

**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 and Approval of the Claims Procedure Order)**

January 7, 2014

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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 (the "**Claims Procedure Order**"), among other things, approving a claims procedure (the "**Claims Procedure**") and extending the Stay Period as defined in paragraph 14 of the Initial Order (defined below) (the "**Stay Period**").
2. The Claims Procedure is designed to identify and determine claims against the Fund, including direct claims against the Fund and claims against the Fund for indemnity by its current and former directors and officers (as defined in the Claims Procedure Order, the "**Directors and Officers**").
3. The Fund is seeking to implement the Claims Procedure at this time to assist potential bidders (presently participating in Phase 2 of the Fund's Sale and Investor Solicitation Process (the "**SISP**")) to the extent they require clarity regarding the potential claims against the Fund to close a transaction, and to move forward with the restructuring process generally.

4. The Fund also seeks an extension of the Stay Period, which presently expires on January 15, 2014, to March 7, 2014, a date shortly after the deadline for bids in Phase 2 of the SISP (if extended according to the SISP). The Fund has been acting diligently and in good faith. The extension will allow the Fund to complete Phase 2 of the SISP and commence the claims procedure, among other things, and is appropriate in the circumstances.

PART II—FACTS

BACKGROUND

5. 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

6. In the face of a series of challenges, 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**”).²

7. On November 18, 2013, the Honourable Mr. Justice Morawetz granted an order approving a SISP. The purpose of the SISP is to canvass the market to solicit interest in purchasing or investing in the Fund’s business and property.³

¹ Affidavit of C. Ian Ross sworn January 6, 2014 (the “January 6 Ross Affidavit”) at para. 4, Applicant’s Motion Record for Approving Claims Procedure Order (“Applicant’s Motion Record”), Tab 2, p. 14.

² January 6 Ross Affidavit at para. 5, Applicant’s Motion Record, Tab 2, p. 14.

³ January 6 Ross Affidavit at para. 7, Applicant’s Motion Record, Tab 2, p. 14.

THE SALE AND INVESTOR SOLICITATION PROCESS

8. Since the order approving the SISP was granted in November, 2013, the Fund together with its financial advisor, The Commercial Capital Corporation (operating as CCC Investment Banking) (the “**Financial Advisor**”) and FTI Consulting Canada Inc. in its capacity as monitor in these proceedings (the “**Monitor**”), have been working diligently to complete the SISP.⁴

9. During Phase 1 of the SISP, among other things:

- (a) The Financial Advisor (with the assistance of the Fund, and under the supervision of the Monitor and in accordance with the terms of the SISP) solicited 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 Fund’s property or to invest in the Fund; and
- (b) Parties that qualified as “Qualified Bidders”, as defined in the SISP (the “**Qualified Bidders**”), were provided with a Confidential Information Memorandum and access to an electronic data room of due diligence information.⁵

10. Multiple parties delivered LOIs to the Financial Advisor by December 13, 2013, the Phase 1 bid deadline.⁶ After assessing the LOI’s in accordance with the SISP⁷, the Special Committee, in consultation with the Financial Advisor and with the consent of the Monitor,

⁴ January 6 Ross Affidavit at para. 8, Applicant’s Motion Record, Tab 2, p. 15.

⁵ January 6 Ross Affidavit at para. 10, Applicant’s Motion Record, Tab 2, p. 15.

⁶ January 6 Ross Affidavit at para. 11, Applicant’s Motion Record, Tab 2, p. 15.

⁷ January 6 Ross Affidavit at para. 12, Applicant’s Motion Record, Tab 2, p. 16.

authorized the commencement of Phase 2 of the SISP, which commenced on December 20, 2013.⁸

11. During Phase 2, in accordance with the SISP, Qualified Bidders that have not been eliminated from the SISP will be granted further access to due diligence materials and information relating to the Fund's property and business, including, as appropriate, information or materials reasonably requested by Qualified Bidders and, if permitted by the Portfolio Companies, presentations by senior management of Portfolio Companies and access to further information in the electronic data room.⁹

12. Parties will have the opportunity to submit a final, binding proposal in the form of Purchase Agreement or form of Investment Agreement (each as defined in the SISP) by the Phase 2 bid deadline, which is February 3, 2014, which date may be extended in accordance with the SISP by an additional 15 days to February 18, 2014 (the "**Phase 2 Bid Deadline**").¹⁰

13. Identifying the disputed and undisputed claims against the Fund may be required shortly after the Phase 2 Bid Deadline, depending on the form of transaction identified and the closing date of any such transaction.¹¹

14. Clarity regarding claims against the Fund is important and likely essential for any proposed merger transaction since:

- (a) a merger transaction can only preserve the favourable tax treatment that the existing shareholders of the Fund receive (as holders of shares in a labour sponsored fund) if all of the shares issued to the Fund as consideration in a "merger" transaction are distributed to the Fund's shareholders; and,

⁸ January 6 Ross Affidavit at para. 13, Applicant's Motion Record, Tab 2, p. 16.

