

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PROPOSED PLAN
OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO
GROWTHWORKS CANADIAN FUND LTD.**

Applicant

**REPLY MOTION RECORD
(Distribution, Termination and Discharge Order)
(Returnable January 19, 2023)**

January 6, 2023

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TO: SERVICE LIST

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<u>TAB</u>	<u>DOCUMENT</u>
1.	Affidavit of C. Ian Ross sworn January 6, 2023
A.	Exhibit "A" – Excerpt of the Fund's Closing Submission

TAB 1

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GROWTHWORKS CANADIAN FUND LTD.

**AFFIDAVIT OF C. IAN ROSS
(sworn January 6, 2023)**

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

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

2. I previously swore an affidavit on December 2, 2022 (my “**December Affidavit**”) in support of the motion by the Fund for the Distribution Termination and Discharge Order. All capitalized terms used and not otherwise defined herein have the meanings given to them in my December Affidavit.

3. I make this affidavit in response to certain of the factual allegations set out in the affidavit of Derek Lew sworn December 23, 2022 (the “**Lew Affidavit**”). The Lew Affidavit was filed on behalf of GrowthWorks WV Management Ltd. (the “**Former Manager**”) in support of a claim that the Former Manager is entitled to a payment of \$672,390.61 (the “**Claimed IPA Dividend**”) on account of its IPA Shares in priority to the Fund’s 115,859 Class A retail shareholders.

No Findings Made at Trial Regarding the Claimed IPA Dividend

4. The Lew Affidavit asserts that, at trial in the Former Manager Litigation:
- (a) the Fund did not dispute that the Claimed IPA Dividend was earned by the Former Manager; and
 - (b) Justice Wilton-Siegel made a finding that the Claimed IPA Dividend had been earned by the Former Manager and its quantum was fixed at \$672,390.61.
5. Neither assertion is correct.
6. First, the Fund’s position at trial was that the Former Manager was not entitled to the Claimed IPA Dividend because dividends on the IPA Shares were not declared by the Board and could not have been declared because the Fund did not meet the solvency test in section 42(b) of the CBCA. The Fund’s position was accepted by Justice Wilton-Siegel in dismissing the Former Manager’s claim. The Reasons stated, in relevant part:

[380] The Fund does not dispute that this amount was earned in the sense that the Former Manager is entitled to receive dividends in such amount pursuant to the provisions of section 4.2(d)(i) of the share conditions of the IPA Shares, subject to compliance with the terms of that provision. However, it submits that the Former Manager is not entitled to be paid such amount in the absence of a Board resolution declaring a dividend in such amounts on the IPA Shares, which the Board is prevented

from passing in view of the solvency provisions of section 42 of the CBCA. In my view, the language of section 4.2(f)(ii) does not support the Former Manager's position that it is entitled to payment of the amount claimed by way of an IPA Dividend on the IPA Shares in the present circumstances for the following reasons.

...

[382] As the share provisions are clear that the earned amounts are to be paid to the Former Manager in the form of dividends, and, in any event, as it is not disputed that, in the present circumstances, the directors could not satisfy section 42 of the CBCA if they were to declare a dividend in respect of such amounts, the Board has no obligation to declare such dividend and the Fund therefore has no obligation to pay any amount to which the Former Manager is otherwise entitled pursuant to section 4.2(f)(ii). In short, there is no amount to which the Former Manager would have been entitled pursuant to section 4.2(d)(i) of the share conditions of the IPA Shares.¹ [emphasis added]

7. The Fund did not take a position on the quantum of the Claimed IPA Dividend or whether it had been "earned" because, in the Fund's view, it was a moot point. A copy of the excerpt of the Fund's written closing submissions at trial on the Claimed IPA Dividend is attached hereto as **Exhibit "A"**. The closing submissions did not address the quantum of the Claimed IPA Dividend or whether it had been "earned".

8. Second, Justice Wilton-Siegel did not make any finding in the Reasons regarding the quantum of the Claimed IPA Dividend or whether it had been "earned", nor did he have to because, like the Fund, Justice Wilton-Siegel concluded that it was a moot point. Justice Wilton-Siegel merely noted that the Former Manager had asserted the Claimed IPA Dividend in the amount of \$672,390.61 had been earned, an assertion in respect of which the Fund did not engage at trial for the reasons stated above.

¹ A copy of the Reasons is attached as Exhibit "D" to my December Affidavit.

