



ONTARIO SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)

**COUNSEL/ENDORSEMENT SLIP**

COURT FILE NO.: CV-13-00010279-00CL

HEARING DATE: July 4, 2025

NO. ON LIST: 4

TITLE OF PROCEEDING:

GROWTHWORKS CANADIAN FUND LTD. et al v. L'ABBE et al

BEFORE: MADAM JUSTICE KIMMEL

**PARTICIPANT INFORMATION**

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## **ENDORSEMENT OF JUSTICE KIMMEL:**

### **The Motion**

- [1] Growthworks Canadian Fund Ltd. (the "Fund") is a labour-sponsored venture capital fund. It has been under the protection of the *Companies' Creditors Arrangement Act* since October 1, 2013, to allow for an orderly realization of its investments.
- [2] Investment Administration Solution Inc. ("IAS" or "Transfer Agent") has provided administration services to the Fund for over ten years pursuant to a services agreement dated January 6, 2015 (the "IAS Agreement").
- [3] This is a motion by IAS for a declaration and order in respect of statements that were made by FTI Consulting Inc., the court appointed Monitor, on its website following an order and endorsement of Osborne J. on March 4, 2025. The relief sought on this motion is highly unusual and admittedly unprecedented. IAS seeks an order:
  - a. declaring that IAS was not the cause of any of the delays with respect to the Fund's distribution to Class "A" Shareholders originally planned for December 31, 2024 (the "Planned Distribution");
  - b. Compelling the Monitor to correct the statements (the "Monitor's Statements") made on its website found at the URL of <https://cfcanada.fticonsulting.com/GCFL/> (the "FTI Website") with a new post that is mutually agreeable between the Transfer Agent and the Monitor.
- [4] The Motion is opposed by the Fund and the Monitor. In addition to asking that the court dismiss the motion by IAS, they seek further directions regarding updates to the Share Register delivered by IAS on March 7, 2025, in advance of their Planned Distribution to Shareholders.

### **Background**

- [5] After obtaining an initial distribution and discharge order dated January 19, 2023, the Fund obtained an Amended Distribution and Discharge Order on December 18, 2024. That order identified the remaining issues that needed to be addressed before the final distribution and wind-up of the Fund, which included the need to reach a definitive agreement with IAS in respect of the services to be provided to the Fund to effect the Planned Distribution and the wind-up (the "Distribution Services"). By that time, the Planned Distribution was expected to occur around March 31, 2025.

- [6] The services to be provided by IAS under the IAS Agreement did not include Distribution Services. The terms for the Distribution Services that the Fund and the Monitor were hoping to negotiate with IAS were set out in a proposed draft amendment to the IAS Agreement (the "IAS Amendment").<sup>1</sup> The court approved the proposed form of the IAS Amendment at the time of the Amended Distribution and Discharge Order, although IAS did not participate in that motion.
- [7] Efforts to reach an amending agreement with IAS for the Distribution Services were not progressing to the Monitor's and the Fund's satisfaction, so they began to look for alternative service providers, while continuing negotiations with IAS.
- [8] The Distribution Services, whether provided by IAS or another service provider, would require an up-to-date Shareholder Register. The Shareholder Register refers to the Fund's shareholder information that IAS had been managing, including the names, addresses and other information relating to the shareholders of the Fund.
- [9] The Monitor and the Fund took the position that the Shareholder Register was something that IAS was responsible for maintaining under the IAS Agreement. They considered the Shareholder Register to be: (i) a standard record contained in the minute book of any company; (ii) Property (as defined in the IAS Agreement); and (iii) required for the Fund to proceed with an alternate service provider to complete the Distribution Services.
- [10] IAS asserted that this was information that was proprietary and confidential, and as such refused to provide it. The Monitor and the Fund advised IAS that they had no interest in receiving any of IAS's proprietary information. On February 7, 2025, the Fund's counsel also provided a list of fields that the Fund and Monitor believed would be required for production of the Shareholder Register. IAS continued to refuse to produce the Shareholder Register or such information fields to the Fund. This led to the March 4, 2025 motion.
- [11] At the March 4, 2025 motion the Monitor sought and obtained an order compelling IAS to turn over the Shareholder Register Information to the Monitor and the Fund. Paragraph 8 of the court's March 4, 2025 endorsement is at the center of the current dispute. It reads as follows:

