

**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: Approval of the Sale and Investor Solicitation Process)**

November 14, 2013

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**FACTUM OF THE APPLICANT**

**PART I—OVERVIEW**

1. Growthworks Canadian Fund Ltd. (the "**Applicant**" or the "**Fund**"), a labour-sponsored venture capital fund, applied for and received protection under the *Companies' Creditors Arrangement Act* (Canada) (the "**CCAA**") in the form of an initial order on October 1, 2013 (as amended and restated, the "**Initial Order**").
2. In this motion, the Applicant seeks approval of a Sale and Investor Solicitation Process in the form attached to the draft Order (the "**SISP**"). The SISP is designed to enable the Fund to canvass the market to solicit interest in purchasing or investing in the Fund's business and property.
3. The Fund has been and continues to be in discussions with a potential merger partner. While such discussions continue, the SISP will provide a transparent process for canvassing the market for other interested parties and potential transactions.

4. The SISP will enable the Fund to canvass the market in an effort to identify the best opportunity to satisfy its obligations to Roseway and to maximize the value of its assets for the benefit of all of its stakeholders.

## PART II—FACTS

5. The Fund is insolvent because a \$20 million secured payment obligation to Roseway, along with certain related obligations (the “**Roseway Obligations**”), became due on September 30, 2013, which the Fund was unable to pay.

6. In the face of a demand for this payment, the Fund sought CCAA protection to avoid the negative effects of a fire sale of its assets, which are held in illiquid securities (consisting of minority equity interests in private companies and restricted equity securities in a publicly traded company (together, the “**Portfolio Companies**”) that are difficult to liquidate in advance of an appropriate exit opportunity arising without resulting in depressed values and portfolio losses.

7. The Fund retained The Commercial Capital Corporation (operating as CCC Investment Banking) as financial advisor (the “**Financial Advisor**”) to assist it in exploring possible merger or other transactions.

8. In its review of options available to the Fund, the Financial Advisor concluded that a merger with a similar fund, coupled with the refinancing of the Roseway Obligations, is the recommended course of action. The Financial Advisor further concluded that if a merger cannot be completed, an orderly disposition of the holdings of the Fund in the Portfolio Companies is likely to generate greater proceeds of disposition to the Fund than an *en bloc* sale of such holdings at this time, which would likely generate the least proceeds to the Fund.<sup>1</sup>

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<sup>1</sup> Ross Affidavit at para. 82, Application Record, Tab 2.

9. The Fund has been in serious discussions with a possible merger partner (the "**Potential Merger Partner**"). On September 30, 2013, the Fund received a confidential letter agreement from the Potential Merger Partner, proposing terms of a potential transaction.<sup>2</sup>

10. Since the Initial Order was granted, the Fund has continued its discussions with the Potential Merger Partner. Those discussions are ongoing and the parties continue to work towards a possible merger transaction, although no definitive agreement has been reached.<sup>3</sup>

11. The Fund has also worked with the Financial Advisor, in consultation with Roseway and the Monitor, to develop the SISP. The purpose of the SISP is to canvas the market to solicit interest in purchasing or investing in the Fund's business and property (meaning all of property, assets and undertakings of Growthworks, specifically including Growthworks' interests and investments in the Portfolio Companies and any agreements or rights it holds in respect of the Portfolio Companies), in addition to the interest expressed by the Potential Merger Partner.<sup>4</sup>

12. The goal is to attempt to identify a superior offer to any merger transaction in order to identify the best opportunities for optimizing the returns for the Fund's creditors and stakeholders.<sup>5</sup>

13. The forward to the SISP describes, among other things:

- (a) the Property available for sale and the opportunity for an investment in the Business,
- (b) the manner in which prospective bidders may gain access to or continue to have access to due diligence materials concerning the Property and the Business,
- (c) the manner in which bidders and bids become Qualified Bidders and Qualified Bids, respectively,

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<sup>2</sup> Affidavit of C. Ian Ross sworn on November 14, 2013 at para. 8 (the "**C. Ian Ross Affidavit**"), Motion Record, Tab 2.

<sup>3</sup> C. Ian Ross Affidavit at para. 9-10, Motion Record, Tab 2.

<sup>4</sup> C. Ian Ross Affidavit at para. 13, Motion Record, Tab 2.