9. Justice Wilton-Siegel expressly noted that the Former Manager's entitlement to the Claimed IPA Dividend was "subject to compliance with the terms of that provision." See paragraph 380 excerpted above.

10. Justice Wilton-Siegel did not make any findings at trial regarding, or even consider in the Reasons, whether the conditions set out in the share terms for the payment of dividends on the IPA Shares had been met.

Former Manager Has Not Provided Any Support For The Claimed IPA Dividend

11. As set out in paragraph 81 to my December Affidavit, in order for the Former Manager to be entitled to payment on account of the IPA Shares, the Portfolio Test, Venture Investment Test and Principal Test must each have been satisfied at the relevant time.

12. Determining whether these tests have been satisfied requires complex calculations given the breadth of the Fund's investment portfolio – the Fund held venture investments in 71 Portfolio Companies as of the commencement of the CCAA Proceeding – and the fact that the Fund made one or more follow-on investments in many of these companies.


13. I have reviewed Exhibit "A" to the Lew Affidavit which purports to set out the Former Manager's calculation of the quantum of the Claimed IPA Dividend and the application of the Portfolio Test, Venture Investment Test and Principal Test with respect to four venture investments of the Fund at the time they were divested over a decade ago. The Former Manager's calculations from this short spreadsheet do not support the assertion that the Portfolio Test (in particular), Venture Investment Test and Principal Test are all met, in part because the Former Manager has not provided the court with any documentation supporting its calculations.

14. In any event, the Fund's position is that the relevant point in time for applying the Portfolio Test, Venture Investment Test and Principal Test is as of the Dissolution Event, not as of the divestment of particular venture investments regardless of the subsequent performance of the remainder of the investment portfolio.

15. I do not intend to respond to Mr. Lew's attempt to selectively parse the language of sections 4.2(e) and 4.2(f) of the IPA Share terms for the Former Manager's benefit. I will only say that the Fund disagrees with the Former Manager's stretched interpretation and the correct interpretation of these terms is set out in my December Affidavit.

16. Nothing in Mr. Lew's affidavit changes the Fund's conclusion set out in paragraphs 81-92 of my December Affidavit that the Former Manager is not entitled to the Claimed IPA Dividend because the Portfolio Test has not been met.

SWORN BEFORE ME VIA VIDEOCONFERENCE, the affiant being located in the City of Collingwood, in the Province of Ontario, Canada and the Commissioner being located in the City of Toronto, in the Province of Ontario, Canada on January 6, 2023, in accordance O. Reg. 431/20, Administering Oath or Declaration Remotely.



C. Ian Ross

**William Joseph Kee Dandie,
a Commissioner, etc., Province of Ontario,
while a Student-at-Law.
Expires July 14, 2025.**

A Commissioner for taking Affidavits

TAB A

This is **Exhibit “A”** referred to in the
affidavit of **C. IAN ROSS**
sworn before me this
6th day of January, 2023

William Joseph Kee Dandie,
a Commissioner, etc., Province of Ontario,
while a Student-at-Law.
Expires July 14, 2025.

A Commissioner for taking affidavits

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IN THE MATTER OF THE *COMPANIES' CREDITORS
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B E T W E E N :

GROWTHWORKS WV MANAGEMENT LTD.

Plaintiff

- and -

GROWTHWORKS CANADIAN FUND LTD.

Defendant

**WRITTEN CLOSING OF
GROWTHWORKS CANADIAN FUND LTD.**

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Lawyers for GrowthWorks Canadian Fund
Ltd.

203. The Fund retained an expert, Mr. Razmig Boghossian, a chartered accountant and a CFA Charterholder, to calculate the Former Manager's alleged damages. Mr. Boghossian opines that, when applying the appropriate formula, discount rate and interest rate, the Former Manager is allegedly entitled to only \$3,920,500.²⁸⁹

204. Contrary to the analysis by Mr. Mia, Mr. Boghossian's calculation accurately takes into account the inherent risk of the Fund.²⁹⁰ The Fund's projected cash flows were tied to highly risky venture capital investments. Given the inherent risks of the Fund and its projected cash flows, **a higher discount rate would be required. The appropriate rate would be 18%,²⁹¹ not 8%.** Finally, Mr. Boghossian appropriately uses an interest rate of 1.3%, as prescribed by the *Court of Justice Act*.

