

**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
(RETURNABLE OCTOBER 21, 2014)
(Motion to Extend Stay and Deadline for AGM)**

October 17, 2014

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FACTUM OF THE APPLICANT

PART I—OVERVIEW

1. GrowthWorks Canadian Fund Ltd. (the "**Applicant**" or the "**Fund**") is a labour-sponsored venture capital fund with a diversified portfolio of investments in small and medium-sized Canadian businesses (the "**Portfolio Companies**").¹
2. The Fund is insolvent, and on October 1, 2014 it sought and received Court protection pursuant to the CCAA in the form of an initial order (as amended and restated, the "**Initial Order**").² Among other things, the Initial Order granted a stay of proceedings up to and

¹ Affidavit of C. Ian Ross sworn September 30, 2014 (the "Initial Order Affidavit") at para. 2, Tab 1 of the Applicant's Compendium

² Affidavit of C. Ian Ross sworn October 15, 2014 (the "October Ross Affidavit") at para.6, Tab 2 of the Applicant's Motion Record.

including January 15, 2015 (the “**Stay Period**”). The stay period has been extended a number of times and is presently set to expire on November 30, 2014.³

3. The Fund’s holdings are largely illiquid. The ability of the Fund to profitably exit its investments is dependent on market conditions, typically at the stage of an initial public offering or merger or acquisition involving a Portfolio Company.⁴

4. Pursuant to s. 133(1)(b) of the *Canada Business Corporations Act* (“**CBCA**”), the Fund is required to hold an annual meeting of shareholders (“**AGM**”) not later than 15 months after the last preceding AGM but no later than 6 months after the end of the financial year. Section 133(3) allows a corporation to apply to the court for an order extending the time for an AGM.

5. In part due to the Fund’s restricted cash flows during the CCAA proceedings and the need to focus on, among other things, a sale and investment solicitation process and a claims process, the time for the Fund to hold an AGM was extended, by an order of the Honourable Mr. Justice Brown, to October 31, 2014.

6. The CCAA proceedings are ongoing and cash flow remains restricted. An AGM is both costly and time-consuming and an AGM would be of little utility to shareholders, the Fund seeks a further extension of the deadline for holding an AGM on or before October 31, 2014.

7. The Fund continues in its efforts to compete a restructuring of its financial affairs for the benefit of its stakeholders in good faith and with due diligence.

8. Accordingly, in this motion, the Fund seeks orders:

³ October Ross Affidavit at para. 6, Tab 2 of the Applicant’s Motion Record.

⁴ Initial Order Affidavit at para. 5, Tab 1 of the Applicant’s Compendium.

- (a) abridging the time for service of the Notice of Motion and dispensing with further service thereof;
- (b) extending the Stay Period as defined in paragraph 14 of the order of the Honourable Mr. Justice Newbould dated October 1, 2013 (as amended and restated, the “**Initial Order**”) up to and including May 31, 2015;
- (c) extending the time for the Fund to call an annual meeting of its shareholders until a date that is within 90 days of the expiry of the Stay Period, including, without limitation, any extension of the Stay Period from time to time; and
- (d) such other relief as this Honourable Court may allow.

PART II—FACTS

THE STAY PERIOD SHOULD BE EXTENDED

(a) The Restructuring Process

9. The Fund is a labour-sponsored venture capital fund holding largely illiquid securities in a portfolio comprising of minority equity interests in small and medium-sized Canadian companies.⁵ The Fund’s only secured creditor is Roseway Capital S.a.r.l. (“**Roseway**”).

