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

***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.
(the "APPLICANT")

**AFFIDAVIT OF C. IAN ROSS,**
**SWORN November 20, 2013**
**(Re: Motion re: Allen-Vanguard Action)**

I, C. Ian Ross, of the Town of The Blue Mountains, in the Province of Ontario, MAKE OATH AND SAY:

1. I am the Chairman of GrowthWorks Canadian Fund Ltd. (the "**Fund**"), the Applicant in these proceedings. I am a director of the Fund and interim chief executive officer of the Fund in which role I am responsible for the daily operations of the Fund, acting under the oversight of a special committee of the Fund's Board of Directors. As such, I have personal knowledge of the facts to which I depose, except where I have indicated that I have obtained facts from other sources, in which case I believe those facts to be true.

2. I have sworn affidavits on September 30, 2013 (my "**Initial Affidavit**"), October 25, 2013 and November 14, 2013 in these *Companies Creditors' Arrangement Act* ("**CCAA**") proceedings of the Fund (the "**CCAA Proceedings**"). Capitalized terms contained herein, and not otherwise defined, have the meanings provided in my Initial Affidavit.

## BACKGROUND OF CCAA PROCEEDINGS

3. 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 my Initial Affidavit, the "**Portfolio Companies**").

4. As set out in my Initial Affidavit, the Fund faces challenges, including the following:

(a) A $20 million payment obligation to Roseway Capital S.a.r.l. ("**Roseway**"), along with certain related obligations (together, the "**Roseway Obligations**"), became due on September 30, 2013, which the Fund was unable to pay; and

(b) The Fund does not have access to short-term financing and its investments in the Portfolio Companies are held in illiquid securities consisting of minority equity interests in private companies and restricted equity securities in a publicly traded company. While the Fund had total assets of $115,879,821 as at September 27, 2013 (and cash and cash equivalents of approximately $6,586,662 as at September 30, 2013), the Fund's ability to divest of its investments in the Portfolio Companies at a profit is largely dependent on favourable market conditions and tends to require waiting for opportunities such as an initial public offering or merger or acquisition involving a Portfolio Company.

5. On October 1, 2013, the Fund sought and received Court protection pursuant to the CCAA in the form of an initial order of the Honourable Mr. Justice Newbould (as amended and restated, the "**Initial Order**").

6. On October 29, 2013, the Honourable Justice Mesbur extended the Stay Period, as defined in the Initial Order, to January 14, 2014, and amended and restated the Initial Order.

7. On November 18, 2013, the Honourable Justice Morawetz granted an order approving a Sale and Investor Solicitation Process (the "**SISP**"). Pursuant to the SISP, the Fund is seeking parties interested in purchasing the assets, undertakings and property of the Fund (a "**Sale Proposal**") and/or parties interested in investing in or refinancing the business of the Fund (an "**Investment Proposal**").

8. The SISP consists of two "Phases". Phase 1 runs for 25 days from November 18, 2013. The parties then have 5 Business Days to assess any letters of intent received and determine whether to proceed to Phase 2, which, if entered, will last an additional 45 days with the option to extend for a further 15 days.

9. Accordingly, the SISP deadlines are as follows:

| DATE | STEP |
|---|---|
| **November 18, 2013:** | Phase 1 Commences |
| **December 13, 2013** | Phase 1 Bid Deadline |
| **December 20, 2013:** | Date to assess Qualified LOIs and any Final Bids received |
| **December 23, 2013 (or earlier date if assessment steps proceed more quickly):** | Commencement of Phase 2, if required |
| **February 6, 2014 (or February** | Phase 2 Bid Deadline |

| | |
|---|---|
| **21, 2014 if extended):** | |
| **Thereafter** | Court Approval of Successful Bid or Court Appearance to Seek Directions if No Successful Bid |

10. The Fund has also been exploring potential merger options and is continuing its serious discussions with a possible merger partner (the "**Potential Merger Partner**").

