

**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.
(the "APPLICANT")

**FACTUM OF THE APPLICANT
(re: Stay Extension)**

March 4, 2014

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FACTUM OF THE APPLICANT

PART I—OVERVIEW

1. In this motion, GrowthWorks Canadian Fund Ltd. (the "**Applicant**" or the "**Fund**") seeks an order in the form attached to the Motion Record of the Fund extending the Stay Period as defined in paragraph 14 of the Initial Order (defined below) (the "**Stay Period**") to May 2, 2014.

PART II—FACTS

BACKGROUND

2. The Fund is a labour-sponsored venture capital fund with a diversified portfolio of investments in small and medium-sized Canadian businesses (as defined in the Initial Affidavit of C. Ian Ross dated September 30, 2013, the "**Portfolio Companies**").¹

3. The Fund's investments in the Portfolio Companies are held in illiquid securities consisting primarily of minority equity interests in private companies. The Fund's ability to divest

¹ Affidavit of C. Ian Ross sworn March 3, 2014 (the "March 3 Ross Affidavit") at para. 4, Applicant's Motion Record, Tab 2, p. 7.

of its relatively illiquid investments at a profit 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. Such opportunities have been limited as a result of the 2008 financial crisis and other market constraints.²

4. A forced sale of the Fund's investment assets, prior to an appropriate exit opportunity arising, generally results in depressed values and portfolio losses.³

5. In the face of the above and other challenges, including a \$20 million secured payment obligation coming due to Roseway Capital S.a.r.l. ("**Roseway**"), the Fund sought and received Court protection pursuant to the CCAA in the form of an initial order of the Honourable Mr. Justice Newbould dated October 1, 2013, which was amended and restated on October 29, 2013 by the Honourable Justice Mesbur (as amended and restated, the "**Initial Order**").⁴

6. Also on October 29, 2013, the Stay Period was extended by order of the Honourable Justice Mesbur to January 15, 2014.⁵

7. On November 18, 2013, the Honourable Mr. Justice Morawetz granted an order approving a Sale and Investor Solicitation Process (the "**SISP**"). The purpose of the SISP was to canvass the market to solicit interest in purchasing or investing in the Fund's business and property.⁶

² March 3 Ross Affidavit at para. 5, Applicant's Motion Record, Tab 2, p. 7

³ March 3 Ross Affidavit at para. 6, Applicant's Motion Record, Tab 2, p. 7

⁴ March 3 Ross Affidavit at para. 7, Applicant's Motion Record, Tab 2, p. 7

⁵ March 3 Ross Affidavit at para. 8, Applicant's Motion Record, Tab 2, p. 8

⁶ March 3 Ross Affidavit at para. 9, Applicant's Motion Record, Tab 2, p. 8

8. On January 9, 2014, the Stay Period was extended to and including March 7, 2014 by order of the Honourable Justice McEwen and a procedure for identifying, assessing and determining claims against the Fund (the “**Claims Process**”) was approved.⁷

SALE AND INVESTOR SOLICITATION PROCESS UPDATE

9. The SISP was divided into two phases. The deadline for bids in Phase 1 of the SISP occurred on December 13, 2013 at which time The Commercial Capital Corporation (operating as CCC Investment Banking) (the “**Financial Advisor**”) received seven non-binding letters of intent (“**LOI**”). Six of the LOI’s received in Phase 1 were determined to be “Qualified LOI’s” as defined in the SISP.⁸

10. Phase 2 of the SISP commenced on December 20, 2013 with six bidders invited to participate in Phase 2.⁹

11. During Phase 2 of the SISP, the participating bidders were given access to a variety of legal agreements, updated financial information and company overview presentations relating to the material Portfolio Companies. Due diligence calls were also conducted in which management of the relevant Portfolio Companies gave an overview presentation and responded to questions from bidders.¹⁰

12. At the Phase 2 bid deadline of February 3, 2014, two parties submitted proposals. Neither of these proposals constituted a “Qualifying Bid” as defined in the SISP since, among

⁷ March 3 Ross Affidavit at para. 10, Applicant’s Motion Record, Tab 2, p. 8

⁸ March 3 Ross Affidavit at para. 11, Applicant’s Motion Record, Tab 2, p. 8

⁹ March 3 Ross Affidavit at para. 12, Applicant’s Motion Record, Tab 2, p. 8

¹⁰ March 3 Ross Affidavit at para. 13, Applicant’s Motion Record, Tab 2, p. 8

other reasons, neither included a purchase price or funds to be invested in an amount sufficient to pay the Roseway Claims (as defined in the SISP) in full in cash.¹¹

13. One proposal contemplated a purchase of only a portion of the Fund's assets at a price that was unacceptable to the Fund and the Financial Advisor (the "**Discounted Sale Offer**"). The second proposal was neither a sale nor investment offer but rather was a proposal to take over the management of the Fund's portfolio (the "**Management Proposal**") for a fee. No offer to complete a merger transaction was received.¹²

14. The Fund, its advisors and FTI Consulting Canada Inc. in its capacity as Court-appointed monitor (the "**Monitor**") met with Roseway and its advisors to consider the Discounted Sale Offer and the Management Proposal and to discuss the best path forward for the Fund and its stakeholders including Roseway.¹³

