Court File No. •

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
(re: Application for Initial Order)

October 1, 2013

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TABLE OF CONTENTS

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FACTUM OF THE APPLICANT

PART I—OVERVIEW

1. This is an application for protection under the *Companies' Creditors Arrangement Act* (Canada) (the "**CCAA**") by Growthworks Canadian Fund Ltd. (the "**Applicant**" or the "**Fund**"), a labour-sponsored venture capital fund with a diversified portfolio (the "**Venture Portfolio**") of investments in small and medium-sized Canadian businesses (the "**Portfolio Companies**").

2. The Fund is insolvent because a $20 million secured payment obligation to Roseway Capital S.a.r.l. ("**Roseway**") pursuant to a Participation Agreement (defined below), along with certain related obligations, has become due on September 30, 2013, which the Fund is unable to pay. While it has negotiated extensions in the past, the Fund has been unable to negotiate a further extension for this payment.

3. The Fund does not have access to short-term financing and its only source of liquidity is the proceeds realized upon disposition of assets in the Venture Portfolio. However, the investments are held in illiquid securities consisting of minority equity interests in private companies and restricted

equity securities in a publicly traded company. Generally, divesting of these investment assets at a profit requires waiting for an appropriate exit opportunity such as an initial public offering or merger or acquisition involving the Portfolio Company. A forced sale of such investment assets, prior to an appropriate exit opportunity arising, generally results in depressed values and portfolio losses.

4. Accordingly, while the Venture Portfolio remains viable, it is not in the best interests of the Fund's stakeholders to force an untimely sale of its investments in the Venture Portfolio *en bloc*, prior to appropriate exit opportunities arising, to satisfy the Roseway Obligations (defined below). The Fund's stakeholders include its Class A Shareholders, each of whom is a retail investor currently affected by the suspension of redemptions of Class A Shares.

5. The Fund is seeking protection in the form of a CCAA stay from the negative effects of a fire sale of its assets, as well as assistance – in the form of a critical supplier order, ordering its former manager to deliver essential transition services and Court-ordered charges in favour of the Applicants' advisors, directors and critical supplier – to ensure that it is able to continue to service its Venture Portfolio. If such relief is granted, the Fund intends to continue its discussions with a possible merger partner, while at the same time exploring other options for a merger, other transaction, financing or judicious disposition of its assets, without the threat of a forced sale of its interests and related losses.

6. The Fund has retained The Commercial Capital Corporation (operating as CCC Investment Banking) ("**CCC**") as financial advisor to assist it in exploring possible merger or other transactions. FTI Consulting Canada Inc. ("**FTI**" or the "**Proposed Monitor**") has been retained as financial advisor to assist in its preparation of this Application. FTI has provided a consent to its appointment as the monitor as required by the CCAA.

7. The board of directors of the Fund believes that, with the benefit of the protection of a stay of proceedings and critical supplier order under the CCAA and the assistance of the Court in

resolving certain legal and factual issues, all creditors will be paid in full and substantial equity will remain for the Fund's shareholders.

PART II—FACTS

A. THE FUND

i. Description of the Fund

8. Formed in 1988, the Fund is a corporation incorporated under the *Canada Business Corporations Act* (the "**CBCA**") with the investment objective of achieving long term capital appreciation for its Class A shareholders, each of whom is a retail investor. The Fund is a labour-sponsored venture capital corporation registered under the *Income Tax Act* (Canada) and the *Labour-Sponsored Venture Capital Corporations Act* (Manitoba) (the "**Manitoba Act**"), a labour-sponsored investment fund corporation registered under the *Community Small Business Investment Funds Act* (Ontario) and is an approved fund under the *Labour-sponsored Venture Capital Corporations Act* (Saskatchewan). The Fund is also an "investment fund" and a "mutual fund" for purposes of the *Securities Act* (Ontario) and a "reporting issuer" under applicable securities laws in each of the provinces and territories of Canada.[1]

9. The Fund's head office and registered office is located at Suite 2200, Exchange Tower, 130 King Street West, Toronto, Ontario.[2]

10. The Fund's main assets are investments in the Portfolio Companies. The Fund generally makes an initial investment in a Portfolio Company, which is followed by rounds of subsequent or "follow-on" investments. Failure to participate in follow-on rounds of financing can often lead to adverse consequences for the Fund, including (i) significant dilution, (ii) penalties such as loss of

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[1] Affidavit of C. Ian Ross sworn on September 30, 2013 ("**Ross Affidavit**") at para. 16 and 18, Application Record, Tab 2.

[2] Ross Affidavit at para. 17, Application Record, Tab 2.

anti-dilution rights and board representation, and (iii) forced conversion of preferred shares into common shares.[3]

11. Currently, the Fund has a mature venture capital portfolio. As such, the Fund's activities are focussed on pursuing divestments and, to a lesser extent, making selected follow-on investments in existing portfolio companies. A significant portion of the Fund's existing holdings in the Portfolio Companies are minority equity holdings in private companies.[4]

12. As at September 27, 2013, the Fund had total assets of $115,879,821. As at September 30, 2013, the Fund had cash and cash equivalents of approximately $6,586,662.[5]

ii. Equity Capital of the Fund

13. The authorized capital of the Fund consists of: (i) an unlimited number of Class A Shares ("**Class A Shares**"), issuable in series; (ii) an unlimited number of Class B Shares ("**Class B Shares**"); and (iii) an unlimited number of Class C shares ("**Class C Shares**"), issuable in series.[6]

14. All of the Class A shares are held by individuals or registered retirement savings plans and other persons permitted by legislation.[7] The shares are not listed or quoted on any stock exchange or over-the-counter market and no market exists through which holders of Class A Shares may be sold.[8]

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[3] Ross Affidavit at para. 57, Application Record, Tab 2.
[4] Ross Affidavit at para. 20, Application Record, Tab 2.
[5] Ross Affidavit at paras. 21, Application Record, Tab 2.
[6] Ross Affidavit at para. 40, Application Record, Tab 2.
[7] Ross Affidavit at para. 41 and 50, Application Record, Tab 2.
[8] Ross Affidavit at para. 50, Application Record, Tab 2.