<sup>5</sup> *Ibid.*

- (d) the evaluation of bids received,
- (e) the ultimate selection of a Successful Bidder, and
- (f) the process for obtaining such approvals (including the approval of the Court) as may be necessary or appropriate in respect of a Successful Bid.<sup>6</sup>

14. The following is a general overview of the SISP (capitalized terms used in this paragraph and not defined herein have the meanings provided in the SISP)<sup>7</sup>:

- (a) Potential Bidders must execute a Non-Disclosure Agreement and deliver to the Financial Advisor certain documents and information such as contact information. If the Special Committee, in its reasonable business judgement, in consultation with the Financial Advisor and the Monitor, determines such a Potential Bidder is likely, based on the availability of financing, experience and other considerations, to be able to consummate a Sale Proposal or an Investment Proposal on or before the Outside Date, it will be deemed a **"Qualified Bidder"**;
- (b) **Phase 1:** The first phase of the SISP will last for a period of 25 days following the date of the Order approving the SISP (the **"Phase 1 Bid Deadline"**). During Phase 1,
  - (i) the Financial Advisor (with the assistance of Growthworks, and under the supervision of the Monitor and in accordance with the terms of the SISP) will solicit non-binding indications of interest in the form of non-binding letters of intent (each an **"LOI"**) from prospective strategic or financial parties to acquire the Property or to invest in the Business/Growthworks.
  - (ii) The Qualified Bidders will be provided with a Confidential Information Memorandum and access to an electronic data room of due diligence information; and,
  - (iii) A Qualified Bidder that wishes to pursue a Sale Proposal or Investment Proposal must deliver an LOI to the Financial Advisor by the Phase 1 Bid Deadline; a Qualified Bidder may also submit a Final Bid during Phase 1;
- (c) Within 5 Business Days following the Phase 1 Bid Deadline (or such later date as may be determined by Growthworks, in consultation with the Financial Advisor and Roseway and with the consent of the Monitor), the Special Committee, in consultation with the Financial Advisor and the Monitor, will assess the Qualified LOIs and any Final Bids received during Phase 1, if any. The criteria for a **"Qualified LOI"** are set out in the SISP and include that:
  - (i) the LOI is submitted by the Phase 1 Bid Deadline;

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<sup>6</sup> Exhibit "A" of the C. Ian Ross Affidavit, Motion Record, Tab 2.

<sup>7</sup> *Ibid.*

- (ii) the LOI sets out whether it is a Sale Proposal (in which case it sets out the purchase price, property to be purchased, conditions to closing and any further due diligence required, among other things), or Investment Proposal (in which case it sets out the aggregate amount of the debt or equity investment, the structure and financing for the transaction, conditions to closing and any further due diligence required, among other things); and
- (iii) the purchase price or funds to be invested are in an amount that can reasonably be expected to be sufficient to pay the Roseway Claims in full and in cash or provide for consideration acceptable to Roseway.

All of the criteria for a "Qualified LOI" may be waived except the requirement of paying the Roseway Claims in full or provide consideration acceptable to Roseway.

- (d) In assessing the Qualified LOIs and any Final Bid submitted in Phase 1, the following factors will be considered, among other things:
  - (i) the form and amount of consideration being offered;
  - (ii) the demonstrated financial capability of the Qualified Bidder to consummate the proposed transaction;
  - (iii) the conditions to closing of the proposed transaction; and
  - (iv) the estimated time required to complete the proposed transaction and whether, in the Special Committee's reasonable business judgment, it is reasonably likely to close on or before the Outside Date.
- (e) If a Final Bid is received on or before the Phase 1 Deadline which is a Qualified Bid and the Special Committee, in consultation with the Financial Advisor and with the consent of the Monitor, determines that there is no reasonable prospect of obtaining another Qualified Bid or Final Bid that would be superior to the Final Bid, the Special Committee, following consultation with the Financial Advisor and Roseway and with the consent of the Monitor, may select a Final Bid, and a definitive agreement negotiated in respect of that Final Bid, conditional upon Court approval.
- (f) **Phase 2** will only be entered if a Qualified LOI is obtained in Phase 1 and the Special Committee, in consultation with the Financial Advisor and with the consent of the Monitor, determines that there is a reasonable prospect of obtaining a Qualified Bid. If Phase 2 is entered, it will continue for a further 30 days, with the option to extend by an additional 15 days in consultation with the Financial Advisor and Roseway and with the consent of the Monitor (the "**Phase 2 Bid Deadline**"). In Phase 2,
  - (i) the Qualified Bidders that have not been eliminated from the SISP will be granted further access to due diligence materials and information relating to the Property and the Business as the Financial Advisor, in consultation with the Monitor and Growthworks, determines, including, as appropriate,

information or materials reasonably requested by Qualified Bidders, and, as permitted by the Portfolio Companies, on-site presentations by senior management of Portfolio Companies, facility tours and access to further information in the electronic data room;