## ALLEN-VANGUARD LITIGATION

### *Brief Overview of the Dispute*

11. The litigation between the Fund and Allen-Vanguard Corporation (**"Allen Vanguard"**) relates to Allen-Vanguard's acquisition of all of the shares of Med-Eng Systems Inc. ("**Med-Eng**") from the Med-Eng shareholders pursuant to a Share Purchase Agreement dated as of August 3, 2007, which is attached to the Affidavit of David E. Luxton sworn October 28, 2013 (the "**Luxton Affidavit**"), served on behalf of Allen-Vanguard in these proceedings as Exhibit "A" (the "**SPA**"). I am advised by Chris Hutchison, of counsel for the Offeree Shareholders in the Action, that, at the time, the Fund was a shareholder, holding approximately 12.4% of the Med-Eng shares which were transferred to Allen-Vanguard on closing of the transactions contemplated in the SPA.

12. I am advised by Mr. Hutchison that, on closing, the Fund received approximately $72,388,000 in return for its shares representing approximately 12.4% of the total cash proceeds released at that time. The balance of the purchase price, $40 million, has been held in escrow pursuant to the terms of the SPA (the "**Escrow**").

13. The Escrow was to be used to satisfy valid claims made by Allen-Vanguard pursuant to the terms of the SPA and, to the extent any of the Escrow remained after payment of such valid claims, to be distributed to the Fund and the other former shareholders of Med-Eng in proportion to their former holdings as deferred purchase price. The Escrow continues to be held by an escrow agent pursuant to the terms of the Escrow Agreement dated as of September 17, 2007 (the "**Escrow Agreement**").

14. The Fund and certain other Med-Eng shareholders listed on the Statement of Claim attached to the Luxton Affidavit as Exhibit "G" commenced an action on November 12, 2008 in Court File No. 08-CV-43188 (the "**Offeree Shareholder Action**") seeking, among other things, a declaration that they are entitled to payment of the Escrow and ordering distribution of the Escrow in accordance with the Escrow Agreement.

15. In December, 2008, Allen-Vanguard commenced a separate claim against the Fund and the other defendants listed on the Statement of Claim attached to the Luxton Affidavit as Exhibit "I" (the "**Statement of Claim**") in Court File #08-CV-43544 (the "**Allen-Vanguard Action**"). In this affidavit, I use the term "**Offeree Shareholders**" to refer, collectively, to the Fund and the other plaintiffs in the Offeree Shareholder Action, which are the same parties that are defendants in the Allen-Vanguard Action.

16. In the original Statement of Claim issued in 2008 in the Allen-Vanguard Action, Allen-Vanguard alleged that it had valid claims totalling $40 million arising under the SPA which should be satisfied from the Escrow. Accordingly, from the point of view of the Fund, its interest in the Escrow was a contingent asset as a proportion of the balance of the Escrow after payment of Allen-Vanguard's valid claims, if any.

17. In 2013, more than 4 years after the issuance of the original Statement of Claim, Allen-Vanguard amended the Statement of Claim in the Allen-Vanguard Action to, among other things, increase the quantum claimed against the Defendants to $650 million, of which they note $40 million would be distributed from the Escrow, plus interest and costs. The Amended Statement of Claim in the Allen-Vanguard Action, dated June 11, 2013, is attached to the Luxton Affidavit as Exhibit "P". The balance of the claim is asserted by Allen-Vanguard as a joint and several claim against all of the Offeree Shareholders, including the Fund. Among other things, it is the position of the Offeree Shareholders that the SPA limits any claims against them to the amount of the Escrow.

18. Accordingly, between September, 2007 when the Escrow was set aside to satisfy Allen-Vanguard's valid claims under the SPA, if any, and June, 2013, the claim by Allen-Vanguard against the Fund and the other Offeree Shareholders was limited to the amount of the Escrow, and the Fund's portion of the Escrow was a contingent asset of the Fund. Since the amendment of the Statement of Claim in June, 2013, the claim against the Offeree Shareholders has expanded to claim $650 million of which only approximately $40 million could be funded from the Escrow, leaving a joint and several claim against the Fund of approximately $610 million, and a significant potential liability.