15. On September 30, 2011, due to poor sales activity, the Fund ceased offering Class A Shares for sale to the public and in and around that same time suspended the redemption of Class A Shares.[9]

16. The Class B Shares may be issued only to the sponsor of the Fund, which is the Canadian Federation of Labour (the "**Sponsor**"). All of the outstanding Class B Shares are held by the Sponsor and are of nominal value. The holder of the Class B Shares is not entitled to receive any dividends.[10]

17. All of the outstanding Class C Shares are held by the Manager (defined below). Due to poor sales activity, the Fund has also suspended payment of dividends on, and redemption of, Class C Shares.[11]

B. OTHER KEY PLAYERS

i. The Manager

18. The manager of the Fund plays a critical role in the operation of the Fund. Until September 30, 2013, the manager of the Fund was GrowthWorks WV Management (the "**Manager**") pursuant the amended and restated management agreement dated July 15, 2006 (the "**Management Agreement**") between the Fund and the Manager.[12]

19. On September 30, 2013, the Management Agreement was terminated by the Fund as a result of the Manager's material defaults in respect of obligations thereunder.[13]

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[9] Ross Affidavit at para. 51 and 53, Application Record, Tab 2.
[10] Ross Affidavit at para. 22, 46 and 52, Application Record, Tab 2.
[11] Ross Affidavit at para. 48 and 52, Application Record, Tab 2.
[12] Ross Affidavit at para. 6 and 11, Application Record, Tab 2.
[13] Ross Affidavit at para. 11 and 35, Application Record, Tab 2.

20. Prior to the termination of the Manager, the Fund had operated without employees because it had outsourced all of its daily operations, monitoring of the Fund's investments and other management and operational oversight, to the Manager.[14] The Manager in turn delegated all of its obligations under the Management Agreement to GrowthWorks Capital Ltd. ("**GWC**"), an affiliate of Matrix Asset Management Inc. ("**Matrix**"), the parent corporation of the Manager.[15]

21. As a result of its role overseeing the Fund, the Manager and/or GWC are in possession of key records of the Fund including (i) a current list of the shareholders of the Fund; (ii) copies of all requests seeking redemption of Class A shares of the Fund that are outstanding; (iii) other information relating to the holders of Class A shares of the Fund on a per series and per shareholder basis; (iv) contracts to which the Fund is a party or is otherwise bound;(v) the accounting books and records of the Fund, including the general ledger, trial balances, sub ledgers, excel work sheets and other work product used to support accounting balances and/or financial statement note disclosure and all working papers prepared for the auditors of the Fund, KPMG LLP, in order to complete the Fund's fiscal 2013 financial statement audit; (vi) records relating to investments held by the Fund in any Portfolio Company; (vii) the identity, contact name, telephone number and email address of all third party suppliers who provide services to the Fund, GWC or any of their respective affiliates to assist the Manager with its obligations under the Management Agreement, including auditors, valuators, shareholder recordkeeping service providers, technology licensors, and commissions payable service providers; (viii) tax records; and (ix) bank and brokerage account records.[16]

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[14] Ross Affidavit at para. 11, Application Record, Tab 2.
[15] Ross Affidavit at para. 24, Application Record, Tab 2.
[16] Ross Affidavit at para. 38, Application Record, Tab 2.

ii. Roseway

22. Roseway is the sole secured creditor of the Fund and is currently owed in excess of $25 million, which the Fund is unable to pay. The obligations owing to Roseway pursuant to the Participation Agreement (defined below) represent the only outstanding secured debt or other secured payment obligations of the Fund.[17]

iii. The Special Committee of the Fund

23. The board of directors of the Fund established a special committee (the "**Special Committee**") comprised entirely of directors that are independent of the Manager. The duties of the Special Committee include examining strategic alternatives available to the Fund and monitoring the liquidity and capital resources of the Fund.[18]

iv. CCC

24. In February 2013, the Special Committee, as part of its strategic review process, retained CCC as independent financial advisor to the board of directors of the Fund, to examine the strategic alternatives available to the Fund and report to the Board on its findings.[19]

v. FTI (the Proposed Monitor)

25. In compliance with requirements under the CCAA, the Fund has also engaged FTI to act as the monitor if the Court grants the relief sought herein.[20]

C. ROSEWAY AND THE PARTICIPATION AGREEMENT

26. In 2009, given declining levels of fundraising and increasing levels of mature capital in the Fund, the Manager began to explore possible sources of external financing that would provide the Fund with additional capital for follow-on investments.[21]

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[17] Ross Affidavit at para. 7, Application Record, Tab 2.
[18] Ross Affidavit at para. 76, Application Record, Tab 2.
[19] Ross Affidavit at para. 80, Application Record, Tab 2.
[20] Ross Affidavit at para. 121, Application Record, Tab 2.