Other Damages Claimed

205. The Former Manager also claims that it is entitled to a 20% dividend of the realized gains and income from four venture investments: xKoto Inc., GeminX Biotechnologies, Vitana Corporation, and Paymentus Corp.²⁹² The Former Manager argues that it is entitled to the dividends because each of the investments have met conditions stipulated in the Fund's prospectus.²⁹³

²⁸⁹ Trial Exhibit 4B, Tab 7, para. 11; Mr. Boghossian was provided with the following assumptions: (i) to apply an annual discount factor, and (ii) to calculate Management Fees over 5 year period of time (instead of the four years when the Fund would have been wound down). For the purposes of the total damages calculation, the Fund has assumed that the Fund would have had \$0 NAV value as at September 30, 2012.

²⁹⁰ Trial Exhibit 4E, Tab 13, para. 8.

²⁹¹ Trial Exhibit 4E, Tab 13, para. 9.

²⁹² Trial Exhibit 4A, Tab 1, paras. 185-190.

²⁹³ Trial Exhibit 1C, Tab 81.

206. However, the Former Manager is not entitled to dividends because the IPA Dividends were not declared by the Board and indeed could not have been declared, because the Fund does not meet the solvency test in s. 42(b) of the CBCA.²⁹⁴

207. The declaration of a dividend is an essential feature of a dividend payment. Until a dividend is declared, its payment can neither be demanded nor enforced.²⁹⁵ The Board **could not** declare dividends due to the statutory requirements of s. 42 of the CBCA.²⁹⁶ The Fund's prospectus cannot, and do not, remove the requirement to declare dividends before payment.

208. Furthermore, the Former Manager is not entitled to any payment of undeclared dividends under the Article 8 (Term and Termination) provision of the Management Agreement. The Former Manager has no contractual right to the payment of dividends upon termination.

209. The Former Manager also claims for Capital Retention Administration Fees pursuant to section 5.2(b) (**Capital Retention Fee**). The purpose of the Capital Retention Fee is to reward the Former Manager "for [its] efforts to retain capital within the Fund"²⁹⁷ and was calculated based on shares that remained issued and unredeemed, whereby the "fee ceases after [Series] shares have been held for eight years after their original purchase date".²⁹⁸ However, once the Fund ceased redemptions in late 2011, the Former Manager was no longer entitled to a fee that was tied to compensating itself for

²⁹⁴ *Canada Business Corporations Act*, R.S.C., 1985, c. C-44 at s. 42(b).

²⁹⁵ *Fairhall v. White Star Refining Co., sub nom Fairhall v. Butler*, [1928] S.C.R. 369, at para. 19, Fund's BOA, Tab 6.

²⁹⁶ Section 42, *Canada Business Corporations Act*, R.S.C., 1985, c. C-44

²⁹⁷ Trial Exhibit 1C, Tab 81, p. 1279.

²⁹⁸ Trial Exhibit 1C, Tab 81, p. 1292.

its efforts to retain capital, measured by way of unredeemed shares, when it was impossible for the shareholders to redeem their shares.

F. Issue #6: The Former Manager is Not Entitled to Recover Additional Amounts for Transition Services

210. The Former Manager claims an additional \$459,843.11 (previously \$360,965.65) for the provision of transition services for five enumerated categories of services.

i. The Critical Transition Services Agreement

211. Immediately following the termination of the Management Agreement, the Fund and the Former Manager entered into negotiations about what transition services the Former Manager would provide to the Fund and for how much. On October 15, 2013, the parties entered into the CTSA.²⁹⁹ On October 29, 2013, the Former Manager became a critical supplier under the Initial Order.³⁰⁰

212. The CTSA did not contemplate that the Former Manager would provide services other than what was specifically enumerated in the CTSA. Section 2 of the CTSA provided that the “Critical Transition Services to be provided by the Manager to the Fund pursuant to the Management Agreement shall include the following:...”³⁰¹ The CTSA enumerated five specific services that the Former Manager would provide.

213. Yet, the Former Manager incurred costs to provide services not contemplated by the CTSA or otherwise directed by the Fund.

²⁹⁹ Trial Exhibit 4A, Tab 1, para. 72.

³⁰⁰ Trial Exhibit 4A, Tab 2, para. 4.

³⁰¹ Trial Exhibit 1F, Tab 228, p. 496.

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

Proceeding commenced at Toronto

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MTDOCS 46637620

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