15. The Fund and its advisors recommended that the Discounted Sale Offer be rejected because the price offered was inadequate and the remaining Fund assets would require continued management with reduced resources. Instead, the Fund recommended that it retain its assets to be managed and realized to repay Roseway and to preserve value for other stakeholders. In that context, the Fund is discussing with Roseway an appropriate cost reduction and asset management proposal for consideration by the Fund, with the help of the Monitor.¹⁴

¹¹ March 3 Ross Affidavit at para. 14, Applicant's Motion Record, Tab 2, p. 9

¹² March 3 Ross Affidavit at para. 15, Applicant's Motion Record, Tab 2, p. 9

¹³ March 3 Ross Affidavit at para. 16, Applicant's Motion Record, Tab 2, p. 9

¹⁴ March 3 Ross Affidavit at para. 17, Applicant's Motion Record, Tab 2, p. 9

PART III—ISSUES AND THE LAW

16. Should the Stay Period be extended as requested? The Fund submits that the requested extension of the Stay Period for two months to and including May 2, 2014 is appropriate.

Extension of Stay Period

17. Section 11.02 of the CCAA gives the Court discretion to grant or extend a stay of proceedings. Section 11.02(2) applies when a stay of proceedings is requested other than on an initial application. It provides as follows:

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.¹⁵

18. Pursuant to section 11.02(3) of the CCAA, the Court must be satisfied that (a) circumstances exist that make the order appropriate, and (b) the Applicant has acted, and is acting, in good faith and with due diligence.¹⁶

19. With respect to whether circumstances exist that make the order appropriate, the Court “must be satisfied that an extension of the Initial Order and stay will further the purposes of the CCAA.” The broad remedial purposes behind the CCAA include preservation of the business

¹⁵ CCAA, s. 11.02(2).

¹⁶ CCAA, s. 11.02(3).

as a going concern for the benefit of all stakeholders rather than liquidating the business and suffering the resulting social and economic losses.¹⁷

20. Applying these principles in *Re Canwest Global Communications Corp.*, Madam Justice Pepall noted that an extension was necessary to provide stability to allow the debtor to work towards a plan of arrangement and considered factors such as the debtors' available cash resources during the extension of the stay period and the Monitor's support for the stay extension.¹⁸

21. In this case, circumstances exist that make the requested extension of the Stay Period to May 2, 2014 appropriate. The requested extension will further the remedial purpose of the CCAA since, among other things, it will enable the Fund to conclude its current discussions with Roseway and to formulate a management and realization plan for the benefit of its stakeholders.

22. The Fund has sufficient liquidity to be able to continue operating in the ordinary course during the requested Stay Period.¹⁹

23. The Fund has acted and is acting in good faith and with due diligence since the granting of the Initial Order, including that it has, among other things:

- (a) Conducted the SISP, as described above;
- (b) Worked with the former manager of the Fund in relation to providing certain critical transition services to the Fund;
- (c) Updated and worked with Roseway, including in relation to the SISP and potential next steps arising from the SISP;

¹⁷ *Worldspan Marine Inc. (Re)*, 2011 BCSC 1758 at paras. 12-15, Brief of Authorities ("BOA") Tab 1.

¹⁸ *Canwest Global Communications Corp. (Re.)*, [2009] O.J. No. 4788 (Ont. S.C.J.) [Comm. List] at para. 43, BOA Tab 2.

¹⁹ March 3 Ross Affidavit at para. 24, Applicant's Motion Record, Tab 2, p. 11

- (d) Taken steps to address the claim by Allen-Vanguard Corporation against the Fund, including bringing a cross-motion seeking to have certain questions relating to the Allen-Vanguard Action determined in a mini-trial in these CCAA proceedings; and
- (e) Prepared and obtained approval of the Claims Process to identify claims against the Fund and its directors and officers.²⁰

24. The requested two month extension of the Stay Period is necessary and appropriate in the circumstances, in particular to allow the Fund to develop a management arrangement, identify exit opportunities to realize on the value of its investments, and assess and address tax implications for its shareholders.²¹

25. The Fund and its stakeholders will benefit from having sufficient time and the protection of a CCAA stay to enable these steps to be taken.²²

PART IV—ORDER REQUESTED

26. Accordingly, it is respectfully submitted that the Stay Period should be extended up to and including May 2, 2014.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



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²⁰ March 3 Ross Affidavit at para. 21, Applicant's Motion Record, Tab 2, p. 10

²¹ March 3 Ross Affidavit at para. 22, Applicant's Motion Record, Tab 2, p. 11

²² March 3 Ross Affidavit at para. 23, Applicant's Motion Record, Tab 2, p. 11

SCHEDULE “A” – LIST OF AUTHORITIES

1. *Worldspan Marine Inc. (Re)*, 2011 BCSC 1758
2. *Canwest Global Communications Corp. (Re.)*, [2009] O.J. No. 4788 (Ont. S.C.J.)

SCHEDULE "B" – LIST OF 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,

- (f) 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;
- (g) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (h) 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.

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

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Proceeding Commenced at Toronto

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(Stay Extension Order)**

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