27. As a result, the Fund entered into a Participation Agreement dated May 28, 2010 with Roseway Capital L.P. (as amended, the "**Participation Agreement**" with amounts owing thereunder from time to time referred to herein as the "**Roseway Obligations**"), pursuant to which Roseway Capital L.P. advanced $20 million to the Fund (the "**Roseway Proceeds**") in exchange for a participating interest in selected venture investment holdings of the Fund. Thereafter, Roseway Capital L.P. assigned the Participation Agreement to Roseway.[22]

28. In connection with the execution of the Participation Agreement, the Fund executed a security agreement dated May 28, 2010 (the "**Security Agreement**") in favour of Roseway whereby the Fund's payment obligations under the Participation Agreement are secured by a continuing security interest in the Fund's property, assets and undertakings, other than "Excluded Assets" (as such term is defined in the Security Agreement).[23]

29. In essence, all the equity and debt investments held by the Fund (other than those securities which are not subject to a restriction on assignment under an applicable contract, articles or by-laws or applicable law), are Excluded Assets. Liquid proceeds (including cash divestiture proceeds and dividends) of Excluded Assets are subject to the security interests created by the Security Agreement.[24]

30. At the time of the advance of $20 million by Roseway under the Participation Agreement, Roseway's participating interest extended to 15 investments in the Fund's Venture Portfolio (the "**Participation Holdings**"), with a total carrying value of approximately $100 million. In addition, Roseway agreed to provide up to $3 million in follow-on funding for these companies, of which approximately $2 million has been invested to date. The participating interest entitles Roseway to

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[21] Ross Affidavit at para. 60, Application Record, Tab 2.
[22] Ross Affidavit at para. 63, Application Record, Tab 2.
[23] Ross Affidavit at para. 64, Application Record, Tab 2.
[24] Ross Affidavit at para. 64, Application Record, Tab 2.

receive 20% of the proceeds (cash or shares) of divestment ("**Participation Payments**") of the Participation Holdings. There is a guaranteed minimum Participation Payment of $5.7 million per year for three years following closing (the "**Guaranteed Minimum Participation Payment**").[25]

31. Under the terms of the Participation Agreement, the Fund is required to:

(a) make a payment to Roseway in the amount of $20 million on May 28, 2013, which date has been extended by agreement to September 30, 2013. This amount remains unpaid. Roseway indicated that it intends to deliver notice under the Security Agreement demanding payment of this amount on October 1, 2013; and,

(b) make a payment to Roseway in the amount of $5.7 million, representing the outstanding balance owing and due to Roseway on account of the Guaranteed Minimum Participation Payment, of which a total of $11.4 million has been paid by the Fund since May 28, 2010, leaving an additional $5.7 million outstanding. This amount is due within five business days after the $20 million payment is due and has not been paid. Roseway has indicated that it intends to deliver notice under the Security Agreement on October 1, 2013 accelerating all other Roseway Obligations as a result of the default.[26]

32. In sum, $20 million was due to Roseway on September 30, 2013 and remains unpaid, and Roseway has indicated it will accelerate an additional $5.7 million of Roseway Obligations on October 1, 2013 as a result of the default. The Fund is unable to pay these amounts.

D. NEED FOR CCAA PROTECTION

33. Since early January of 2013, representatives of the Fund, under the oversight of the Special Committee, have been engaged in on-going negotiations with Roseway with a view to amending the terms of the Participation Agreement to enable the Fund to pay amounts owing to Roseway under that agreement over a period of time and otherwise on terms that coincide with the Fund's projections for an orderly disposition of the Venture Portfolio.[27]

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[25] Ross Affidavit at paras. 65-66, Application Record, Tab 2.
[26] Ross Affidavit at para. 69, Application Record, Tab 2.
[27] Ross Affidavit at para. 83, Application Record, Tab 2.

34. On each of May 28, 2013, June 14, 2013, June 27, 2013, July 15, 2013, August 16, 2013 and August 30, 2013, the Fund and Roseway amended the Participation Agreement. As a result of the amendments, the date by which payment of $20 million is due has been extended from May 28, 2013 to September 30, 2013. The payment of the remaining Roseway Obligations in the amount of $5.7 million would then become due on October 7, 2013 but Roseway has indicated it will deliver a notice on October 1, 2013 accelerating these amounts as a result of the default.[28]

35. Since May 28, 2013, the parties have continued their negotiations with respect to amending the Participation Agreement on mutually acceptable terms but have yet to reach such an agreement.[29]

36. The Fund and Roseway have also discussed the Fund's strategy for meeting the Roseway Obligations, including: (a) discussions regarding the CCAA filing, which Roseway indicated it supports; and (b) ongoing discussions about the need for an orderly liquidation should the Fund be unable to complete a merger, financing or other transaction.[30]

37. Having ceased sales of Class A Shares, the Fund's only means of generating liquidity are through replacement debt financing and/or through dispositions of investments in the Venture Portfolio.[31]

38. The Fund has been actively seeking and continues to seek alternative financing but has been unable to secure any such financing to date. Further complicating matters is that divestment activity is highly sensitive to market conditions for sales of private companies. Therefore, the Fund's investments in the Portfolio Companies are not immediately saleable and it takes some time for exit

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[28] Ross Affidavit at para. 84, Application Record, Tab 2.
[29] Ross Affidavit at para. 85, Application Record, Tab 2.
[30] Ross Affidavit at para. 86, Application Record, Tab 2
[31] Ross Affidavit at para. 76, Application Record, Tab 2.

opportunities to arise. Forced sales of investments prior to exit opportunities arising generally result in exit values that are lower than prevailing carrying values, which would result in portfolio losses.[32]

39. In addition to the looming liquidity crisis faced by the Fund, certain factual and legal issues have arisen between the Fund and the Manager and Roseway relating to the Management Agreement and Participation Agreement, respectively.[33] Specifically,

(a) with respect to the Roseway dispute, an issue has arisen with respect to the beneficial ownership of securities of affiliates of Cytochroma Inc. ("**Cytochroma**"), a former Portfolio Company of the Fund. Roseway had provided follow-on financing to Cytochroma and takes the position that they beneficially owned the securities. The Fund disagrees with this position. The securities of Cytochroma have been sold and the amount in dispute between Fund and Roseway (totalling approximately US$2 million) is currently held in a trust account of McCarthy Tétrault LLP.[34]

(b) With respect to the dispute with the Manager, among other things, there is an outstanding dispute with the Manager regarding expenses totalling approximately $2 million that the Fund alleges ought to have been paid by the Manager from its own resources pursuant to the Management Agreement but were instead charged to the Fund.[35]

40. Accordingly, the Fund is requesting the Court's assistance through the granting of an Initial Order. With the benefit of the protection of a stay of proceedings and critical supplier order under

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[32] Ross Affidavit at para. 58, 75 and 77, Application Record, Tab 2.