19. I am advised by Mr. Hutchison that, prior to the issuance of the Initial Order, the Offeree Shareholders were in the process of bringing a summary judgment motion to seek to determine the question of whether Allen-Vanguard could claim against the Offeree Shareholders for amounts beyond the Escrow or whether their recovery is limited to the Escrow by the terms of the APA and/or other factual or legal issues (the "**Key Issue**").

***Impact on CCAA Proceedings***

20. The continued existence of the joint and several claim of approximately $610 million against the Fund will have a profound effect on the restructuring of the Fund in these CCAA Proceedings and will particularly impact the completion of any merger transaction.

21. The Fund is aware of only two other potential creditor claims of any significance. The first is the secured claim of Roseway described in my previous affidavits. While one element of Roseway's claim in the amount of approximately $1.9 million is disputed, the balance of Roseway's claim has been quantified. The second claim of which I am aware is that of the former Manager arising from the termination of the Management Agreement. The amount of that claim has not been stated by the former Manager but it is certain to be less than the claim now asserted by Allen-Vanguard.

22. In the course of these CCAA proceedings, the Fund will apply for approval of a claims process to identify any claims against it, and intends to seek approval to distribute funds, as such funds are received, to Roseway totalling the undisputed secured Roseway Obligations.

23. As noted above, the Fund is proceeding with the SISP to identify a potential Sale Proposal or Investment Proposal and continuing its discussions with the Potential Merger Partner. The Fund is soliciting such proposals for the benefit of its stakeholders. If its primary stakeholders are its shareholders, the most beneficial transaction might be a merger to preserve the positive tax treatment of the shareholders' investment in the Fund. If the primary stakeholders of the Fund are its

creditors, a merger transaction will likely not be beneficial and may not be possible at all.

24. I am advised by our counsel, McCarthy Tétrault LLP, and believe that a merger transaction can only preserve the favourable tax treatment 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. Any creditor claims must either be paid in cash or assumed by the merger partner.

25. Because the disputed claim of Allen-Vanguard is so large in face amount relative to the value of the assets of the Fund, it would likely be impossible to complete a merger transaction with the Allen-Vanguard claim outstanding even if the merger transaction was in the best interests of all legitimate stakeholders of the Fund.

26. The Fund believes that the Allen Vanguard claim is limited to the Escrow and the claim for damages exceeding the Escrow (the "**Excess Claim**") is not legitimate, should be and will be dismissed when adjudicated.

27. If the Key Issue is adjudicated and the Excess Claim is dismissed, the continuation of the Action would not impede the completion of a merger transaction or the completion of any other restructuring transaction that may arise from the implementation of the SISP.

28. Accordingly, it is critical to the completion of the restructuring process that the Key Issue and Excess Claim be litigated in a timely and efficient manner in the CCAA proceedings and subject to the case management of the CCAA court.

29. Given the length of time the Allen-Vanguard Action and Offeree Shareholder Action have taken to date and the recent amendment to increase the quantum of damages claimed, among other amendments, I am concerned about the potential to delay these CCAA Proceedings in the event that the Key Issue is not determined and if the Allen-Vanguard Action and the related Offeree Shareholder Action are allowed to proceed in the usual course.

**RELIEF REQUESTED**

30. Accordingly, this affidavit is sworn in support of a motion by the Fund to have the Key Issue determined in a summary fashion through a mini-trial before a judge of the Commercial List (Toronto).

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario, this 20th day of November, 2013.

Commissioner for taking affidavits

**C. IAN ROSS**

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF GROWTHWORKS CANADIAN FUND LTD.

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Proceeding commenced at Toronto

**AFFIDAVIT OF C. IAN ROSS**
**(sworn November 20, 2013)**

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