- (ii) parties will have the opportunity to submit a Final Bid: a final, binding proposal in the form of a Purchase Agreement (in the case of a Sale Proposal) or Investment Agreement (in the case of an Investment Proposal).
- (g) A Final Bid will be considered a "Qualified Bid" if it meets the criteria set out in the SISP, including that:
- (i) It includes a letter stating that the offer is irrevocable until court approval of a Successful Bid and 30 days following the Phase 2 Bid Deadline (and will remain irrevocable until closing if it is the Successful Bidder);
  - (ii) It includes written evidence of a firm, irrevocable commitment for financing, or other evidence of ability to consummate the proposed transaction;
  - (iii) In respect of a Sale Proposal, it sets out the Property to be included, and in the case of an Investment Proposal, it sets out any Property to be divested or disclaimed prior to closing;
  - (iv) It includes details of any liabilities to be assumed by the Qualified Bidder;
  - (v) It is not conditional upon, among other things the outcome of unperformed due diligence by the Qualified Bidder or obtaining financing;
  - (vi) It fully discloses the identity of each entity that will be sponsoring or participating in the bid, and the complete terms of such participation;
  - (vii) It outlines any anticipated regulatory and other approvals required to close the transaction and the anticipated time frame and any anticipated impediments for obtaining such approvals;
  - (viii) It identifies with particularity the contracts the bidder wishes to assume and reject, contains full details of the bidder's proposal for the treatment of related cure costs (and provides adequate assurance of future performance thereunder); and it identifies with particularity any executory contract the assumption and assignment of which is a condition to closing;
  - (ix) It provides a timeline to closing with critical milestones;
  - (x) It includes evidence, in form and substance reasonably satisfactory to the Monitor and Growthworks, of authorization and approval from the bidder's board of directors (or comparable governing body) with respect to the submission, execution, delivery and closing of the transaction contemplated by the bid;

- (xi) It is accompanied by a refundable deposit (the “**Deposit**”) in the form of a wire transfer (to a bank account specified by the Monitor), or such other form acceptable to the Monitor, payable to the order of the Monitor, in trust, in an amount equal to \$3 million, to be held and dealt with in accordance with the terms of this SISP;
- (xii) It contains other information reasonably requested by the Financial Advisor, in consultation with the Monitor and Growthworks;
- (xiii) It is received by the Phase 2 Bid Deadline;
- (xiv) The purchase price or funds to be invested are in an amount sufficient to pay the Roseway Claims in full and in cash (or provide for such other consideration as may be acceptable to Roseway in their sole and absolute discretion) on the closing of the transactions contemplated by the Final Bid;
- (xv) The Special Committee, with the consent of the Monitor, determines that it is reasonably likely that the Qualified Bidder will be able to consummate a Sale Proposal or Investment Proposal on or before the Outside Date in a manner that complies with all requirements of the SISP, including, without limitation, payment in full of the Roseway Claims (or provide for such other consideration as may be acceptable to Roseway in their sole and absolute discretion);
- (xvi) In the case of a Sale Proposal, it includes an acknowledgement and representation that the bidder: (a) has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the assets to be acquired and liabilities to be assumed in making its bid; and (b) did not rely upon any written or oral statements, representations, promises, warranties or guaranties whatsoever, whether express or implied (by operation of law or otherwise), regarding the assets to be acquired or liabilities to be assumed or the completeness of any information provided in connection therewith, except as expressly stated in the purchase and sale agreement;
- (xvii) In the case of an Investment Proposal, it includes an acknowledgement and representation that the bidder: (a) has relied solely upon its own independent review, investigation and/or inspection of any documents in making its bid; and (b) did not rely upon any written or oral statements, representations, promises, warranties or guaranties whatsoever, whether express or implied (by operation of law or otherwise), regarding the business of Growthworks or the completeness of any information provided in connection therewith, except as expressly stated in the Investment Agreement;

All of the above criteria for a Qualified Bid may be waived, except for the criterion in sub-paragraph (xiv).



- (h) The Special Committee, in consultation with the Financial Advisor and the Monitor, will review and evaluate each Qualified Bid. Evaluation criteria are set out in the SISP and include, but are not limited to
  - (i) in the case of a Sale Proposal, items such as: (a) the purchase price and net value (including assumed liabilities and other obligations to be performed by the bidder); (b) the firm, irrevocable commitment for financing the transaction; (c) the claims likely to be created by such bid in relation to other bids; (d) the counterparties to the transaction; (e) the terms of transaction documents; (f) other factors affecting the speed, certainty, closing risk, risks arising from deferred redemption of shares, risks associated with the Portfolio Companies and value of the transaction (including any regulatory approvals required to close the transaction); (g) planned treatment of stakeholders; (h) the assets included or excluded from the bid; (i) any transition services required from Growthworks post-closing and any related restructuring costs; and (j) the likelihood and timing of consummating the transaction; and,
  - (ii) in the case of an Investment Proposal, items such as: (a) the amount of equity and debt investment and the proposed sources and uses of such capital; (b) the firm, irrevocable commitment for financing the transaction; (c) the debt to equity structure post-closing; (d) the counterparties to the transaction; (e) the terms of the transaction documents; (f) other factors affecting the speed, certainty, closing risk, risks arising from deferred redemption of shares, risks associated with the Portfolio Companies and value of the transaction (including any regulatory approvals required to close the transaction); (g) planned treatment of stakeholders; and (h) the likelihood and timing of consummating the transaction.
- (i) Growthworks will apply to the Court for an order approving the Successful Bid and authorizing Growthworks to enter into any necessary agreements or undertake any necessary actions with respect to the Successful Bid. If no Successful Bid is selected, Growthworks will advise the Court and seek directions.