Delivery of the Shareholder Register Information is holding up the distribution. That is unfair to stakeholders. I am not persuaded there are any issues with respect to the information and materials to be provided, but if they [*sic*] are, I am satisfied they could be readily sorted out and

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<sup>1</sup> IAS attributes various motives to the Fund and Monitor regarding the pricing for the proposed IAS Amendment and implications that pricing has for IAS's liability cap under the IAS Agreement. This is beyond the scope of this motion in terms of the issues as framed and the record as presented. The parties were advised at the hearing that the court would not be addressing these accusations or implications flowing from them.

resolved, and indeed ought to have been done so already. Providing such information, and indeed effecting such distributions, are the very business of IAS. There is no reason they cannot do so immediately.

- [12] The March 4, 2025 endorsement directed that IAS immediately provide the Shareholder Register Information to the Monitor and the Applicant. It further directed that the parties work out any mechanical issues among themselves.
- [13] After the March 4, 2025 endorsement and order were rendered, on March 6, 2025 the Fund wrote to IAS asking for the Shareholder Register to be provided in Excel readable format. It listed the fields of information that it expected to be included, and asked that IAS also provide any other data that in its knowledge and experience would be necessary to effect the distribution to Fund Shareholders.
- [14] The requested fields of information in this March 6, 2025 letter included the required fields that had been requested on February 7, 2025, although some were expanded upon. IAS replied with concern about the lack of clarity and consistency around what precisely they were being asked to provide as the Shareholder Register based on what they considered to be evolving requests, and about the added request on March 6, 2025 for them to use their knowledge and expertise to identify and provide other data necessary for the Shareholder Distribution if they were not being retained to do that.
- [15] Ultimately, according to IAS in a March 11, 2025 letter from its counsel, IAS used the specifications in the February 7, 2025 email to prepare the Shareholder Register it provided to satisfy its obligations under the March 4, 2025 order.
- [16] Part of the dispute about the Shareholder Register was about which aspects of the work to be performed to prepare it were covered by the services included under the IAS Agreement, and which were additional services for which IAS was entitled to further compensation. IAS maintains that services to prepare a Shareholder Register to be given to another service provider to do the Distribution were not included costs under the IAS Agreement.
- [17] After the March 4, 2025 endorsement, the parties eventually reached an agreement about what would be paid and the Shareholder Register was delivered by IAS on March 7, 2025. IAS agreed to waive some of its invoiced costs. IAS maintains that the payments it did receive are evidence that its refusal to provide the Shareholder Register until additional payment terms had been agreed to was justified. The Fund and the Monitor maintain that this was agreed to because it was considered to be the most efficient and economical way to obtain the Shareholder Register and make the final Distribution, and that it was a compromise in furtherance of that goal, not an admission that IAS was justified in refusing to provide the Shareholder Register until its invoices were paid.

## The Impugned Statement

- [18] Following the March 4, 2025 Order, the Monitor provided an update on its website. IAS has taken issue with this update, specifically the part in italics in the paragraph below (the "Monitor's Statement"):