⁹ January 6 Ross Affidavit at para. 14, Applicant's Motion Record, Tab 2, p. 16.

¹⁰ January 6 Ross Affidavit at para. 15, Applicant's Motion Record, Tab 2, p. 16.

¹¹ January 6 Ross Affidavit at para. 20, Applicant's Motion Record, Tab 2, p. 18.

- (b) If all of the shares issued to the Fund as consideration in a merger transaction are distributed to the Fund's shareholders, then any proposed merger transaction must either provide for a cash payment of all creditor claims against the Fund or for the assumption of such creditor claims by the merger partner.¹²

15. Accordingly, any potential merger partner (and possibly other bidders depending on the type of transaction proposed) will want to identify the claims against the Fund and either adjudicate and quantify such claims prior to closing or specifically identify the disputed and undisputed claims and address them in their bid.¹³

16. The timely identification of claims against the Fund is also important for the restructuring process generally and for the Fund's stakeholders, in particular, in order to permit distributions to be made (beyond distributions to Roseway Capital S.a.r.l. ("**Roseway**") in relation to its agreed upon secured obligations) to the extent possible.¹⁴

KNOWN CLAIMS AGAINST THE FUND

17. The Fund is aware of certain claims advanced or alleged by Roseway, Allen-Vanguard Corporation ("**Allen-Vanguard**"), GrowthWorks WV Management Ltd, the former manager of the Fund (the "**Manager**"), and Douglas Milburn and certain other common shareholders (the "**AGTL Shareholders**") of Advanced Glazing Technologies Limited ("**AGTL**"), which respectively relate generally to the following:

- (a) **Roseway**: Certain obligations are payable by the Fund to Roseway pursuant to the Participation Agreement dated May 28, 2010, which obligations are secured. One element of Roseway's claim (the "**Roseway Claim**") in the amount of approximately \$1.9 million is disputed; however, the balance of Roseway's claim

¹² January 6 Ross Affidavit at para. 17, Applicant's Motion Record, Tab 2, p. 17.

¹³ January 6 Ross Affidavit at para. 18, Applicant's Motion Record, Tab 2, p. 17.

¹⁴ January 6 Ross Affidavit at para. 21, Applicant's Motion Record, Tab 2, p. 18.

has been quantified and, on November 28, 2013, Justice Mesbur ordered that the Fund, with the consent of the Monitor, was entitled to distribute funds to Roseway, provided certain conditions (relating to ensuring payment of priority amounts) were met;

- (b) **Allen-Vanguard:** In Court File No. 08-CV-43544 (the “**Allen-Vanguard Action**”), Allen-Vanguard claims \$650 million of which it states \$40 million would be recovered from an escrow account, plus costs and interest against the Fund and the other Offeree Shareholders (as defined therein). The Fund disputes this claim in its entirety. Allen-Vanguard brought a motion in these CCAA proceedings for, among other things, an order that the stay of proceedings in the Initial Order does not apply to the continuation of proceedings in the Allen-Vanguard Action. The Fund brought a cross-motion seeking to have certain questions arising in the Allen-Vanguard Action determined in a mini-trial in these CCAA proceedings. A motion is presently scheduled for February 11, 2014 to address these issues;
- (c) **The Manager:** Prior to September 30, 2013, the Fund had outsourced all of its day-to-day operations, monitoring of the Fund’s investments and other management and operational oversight to the Manager pursuant to a management agreement dated July 15, 2006 (the “**Management Agreement**”). On September 30, 2013, the Fund terminated the Management Agreement in accordance with its terms as a result of the Manager’s material defaults in respect of certain of its obligations thereunder. The Manager’s counsel has delivered a letter disputing the termination of the Management Agreement and claiming damages from the Fund relating thereto. The Fund has claims against

the Manager that should be resolved at the same time as the Manager's claims against the Fund; and