10. In the face of financial challenges including a \$20 million secured payment obligation coming due to Roseway, the Fund sought and received protection under the *Companies’ Creditors Arrangement Act* (“**CCAA**”) on October 1, 2013. The Initial Order granted, among

⁵ October Ross Affidavit at para. 6., Tab 2 of the Applicant’s Motion Record.

other things, a stay up to and including January 15, 2014. The Stay Period was extended by court orders dated October 29, 2013, January 9, 2014 and March 6, 2014 and April 8, 2014. It is presently set to expire on November 30, 2014.⁶

11. The Fund's ability to divest its illiquid holdings at a profit is largely dependent on favourable market conditions for exit opportunities. The timing of divestments is driven by a number of factors, including the stage and development and prospects of companies within the Fund's portfolio, and the state of the initial public offering ("IPO") or merger and acquisition ("M&A") markets. The Fund typically divests of its investments at the time of an IPO or M&A transaction involving a Portfolio Company.⁷ A forced sale of the Fund's investment assets prior to an appropriate exit opportunity arising will result in depressed values and portfolio losses.⁸

12. In the course of these CCAA proceedings (the "**CCAA Proceedings**"), the Fund conducted a Sale and Investor Solicitation Process (the "**SISP**") to seek reasonable offers of interest for the purchase of its assets. The SISP did not result in any reasonable offers. The Fund has also conducted a claims process, which is now concluded.

13. Given that the SISP did not result in an acceptable offer to purchase all of the Fund's assets in a single transaction and no merger option was identified, the Fund believes that providing time to the Fund to realize its investment assets in the ordinary course, with a manager in place to identify and capitalize on exit opportunities as they arise and perform other management functions, is the best method to maximize recovery on the assets of the Fund for the benefit of its stakeholders.

⁶ October Ross Affidavit at para. 6, Tab 2 of the Applicant's Motion Record.

⁷ Initial Order Affidavit at para. 56, Tab 1 of the Applicant's Compendium.

⁸ Initial Order Affidavit at para. 6, Tab 1 of the Applicant's Compendium.

14. On May 9, 2014, the Fund concluded an investment advisor agreement with Roseway whereby Roseway was engaged to manage the Fund's investment portfolio over a longer term. The Fund sought and received an order extending the Stay Period to November 30, 2014 to allow it to implement the Investment Advisor Agreement. The Investment Advisor Agreement was approved by order of this Court dated May 14, 2014.

15. Now the Fund, with the assistance of FTI Consulting Canada Inc. in its capacity as Court-appointed monitor (the "**Monitor**") and Roseway as investment advisor, is in the process of assessing potential exit opportunities in order to maximise value during this restructuring. It requires the protection of a CCAA stay.⁹

(b) The Ottawa Proceedings

16. The Fund is a defendant in court proceedings commenced in Ottawa by Allen-Vanguard Corporation ("**AVC**") and offeree shareholders in relation to the sale of shares in Med-Eng Systems Inc. to AVC.¹⁰ On February 11, 2014, AVC sought an order lifting the CCAA stay of proceedings to allow it to continue its action against the Fund. The Fund brought a cross-motion seeking the "mini-trial" of the matters within the CCAA proceedings.

17. The Court allowed the partial lifting of the stay but imposed certain milestones on the parties in respect of the litigation (the "**Litigation Milestones**") including that the actions must be set down to commence no later than the second quarter of 2015.¹¹

⁹ October Ross Affidavit at para. 6, Tab 2 of the Applicant's Motion Record.

¹⁰ October Ross Affidavit at para. 7, Tab 2 of the Applicant's Motion Record.

¹¹ *GrowthWorks Canadian Fund Ltd. (Re)*, 2014 ONSC 2253 (CanLII), Reasons of Justice Brown at Tab 3 of the Applicant's Compendium.

18. The Court directed that the Litigation Milestones be considered in any future motion to extend either the Stay Period or the lifting of the stay.¹²

19. The Fund has engaged with the claimants in the Ottawa Proceedings and has made efforts to progress the Ottawa Proceedings. As a result of the parties' efforts, the matters have been set down for trial, scheduled to commence on March 30, 2015 for 9 to 11 weeks. The trial date has been made peremptory on all parties.¹³ The Fund is therefore in compliance with the Litigation Milestones.

