third-party banking procedures

15 Due to circumstances beyond the parties' control, the Blocked Account could not be established in the precise manner contemplated by the IAA. In the Monitor's words, "the procedural obstacles of the banks have made the opening of the blocked account not possible at this time". Therefore, the parties agreed that the Blocked Account could be established by the Monitor instead. However, consistent with the IAA, Roseway was to have the sole authority

⁷ IAA, Roseway Motion Record, page 53, Sections 7.4 and 7.5; Forer Affidavit, Roseway Motion Record, pages 15-16, paragraphs 38-41

⁸ IAA; Roseway Motion Record, page 53, Sections 7.4 and 7.5; Forer Affidavit, Roseway Motion Record, page 11, paragraph 24

⁹ Forer Affidavit, Roseway Motion Record, pages 19-20, paragraphs 51-55

for disbursements from the Blocked Account and, in addition, proceeds from the disposition of the Portfolio were to be prioritized and handled in accordance with Section 7.5 of the IAA.¹⁰

16 Donna Parr of Crimson Capital Inc., the “Sub-Contractor” under the IAA on Roseway’s behalf, and Jim Cade of Norton Rose Canada Fulbright LLP (“Norton Rose”), Roseway’s solicitors, were and remain the two individuals who can authorize disbursements from the Blocked Account.¹¹

17 These matters are set out in a letter agreement dated October 6, 2014, signed by the Monitor, Roseway and GrowthWorks, with respect to this alternate Blocked Account (the “Blocked Account Letter Agreement”).¹²

18 The new structure of the Blocked Account did not change the basic concept that Roseway was entitled to be paid the money owed to it; nor did it change the application of funds, which was to continue in accordance with Section 7.5 of the IAA (as stated in the Blocked Account Letter Agreement). What it did, however, was to introduce the Monitor into the mix, since the Blocked Account was now in its name.¹³

19 This has now become a point of leverage for GrowthWorks, and unfairly so. The IAA never contemplated GrowthWorks having control over or a veto over payment of the Investment Advisor Debt. The Blocked Account was intended to be under the sole control of the Investment Advisor (that is, Roseway). However, with the Monitor now being the holder of the Blocked Account, GrowthWorks has attempted to exercise control / a veto by objecting to payments out of the Blocked Account. This has put the Monitor in a difficult position and, being cautious, the

¹⁰ Forer Affidavit, Roseway Motion Record, page 17, paragraphs 43-46; Blocked Account Letter Agreement; Roseway Motion Record, Tab 2D, pages 69-73

¹¹ Forer Affidavit, Roseway Motion Record, page 17, paragraph 44; Blocked Account Letter Agreement; Roseway Motion Record, Tab 2D, pages 69-73

¹² Blocked Account Letter Agreement, Roseway Motion Record, Tab 2D; pages 69-73

¹³ Forer Affidavit, Roseway Motion Record, page 17, paragraph 46

Monitor has declined to make payments out of the Blocked Account when GrowthWorks has objected.¹⁴

20 GrowthWorks has, through this mechanism of unauthorized vetos, caused delay and manipulated the timing of the payment of amounts due to Roseway under the IAA. Roseway believes that the ongoing objections of GrowthWorks have been for a collateral purpose and have been made in bad faith to avoid payment of the Additional Fee due to Roseway from a successful divestment within the portfolio that is managed by Roseway.¹⁵

No Dispute that Investment Advisor Debt is owed, and that there were funds to pay it

21 Roseway is owed the Investment Advisor Debt, as noted above, in the amount of \$955,404; there is no dispute about this.

22 Further, there is no dispute that as of July 28, 2015, there were sufficient funds in the Blocked Account to pay this. As of that date, the Blocked Account had a balance of \$1,230,248.¹⁶

23 Roseway requested that the Monitor pay the balance of the Investment Advisor Debt prior to the closing of the PerspecSys Transaction, and the Monitor was content to do so. The Monitor did not make this payment because of GrowthWorks' objection to it.¹⁷

24 There is no dispute that funds also remained in the GW Expenses Account (\$122,438) as of July 28, 2015.¹⁸

¹⁴ Forer Affidavit, Roseway Motion Record, page 18, paragraph 47

¹⁵ Forer Affidavit, Roseway Motion Record, page 18, paragraph 48

¹⁶ Forer Affidavit, Roseway Motion Record, page 24, paragraph 71

¹⁷ Forer Affidavit, Roseway Motion Record, pages 30-31, paragraphs 95-97; Tabs 2G and 2H, pages 117-121

¹⁸ Forer Affidavit, Roseway Motion Record, page 24, paragraph 71

25 Had the full amount of the Investment Advisor Debt been paid on July 28, 2015, \$397,282 would still have remained in the two accounts (\$274,844 in the Blocked Account and \$122,438 in the GW Expenses Account).