- (d) **AGTL:** In the Supreme Court of Nova Scotia, Court File No. SN296202, the AGTL Shareholders claim, among other things, \$28 million dollars in damages from the Fund and certain other defendants. The Fund disputes this claim in its entirety.¹⁵

18. While the Fund is not presently aware of any claims against the directors or officers of the Fund, the directors and officers of the Fund have unlimited indemnities from the Fund. Therefore, it is also important to identify, quantify and adjudicate claims against the directors and officers of the Fund for which they would have a claim against the Fund for indemnity (as defined in the Claims Procedure Order, a "**D&O Indemnity Claim**").¹⁶

CLAIMS PROCEDURE ORDER

19. The proposed Claims Procedure Order includes the following terms (capitalized terms used in this paragraph and not defined herein have the meanings given in the proposed Claims Procedure Order):

- (a) **Notice:** the Monitor is to provide notice of the claims process by posting a copy of the Proof of Claim Document Package on its website, publishing a notice in The Globe and Mail newspaper and sending a Proof of Claim Document Package to all known Creditors according to the Fund's books and records, among other things;

¹⁵ January 6 Ross Affidavit at para. 22, Applicant's Motion Record, Tab 2, p. 18-20.

¹⁶ January 6 Ross Affidavit at para. 23, Applicant's Motion Record, Tab 2, p. 20.

- (b) **Claims Bar Date:** Proofs of Claim relating to Claims and D&O Claims must be filed by the March 6, 2014 (the “**Claims Bar Date**”), and all Claims or D&O Claims not filed by that date are forever barred and extinguished;
- (c) **D&O Indemnity Claims Bar Date:** A copy of any D&O Proof of Claim will be provided to the Director(s) and/or Officer(s) named therein and such Directors and Officers will have 15 Business Days after deemed receipt thereof to file a D&O Indemnity Claim; D&O Indemnity Claims not filed by that date are forever barred and extinguished;
- (d) **Excluded Claims:** Certain Claims are excluded and such Claimants are not required to file a Proof of Claim, including any Claim entitled to the benefit of the Administration Charge, the Claims of Roseway pursuant to the Participation Agreement dated May 28, 2010, including the disputed portion of such Claims (which shall be determined separately in the CCAA Proceedings), and any Post-Filing Claims;
- (e) **Review of proofs of claim:** The Monitor is to review the proofs of claim, may request additional information, may request a revised proof of claim, may resolve and settle any issue or claim arising in a Proof of Claim or D&O Proof of Claim (with the consent of the Fund and any Person whose liability may be affected or with Court approval), may accept a D&O Indemnity Claim in whole or in part, and may revise or disallow a claim in whole or in part (in consultation with the Applicant with respect to the Proofs of Claim and the named Directors and Officers with respect to D&O Proofs of Claim);

- (f) **Notice of Revision or Disallowance:** Where a claim is revised or disallowed in whole or in part, the Monitor is to deliver a Notice of Revision or Disallowance, attaching the form of Dispute Notice.
- (g) **Dispute Notice:** A Person who disputes a Notice of Revision or Disallowance shall file a Dispute Notice with the Monitor not later than the fifteenth (15th) Business Day following deemed receipt of the Notice of Revision or Disallowance; otherwise, the amount of such claim will be deemed to be as set out in the Notice of Revision or Disallowance.
- (h) **Resolution:** as soon as practicable after the delivery of the Dispute Notice, the Monitor shall attempt to resolve and settle the purported claim and, in the event it is not settled within a time period or in a manner satisfactory to the Monitor in consultation with the Fund and the applicable Claimant, the Monitor shall seek directions from the Court concerning an appropriate process for resolving the dispute.
- (i) **Related claims:** Any Claims and related D&O Claims and/or D&O Indemnity Claims shall be determined at the same time and in the same proceeding and any claims of the Applicant against a purported Claimant may, at the option of the Applicant, be determined at the same time and in the same proceeding as the claims by the purported Claimant against the Applicant.¹⁷

20. The proposed Claims Procedure Order also separately addresses the purported claims advanced by the following known claimants: the Manager, Allen-Vanguard, AGTL and Roseway.

¹⁷ January 6 Ross Affidavit at para. 25, Applicant's Motion Record, Tab 2, p. 20-22.

