

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

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

AND IN THE MATTER OF A PROPOSED PLAN
OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO
GROWTHWORKS CANADIAN FUND LTD.

**FACTUM OF THE APPLICANT
(Motion to Extend Time for Annual General Meeting of Shareholders
Returnable February 28, 2014)**

February 26, 2014

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PART I—OVERVIEW

1. In this motion, Growthworks Canadian Fund Ltd. (the “**Fund**” or the “**Applicant**”) seeks an order extending the time for the Fund to call the next annual general meeting of its shareholders (“**AGM**”) to a date on or before October 31, 2014 pursuant to subsection 133(3) of the *Canada Business Corporations Act* (“**CBCA**”).

2. The Applicant is insolvent and has been under *Companies' Creditors Arrangement Act* (the “**CCAA**”) protection since October 1, 2013. The requested extension to call the next AGM is sought by the Fund to enable it to focus 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. Material information relating to the Fund has been publicly disclosed and there is no business to address at the AGM other than routine matters. As such it is appropriate to delay the AGM, as requested.

PART II—FACTS

3. The Fund is a labour-sponsored venture capital fund with a diversified portfolio of investments in small and medium-sized Canadian businesses, and a corporation incorporated under the CBCA.¹

4. The Fund is insolvent. It 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

5. In the CCAA proceedings of the Fund (the “**CCAA Proceedings**”), the Fund has conducted a Sale and Investor Solicitation Process (the “**SISP**”) to solicit interest in purchasing or investing in the Fund’s business and property and has obtained an order approving a claims procedure to identify, determine and resolve claims of creditors of the Fund, among other things. The Fund, with the assistance of FTI Consulting Canada Inc. in its capacity as Court-appointed monitor (the “**Monitor**”) is presently assessing the outcome of the SISP and next steps in the restructuring process.³

SHAREHOLDERS OF THE FUND

6. 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.⁴ Class A Shares are held by individuals or registered plans established for the

¹ Affidavit of C. Ian Ross, sworn February 26, 2014, Tab 2 to the Motion Record of the Applicant (“**Ross Affidavit**”) at para. 4.

² Ross Affidavit at para. 5.

³ Ross Affidavit at paras. 6 and 7.

⁴ Ross Affidavit at para. 10.

benefit of individuals. Class B Shares are all held by the Canadian Federation of Labour, the Fund's labour sponsor, 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.⁵

TIME FOR ANNUAL GENERAL MEETING SHOULD BE EXTENDED

7. Pursuant to subsection 133(b) of the CBCA, the Applicant must 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.⁶

8. The Fund last held an AGM on February 19, 2013 and the Applicant's last financial year ended on August 31, 2013, which means it is required to call the next AGM no later than February 28, 2014, unless an order is made under subsection 133(3) of the CBCA extending that time.⁷

9. The cost to the Fund associated with the holding of a meeting of its shareholders, is approximately \$220,000.⁸

10. In order to reduce the Fund's expenses and permit the Fund and its management to focus on the CCAA process, including the SISP and claims process, the Fund is of the view that it would be appropriate, subject to the approval of this Court, to postpone the calling of

⁵ Ross Affidavit at paras. 8 - 10.

⁶ Ross Affidavit at para. 11.

⁷ Ross Affidavit at para. 12.

⁸ Ross Affidavit at para. 13.

the AGM to a date on or before October 31, 2014 at which time the Fund expects to have greater clarity regarding its restructuring process.⁹

PART III—THE ISSUE

11. **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 :

- (a) 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. An audit cannot be completed at this time because of issues arising in and related to the CCAA proceedings;
- (b) 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 and Retrieval (“**SEDAR**”), and by way of filings with the CCAA Court and posting of material on the website of the Monitor; and,
- (c) 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.¹⁰

⁹ Ross Affidavit at para. 14.

PART IV—LAW AND ARGUMENT

12. 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.”

Judicial consideration of section 133(3)

13. 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.

¹⁰ Ross Affidavit at para. 15.

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

14. The first principle emerges from the decision of Justice Pepall of this court in *Re IMAX Corp.*,¹¹ 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.”¹² (Emphasis added.)

15. 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 ... 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.”¹³ (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

¹¹ *Re IMAX Corp.*, 2007 CarswellOnt 8860, 41 B.L.R. (4th) 289 (Ont. S.C.J.) (“*IMAX*”)

¹² *IMAX* at para. 23

¹³ *IMAX* at paras 23 and 25

no evidence of any steps having been taken to request a shareholders' meeting, and shareholders would continue to receive disclosure in the interim.¹⁴

16. 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.”¹⁵

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

17. 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.*,¹⁶ 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, 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.”¹⁷
(Emphasis added.)

18. 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

¹⁴ *IMAX*, at paras. 16 and 26

¹⁵ *IMAX* at para. 20, citing an Industry Canada policy paper

¹⁶ *Re Canwest Global Communications Corp.*, 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J.)

¹⁷ *Ibid.* at para. 54. See also *Sino-Forest Corporation (Re)*, 2012 ONSC 2063 at para. 44 in which the Court granting the CCAA initial order also extended the time for the AGM of the debtor.

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

19. 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 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.

20. In the Fund's previous request for an extension of time for its AGM, the Honourable Justice Morawetz 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 SEDAR and on their website and that "In view of the number of shareholders, personal service was not a practical alternative."¹⁸

¹⁸ *Re Growthworks* (unreported), decision of Justice Morawetz dated January 19, 2012 and related order dated February 3, 2012.

21. 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.¹⁹

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

PART V—RELIEF REQUESTED

23. The Applicant therefore requests an order extending the time to call its AGM to a date on or before October 31, 2014, and an order validating service of the motion materials.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 26th DAY OF FEBRUARY, 2014.



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Counsel to the Applicant

¹⁹ See *Sprott Resources Lending, Corp (Re)*, 2013 ONSC 4350 at Schedule "A" and *Re Lorus Therapeutics Inc.* (unreported), decision of Justice Morawetz dated October 23, 2013 and the related affidavit referencing the manner of service.

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. *Re IMAX Corp.*, 2007 CarswellOnt 8860, 41 B.L.R. (4th) 289 (Ont. S.C.J.)
2. *Re Canwest Global Communications Corp.*, 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J.)
3. *Sino-Forest Corporation (Re)*, 2012 ONSC 2063
4. *Re Growthworks* (unreported), decision of Justice Morawetz dated January 19, 2012 and related order dated February 3, 2012
5. *Sprott Resources Lending, Corp (Re)*, 2013 ONSC 4350
6. *Re Lorus Therapeutics Inc.* (unreported), decision of Justice Morawetz dated October 23, 2013 and related affidavit (without exhibits)

**SCHEDULE “B”
RELEVANT STATUTES**

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

Calling annual meetings

133. (1) 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.

Calling special meetings

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

Order to delay calling of annual meeting

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

Rules of Civil Procedure (Ontario)

Rule 3.02

3.02 (1) Subject to subrule (3), the court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just.

(2) A motion for an order extending time may be made before or after the expiration of the time prescribed.

(3) An order under subrule (1) extending or abridging a time prescribed by these rules and relating to an appeal to an appellate court may be made only by a judge of the appellate court.

Rule 16.08

16.08 Where a document has been served in a manner other than one authorized by these rules or an order, the court may make an order validating the service where the court is satisfied that,

(a) the document came to the notice of the person to be served; or

(b) the document was served in such a manner that it would have come to the notice of the person to be served, except for the person’s own attempts to evade service.

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

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Proceeding Commenced at Toronto

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