By Preventing Payment, GrowthWorks Intended to Alter Rights under IAA

26 GrowthWorks' apparent intention in delaying this payment was to attempt to avoid payment of the Additional Fee accruing on the PerspecSys Transaction.¹⁹

27 The PerspecSys Transaction accrued value to the debtor's estate over and above the amount needed to repay Roseway the balance of its secured debt (the Investment Advisor Debt).²⁰

28 GrowthWorks has brought a motion permitting it to pay the Investment Advisor Debt only, even though the Additional Fee is also payable under the terms of the IAA.

29 All amounts owing under the IAA are post-filing obligations of GrowthWorks, for services provided post-filing.

¹⁹ Forer Affidavit, Roseway Motion Record, page 30, paragraphs 92-94

²⁰ Forer Affidavit, Roseway Motion Record, page 29, paragraph 90

The IAA

30 Section 7.4.1 of the IAA provides as follows²¹:

7.4 Expenses Borne by GW CDN

7.4.1 The Monitor, on behalf of GW CDN shall pay all expenses relating to the performance of GW CDN's obligations pursuant to Article 6 as well as ordinary course expenses and fees as set out in the Budget (the "GW Expenses").

7.4.2 Until such time as the Investment Advisor Debt is paid in full, the Monitor, on behalf of GW CDN shall be permitted to retain up to an amount agreed by the Parties and the Monitor (the "Budget Agreed Amount") in order to pay the Investment Advisor the Annual Fee as well as the GW Expenses, as they become due. Upon dispositions of Portfolio Securities, payment will be made from the Blocked Account to the Monitor in an amount representing the difference between the Budget Agreed Amount and the amount then held by the Monitor on behalf of GW CDN in respect thereof (the "Fees and Expenses Allowance") in accordance with Section 7.5

31 Funds for the GW Expenses were placed in a separate account by the Monitor (the "**GW Expenses Account**"). GrowthWorks did not have control of the payment of GW Expenses, nor did it have any control of the GW Expenses Account. However, as the IAA indicates, payments were being made on its behalf (since it was and is the CCAA debtor and it was and is responsible for those payments).²²

32 The IAA also contemplates a separate Blocked Account under the sole control of Roseway (as Investment Advisor). GrowthWorks and the Monitor were to have "read-only" access, for monitoring purposes, but Roseway and Roseway alone was authorized to disburse from the Blocked Account. Disbursements were to be made for three purposes, being (i) to pay expenses related to selling or realizing upon securities in the Portfolio, (ii) to 'top up' the GW Expenses Account to the "Budget Agreed Amount" as defined (*upon disposition of Portfolio Securities*, and if top up was required), and then (iii) to pay the Investment Advisor Debt owing to Roseway.

²¹ IAA, Roseway Motion Record, page 53, Section 7.4

²² Forer Affidavit, Roseway Motion Record, page 15, paragraph 39

33 Section 7.5.1, which deals with these issues, is set out below:

7.5 Proceeds of Disposition

7.5.1 Until such time as the Investment Advisor Debt is paid in full, the Investment Advisor will ensure that all of the proceeds received from the disposition of any Portfolio Securities are directed to a newly created blocked account (the "Blocked Account") in the name of GW CDN which account shall require the signature of a representative of the Investment Advisor for all disbursements. GW CDN and the Monitor will have "read-only" access to the Blocked Account at all times. Upon notice provided to GW CDN and the Monitor, the proceeds will be distributed from the Blocked Account in the following priority:

7.5.1.1 payment of any Legal Expenses and Transaction Expenses;

7.5.1.2 payment to the Monitor of the Fees and Expenses Allowance; and

7.5.1.3 payment of the Investment Advisor Debt, with effect on the date such proceeds are received by or on behalf of the Investment Advisor.