(c) Cash Flow

20. The Fund is requesting that the Stay Period be extended up to and including May 31, 2015. The cash flow report to be filed by the Monitor with its eleventh report (the "**Eleventh Report of the Monitor**") will demonstrate that the Fund has sufficient liquidity to continue operating in the ordinary course to the end of the requested Stay Period and that it may substantially reduce its indebtedness to Roseway through the completion of liquidity transactions that are anticipated.

TIME FOR THE FUND'S ANNUAL GENERAL MEETING SHOULD BE EXTENDED

21. The authorized capital of the Fund consists of Class A Shares, Class B Shares and Class C Shares. The Fund currently has approximately 92,000 individual Class A shareholders. Class A Shares are held by individuals or registered plans established for the benefit of individuals. Class B Shares are all held by the Canadian Federation of Labour, the Fund's labour sponsor,

¹² October Ross Affidavit at para. 10, Tab 2 of the Applicant's Motion Record.

¹³ October Ross Affidavit at paras. 12-14, Tab 2 of the Applicant's Motion Record.

and are of nominal value. Class C Shares are all issued to the former manager of the Fund and have various restrictions including that, except as required by law, the holder is not entitled to vote.¹⁴

22. Pursuant to subsection 133(1)(b) of the CBCA, unless time is extended by court order, the Applicant is required to call an AGM no later than fifteen months after holding the last preceding annual meeting but no later than six months after the end of the Applicant's preceding financial year.

23. The Fund last held an AGM on February 19, 2013. By order dated February 28, 2014, the deadline for the Fund to hold its next AGM was extended to November 30, 2014.¹⁵

24. The cost to the Fund associated with the holding of a meeting of its shareholders, is approximately \$220,000.¹⁶ All material disclosure is made publicly in a prompt and timely manner. Further, during the CCAA proceedings, there is very little business to put before the shareholders other than routine matters.¹⁷

25. In order to reduce the Fund's expenses and permit the Fund and its management to focus on the CCAA process and to identify opportunities to exit its investment portfolio profitably, the Fund is of the view that it would be appropriate, subject to the approval of this Court, to postpone the calling of the AGM to a date that is no more than 90 days after the conclusion of

¹⁴ Initial Order Affidavit at paras. 40 to 49, Tab 1 of the Applicant's Compendium.

¹⁵ October Ross Affidavit at para. 22, Tab 2 of the Applicant's Motion Record.

¹⁶ October Ross Affidavit at para. 23, Tab 2 of the Applicant's Motion Record.

¹⁷ October Ross Affidavit at para. 24, Tab 2 of the Applicant's Motion Record.

the CCAA process.¹⁸ Because of the CCAA proceedings and the insolvency of the Fund, little could be accomplished by a meeting of shareholders at this time.

PART III—ISSUES AND THE LAW

26. The issues to be decided on this motion are:

(a) **Should the Stay Period be extended as requested?** The Fund submits that the requested extension of the Stay Period to and including May 31, 2014 is appropriate.

(b) **Is it appropriate to grant an extension of time for the calling of the AGM?**

Yes. Doing so is appropriate to avoid the unnecessary cost and disruption of holding the AGM, which would distract from the CCAA restructuring process. The shareholders of the Fund are unlikely to suffer any prejudice should the calling of the AGM be so postponed as:

(i) There is no business to be put before the AGM other than the usual matters of placing financial statements before shareholders, election of auditors and election of directors. The unaudited annual financial statements of the Fund have been publicly disclosed;

(ii) Shareholders of the Fund are kept apprised on a timely basis of material developments affecting the Fund through the issuance of press releases and other public disclosures, the posting of such press releases and disclosure documents on the System for Electronic Document Analysis

¹⁸ October Ross Affidavit at para. 26, Tab 2 of the Applicant's Motion Record.

and Retrieval (“**SEDAR**”), and by way of filings with the CCAA Court and posting of material on the website of the Monitor; and,

- (iii) If there are further material developments before the holding of the AGM, disclosure will be made in accordance with applicable securities laws and the CCAA.¹⁹

EXTENSION OF THE STAY PERIOD

27. 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.²⁰

28. 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.²¹

¹⁹ October Ross Affidavit at para. 24, Tab 2 of the Applicant’s Motion Record.