21. Paragraphs 47 to 54 of the proposed Claims Procedure Order address the Manager's Claim including, among other things, providing:

- (a) "for the purposes only of crystalizing its maximum damages claim as against the Applicant" the Manager is deemed to have submitted a Proof of Claim in the amount of \$18,000,000 pursuant to a letter of Dentons LLP dated and delivered to counsel for the fund on November 26, 2013;
- (b) that "pleadings" be delivered in addition to the other documents set out in the Claims Procedure; and
- (c) that the parties to attend before a judge to set a timetable for all procedural steps for hearing of a dispute relating to the Manager's Claim, if necessary as set out therein, which timetable shall include (unless the Court orders otherwise) discoveries, delivery of expert reports (if any), mediation and a hearing before a judge of the Court.¹⁸

22. Paragraphs 43 to 46 of the proposed Claims Procedure Order address the Allen-Vanguard Claim including, among other things, providing that:

- (a) Allen-Vanguard shall be deemed to have submitted a Proof of Claim in the amount of \$650,000,000, of which they state \$40,000,000 shall be distributed from the Escrow Agreement (as defined in the Statement of Claim of Allen-Vanguard filed in the Allen-Vanguard Action) plus pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c.C.43, as amended and costs on a substantial indemnity basis in reliance on the grounds

¹⁸ Proposed Claims Procedure Order, Applicant's Motion Record, Tab 3, p. 44-45.

set out in the Allen-Vanguard Statement of Claim and Reply of Allen-Vanguard in the Allen-Vanguard Action,

- (b) the Monitor shall be deemed to have delivered a Notice of Revision and Disallowance disallowing the Allen-Vanguard Claim in its entirety in reliance on the grounds set out in the Statement of Defence of the "Offeree Shareholders" in the Allen-Vanguard Action;
- (c) Allen-Vanguard shall be deemed to have submitted a Dispute Notice disputing such disallowance in its entirety; and
- (d) the procedure for determining the Allen-Vanguard Claim shall not be determined until after the hearing or other determination of the pending motion of Allen-Vanguard and cross-motion of the Fund, now scheduled for February 11, 2014, unless otherwise agreed by the Fund, the Monitor and Allen-Vanguard.¹⁹

23. The proposed Claims Procedure Order provides for a "Proof of Claim Document Package" to be delivered to AGTL.²⁰

24. The claims by Roseway are excluded from the proposed Claims Procedure Order since such claims are secured obligations. The Fund intends to seek to resolve the disputed portion of the Roseway Claims, with the assistance of the Monitor, and, if necessary, will seek direction of the Court regarding a process to resolve such dispute.²¹

¹⁹ Proposed Claims Procedure Order, Applicant's Motion Record, Tab 3, p. 43.

²⁰ Proposed Claims Procedure Order, Applicant's Motion Record, Tab 3, p. 36.

²¹ January 6 Ross Affidavit at para. 26, Applicant's Motion Record, Tab 2, p. 23.

PART III—ISSUES AND THE LAW

The Proposed Claims Procedure Order should be approved

25. Under the broad authority granted under the CCAA as well as its inherent jurisdiction, this Court has the authority to establish a claims process with an appropriate claims bar provision.²²

26. The Nova Scotia Supreme Court in *Re ScoZinc* acknowledged that Claims Procedure Orders are a “well-accepted practice” and observed that the typical claims process should be “both flexible and expeditious”. In particular:

[18] [...] as noted by McElcheran in *Commercial Insolvency in Canada* (LexisNexis Canada Inc., Markham, Ontario, 2005 at p. 279-80) the CCAA does not set out a process for identification or determination of claims; instead, the Court creates a claims process by court order [...]

[22] [...] the CCAA does not set out the procedure beyond the language in s.12 [now s. 20]. The language only accomplishes two things. The first is that the debtor company can agree on the amount of a secured or unsecured claim; and secondly, if there is a disagreement, then on application of either the company or the creditor, the amount shall be determined by the court on “summary application”.

[23] The practice has arisen for the court to create by order a claims process that is both flexible and expeditious. The Monitor identifies, by review of the debtor's records, all potential claimants and sends to them a claim package. To ensure that all creditors come forward and participate on a timely basis, there is a provision in the claims process order requiring creditors to file their claims by a fixed date. If they do not, subject to further relief provided by the claims process order, or by the court, the creditor's claim is barred.

[...]

[30] The CCAA gives to the court the express and implied jurisdiction to do a variety of things. They need not all be enumerated. The court is required to appoint a monitor (s.11.7). Once appointed, the monitor is required to monitor the company's business and financial affairs. The Act mandates that the monitor have access to and examine the company's property including all records. The monitor must file a report with the court on the state of the company's business and financial affairs and contain prescribed information. In addition, the monitor

²² CCAA, s. 20.

shall carry out such other functions in relation to the company as the court may direct (s.11.7(3)(d)).