[33] For a more detailed to discussion of these issues see Ross Affidavit at paras. 35 and 87-88, Application Record, Tab 2.

[34] Ross Affidavit at para. 88, Application Record, Tab 2.

[35] Ross Affidavit at para. 30, Application Record, Tab 2.

the CCAA and the assistance of the Court in resolving certain legal and factual issues, the Board of Directors of the Fund believe that all creditors will be paid in full and substantial equity will remain for the Fund's shareholders.[36]

E. POSSIBLE MERGER PARTNER

41. The Fund has continued to explore options to secure sufficient financing to meet the Roseway Obligations without attempting to sell its investments in the Venture Portfolio prematurely or under circumstances that will impair its value.[37]

42. The Fund has been in serious discussions with a possible merger partner (the "**Potential Merger Partner**") and received a confidential letter agreement from the Potential Merger Partner on September 30, 2013, proposing terms of a potential transaction. The proposed transaction would involve the Potential Merger Partner acquiring the assets and assuming certain liabilities of the Fund in exchange for shares of the Potential Merger Partner. Among other things, the letter agreement provides that:

(a) The Potential Merger Partner is prepared to immediately assume a role as a transition manager to the Fund, reporting to the Board of Directors, and is prepared to accrue all manager fees while in the transition role and accept a fee that is less than the Manager's fee; and,

(b) There would be no discount imposed on the NAV of the Fund in the Transaction, although there may be Board-approved valuation adjustments in the transition period. [38]

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[36] Ross Affidavit at para. 15, Application Record, Tab 2.
[37] Ross Affidavit at para. 89, Application Record, Tab 2.
[38] Ross Affidavit at para. 90, Application Record, Tab 2.

43. A merger with the Potential Merger Partner would be preferable to a forced, premature sale of the Fund's investment assets and the Fund and its stakeholders would benefit from having sufficient time and the protection of a CCAA stay to enable discussions regarding a possible merger to continue.[39] A merger with a similar fund, coupled with the refinancing of the Roseway Obligations, was also the recommended course of action of the CCC. If a merger cannot be completed, the CCC has concluded that an orderly disposition of the holdings of the Fund in the Portfolio Companies is likely to generate greater proceeds of disposition to the Fund than an *en bloc* sale of such holdings at this time, which would likely generate the least proceeds to the Fund.[40]

PART III—ISSUES AND THE LAW

F. The Applicant is a debtor company to which the CCAA applies

44. Pursuant to section 3 of the CCAA, the CCAA applies to a "debtor company" with claims against it of more than $5 million:

> (1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than 5,000,000 or any other amount that is prescribed.

45. Section 2 of the CCAA defines a "debtor company" to include: a corporation, incorporated by or under an Act of Parliament that is insolvent:

> "debtor company" means any company that
>
> (*a*) is bankrupt or insolvent,
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> ...
>
> "company" means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and

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[39] Ross Affidavit at para. 92, Application Record, Tab 2.
[40] Ross Affidavit at para. 82, Application Record, Tab 2.

> any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, railway or telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies;

46. The Fund is a corporation incorporated under the *Canada Business Corporations Act*. It is has claims against it of more than $5 million since the $20 million Roseway obligation pursuant to the Participation Agreement is now due.

47. The CCAA does not define insolvency; however, in *Re Stelco Inc*, the Court defined "insolvent" in the context of the CCAA, in a manner that expands on the definition of "insolvent person" within the meaning of section 2(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("**BIA**"). According to the Court in *Re Stelco Inc*, in addition to the more narrow BIA definition, a company is also insolvent for the purposes of the CCAA if, at the time of filing, there is a reasonably foreseeable expectation that there is a looming liquidity condition or crisis that would result in the company being unable to pay its debts as they generally become due if a stay of proceedings and ancillary protection are not granted by the Court. This definition has been adopted by Courts in subsequent CCAA proceedings.[41]

48. As set out below, the Fund is insolvent pursuant to this definition. In addition, the Fund is insolvent pursuant to the more narrow definition of "insolvent person" under the BIA, which provides as follows:

> "insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, and whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> *(a) who is for any reason unable to meet his obligations as they generally become due,*

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[41] *Re Stelco Inc.* (2004), 2004 CarswellOnt 1211 (SCJ), leave to appeal refused (2004), 48 C.B.R. (4th) 299 (ON CA), leave to appeal to refused 2004 CarswellOnt 5200 (SCC), Brief of Authorities, Tab 1; *Priszm Income Fund, Re*, 2011 CarswellOnt 2258 at para. 21 (SCJ)), Brief of Authorities, Tab 2; See also *Canwest Global Communications Corp. (Re)*, [2009] O.J. 4286 at para 25), Brief of Authorities, Tab 3.

> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due. [emphasis added]

49. In this case, the Fund is unable to meet its obligations as they become due to Roseway, its only secured creditor.

50. It is well settled that a failure to pay a single creditor can constitute an act of bankruptcy under s. 42(1)(j) of the BIA, namely ceasing to meet liabilities generally as they become due, when there are special circumstances, including that the debtor has admitted its inability to pay creditors generally without identifying the creditors.[42]

51. It has been found to constitute special circumstances sufficient to constitute ceasing to meet liabilities as the generally become due when "The applicant creditor's claim is either the only claim or is so large that the claims of other creditors are of no real significance, so that in effect there is only one creditor."[43]

52. Similarly, courts have found that one creditor will suffice to meet the definition of an "insolvent person" under section 2 of the BIA notwithstanding the reference to liabilities of "*creditors*", noting as follows:

> The fact that "insolvent person" defined in s. 2 of the Act alludes to "liabilities of *creditors*" (my emphasis) is not, as contended, determinative of the proposition that the framers of the legislation had not in mind the need for more than one creditor. Applying the principles of statutory interpretation, one creditor will suffice; otherwise, he or she who has incurred but a single debt in excess of $1,000 would be encouraged to take on a second debt so as to enable that person to make an assignment. As well, one who is able to disclose a debt of $10,000, and no more, would be precluded from availing him or herself of the benefit of the Act, where one

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[42] *Valente*, Re (2004), 70 O.R. (3d) 31 at para. 8, Brief of Authorities, Tab 4.

[43] Houlden & Morawetz, *Bankruptcy and Insolvency Law of Canada* (4th ed.), D§11, Book of Authorities, Tab 6.

who has incurred two debts, each for somewhat more than $500, would be able to do so.[44]

53. The Fund has admitted that it is insolvent and it is unable to meet the obligations owed to Roseway, which is its only secured creditor.[45]

54. Accordingly, the Fund has met both the traditional test for insolvency under the BIA and the expanded test for insolvency based on a looming liquidity condition because: (i) the Fund is indebted to Roseway, its sole secured creditor, in an amount totalling approximately $25 million, (ii) the Fund is in default of certain financial covenants under the Participation Agreement, which it cannot cure, (iii) the $20 million payment is now due and the Fund has been unable to negotiate a further extension, (iv) the Fund does not have access to short-term financing and as a result is unable to pay the Roseway Obligations.

55. In addition, the Applicant has met the other threshold requirements in that they have also filed the necessary statement of projected cash-flow and other financial documents required by section 10 of the CCAA.[46]

G. Stay of Proceedings is Appropriate

56. Pursuant to section 11.02 of the CCAA, the Court has discretion to make an order staying proceedings, restraining further proceedings, or prohibiting the commencement of proceedings, "on any terms that it may impose" and "effective for the period that the court

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[44] *Canada (Attorney General) v. Gordon (Trustee of)*, 1992 CarswellSask 32, Book of Authorities, Tab 5. See also Houlden & Morawetz, *Bankruptcy and Insolvency Law of Canada* (4th ed.), B§25, Book of Authorities, Tab 6.

[45] Ross Affidavit at paras. 83-85, Application Record, Tab 2.

[46] Section 10 of the CCAA provides,

(1) Applications under this Act shall be made by petition or by way of originating summons or notice of motion in accordance with the practice of the court in which the application is made.

(2) An initial application must be accompanied by

(a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;

(b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and

(c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

considers necessary" provided the stay period is not longer than 30 days. The onus is on the applicants to satisfy the court that circumstances exist that make the order appropriate.

57. The Applicant seeks a stay of proceedings in this case for an initial period of 30 days.

58. In exercising the discretionary authority to grant a stay pursuant to the CCAA, the discretionary authority must be informed by the purpose behind the CCAA, and the CCAA should be construed broadly in order to achieve the objectives of the CCAA.[47]

59. The purpose of the CCAA is to permit a compromise or an arrangement between an insolvent company and its creditors with a view to allowing the business to continue and thereby preserving the goodwill of the company, maximizing the return available to creditors, shareholders and other stakeholders and avoiding the social and economic costs of liquidating its assets.[48]

60. The CCAA has a broad remedial purpose giving a debtor an opportunity to find a way out of financial difficulties short of bankruptcy, foreclosure or the seizure of assets through receivership proceedings. It preserves the *status quo* while allowing the debtor to file a plan that will enable it to meet the demands of its creditors through refinancing with new lending, equity-financing or the sale of the business as a going concern.[49]

61. The CCAA is intended to be flexible and must be given a broad and liberal interpretation to achieve its objectives. The CCAA's effectiveness in achieving its objectives is dependent

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[47] *Nortel Networks Corporation (Re)*, 2009 CanLII 39492 (ON SC) at 31, Book of Authorities, Tab 7; *Lehndorff General Partners Ltd. (Re)* (1993), 17 C.B.R. (3rd) 24 (Ont. Gen. Div. [Comm. List]) at 10, Book of Authorities, Tab 8.

[48] Ontario Court of Appeal in *Stelco Inc., Re*, (2005), 75 O.R. (3d) 5 at para. 36, Book of Authorities, Tab 9; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 (CanLII) at para. 15, Book of Authorities, Tab 10.

[49] *Diemaster Tool Inc. v. Skvortsoff (Trustee of)* (1991), 3 C.B.R. (3d) 133 at para. 40 (ON Gen Div.), Book of Authorities, Tab 11.

upon a broad and flexible exercise of jurisdiction to facilitate a restructuring and continue the debtor as a going concern in the interim.[50]

62. The Applicant seeks a stay of proceedings to enable it to continue discussions with its potential merger partner, with the goal of a successful merger transaction, while at the same time enabling it to explore other options for a refinancing, merger or judicious divestiture of its investment assets, without the threat of a forced sale of its interests and related losses. As stated in the Ross Affidavit:

> 94. The Fund is seeking the opportunity, under the protection of a stay of proceedings, to explore opportunities to refinance, merge or make judicious divestitures without the threat of an untimely, forced sale of the Venture Portfolio.
>
> 95. The Fund is also seeking the Court's assistance to ensure that it has access to its critical documents and systems and the assistance of the Manager in providing necessary transition services in order to continue to operate and service its Venture Portfolio throughout this process.
>
> 96. If the Fund is protected from the negative effects of a fire sale of its assets and given access to its documents and systems, the Fund expects to be able to satisfy the Roseway Obligations in full through a combination of judicious dispositions, new debt financing and/or a merger or other transaction.[51]

i. Extension of Stay of Proceedings to Portfolio Companies

63. The relief sought in this application includes an order that any rights or obligations, affecting or relating to a Portfolio Company, that arise, come into effect or are "triggered" by the insolvency of the Applicant, by the commencement of the CCAA proceedings or the making of the Order shall be of no effect and no person shall be entitled to exercise any rights or remedies in connection therewith.