²⁰ CCAA, s. 11.02(2).

²¹ CCAA, s. 11.02(3).

29. 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.²²

30. 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.²³

31. In this case, circumstances exist that make the requested extension of the Stay Period to May 31, 2015 appropriate. The requested extension will further the remedial purpose of the CCAA since, among other things, it will enable the Fund to work with its investment advisor to exit its investments profitably, and in turn generate sufficient funds to pay its creditors and to preserve and maximizing the value of its assets for the benefit of its stakeholders.

32. The Fund believes that realization of its investment assets over time, through ordinary course exit opportunities, is the course of action that is most likely to provide the greatest value to its stakeholders. Without the protection of the CCAA stay to enable the Fund to realize on its assets in the ordinary course – the Fund’s ability to recover appropriate value for its relatively illiquid assets may be impeded.

²² *Worldspan Marine Inc. (Re)*, 2011 BCSC 1758 at paras. 12-15, Brief of Authorities (“BOA”) Tab 1 (“*Worldspan*”)

²³ *Canwest Global Communications Corp. (Re.)*, 2009 CanLII 63368 (ONSC) at para. 43, BOA Tab 2 (“*Canwest*”)

33. If the stay is lifted and a receiver appointed, in addition to giving the appearance of a “fire sale”, a receivership may cause defaults in shareholder agreements to which the Fund is a party thereby forcing a sale of the Fund’s investment assets prematurely ahead of any natural exit opportunity and at a discount to the price otherwise obtainable by the Fund in the ordinary course.²⁴

34. The CCAA Stay is providing protection to the Fund while it continues to have creditor claims against the Fund in order to prevent such creditors from causing a liquidation and possible wind-up of the Fund and the possible negative consequences for the shareholders of the Fund. The CCAA Stay also enables the Fund to continue to manage its assets in the ordinary course and to seek appropriate exit opportunities as they arise in order to maximize value for stakeholders.²⁵

35. This is a valid and appropriate restructuring goal that will further the purposes of the CCAA. By preserving the business as a going concern to enable the Fund to identify appropriate exit opportunities and to protect its shareholders and other stakeholders from negative consequences while seeking to pay its creditors, the broad remedial purposes behind the CCAA are met.²⁶

36. The Applicant has acted in good faith and with due diligence since the granting of the Initial Order, including that the Applicant has, among other things:

- (a) Concluded an investment advisor arrangement with Roseway;

²⁴October Ross Affidavit at para. 17, Tab 2 of the Applicant’s Motion Record.

²⁵Initial Order Affidavit at para. 106, Tab 1 of the Applicant’s Compendium.

²⁶*Worldspan*, BOA Tab 1; *Canwest*, BOA Tab 2.

- (b) Taken steps to address the claim by AVC against the Fund, in accordance with the Litigation Milestones;
- (c) Continued to diligently seek records and documentation relating to the Fund's business and affairs that are in the possession and control of the Fund's former manager; and
- (d) Worked with its investment advisor to identify exit opportunities.²⁷

37. The cash flow projection attached to the Eleventh Report of the Monitor will demonstrate that the Fund has sufficient liquidity to be able to continue operating in the ordinary course during the requested Stay Period and will likely substantially reduce its indebtedness to Roseway.

ANNUAL GENERAL MEETING OF THE FUND

38. Section 133 of the CBCA governs the time for calling an AGM:

“133. (1) Calling annual meetings – The directors of a corporation shall call an annual meeting of shareholders

(a) not later than eighteen months after the corporation comes into existence; and

(b) subsequently, not later than fifteen months after holding the last preceding annual meeting but no later than six months after the end of the corporation's preceding financial year.