As referenced above, on December 18, 2024, the Fund obtained an amended and restated order of the Ontario Superior Court of Justice (the "Court" ) relating to the proposed wind-up of the Fund, including a possible cash distribution to the Fund's Class A shareholders utilizing the services of the Fund's existing transfer agent, The Investment Administration Solution Inc. (the "Transfer Agent" ). Following receipt of that Court order, the Fund and the Transfer Agent were unable to agree on the terms governing the delivery of those services. Accordingly, the Monitor requested that the Transfer Agent deliver the Fund's shareholder register (the "Shareholder Register" ) to the Monitor. *The Transfer Agent did not deliver the Shareholder Register when requested, causing a delay in the proposed distribution process.* As set out in the Monitor's 31st Report, the Monitor sought an order of the Court compelling the Transfer Agent to deliver the Shareholder Register. On March 4, 2025, the Court granted the requested order requiring the Transfer Agent to promptly turn over the Shareholder Register to the Monitor. The Shareholder Register was delivered to the Monitor on March 7, 2025. The Fund and the Monitor are currently working with an alternate service provider in relation to the proposed distribution; however, the distribution will be delayed beyond the previously anticipated date of March 31, 2025. The Monitor will post additional updates on its website when the timing of the proposed distribution is finalized.

- [19] IAS asserts that this posting contains allegedly incorrect statements that it wants the Monitor to correct on its website.
- [20] Specifically, IAS challenges the accuracy of the statement that: "The Transfer Agent did not deliver the Shareholder Register when requested, causing a delay in the proposed distribution process". IAS maintains that this is inaccurate and misleading because the website summary does not mention the middle sentence in paragraph 8 that reads: "I am not persuaded there are any issues with respect to the information and materials to be

provided, but if they [sic] are, I am satisfied they could be readily sorted out and resolved, and indeed ought to have been done so already.”

- [21] IAS maintains that it was not the cause of the delay in the distribution process and that this middle sentence from the March 4, 2025 endorsement provides important context. It asserts that the sentence acknowledges that there may have been issues that needed to be sorted out between the parties with respect to the information and materials to be delivered, and that the March 4, 2025 endorsement does not attribute all of those issues to IAS. It points to the fact that the parties did indeed have to negotiate certain terms of payment for the Shareholder Register that it insisted were not covered by the IAS Agreement, after which the Shareholder Register was provided.
- [22] IAS also complains that the reference to the fact that the Fund is consulting with alternative service providers to perform the Planned Distribution creates an impression that IAS is either unable or unwilling to effect same in a tone that will likely harm IAS’s reputation.
- [23] The Fund and the Monitor maintain that the statement that “[t]he Transfer Agent did not deliver the Shareholder Register when requested, causing a delay in the proposed distribution process” is accurate. Read in context, this statement is referring to the delay that preceded the March 4, 2025 endorsement and the lead up to the court’s direction and order of that day for IAS to deliver the Shareholder Register (rejecting its position that it was propriety to IAS), based on the court’s finding “that Delivery of the Shareholder Register Information is holding up the distribution”. They also note that the full March 4, 2025 endorsement is posted on the FTI Website so that the middle sentence that was not replicated is available for all to see on the website.
- [24] Further, it is noted that there is no evidence about the “impression” that IAS is unable or unwilling to perform requested services or about any damage to its reputation.

## **Analysis**

- [25] The two aspects of the relief sought on this motion will be addressed sequentially.

### *The Declaratory Relief*

- [26] IAS wants the court to declare that it was *not the cause of any of the delays with respect to the Fund's Planned Distribution, originally planned for December 31, 2024*.
- [27] The declaration that IAS seeks is not factually supported by the record. The wording of the declaration sought by IAS leads me to a double negative determination: I am unable to find that IAS was not the cause of any of the delays that led to the Planned Distribution being delayed after December 31, 2024 (first to March 31, 2025 and now delayed beyond that).