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[50] *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R (3d) 165 at para. 48 (ON GD), Book of Authorities, Tab 12; *Nortel Networks Corporation (Re)*, 2009 CanLII 39492 (ON SC) at para. 47, Book of Authorities, Tab 7.

[51] Ross Affidavit at paras. 94-96, Application Record, Tab 2.

64. The Court has broad inherent jurisdiction to impose stays of proceedings that supplement the statutory provisions of Section 11 of the CCAA, providing the Court with the power to grant a stay of proceedings where it is just and reasonable to do so, including with respect to non-applicant third parties.[52]

65. The Courts have found it just and reasonable to grant a stay of proceedings against non-applicant third parties in a number of circumstances, including where it is important to the reorganization process.[53]

66. The extension of the stay of proceedings to the Portfolio Companies is critical to the restructuring of the Fund. Since the Fund's key assets are investments in the Portfolio Companies, the requested relief is intended to protect the Fund's assets to the extent the Fund's insolvency or the CCAA filing triggers a default or other negative implication in connection with the Portfolio Companies. Failure to provide such relief could prevent the Fund from maximizing the value of its assets for the benefit of its stakeholders, thereby undermining the purpose of this CCAA proceeding.

H. Critical Supplier

67. Section 11.4 of the CCAA provides authority to grant an order requiring critical suppliers to supply goods or services on terms and conditions the Court considers appropriate:

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

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[52] *Lehndorff General Partners Ltd. (Re)* (1993), 17 C.B.R. (3rd) 24 (Ont. Gen. Div. [Comm. List]) at paras. 5 and 16, Book of Authorities, Tab 8. *Tamerlane Ventures Inc. and Pine Point Holding Corp.*, 2013 ONSC 5461, at para. 21, Book of Authorities, Tab 13.

[53] *Tamerlane Ventures Inc. and Pine Point Holding Corp.*, 2013 ONSC 5461, at para. 21, Book of Authorities, Tab 13.

68. Courts will declare a supplier to be a "critical supplier" where the interruption of supply could materially interfere with the restructuring of the debtor:

> Having reviewed the record, I have been satisfied that any interruption of supply by the Critical Suppliers could have an immediate material adverse impact on the Priszm Entities business, operations and cash flow such that it is, in my view, appropriate to declare the Critical Suppliers as "critical suppliers" pursuant to the CCAA.[54]

69. As noted above, the Fund does not have any employees and, prior to the termination of the Management Agreement, the day-to-day business, affairs and operations of the Fund were managed by the Manager (and/or GWC) pursuant to the Management Agreement. In order to preserve the value of the Venture Portfolio pending a merger or other transaction or judicious disposition, the Fund requires access to the documents and systems previously used by the Manager and assistance from the Manager in providing transitional services. The provision of these transition services are critical to the Fund and its operations and is necessary to protect the value of the Fund's investment assets while it explores restructuring options.[55]

70. The Management Agreement requires the Manager to assist the Fund and any replacement manager, to deliver the Fund's records, and to provide transition services:

(a) Upon termination pursuant to section 8.2, the Manager "shall use reasonable commercial efforts to co-operate with the Fund and any successor manager to facilitate an orderly transition such that the Services will be provided to the Fund by the successor without delay or compromise of service"[56];

(b) Upon termination of this Agreement under Sections 8.2, the Manager shall "promptly deliver to the Fund all records, including electronic records or data in a

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[54] *Priszm Income Fund, Re*, 2011 CarswellOnt 2258 (ON SCJ), para. 34, Book of Authorities, Tab 2.
[55] Ross Affidavit at paras. 12, 27 and 39, Application Record, Tab 2.
[56] Management Agreement, section 8.4, Exhibit A to the Ross Affidavit, Application Record, Tab 2.

form accessible to the Fund, of or relating to the affairs of the Fund in its custody, possession or control";[57] and,

(c) if this Agreement is terminated pursuant to Section 8.2, the Fund shall pay to the Manager "all reasonable transfer, wind-down and transition costs incurred by or put to the Manager as a result of having to transition operations to a successor manager" and the Manager "shall calculate the amounts payable to the Manager under (a) and (b) above and the Fund shall pay such amounts to the Manager on or about the 25th Business Day after receipt by the Fund of an invoice for the same."[58]

71. With transitional services from the Manager and/or GWC in place, and the Chairman of the Fund, Ian Ross, assuming the role as interim CEO under the oversight of a special committee of the Board of Directors, critical elements of management of the Fund will be temporarily sustained, with the help of CCC and the Proposed Monitor.[59]

72. Accordingly, the proposed Order includes an order and declaration that the Manager, GWC and each person engaged or contracted by the Manager and/or GWC in connection with the services provided pursuant to the Management Agreement (not including employees of the Manager or GWC) is a critical supplier to the Fund (each a "**Critical Supplier**").[60] The proposed Order further provides that each Critical Supplier shall supply the Fund with transitional services pursuant to the Management Agreement and no Critical Supplier may require the payment of a

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[57] Management Agreement, section 8.5, Exhibit A to the Ross Affidavit, Application Record, Tab 2.
[58] Management Agreement, section 8.6, Exhibit A to the Ross Affidavit, Application Record, Tab 2.
[59] Ross Affidavit at para. 39, Application Record, Tab 2.
[60] Ross Affidavit at para. 107, Application Record, Tab 2.

deposit or posting of any security in the connection with the supply of such services after the date of the Order.[61]

73. The proposed Order also includes certain protections for the Critical Suppliers including that, at paragraph 6(a), the proposed Order provides that the Fund is entitled but not required to pay, among other things, the reasonable transition costs of the Manager. In addition, the proposed Order contemplates a critical supplier charge (the "**Critical Suppliers' Charge**"), discussed below.