15. The Financial Advisor is of the view that the timeframes set out in the SISP are reasonable in the circumstances.<sup>8</sup>

16. At this stage, the Fund seeks the Court's approval of the marketing process set out in the SISP. As noted in the summary of the SISP, above, the Fund will return to Court for approval of any transaction identified in the SISP process.<sup>9</sup>

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<sup>8</sup> C. Ian Ross Affidavit at para. 19, Motion Record, Tab 2.

### PART III—ISSUES AND THE LAW

17. When considering whether to approve a marketing process, the Court ought to consider:

- (a) Is a sale warranted at this time?
- (b) Will the sale be of benefit the whole “economic community”?
- (c) Do any of the debtors’ creditors have a *bona fide* reason to object to a sale of the business?
- (d) Is there a better viable alternative?<sup>10</sup>

18. In addition to the above criteria, section 36 of the CCAA, which is engaged when determining whether to approve a sale (as opposed to approving a marketing process), may also be considered indirectly when approving a sales process. Section 36 provides:

36(3) In deciding whether to grant the authorization, the court is to consider, among other things,

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the monitor approved the process leading to the proposed sale or disposition;
- (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.<sup>11</sup>

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<sup>9</sup> C. Ian Ross Affidavit at para. 23, Motion Record, Tab 2.

<sup>10</sup> *Nortel Networks Corp., Re*, 2009 CanLII 39492 (ON SC).

<sup>11</sup> *Brainhunter Inc., Re* 2009 CarswellOnt 8207 (ONSC).

19. In general, a CCAA court should accept a proposed sale process that has been recommended by the monitor and disinterested creditors absent exceptional circumstances:

21 Absent some compelling, exceptional factor to the contrary (not seen here), in my view, the Court should accept an applicant's proposed sales process under the CCAA, when it has been recommended by the Monitor and is supported by the disinterested major creditors. The Court has the discretion to stipulate a variation to such a proposed sales process plan. However, the exercising of such discretion would seem appropriate in only very exceptional circumstances.<sup>12</sup>

20. The Financial Advisor concluded that a merger with a similar fund, coupled with the refinancing of the Roseway Obligations, is the recommended course of action or, if a merger cannot be completed, an orderly disposition of the holdings of the Fund in the Portfolio Companies is likely to generate greater proceeds of disposition to the Fund than an *en bloc* sale of such holdings.

21. The purpose of the SISF is to solicit and assess available opportunities including possible merger, refinancing or other transactions. The SISF provides an opportunity, on a timeframe that the Financial Advisor believes is reasonable, to canvass the market for such opportunities and for Growthworks, in consultation with the Monitor, Financial Advisor and Roseway, to assess the available options.

22. In the present circumstances, the marketing process has been vetted by Roseway and the Monitor. It currently represents the best likelihood for the maximization of value to stakeholders and the best opportunity to avoid the negative consequences to the Fund and its stakeholders that would result from a fire sale of its assets.

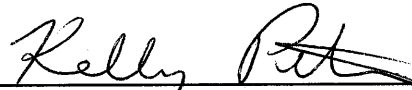
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<sup>12</sup> *Ivaco Inc., Re*, 2004 CarswellOnt 2397 (ONSC) at para. 21.

**PART IV—ORDER REQUESTED**

23. Accordingly, it is respectfully submitted that the SISP be approved to enable the Applicant to commence the marketing process.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



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Lawyers for Growthworks Canadian Fund Ltd.

## SCHEDULE "A" – LIST OF AUTHORITIES

1. *Nortel Networks Corp., Re*, 2009 CanLII 39492 (ONSC).
2. *Brainhunter Inc., Re* 2009 CarswellOnt 8207 (ONSC).
3. *Ivaco Inc., Re*, 2004 CarswellOnt 2397 (ONSC).

## SCHEDULE "B" – LIST OF STATUTES

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

36(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

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

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Proceeding Commenced at Toronto

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