- [28] The Monitor's website does not state that IAS was the sole cause of delay in the Fund's Planned Distribution. IAS did cause or contribute to some of the delay. It is irrelevant to the fact of the delay whether IAS could complete the Planned Distribution within two weeks or what it would charge to do so since the parties were never able to agree on the terms upon which IAS would do so.
- [29] IAS's position regarding the delivery of the Shareholder Register prior to December 31, 2024 was tied initially to the negotiations about the IAS Amendment. When the Fund and the Monitor began exploring options for the Planned Distribution to be carried out by another party using the Shareholder Register that only IAS had the ability to provide, IAS took some positions regarding its obligations regarding the maintenance and delivery of the Shareholder Register that were ultimately not accepted by the court on the March 4, 2025 motion.
- [30] IAS blames its failure to produce the Shareholder Register on "the meandering definition of what exactly the Fund was looking for [which] made it impossible for IAS to produce any data extract until it was given field specifications on February 7, 2025 and March 6, 2025". However, even if this was a valid excuse, it does not account for its various other positions resisting production of the Shareholder Register.
- [31] The court found in the March 4, 2025 endorsement that "Delivery of the Shareholder Register Information is holding up the distribution". The court expressly stated in that endorsement that it was "not persuaded there are any issues with respect to the information and materials to be provided", and only then went on to say that even if there were any issues, they should be sorted out immediately. IAS's positions were at least in part the cause of delays up to when the March 4, 2025 motion was decided. IAS was directed by the court to provide the Shareholder Register.
- [32] The parties disagree about the back and forth concerning the provision of the Shareholder Register, what was needed for it to be prepared and the terms upon which that would be done by IAS. However, IAS acknowledges that it had received a request with sufficient particularity and clarity to enable it to prepare the Shareholder Register by February 7, 2025. The fact of the matter is that after the March 4, 2025 directions and order were given, it was able to prepare and deliver the Shareholder Register using the February 7, 2025 fields within three days, by March 7, 2025. IAS says this was only after it was paid an agreed amount for this work. The fact that once IAS was directed to deliver the Shareholder Register the parties agreed upon an amount IAS would be paid for this work to avoid further delays in its delivery does not absolve IAS from any responsibility for the delays (e.g., at a minimum, the delay from February 7 to March 7, 2025) that preceded its preparation of the Shareholder Register.
- [33] At the very least, I find that IAS played a role in the delays regarding the delivery of the Shareholder Register and it would be factually inaccurate for the court to declare that IAS

*was not the cause of any of the delays with respect to the Fund's Planned Distribution, originally planned for December 31, 2024.*

- [34] Even if some of the delays were caused by the positions of the Monitor and/or the Fund, that would not change the fact that the declaration sought is still not accurate.
- [35] Accordingly, I am not prepared to make the declaration sought by IAS. I also have concerns about the basis on which the court can make the type of declaration that IAS seeks. Declaratory relief is granted by the court sparingly and only when necessary. I do not need to analyze this more deeply now, however, since the factual findings that would be necessary to make such a declaration are not supported by the evidentiary record in any event.
- [36] Although IAS denied when asked during the hearing whether this motion was really about the Fund's and Monitor's decision not to use IAS to make the Planned Distribution, there are various assertions in its factum regarding its continued willingness to perform the Planned Distribution and questioning why it has not been instructed to do so. IAS has devoted much of its written submissions to criticisms of the Fund and the Monitor for their handling of the Planned Distribution. That is a matter between the parties and not the subject of this endorsement.

#### *The Mandatory Order*

- [37] IAS wants the court to make an order compelling the Monitor to correct the allegedly incorrect Statements made on its website with a new post that is mutually agreeable between the Transfer Agent and the Monitor.
- [38] IAS suggests that the allegedly incorrect Statements can be corrected by the Monitor posting a further statement on its website, below the impugned one. The precise wording was not provided to the court in writing but the gist of it was to have the Monitor describe the events after March 4, 2025, when the Shareholder Register was prepared within a matter of days and provided to the Fund.
- [39] IAS relies on *Nelson Financial Group Ltd., Re*, 2011 CarswellOnt 19453 (Ont. S.C.), at para. 6, in which it says this court lightly reminded the Monitor and the Representative Counsel: "to modify their respective websites to reflect up to date information". That is the only authority presented by IAS or that it could find to support the mandatory order it seeks. Far from directing the Monitor to update its website, the court in *Nelson* simply stated (at para. 6) that it: "has no objection to the Monitor and Representative Counsel taking steps to modify their respective websites to reflect up to date information."
- [40] While the court does exercise supervisory authority over its court officers, including (as IAS contends) the ability to make light suggestions about how to best describe the court's



processes that are being overseen by them, the mandatory nature of the relief sought in this motion is problematic. No attempt was made by IAS to satisfy the usual requirements for a mandatory order under s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, and from *RJR-McDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at p. 334.