(2) Calling special meetings – The directors of a corporation may at any time call a special meeting of shareholders.

(3) Order to delay calling of annual meeting – Despite subsection (1), the corporation may apply to the court for an order extending the time for calling an annual meeting.”

²⁷ October Ross Affidavit at para. 16, Tab 2 of the Applicant's Motion Record.

Judicial consideration of section 133(3)

39. Two principles emerge from the jurisprudence relating to section 133(3) of the CBCA that are relevant to this application:

- (a) Section 133(3) requires a balancing of the interests of the corporation against the risk of harm to shareholders.
- (b) Efficient use of the corporation's resources is an important consideration and it is common for CCAA Courts to grant an extension of time for calling an AGM.

(a) Balancing of the interests of the corporation against the risk of harm to shareholders

40. The first principle emerges from the decision of Justice Pepall of this court in *Re IMAX Corp.*,²⁸ which is the most comprehensive consideration of section 133(3) to date. The applicant requested the extension because of delays resulting from the discovery of certain accounting errors in its financial statements. The extension was granted despite opposition. Pepall J. held that:

“In exercising its discretion, the court will consider the interests of the company balanced against any meaningful risk of harm to the shareholders arising from the granting of an extension.”²⁹ (Emphasis added.)

41. In undertaking this balancing exercise, Pepall J. considered the following factors under the rubric of the best interests of the corporation:

“Without the financial statements, little purpose would be served by holding a meeting of shareholders at this time. Furthermore, from a practical perspective, IMAX would be required to hold two rather than one meeting within a short period of time thereby incurring additional costs for IMAX and its shareholders ...

²⁸ *Re IMAX Corp.*, 2007 CarswellOnt 8860, 41 B.L.R. (4th) 289 (Ont. S.C.J.), BOA Tab 3 (“*IMAX*”).

²⁹ *IMAX.*, BOA Tab 3, at para. 23

Preparing for and holding an annual meeting of shareholders at this time would be a drain on the resources of IMAX's senior management and may ultimately result in further delaying the company's filing of its financial statements.³⁰ (Emphasis added.)

On the other side of the scale, she found no meaningful risk of harm to shareholders because there was no evidence of any shareholder proposal having been delivered to IMAX, there was no evidence of any steps having been taken to request a shareholders' meeting, and shareholders would continue to receive disclosure in the interim.³¹

42. Section 133(3) is designed to provide companies with “increased flexibility without creating any new risk for the shareholders.” Postponing an AGM, especially in an uncontested application, is not prejudicial to shareholders who “remain protected by a number of provisions which enable them to require the corporation to hold a meeting.”³²

(b) Efficient use of resources and Extension of time for AGM in CCAA Proceedings

43. The second principle is best illustrated by the numerous cases in which a section 133(3) extension has been granted in proceedings involving the CCAA. One example is *Canwest Global Communications Corp.*,³³ in which Pepall J. held:

“CCAA courts have commonly granted extensions of time for the calling of an annual general meeting. In this case, the CMI Entities including Canwest Global are devoting their time to stabilizing business and implementing a plan. Time and resources would be diverted if the time was not extended as requested and the preparation for and the holding of the annual meeting would likely impede the timely and desirable restructuring of the CMI Entities. Under section 106(6) of the CBCA,

³⁰ *IMAX*, BOA Tab 3, at paras 23 and 25

³¹ *IMAX*, BOA Tab 3, at paras. 16 and 26

³² *IMAX*, BOA Tab 3, at para. 20, citing an Industry Canada policy paper.