34 As noted above, the IAA was approved by an Order of the Court made on May 14, 2014. The IAA continues to govern the relationship between GrowthWorks, on the one hand, and Roseway as Investment Advisor, on the other hand. Nothing has abrogated this agreement, and as noted below, a recent Settlement Agreement expressly recognizes the continued effectiveness of the IAA.

The Blocked Account Letter Agreement

35 Due to the procedural banking difficulties encountered when the parties attempted to set up the Blocked Account in accordance with the IAA, an account was opened by the Monitor for the same purposes. The Blocked Account Letter Agreement was executed by the parties in October of 2014. It provides in part as follows:

- (a) GrowthWorks will have "read-only" access to the Blocked Account;
- (b) "... the proceeds from the disposition of Portfolio Securities will be prioritized and handled in accordance with Section 7.5 of the Investment Advisor Agreement.";

- (c) The parties consented to “the jurisdiction and venue of ... the Court supervising the CCAA Proceedings for the resolution of any disputes arising under this letter agreement.”²³

The Settlement Agreement

36 GrowthWorks alleges that Section 2.04 of the Settlement Agreement has amended and/or displaced the detailed payment mechanisms and monetary controls in the IAA and the Blocked Account Letter Agreement.

37 Section 2.04 operates “notwithstanding any provision of any Applicable Document”. Three documents are included within the definition of “Applicable Document”, but neither the IAA nor the Blocked Account Letter Agreement are within that definition.²⁴

38 Section 6.02 provides that “Except as amended or modified by the terms of this Agreement, ... the IAA ... continue[s] ... in full force and effect in accordance with its terms. The Settlement Agreement does not address the Blocked Account Letter Agreement in any fashion.”²⁵

PART III – ISSUES

39 The issues to be determined on this motion are:

- (a) Did GrowthWorks have authority to direct the Monitor to not repay the Investment Advisor Debt from the Blocked Account, on or about July 28, 2015?
- (b) If not, should the delay in payment of the Investment Advisor Debt deprive Roseway of the Additional Fee earned on the PerspecSys Transaction?

²³ Blocked Account Letter Agreement, Roseway Motion Record, pages 69-73

²⁴ Settlement Agreement, Roseway Motion Record, page 76, Section 1.01

²⁵ Settlement Agreement, Roseway Motion Record, page 90, Section 6.02

PART IV – LAW AND ARGUMENT

A. *Contractual Provisions*

40 GrowthWorks alleges that Section 2.04 of the Settlement Agreement has amended and/or displaced the detailed payment mechanisms and monetary controls in the IAA and the Blocked Account Letter Agreement.

41 Section 2.04 operates “notwithstanding any provision of any Applicable Document”. Three documents are included within the definition of “Applicable Document”, but neither the IAA nor the Blocked Account Letter Agreement are within that definition.²⁶

42 Section 6.02 provides that “Except as amended or modified by the terms of this Agreement, ... the IAA ... continue[s] ... in full force and effect in accordance with its terms.”²⁷

43 The Settlement Agreement was intended to amend and terminate certain agreements, and did so explicitly. Section 2.06 of the Settlement Agreement is entitled “Amendment of the Security Agreement”, and contains provisions over two pages in length, specifying amendments to the Security Agreement. Section 2.08 is entitled “Termination of Applicable Documents” and specifically terminates two prior agreements.²⁸

44 The Settlement Agreement does not attempt to amend or modify the IAA, and does not address the Blocked Account Letter Agreement.

45 Language used in the IAA (or any agreement) should be interpreted in a manner that is consistent within that document. Section 7.3 of the IAA (which deals with the payment of the Additional Fee) provides that the Additional Fee is “payable upon the disposition of any Portfolio Securities”. It is clear what this means. Section 7.4.2 of the IAA (which deals with the top-up of

²⁶ Settlement Agreement, Roseway Motion Record, page 76, Section 2.04

²⁷ Settlement Agreement, Roseway Motion Record, page 90, Section 6.02

²⁸ Settlement Agreement, Roseway Motion Record, pages. 83-86, Sections 2.06 and 2.08

the GW Expenses Account), provides that “Upon dispositions of Portfolio Securities, payment will be made from the Blocked Account to the Monitor [etc.].”²⁹

46 The timing for both the payment of the Additional Fee and the top-up was to be the same: upon disposition of Portfolio Securities, which in this case was upon the completion of the PerspecSys Transaction.

