

Court File No. CV-13-10274-00CL

**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 28, 2013)**

November 26, 2013

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FACTUM OF ROSEWAY CAPITAL S.À.R.L.

PART I - OVERVIEW

- 1 By this motion, Roseway Capital S.à.r.l. ("**Roseway**") seeks an order:
 - (a) that the security agreement granted by GrowthWorks Canadian Fund Ltd. ("**GrowthWorks**") to Roseway Capital L.P. ("**Roseway LP**") and subsequently assigned to Roseway (as amended, the "**Security Agreement**") creates a valid security interest in the Collateral (as defined in the Security Agreement; herein the "**Collateral**") perfected in accordance with the *Personal Property Security Act* (Ontario) (the "**PPSA**"); and
 - (b) that GrowthWorks, with the consent of FTI Consulting Canada Inc., in its role as Court-appointed Monitor to GrowthWorks (the "**Monitor**"), may make distributions of the Collateral or proceeds from the Collateral from time to time to Roseway, without further Order of this Court, subject to certain conditions as set out in the draft Order included as Tab 4 in Roseway's Motion Record (the "**Draft Order**").
- 2 The relief sought by Roseway is supported by GrowthWorks and the Monitor.

PART II - FACTS

3 The facts are set out in the Affidavit of Michael Forer dated November 22, 2012 (the "**Forer Affidavit**") and the Affidavit of Alexander Schmitt (the "**Schmitt Affidavit**") dated the same.

Background

4 GrowthWorks is a Canadian labour-sponsored venture capital corporation which assists in the development of eligible business entities by providing financial and managerial advice to such entities and by investing in eligible investments and reserves.¹

5 On May 28, 2010 (the "**Closing Date**"), GrowthWorks and Roseway LP entered into a Participation Agreement (as amended, the "**Participation Agreement**") pursuant to which Roseway LP advanced \$20 million to GrowthWorks in exchange for, *inter alia*, a participating interest in GrowthWork's holdings in 15 portfolio companies.²

6 The Participation Agreement obligated GrowthWorks to make certain scheduled payments to Roseway, including:

- (a) a payment of \$20 million on the third anniversary of the Closing Date; and
- (b) guaranteed minimum payments of \$5.7 million within 5 business days of each of the first, second, and third anniversaries of the Closing Date.³

Roseway's Security

7 Security for GrowthWorks' obligations under the Participation Agreement was also provided on the Closing Date pursuant to the Security Agreement.⁴

¹ Forer Affidavit, Tab 2 of the Motion Record of Roseway (the "**Motion Record**") at para. 2.

² Forer Affidavit, Tab 2 of the Motion Record, at para. 3.

³ Forer Affidavit, Tab 2 of the Motion Record, at para. 4.

8 The Security Agreement provides Roseway with security over the Collateral. In essence, this refers to all of GrowthWorks' property, assets and undertaking, whether then owned or thereafter acquired, subject to the exclusions that security over certain equity and debt investments held by GrowthWorks was not granted to Roseway. Notwithstanding this exclusion, the proceeds from these equity and debt investments do form a part of the Collateral.⁵

9 The Participation Agreement and the Security Agreement were assigned to Roseway pursuant to an assignment and assumption agreement dated May 31, 2010, which was acknowledged by GrowthWorks.⁶

10 Roseway has registered its security interest against GrowthWorks in the Personal Property Security Registry of the Province of Ontario. This was done pursuant to a financing statement registered on May 28, 2010 in accordance with the PPSA in favour of "Roseway Capital LP" under registration number 20100528 1401 1862 3705 (reference file number 661705353) for a registration period of five years.⁷

Roseway is GrowthWorks' sole secured creditor

11 GrowthWorks has acknowledged that Roseway is its sole secured creditor, other than those who have been granted the benefit of a charge in the Amended and Restated Initial Order dated October 1, 2013. The Monitor has also confirmed this.⁸

12 The Monitor has also secured an independent legal opinion (the "**Osler Opinion**") from its counsel, Osler, Hoskin and Harcourt LLP, with respect to the validity and perfection of the security held by Roseway. The Osler Opinion concludes that,

⁴ Forer Affidavit, Tab 2 of the Motion Record, at para. 5.

⁵ Forer Affidavit, Tab 2 of the Motion Record, at paras. 5-6.

⁶ Forer Affidavit, Tab 2 of the Motion Record, at para. 7.

⁷ Forer Affidavit, Tab 2 of the Motion Record, at para. 8. See also Exhibit "A" of the Schmitt Affidavit, Tab 4 of the Motion Record, pg. 251.

⁸ Forer Affidavit, Tab 2 of the Motion Record, at para. 20.