[31] In these circumstances, it is not only logical, but eminently practical that the monitor, as an officer of the court, be directed by court order to fulfil the analogous role to that of the trustee under the BIA. The Claims Procedure Order of February 18, 2009 accomplishes this.²³

27. The proposed Claims Procedure has appropriate claims bar dates and is both flexible and expeditious.
28. The proposed Claims Bar Date for claims against the Fund and its Directors and Officers is 5:00 pm Toronto time on March 6, 2014. Claims against the Fund for indemnity by Directors or Officers are to be filed within 15 Business Days after the applicable D&O Proof of Claim is received by the relevant Director or Officer (as set out in the Claims Procedure Order).
29. Each of these deadlines is appropriate. The Claims Bar Date is 45 days after the deadline for the Monitor to publish notice in *The Globe and Mail*, providing sufficient time for potential Claimants to submit a Claim. Directors and Officers are provided 15 Business Days to submit an indemnity claim in accordance with the Claims Procedure Order. This too is an appropriate timeframe in the circumstances.
30. Generally, to the extent there is dispute as to the validity or amount of a claim that cannot be resolved, the proposed Claims Procedure Order contemplates that the Monitor will seek further direction from the Court. This provides flexibility to address such disputes as appropriate.²⁴
31. The proposed Claims Procedure Order separately addresses the claims advanced by known claimants:

²³ *ScoZinc Ltd. (Re)*, 2009 NSSC 136, Book of Authorities ("BOA") Tab 1.

²⁴ *Pine Valley Mining Corp. (Re)* (2008), 41 C.B.R. (5th) 43 at para. 13, BOA Tab 2.

- (a) The procedure to address the Manager's claim was developed together with counsel for the Manager and provides for the parties to attend before a judge on the Commercial List to set a timetable for procedural steps necessary to hear such dispute, which provides flexibility to first clarify the claims and any issues in dispute prior to setting a dispute resolution process, if no resolution is reached;
- (b) The procedure to address the Allen-Vanguard claim does not require separate delivery of a Proof of Claim, Notice of Revision and Disallowance and Notice of Dispute to avoid cost and duplication given that the claim and response are set out in the Allen-Vanguard Action. The proposed Claims Procedure Order then states that the procedure for determining such claim is not to be determined until after the hearing or other determination of the pending motion, presently scheduled for February 11, 2014, unless otherwise agreed by the Fund, the Monitor and Allen-Vanguard. This process is also appropriate, flexible and specifically mindful of the motion presently scheduled before this Court;
- (c) The proposed Claims Procedure Order provides for a "Proof of Claim Document Package" to be delivered to AGTL such that it will be notified of the Claims Procedure and permitted to file a Proof of Claim; and
- (d) The claims by Roseway are excluded from the proposed Claims Procedure Order since such claims are secured obligations. There is a disputed portion of the Roseway Claims, which the Fund intends to seek to resolve with the assistance of the Monitor, and, if necessary, will seek direction of the Court regarding a process to resolve such dispute.²⁵

²⁵ January 6 Ross Affidavit at para. 26, Applicant's Motion Record, Tab 2, p. 23.

32. Similar claims procedure orders involving claims against a debtor company and its directors and officers have been granted in CCAA proceedings in *Arctic Glacier Income Fund (Re)* (September 5, 2012)²⁶ and *Sino-Forest Corporation (Re)* (May 14, 2013).²⁷

33. Not only are the terms of the proposed Claims Procedure Order appropriate but also it is appropriate to commence a Claims Procedure at this time to identify the disputed and undisputed claims against the Fund, which may be required by potential bidders shortly after the Phase 2 Bid Deadline, depending on the form of transaction identified and the closing date of any such transaction, and to permit the continuation of the restructuring process generally.

34. Accordingly, the Fund respectfully requests that the proposed Claims Procedure Order be approved.

Extension of Stay Period

35. 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.²⁸

²⁶ Winnipeg, Court File No. CI 12-01-76323. (MB QB), BOA Tab 3.

²⁷ Toronto Court File No. CV-12-9667-00CL (ON SC), BOA Tab 4.

²⁸ CCAA, s. 11.02(2).