- [41] The only aspect of the test that IAS touched upon in its submissions is the “impression” it says is created by the statements on the website about IAS causing delays in the Planned Distribution and its inability or unwillingness to perform the requested services, which it asserts have or will damage its reputation, causing irreparable harm.
- [42] When asked during oral argument, IAS conceded that there was no evidence of any reputational damage. Rather, it asked the court to infer that its reputation as a long standing service provider in this field would be damaged by these statements. There is guidance in the case law regarding on what basis and in what circumstances inferences should be drawn by the court. IAS failed to identify in its submissions the relevant legal framework for such a determination, or provide any evidence or submissions about how that framework should be applied to the facts of this case. As such, I am unable to draw the inference of prejudice to its reputation that it suggests. In the absence of such, there is no evidence of harm, let alone irreparable harm.

### *Updates*

- [43] That said, there is good reason for the Monitor to consider whether now might be the appropriate time to update its website to reflect what has transpired to implement the March 4, 2025 endorsement and order in a way that makes it clear that the Shareholder Register was prepared by IAS based on the February 7, 2025 criteria, the parties negotiated terms and the Shareholder Register was then provided by IAS on March 7, 2025.
- [44] In terms of updating, it is appropriate to require that IAS continue to fulfill the requirements of the March 4, 2025 order by bringing the Shareholder Register current, to update it with any information in the fields previously provided that has been received from Shareholders since the Shareholder Register was provided on March 7, 2025. IAS is the one that has access to any new information that might have been received from Shareholders. This should be done by IAS in response to a final request from the Monitor when it is ready to set the wheels in motion for the Planned Distribution.

### **Sealing Order**

- [45] The parties agree on one thing, which is that the court grant an order:
- a. sealing the Confidential Exhibits 1 and 2 to the Affidavit of C. Ian Ross dated June 13, 2025; and

- b. sealing the confidential appendices (the "Confidential Appendices") to the Thirty-Third Report of the Monitor (the "Monitor's Report")

together, the "Confidential Material".

- [46] This court does not grant sealing orders just because the parties have agreed to keep certain information or material confidential. However, I am satisfied in the circumstances of this case that the requested sealing order appropriately balances the principle of court openness with legitimate commercial requirements for confidentiality while minimizing risks to retention and privacy. The salutary effects of granting this order outweigh any deleterious effects.
- [47] I am satisfied that the limited nature and scope of the proposed sealing order is appropriate and satisfies the requirements in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522, at para. 53, as modified by the reformulation of the test in *Sherman Estate v. Donovan*, 2021 SCC 25, [2021] 2 S.C.R. 75, at para. 38.
- [48] Courts have acknowledged that there is a public interest in the "general commercial interest of preserving confidential information" and "in maximizing recoveries in an insolvency": see *Sherman Estate*, at para. 41, citing *Sierra Club*, at para. 55; *Danier Leather Inc., Re*, 2016 ONSC 1044, at para. 84.
- [49] In this case, the sealing order is proportional as the Confidential Material has been described generally in the Ross Affidavit and the Monitor's Report, to provide sufficient context in the public portion of the record. The only information not provided is: (i) the terms of commercial agreements between IAS and the Fund, namely the IAS Agreement and the Distribution Addendum; and (ii) the monetary amounts related to proposed budgets and disputed invoices.
- [50] The terms of the commercial agreements and the monetary amounts are commercially sensitive information that, if released, may jeopardize the Fund's efforts to engage with the alternate service provider and effect its Planned Distribution. This would impede the commercial interests of maximizing recoveries to the detriment of the stakeholders. As such, it is in the public interest to seal the Confidential Material, at least until after the Planned Distribution has been made.
- [51] The sealing order is granted. A form of order will need to be prepared for the court to sign. Once signed, it will be the responsibility of counsel to ensure that the sealed Confidential Material is provided to the court clerk at the filing office in an envelope with a copy of this endorsement and the signed order with the relevant provisions highlighted so that it can be physically sealed.