- (a) the Security Agreement creates a valid security interest in the Collateral; and
 - (b) that security interest has been perfected in accordance with the PPSA.⁹
-

From time to time, GrowthWorks may have funds on hand available for distribution to its creditors

13 At the commencement of these proceedings, GrowthWorks cash flow forecasts showed it had approximately \$6.6 million in its bank accounts. This amount did not include an additional \$1.9 million held by GrowthWorks' former manager, GrowthWorks WV Management Ltd., at the Royal Bank of Canada for GrowthWorks' benefit.¹⁰

14 In addition to cash resources, GrowthWorks has other sources of funds which will likely become available during the *Companies' Creditors Arrangement Act* ("CCAA") stay period. By way of example, GrowthWorks may sell up to approximately one million shares that it holds in Ambit Biosciences Corporation, which have been trading on the NASDAQ Global Select Market between US \$11.61 and US \$16.58 from November 1 to November 22, 2013. Accordingly, GrowthWorks may on occasion have more cash assets than it needs to operate its business and fund these CCAA proceedings.¹¹

It is in the interest of Growthworks and its stakeholders that it repay its indebtedness to Roseway promptly

15 The Draft Order being requested by Roseway in the within motion recognizes that certain "Priority Payables" (as defined at paragraph 3 therein) must be paid prior to any distribution to Roseway. Other than the Priority Payables, Roseway's entitlement to be paid ranks in priority to that of all other creditors, who are unsecured.¹²

⁹ Forer Affidavit, Tab 2 of the Motion Record, at para. 21.

¹⁰ Forer Affidavit, Tab 2 of the Motion Record, at para. 18.

¹¹ Forer Affidavit, Tab 2 of the Motion Record, at para. 19.

¹² Forer Affidavit, Tab 2 of the Motion Record, at paras. 20, 21 and 24.

16 As such, as long as there is certainty that the Priority Payables accrued to the date of any distribution are either paid or will be paid, it is in the interests of GrowthWorks, Roseway, and GrowthWorks' other stakeholders that GrowthWorks repay its indebtedness to Roseway at the earliest available opportunity.¹³

17 Specifically, interest in respect of GrowthWorks' indebtedness to Roseway continues to accrue at 20 per cent per annum. Prompt and regular reduction of the indebtedness will operate to significantly reduce such accrual.¹⁴

PART III – ISSUES

18 The issues to be determined on this motion are whether this Court should

- (a) declare that the Security Agreement creates a valid security interest in the Collateral, perfected in accordance with the PPSA; and
- (b) authorize GrowthWorks to make distributions of the Collateral or its proceeds from time to time, without further Order of this Court, subject to certain conditions as set out in the draft Order.

PART IV – LAW AND ARGUMENT

A. THE DECLARATION AS TO THE PERFECTION AND VALIDITY OF ROSEWAY'S SECURITY SHOULD BE GRANTED

The Court has the Necessary Jurisdiction and Grounds

19 Section 67(1)(c) of the PPSA makes clear that a court may "make any order necessary to determine questions of priority or entitlement in or to ... collateral or its proceeds."¹⁵

¹³ Forer Affidavit, Tab 2 of the Motion Record, at para. 25.

¹⁴ Forer Affidavit, Tab 2 of the Motion Record, at para. 26.

¹⁵ PPSA, s. 67(1)(c).

20 Ontario courts make declarations as to secured parties' priority in and entitlement to collateral or its proceeds where such declarations accurately reflect the state of the facts in a given case.¹⁶

21 In this instance, a declaration that the Security Agreement creates a valid security interest, perfected in accordance with the PPSA, would accurately reflect the findings of the Osler Opinion and the facts as set out above.

22 For this reason, Roseway respectfully requests that this Court grant the declaration.

B. GROWTHWORKS SHOULD BE AUTHORIZED TO MAKE INTERIM DISTRIBUTIONS

Courts Routinely Make Distribution Orders Under the CCAA

23 Roseway also seeks an Order authorizing GrowthWorks, with the consent the Monitor, to make interim distributions to Roseway of the Collateral or its proceeds from time to time without further order of this Court, subject to certain conditions as set out in the Draft Order.

24 Section 11 of the CCAA provides that a Court may, "subject to the restrictions set out in [the CCAA] ... make any order it considers appropriate in the circumstances."¹⁷

25 As Mr. Justice Gascon has noted in *Re AbitibiBowater Inc.*, where funds are available in a CCAA reorganization, "it is neither unheard of nor unusual" to proceed with an interim distribution of monies to secured creditors.¹⁸ Indeed, such orders have been identified as appropriate where:

¹⁶ See e.g. *2811472 Canada Inc. (c.o.b. Acorn Partners) v. Royal Bank of Canada*, [2006] O.J. No. 2790 (Ont. S.C.J.) at paras. 1 and 26-28; and *General Motors Acceptance Corp. of Canada v. Alex Williamson Motor Sales Ltd.*, [2009] O.J. No. 3189 (Ont. S.C.J.) at paras. 1, 22, 24, 28-30.