74. In all of the circumstances, including the critical nature of the services provided by the Critical Suppliers to preserving the value of the Venture Portfolio pending a restructuring, it is submitted that it is appropriate to declare the Critical Suppliers critical suppliers pursuant to section 11.4 of the CCAA.

I. Charges

75. The proposed Order provides for the following charges, in the following priority:

First – The Administration Charge (to the maximum amount of $500,000);

Second – The Directors' Charge (to the maximum amount of $1,000,000); and,

Third – The Critical Suppliers' Charge (to the maximum amount of $50,000).[62]

i. Indemnity and Directors' Charge

76. The proposed Order contemplates an indemnification of former, current or future directors and officers of the Fund (the "**Directors**") and the creation of a charge to in relation thereto (the "**Directors' Charge**").

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[61] Ross Affidavit at para. 108, Application Record, Tab 2.

[62] Ross Affidavit at para. 120, Application Record, Tab 2.

77. Section 11.51 of the CCAA provides statutory authority to grant a directors' and officers' charges on a super-priority basis and provides as follows:

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> (3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.
>
> (4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

78. The purpose of a directors' charge was described in *Re Canwest*, at paragraph 48, as follows:

> The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protection against liabilities they incur during the restructuring. Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the applicants to keep the experienced board of directors supported by experienced senior management. The proposed Monitor believes that the charge is required and is reasonable in the circumstances and also observes that it will not cover all of the directors' and officers' liabilities in the worst case scenario. In all of these circumstances, I approved the request.[63]

79. It is submitted that it is necessary and appropriate to make such a charge in the circumstances of this case for the following reasons:

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[63] *Canwest Global Communications, (Re)*, [2009] O.J. No. 4286 (SCJ) at para. 48, Book of Authorities, Tab 3.

(a) The Directors have obtained insurance coverage, which they believe is the best available, but there are certain limitations that may leave the Directors exposed to personal liability. The proposed Directors' Charge is to protect the Directors against exposure beyond that which is covered by the insurance. In particular, the D&O insurance coverage is provided pursuant to a policy maintained by the Manager for various affiliates of the Manager and the Fund. The insurance policy may have been terminated insofar as it applies to the Directors of the Fund as a result of the Fund having terminated the Management Agreement;

(b) It is important to have a Directors' Charge to keep the Directors in place during the restructuring and to protect them against liabilities that they could incur during the restructuring that are not covered by the D&O Insurance;

(c) Roseway, the secured lender likely to be affected by the Directors' Charge has been provided notice.[64]

80. Accordingly, the proposed Order provides for a Directors' Charge to rank second in priority after the Administration Charge, in the maximum amount of $1,000,000.00. It is respectfully submitted that this amount is appropriate to protect the Directors from possible exposure and that the Directors' Charge is appropriate to avoid destabilization that would result without the experienced directors during the restructuring proceedings.

ii. Administration Charge

81. The Applicant also seeks an administration charge (the "**Administration Charge**") to secure payment of certain advisors who will assist the Fund throughout the process; specifically, the proposed Order provides for payment of the Applicant's legal advisors, the Monitor, the Monitor's legal advisors, and CCC (as defined in the Ross Affidavit), among others.

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[64] Ross Affidavit at paras. 116-119, Application Record, Tab 2.

82. The Court is empowered to grant such charges pursuant to section 11.52 of the CCAA:

> 11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
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> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

83. In *Timminco Ltd. (Re)*, Justice Morawetz highlighted the importance of protecting professionals and directors and officers who are participating in the CCAA process, stating as follows:

> In my view, in the absence of the court granting the requested super priority and protection, the objectives of the CCAA would be frustrated. It is not reasonable to expect that professionals will take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position should the Timminco Entities continue CCAA proceedings without the requested protection. The outcome of the failure to provide these respective groups with the requested protection would, in my view, result in the overwhelming likelihood that the CCAA proceedings would come to an abrupt halt, followed, in all likelihood, by bankruptcy proceedings.[65]

84. The proposed Order creates an Administration Charge (to the maximum amount of $500,000.00), which charge shall rank first, in priority to, among other things, the secured Roseway Obligations.

85. The maximum amounts of these charges were established based on estimates provided by the various parties who benefit from this charge. The Proposed Monitor reviewed these estimates

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[65] *Timminco Ltd. (Re)*, 2012 ONSC 506 at para. 66, Book of Authorities, Tab 14.

and concluded that the quantum of the proposed charges are reasonable in light of those estimates. The professionals secured by these proposed charges will play critical roles in the CCAA process going forward and it is important to secure their participation. As set out above, notice has been provided to Roseway, which is the only secured creditor likely to be affected by such charges. Accordingly, it is respectfully submitted that the Administration Charge be granted in the amount and priority requested.

iii. Critical Suppliers' Charge

86. The proposed Order contemplates a Critical Suppliers' Charge in an amount equal to the lesser of (a) the value of the services supplied by the Critical Suppliers after the date of the Order and (b) the amount to which the Manager is entitled to be paid under section 8.6 (b) of the Management Agreement, and (c) $50,000.00.