- [52] Counsel who files the sealed Confidential Material shall also ensure that after the Planned Distribution is made, the Confidential Material is unsealed and placed in the court file.

### **Final Disposition and Costs**

- [53] The Sealing Order in respect of the Confidential Material is granted. The IAS Motion is dismissed. Counsel for the Fund or the Monitor shall prepare a draft order reflecting this outcome and, once the form and content have been approved by counsel for IAS, the order may be submitted to the court for signing.
- [54] The Fund expects to be able to complete its Planned Distribution with the alternate service provider within four weeks of knowing the outcome of this motion. If and when requested by the Fund or the Monitor, IAS shall provide any updated information about the Shareholders listed on the Shareholder Register that IAS has received since March 7, 2025 when the original Shareholder Register was provided. The Monitor should also consider whether any updates to its website might now or soon be appropriate, along the lines suggested by the court earlier in this endorsement or otherwise.
- [55] The Fund says it cannot not proceed to a Distribution while there remains a lack of certainty about the costs to wind-up and dissolve the Fund. The Fund has a limited amount of cash available and it will be necessary to deduct the anticipated wind-up and dissolution costs to determine the amount available for the Planned Distribution. Part of the needed certainty will come from knowing the outcome of this motion, including the decision on costs.
- [56] The parties uploaded their costs outlines for this motion into Case Center after the oral submissions were completed on July 4, 2025.
- [57] The Fund and the Monitor jointly seek their substantial indemnity costs of this motion because they say the motion was ill conceived and has simply resulted in yet further delays and added costs to the Planned Distribution. Their substantial indemnity costs of this motion are certified in their costs outline (at 90% of their actual rates) to be \$90,058.80. Further grounds for this higher scale of costs are set out in the costs outline. Their partial indemnity costs (at 60% of actual rates) are \$60,169.50.
- [58] The moving party's costs are only detailed in their Bill of Costs on what appears to be a full indemnity scale, for the aggregate all-inclusive amount of \$35,821.00.
- [59] The parties need the certainty of costs being fixed and ordered payable forthwith, as indeed the rules contemplate the court will do upon deciding a motion. IAS's motion has been dismissed and the Fund/Monitor are entitled to their costs of this motion.

- [60] I agree that the motion was ill-conceived given the breadth and inaccuracy of the requested declaration and given that no real effort was made to satisfy the test for a mandatory order in the nature being sought. The Monitor, a court officer, was facing serious accusations that it had to defend. The costs outline of the Fund/Monitor details other grounds that support consideration of awarding them a higher scale of costs.
- [61] However, in terms of the quantum of costs to award, some of the other Rule 57 factors, such as proportionality and reasonable expectations, the court does need to take into consideration that the actual cost of the Fund/Monitor is approximately three times as much as what IAS has claimed.
- [62] In the exercise of my discretion under s. 131 of the *Courts of Justice Act*, and having regard to the costs outline of the applicant, the bill of costs of the respondent and the relevant factors under Rule 57, I find that the Fund/Monitor are entitled to their substantial indemnity costs of this motion fixed in the all-inclusive costs in the amount of \$60,000, ordered payable forthwith (within 30 days) by IAS to them.
- [63] This reduced quantum of substantial indemnity costs (roughly equivalent to their claimed partial indemnity costs) is a reflection of the proportionality and reasonable expectations of what a moving party might expect to pay if it lost a motion like this, and to average out some of the costs and time spent across a larger complement of professional staff who have been working on behalf of the Fund and the Monitor in connection with this matter. I am not making any negative findings about the staffing or hourly rates or particular tasks performed by the legal professionals whose accounts are the subject of review. I am simply attempting to make some adjustments to make the costs award proportionate to the issues on this motion and bring it more in line with what might reasonably have been expected by the applicant in the context of this particular matter.



KIMMEL J.

July 10, 2025