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. 1875, C.c-36, AS AMENDED

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

FACTUM OF THE RESPONDENT

(Distribution Motion Returnable January 19, 2023)

January 12, 2023

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FACTUM OF THE RESPONDENT

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Part I - Overview of the Respondent's Position

1. The Respondent, Growthworks WV Management Ltd. ("Growthworks" or "Former Manager") is the former manager of the Applicant, Growthworks Canadian Fund Ltd. (the "Fund").

2. The Former Manager responds to the motion brought by the Fund for, among other things, a Distribution, Termination and Discharge Order that results in the dissolution of the Fund, the discharge of the Monitor appointed under these CCAA Proceedings and the distribution of its remaining assets to, among others, shareholders.

3. Growthworks does not oppose the relief sought by the Fund in the Distribution, Termination and Discharge Order as it relates to dissolution and the discharge of the Monitor. Growthworks also takes no position on the fees charged by the Fund and Monitor and for which approval is sought.

4. Growthworks does take the position that it is entitled to a payment of $672,390.61 on account of the Class C Shares or "IPA Shares" that Growthworks holds. Growthworks states it is entitled to this payment in priority to other distributions, or alternatively, on a pro rata basis with the distribution on the Class A Shares. This request is contrary to the proposed Distribution, Termination and Discharge Order, which Order does not provide for any payment to Growthworks on account of the Class C Shares or "IPA Shares".

5. The following are the issues to be determined:

a. Has the quantum of the amount due to Growthworks on account of the Class C Shares or "IPA Shares" already been determined by the Honourable Justice Wilton-Siegel in a trial between Growthworks, as Former Manager and the Fund (the "IPA Payment")?

- Answer: Yes

b. Is Growthworks entitled to the IPA Payment on dissolution?

- Answer: Yes

c. Should the IPA Payment be paid to Growthworks before any payment to the Class A or Class B Shareholders

- Answer: Yes, or alternatively *pro rata*.

Part II - Summary of Facts

6. The facts related to the relationship between Growthworks and the Fund is set out in detail in the Reasons for Decision of Justice Wilton-Siegel dated May 18, 2018 which were the culmination of an approximate two-week trial before His Honour where issues related to the termination of Growthworks as Fund Manager were adjudicated (the "Trial").

7. One way that the Former Manager was compensated was based on the Fund's investment performance as managed by the Former Manager. This was accomplished by issuance to GrowthWorks of 100 Class C shares of the Fund (the **"IPA Shares"**) that had share rights that provided for payment of performance compensation. The Former Manager is the sole owner of Class C shares of the Fund which were specifically created for the manager of the Fund.

8. The performance compensation, called incentive participation amount (**"IPA"**), was calculated as a percentage of the realized gains and income from each of the Fund's individual investments, provided certain conditions were met. The conditions for IPA Compensation to become payable were substantial and ensured that the other classes of shareholders of the Fund had received the substantial benefit of the investment performance, before the IPA was earned by the Former Manager. The conditions included a performance threshold for the Fund's entire portfolio, an even higher minimum performance threshold for the individual investment and there was a requirement that the Fund receive back cash equal to the cash used in the initial investment on the investment's disposition. All of the conditions had to be present before IPA became payable to the Former Manager.

9. Once it was earned, IPA payable to the former Manager appeared as a liability on the Financial Statements of the Fund.

10. As part of its claim in the Trial, the Former Manager claimed for payment of the earned but unpaid IPA triggered by its termination as Manager for the Fund.

11. The Former Manager's claim for payment of the earned IPA, triggered by the termination as Manager of the Fund, was dismissed. What was expressly not determined was whether the Former Manager was entitled to payment of the earned IPA on a Dissolution Event, which was

determined by different contractual language than the payment triggered on termination (as explained in more detail below).