³³ *Re Canwest Global Communications Corp.*, 2009 CanLII 55114 (ONSC) (“*Canwest Global Communications*”), BOA Tab 4.

if directors of a corporation are not elected, the incumbent directors continue. Financial and other information will be available on the proposed Monitor's website. An extension is properly granted.”³⁴ (Emphasis added.)

44. As a corporation subject to CCAA proceedings, the Applicant’s cash resources are tightly restricted and the Applicant is focused on the restructuring process and the management of its portfolio for the benefit of all of its stakeholders in accordance with the priority of their claims. Holding an AGM is costly and in circumstances in which there are no matters to be addressed at the AGM other than routine matters addressed each year and in which material information has been disclosed publicly by other means, the Fund is of the view that its resources and the time spent by its management and advisors is better spent focusing on the restructuring process at this time.

Validating service

45. Rule 16.08 of the Rules of Civil Procedure allows the court to validate service which is effected in a manner other than prescribed. Personal service on approximately 92,000 shareholders would be impractical and a waste of resources. A press release to the market and posting on the internet (through SEDAR and the Monitor’s website) have made this application known to the market, and anyone with an interest in opposing has been given adequate opportunity to get the application materials and respond to the application if they wish to do so.

46. In the Fund’s previous request for an extension of time for its AGM, the Honourable Mr. Justice Brown approved of a similar methodology for notifying shareholders of the application, noting that the applicants had taken steps to notify their shareholders of the application in

³⁴ *Canwest Global Communications*, BOA Tab 4, at para. 54. See also *Sino-Forest Corporation (Re)*, 2012 ONSC 2063, BOA Tab 5 at para. 44 in which the Court granting the CCAA initial order also extended the time for the AGM of the debtor.

SEDAR and on their website and that “In view of the number of shareholders, personal service was not a practical alternative.”³⁵

47. Notification of shareholders by issuance of a press release and posting the press release on the applicant’s website and on SEDAR has also been approved as an alternative form of service in a number of other proceedings pursuant to section 133 of the CBCA.³⁶

48. Accordingly, service of this motion in the manner described in the October Ross Affidavit should be validated.

PART IV—ORDER REQUESTED

49. Accordingly, it is respectfully submitted that the Stay Period should be extended up to and including May 31, 2015, and the deadline for the AGM should be extended to a date that is no more than 90 days after the conclusion of these CCAA proceedings.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



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³⁵ Order of Justice Brown dated February 28, 2014, Tab 3 of the Applicant’s Compendium.

³⁶ See *Sprott Resources Lending, Corp (Re)*, 2013 ONSC 4350, BOA Tab 6, at Schedule “A”.

SCHEDULE “A” – LIST OF AUTHORITIES

1. *Worldspan Marine Inc. (Re)*, 2011 BCSC 1758
2. *Canwest Global Communications Corp. (Re.)*, 2009 CanLII 63368 (ONSC)
3. *Re IMAX Corp.*, 2007 CarswellOnt 8860, 41 B.L.R. (4th) 289 (ONSC)
4. *Re Canwest Global Communications Corp.*, 2009 CanLII 55114 (ONSC)
5. *Sino-Forest Corporation (Re)*, 2012 ONSC 2063
6. *Sprott Resources Lending, Corp (Re)*, 2013 ONSC 4350.

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.

Canada Business Corporations Act, R.S.C. 1985, c C-44

133. (1) Calling annual meetings – The directors of a corporation shall call an annual meeting of shareholders

(a) not later than eighteen months after the corporation comes into existence;
and

(b) subsequently, not later than fifteen months after holding the last preceding annual meeting but no later than six months after the end of the corporation's preceding financial year.

(2) Calling special meetings – The directors of a corporation may at any time call a special meeting of shareholders.

(3) Order to delay calling of annual meeting – Despite subsection (1), the corporation may apply to the court for an order extending the time for calling an annual meeting.”

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)**

Proceeding Commenced at Toronto

**FACTUM OF THE APPLICANT
(Motion to Extend Stay
and Deadline for AGM)**

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