36. 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.²⁹

37. 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 as a going concern for the benefit of all stakeholders rather than liquidating the business and suffering the resulting social and economic losses.³⁰

38. 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.³¹

39. In this case, circumstances exist that make the requested extension of the Stay Period to March 7, 2014 appropriate. The requested extension will further the remedial purpose of the CCAA since, among other things, it will enable the Fund to pursue the SISP to identify potential sale or investment transactions as part of its restructuring plan, to continue to monitor and maintain its investments, and to proceed with developing and implementing its restructuring plans for the benefit of its stakeholders.

40. The Fund has sufficient working capital to fund operations during the requested extension of the Stay Period.

²⁹ CCAA, s. 11.02(3).

³⁰ *Worldspan Marine Inc. (Re)*, 2011 BCSC 1758 at paras. 12-15, BOA Tab 5.

³¹ *Canwest Global Communications Corp. (Re.)*, [2009] O.J. No. 4788 (Ont. S.C.J.) [Comm. List] at para. 43, BOA Tab 6.

41. The Fund has acted and is acting in good faith and with due diligence, including that the Fund has been conducting the SISP as set out above. In addition and among other things, the Fund has been:

- (a) working with the former manager of the Fund in relation to providing certain critical transition services to the Fund;
- (b) updating and working with Roseway, including supporting a motion for distribution of funds to Roseway in relation to which an order was granted by Justice Mesbur on November 28, 2013;
- (c) taking steps to address the claim by Allen-Vanguard 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
- (d) preparing the Claims Procedure Order to identify claims against the Fund and its directors and officers.³²

42. The requested extension of the Stay Period is to a date shortly after the Phase 2 Bid Deadline, if extended pursuant to the SISP, such that the Fund will be in a position to know whether a sale or investment proposal has been identified in the SISP and to advise the Court of the next steps in these CCAA Proceedings in light of that information.³³

43. Accordingly, granting the extension is necessary and appropriate in the circumstances, in particular to allow the Fund to complete Phase 2 of the SISP and to commence the claims procedure, and the Fund will benefit from having sufficient time and the protection of a CCAA stay to enable these steps to be taken.

³² January 6 Ross Affidavit at para. 32, Applicant's Motion Record, Tab 2, p. 24.

³³ January 6 Ross Affidavit at para. 34, Applicant's Motion Record, Tab 2, p. 24.

PART IV—ORDER REQUESTED

44. Accordingly, it is respectfully submitted that the Claims Procedure Order should be approved to enable the Fund to commence the claims process and that the Stay Period should be extended up to and including March 7, 2014.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



Kevin McEicheran/Heather Meredith/Kelly Peters

McCarthy Tétrault LLP
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SCHEDULE "A" – LIST OF AUTHORITIES

1. *ScoZinc Ltd. (Re)*, 2009 NSSC 136
2. *Pine Valley Mining Corp. (Re)* (2008), 41 C.B.R. (5th) 43 (BC SC)
3. *Arctic Glacier Income Fund (Re)*, Winnipeg, Court File No. CI 12-01-76323. (MB QB)
4. *Sino-Forest Corporation*, Toronto Court File No. CV-12-9667-00CL (ON SC)
5. *Worldspan Marine Inc. (Re)*, 2011 BCSC 1758
6. *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,

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

Determination of amount of claims

20. (1) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor is to be determined as follows:

(a) the amount of an unsecured claim is the amount

(i) in the case of a company in the course of being wound up under the Winding-up and Restructuring Act, proof of which has been made in accordance with that Act,

(ii) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act, proof of which has been made in accordance with that Act, or

(iii) in the case of any other company, proof of which might be made under the Bankruptcy and Insolvency Act, but if the amount so provable is not admitted by the company, the amount is to be determined by the court on summary application by the company or by the creditor; and

(b) the amount of a secured claim is the amount, proof of which might be made under the Bankruptcy and Insolvency Act if the claim were unsecured, but the amount if not admitted by the company is, in the case of a company subject to pending proceedings under the Winding-up and Restructuring Act or the Bankruptcy and Insolvency Act, to be established by proof in the same manner as an unsecured claim under the Winding-up and Restructuring Act or the Bankruptcy and Insolvency Act, as the case may be, and, in the case of any other company, the amount is to be determined by the court on summary application by the company or the creditor.

Admission of claims

(2) Despite subsection (1), the company may admit the amount of a claim for voting purposes under reserve of the right to contest liability on the claim for other purposes, and nothing in this Act, the Winding-up and Restructuring Act or the Bankruptcy and Insolvency Act prevents a secured creditor from voting at a meeting of secured creditors or any class of them in respect of the total amount of a claim as admitted.

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

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(Claims Procedure Order)**

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