B. Contracting Parties have a Duty of Honest Performance

47 The Supreme Court of Canada has recently confirmed that contracting parties have a duty of honest performance toward each other. Parties must not seek to evade their contractual duties.³⁰

C. Specific Contractual Terms should Govern over General Terms

48 Where there is a potential conflict between a general contractual term and a specific contractual term, the specific term will govern.³¹ The Court must have regard not only to the language of the particular contract that is being interpreted, but to the surrounding contracts as well.³²

49 The Settlement Agreement, in Section 2.04, contained a covenant requiring GrowthWorks to “pay 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]”.³³

50 This is a general obligation to pay. It does not displace the fact that GrowthWorks in fact did not control any monies, as per prior agreements and Court orders (made consistently since

²⁹ IAA, Roseway Motion Record, pages 52-53, Sections 7.3 and 7.4

³⁰ *Bhasin v. Hrynew*, 2014 SCC 71, at pages 14 and 19; paragraphs 47 and 73; *Nareerux Import Co. v. Canadian Imperial Bank of Commerce*, 2009 ONCA 764, at pages 13-14, paragraph 69

³¹ *Maher v. Great Atlantic & Pacific Co. of Canada*, 2010 ONCA 415, at page 7, paragraph 46

³² *3869130 Canada Inc. (c.o.b. I.C.B. Distribution 2001) v. I.C.B. Distribution Inc.*, 2008 ONCA 396, at page 10, paragraph 33

³³ Settlement Agreement, Roseway Motion Record, page 82, Section 2.04

the beginning of the CCAA Proceedings, as described in the Forer Affidavit). Amounts were being paid from the GW Expenses Account and the Blocked Account 'on behalf of GrowthWorks' (since these were GrowthWork obligations), but GrowthWorks was not handling any monies or writing any cheques, for anything. Several prior agreements and Court orders had intentionally put the control of monies with the Monitor and Roseway.

51 The IAA and the Blocked Account Letter Agreement deal very specifically with the deposit of the proceeds of dispositions into the Blocked Account, with the "read-only" status of GrowthWorks with respect to that Blocked Account, with the two named individuals (Roseway nominees) who could authorize disbursements from the Blocked Account, and with the transfer from time to time "upon dispositions of Portfolio Securities" from the Blocked Account to the GW Expenses Account. All of this specific detail was not addressed, much less amended, by the general provision found in Section 2.04 of the Settlement Agreement.

PART V - RELIEF SOUGHT

52 For the reasons stated above, Roseway respectfully requests that the Court grant an Order that the Monitor (on behalf of GrowthWorks) promptly pay both the Investment Advisor Debt still outstanding under the IAA (being \$955,404), together with the Additional Fee earned on the PerspecSys Transaction (U.S.\$381,000) and such other amounts as the Monitor determines are payable to Roseway under Subsections 7.5.1 and 7.5.2 of the IAA. If there are any disputes with respect to these other amounts, the Monitor may seek direction of the Court as necessary, as may GrowthWorks or Roseway.

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


Norton Rose Fulbright Canada LLP
Lawyers for Roseway Capital S.à.r.l.

Tab A

SCHEDULE "A"

CASES

- 1 *Bhasin v. Hrynew*, 2014 SCC 71
- 2 *Nareerux Import Co. v. Canadian Imperial Bank of Commerce*, 2009 ONCA 764
- 3 *Maher v. Great Atlantic & Pacific Co. of Canada*, 2010 ONCA 415
- 4 *3869130 Canada Inc. (c.o.b. I.C.B. Distribution 2001) v. I.C.B. Distribution Inc.*, 2008 ONCA 396

- the amount of \$ ~~1,000,000~~ be held aside by the monitor until such time as the court determines the ~~is~~ dispute as to whether the such amount is payable by Growthwols to Roseway.

- the ~~rest~~ ^{provided for} ~~in~~ the ~~blocked~~ account agreement

- that the restrictions imposed on Growthwols in the ~~the~~ Investment Advisor Agreement ~~is~~ for so long

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Proceeding commenced at Toronto

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