¹⁷ CCAA, s. 11.

¹⁸ 2009 QCCS 6461 (Qc. Sup. Ct.), at para 71 [*"AbitibiBowater"*].

- (a) the payee or payees constitute the sole economically interested parties in the proceeds or assets from which funds for the distributions would be derived; and
- (b) the distributions at issue would result in significant interest savings.¹⁹

Interim Distributions Are Appropriate in This Case

26 Given that,

- (a) Growthworks' security has been independently reviewed and confirmed by the Monitor's counsel;²⁰
- (b) GrowthWorks may, from time to time, have funds on hand available for distribution to its creditors;²¹
- (c) interest on GrowthWorks' obligations to Roseway is accruing at 20 per cent per annum;²² and
- (d) it will reduce professional costs and demands on Court time if GrowthWorks is authorized to make distributions to Roseway as funds permit and as approved by the Monitor,

it is appropriate that the Court authorize GrowthWorks to make interim distributions as requested.

¹⁹ *AbitibiBowater*, at paras. 21, 52-57, 60, 70-79.

²⁰ Forer Affidavit, Tab 2 of the Motion Record, at para. 21.

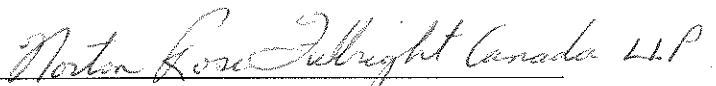
²¹ Forer Affidavit, Tab 2 of the Motion Record, at paras. 18-19.

²² Forer Affidavit, Tab 2 of the Motion Record, at para. 26.

PART V - RELIEF SOUGHT

27 For the reasons stated above, Roseway respectfully requests that the Court grant an Order substantially in the form of the draft Order included as Tab 4 in Roseway's Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of November, 2013.



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

SCHEDULE "A"

CASES

- 1 *2811472 Canada Inc. (c.o.b. Acorn Partners) v. Royal Bank of Canada*, [2006] O.J. No. 2790 (Ont. S.C.J.).
- 2 *General Motors Acceptance Corp. of Canada v. Alex Williamson Motor Sales Ltd.*, [2009] O.J. No. 3189 (Ont. S.C.J.).
- 3 *Re AbitibiBowater Inc.*, 2009 QCCS 6461 (Qc. Sup. Ct.).

SCHEDULE "B"

LEGISLATION

Personal Property Security Act, R.S.O. 1990, c. P.10.

Court orders and directions

67. (1) Upon application to the Superior Court of Justice by a debtor, a creditor of a debtor, a secured party, an obligor who may owe payment or performance of the obligation secured or any person who has an interest in collateral which may be affected by an order under this section, the court may,

(a) make any order, including binding declarations of right and injunctive relief, that is necessary to ensure compliance with Part V, section 17 or subsection 34 (3) or 35 (4);

(b) give directions to any party regarding the exercise of the party's rights or the discharge of the party's obligations under Part V, section 17 or subsection 34 (3) or 35 (4);

(c) make any order necessary to determine questions of priority or entitlement in or to the collateral or its proceeds;

(d) relieve any party from compliance with the requirements of Part V, section 17 or subsection 34 (3) or 35 (4), but only on terms that are just for all parties concerned;

(e) make any order necessary to ensure protection of the interests of any person in the collateral, but only on terms that are just for all parties concerned;

(f) make an order requiring a secured party to make good any default in connection with the secured party's custody, management or disposition of the collateral of the debtor or to relieve the secured party from any default on such terms as the court considers just, and to confirm any act of the secured party; and

(g) despite subsection 59 (6), if the secured party has taken security in both real and personal property to secure payment or performance of the debtor's obligation, make any order necessary to enable the secured party to accept both the real and personal property in satisfaction of the obligation secured or to enable the secured party to enforce any of its other remedies against both the real and personal property, including an order requiring notice to be given to certain persons and governing the notice, an order permitting and governing redemption of the real and personal property, and an order requiring the secured party to account to persons with an interest in the real property or personal property for any surplus.

R.S.O. 1990, c. P.10, s. 67 (1); 2000, c. 26, Sched. B, s. 16 (1); 2006, c. 34, Sched. E, s. 22.

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.

R.S., 1985, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 124; 2005, c. 47, s. 128.

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Proceeding commenced at Toronto

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