87. In the proposed Order, the Critical Suppliers' Charge ranks third after the Administration Charge and the Directors' Charge, each of which has a capped maximum amount. The Critical Supplier Charge is intended to provide the Critical Supplier with protection for their fees for providing the transition services to the Fund, while ensuring that the Fund continues to have access to these critical services.

88. This is consistent with section 11.4(2)-(4) of the CCAA, which provide as follows

> (2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.
>
> (3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.
>
> (4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

J. Appointment of the Monitor

89. Pursuant to section 11.7 of the CCAA, the Court is required to appoint a person to monitor the business and financial affairs of a debtor company at the same time that an initial CCAA order is made.

90. Section 11.7 requires that the monitor be a trustee, within the meaning of subsection 2(1) of the BIA and there are certain restrictions on who may be monitor, set out in subsection 11.7(2). In this case, the proposed Monitor is a trustee within the meaning of subsection 2(1) of the BIA and not subject to any restrictions on who may be a monitor pursuant to section 11.7(2) of the CCAA. It has also consented to its appointment as Monitor.[66]

K. Service and Notice

91. With respect to the notice required for this application, the CCAA provides as follows:

(a) the Court make any order that it considers appropriate, on notice to any person, or without notice, as it may see fit[67]; and

(b) charges such as the Critical Suppliers Charge, Directors' Charge and the Administration Charge proposed herein may be created only on notice to the secured creditors who are likely to be affected by the security or charge.[68]

92. As set out herein, the only secured creditor of the Applicant is Roseway, which has notice of these proceedings and is supportive of the CCAA application and will have counsel present at the court hearing to make submissions. The Manager was notified of these proceedings both through the participation of David Levi, as a director of the Fund, in

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[66] Ross Affidavit at para. 121, Application Record, Tab 2.
[67] CCAA, section 11.
[68] CCAA, Sections 11.4(1), 11.51(1) and 11.52(1).

discussions relating to the CCAA application, and through delivery of drafts of the application materials to the Manager.[69] Accordingly, the specific notice requirements of the CCAA have been met and this Court has broad discretion to grant the order requested.

PART IV—ORDER REQUESTED

93. In all of the circumstances, the Applicant respectfully submits that this Honourable Court ought to grant the requested order as the Applicant requires a stay in order to provide a safe context to restructure the Fund by refinancing, merger or judicious divestitures, and to resolve its legal and factual disputes with Roseway and the Manager, while at the same time ensuring the Fund has access to its critical documents and systems and the assistance of the Manager as needed to provide transitional services that enable the Fund to continue to operate and service its Venture Portfolio pending such a restructuring. The Applicant believes that this will offer the best opportunity to maximize the value of its assets for the benefit of its stakeholders, consistent with the underlying purpose of the CCAA.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Kevin McElcheran/Heather Meredith/Kelly Peters

McCarthy Tétrault LLP
Lawyer for Growthworks Canadian Fund Ltd.

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[69] Ross Affidavit at para. 112, Application Record, Tab 2.

SCHEDULE "A" – LIST OF AUTHORITIES

1. *Re Stelco Inc.* 2004 CarswellOnt 1211 (SCJ), leave to appeal refused (2004), 48 C.B.R. (4th) 299 (ON CA), leave to appeal refused 2004 CarswellOnt 5200 (SCC)

2. *Priszm Income Fund, Re,* 2011 CarswellOnt 2258 (SCJ)

3. *Canwest Global Communication Corp. (Re.),* [2009] O.J. 4286.

4. *Valente, Re,* (2004), 70 O.R. 31 (ON CA)

5. *Canada (Attorney General) v. Gordon (Trustee),* 1992 CarswellSask 32 (QB)

6. Houlden & Morawetz, *Bankruptcy and Insolvency Law of Canada* (4 ed.) B§25 ; D§11.

7. *Nortel Networks Corporation (Re),* 2009 CanLII 39492 (ON SC)

8. *Lehndorff General Partners Ltd. (Re)* (1993), 17 C.B.R. (3rd) 24 (Ont. Gen Div. [Comm. List])

9. *Stelco Inc., Re* (2005), 75 O.R. (3d) 5 (CA)

10. *Century Services Inc. v. Canada (Attorney General),* 2010 SCC 60 (CanLII)

11. *Diemaster Tool Inc. v. Skvortsoff (trustee of)* (1991), 3 C.B.R. (3d) 133 (On. Gen. Div.)

12. *Citibank Canada v. Chase Manhattan Bank of Canada,* 5 C.B.R. (3d) 165 (On. Gen. Div.)

13. *Tamerlane Ventures Inc. and Pine Point Corp.,* 2013 ONSC 5461.

14. *Timminco Ltd. (Re.),* 2012 ONSC 506.

SCHEDULE "B" – LIST OF STATUTES

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

Definitions

2. (1) In this Act,

"company" means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the Bank Act, railway or telegraph companies, insurance companies and companies to which the Trust and Loan Companies Act applies;

debtor company" means any company that

(a) is bankrupt or insolvent,

Application

3. (1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.

Form of applications

10. (1) Applications under this Act shall be made by petition or by way of originating summons or notice of motion in accordance with the practice of the court in which the application is made.

(2) An initial application must be accompanied by

(a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;

(b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and

(c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

General power of court

11. Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

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,

(a) 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;

(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.

Stays, etc. — other than initial application

(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

(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

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section. 2005, c. 47, s. 128, 2007, c. 36, s. 62(F).

Critical supplier

11.4 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person

to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

Obligation to supply

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

Security or charge in favour of critical supplier

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

Priority

(4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Security or charge relating to director's indemnification

11.51 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Restriction — indemnification insurance

(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

Court may order security or charge to cover certain costs

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

***Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3**

Definitions

2. In this Act,

"insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

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. •

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

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