12. A Dissolution Event means "the liquidation, dissolution or winding-up of the Corporation, whether voluntary or involuntary, or any other distribution of the assets of the Corporation amount its shareholders for the purpose of winding-up its affairs"[1]

13. Specifically, paragraph 2 of the Judgment stated:

> "2. THIS COURT ORDERS that the claim of the Former Manager for $672,390.61 for unpaid incentive payments amounts ("IPA") as a result of the termination of the Management Agreement, **but not any potential claim for IPA based on a Dissolution Event as defined in the Article of Amendment for Class C Shares (which potential claim was not before the court on this trial)**, is dismissed." [**Emphasis Added**][2]

14. Further at paragraph 380 of the Reasons for Decision:

> "[380] In support of its position that it is entitled to the earned, undeclared and unpaid dividends, the Former Manager relies on: (1) the language of section 4.2(f)(ii); and (2) the Fund's treatment of earned, undeclared and unpaid dividends in its financial statements."[3]

Part III – Issues and the Law and Analysis

Issue One: Has the quantum of the amount due to Growthworks on account of the Class C Shares or "IPA Shares" already been determined by the Honourable Justice Wilton-Siegel in a trial between Growthworks, as Former Manager and the Fund (the "IPA Payment")?

15. The amount of the IPA Payment, not yet paid to Growthworks, has already been determined by the Honourable Justice Wilton-Siegel to be $672,390.61. At paragraphs 378 to 380 of the Reasons for Decision, His Honour found:

> [378] The Former Manager claims that it is entitled pursuant to section 4.2(f)(ii) to payment of dividends on the IPA Shares equal to the total of realized gains and income from four venture capital investments that were divested prior to termination of the Management Agreement. The total amount claimed is $672,390.61.
>
> [379] In support of its position that it is entitled to the earned, undeclared and unpaid dividends, the Former Manager relies on: (1) the language of section 4.2(f)(ii); and (2) the Fund's treatment of earned, undeclared and unpaid dividends in its financial statements.

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[1] Motion Record, Exhibit "M" – Certificate of Amendment, page 364
[2] Motion Record, Exhibit "E" – Judgment, page 295
[3] Motion Record, Exhibit "D" – Reasons for Decision, page 266, para. 380 ff

> [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. **[Emphasis added]**[4]
>
> ***Growthworks WV Management Ltd. v. Growthworks Canadian Fund Ltd.*, 2018 ONSC 3108 (CanLII), at para 378,**

16. This determination was made in the Trial between the Former Manager and the Fund. There is no question that *res judicata* applies to that determination as the issue was before the Court, the parties were the same, the decision was adjudicated on evidence and the decision was final. It was not disputed by the Fund.

> ***Dosen v. Meloche Monnex Financial Services Inc. (Security National Insurance Company*), 2021 ONCA 141 (CanLII), at para 18,**
>
> ***Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 (CanLII), [2001] 2 SCR 460, at para 25,**

17. In its Reply Affidavit, the Fund is now stating that His Honour did not determine the amount of the IPA Payment and that the Former Manager has not quantified its claim for $672,390.61 in its affidavit material.

18. The Former Manager takes the position that:

a. At the Trial, the calculation of the quantum of the value of the IPA Payment was evidenced to be $672,390.61. That quantification is supported by the Former Manager's evidence with respect to the four investments of xKoto Inc., GeminX Biotechnologies Inc., Vitana Corp and Paymentus Corp., which totalled $672,390.61. This calculation found at Exhibit "A" to the Affidavit of Derek Lew, which was also an Exhibit at the trial before Justice Wilton-Siegel; and,

[4] *Supra*, pages 266 ff.

b. In its Submissions at Trial, found in the Affidavit of Ian Ross sworn January 6, 2023 at Paragraph 205, as seen in paragraph 205, the Fund recognizes that the only investments subject to the IPA Payment are: xKoto Inc., GeminX Biotechnologies, Vitana Corporation and Paymentus Corp. These are the same investments that are found on Exhibit "A" to the Derek Lew Affidavit. As such, it is clear that the exact same investments were addressed at Trial.

19. At the Trial, the Fund did not dispute that the Former Manager had earned an IPA payment in the amount of $672,390.61 with respect to the investments xKoto Inc., GeminX Biotechnologies, Vitana Corporation and Paymentus Corp. It cannot now do so on this motion. There has already been a judicial finding with respect to the quantum of the IPA Payment.

Issue Two: Is Growthworks entitled to the IPA Payment on a Dissolution Event?

20. The submissions made by the Fund at the Trial reflect that the disputed issue at the Trial was not quantum, but rather, entitlement.

21. Paragraph 2 of the Judgment expresses that although the Court found that the Former Manager was not entitled to the IPA Payment on termination, the determination of whether the Former Manager would be entitled to that payment on dissolution was expressly left open.

22. There are two basis upon which Growthworks states that it is entitled to the IPA Payment at this time.

23. First, the IPA Payment is reflected on the Financial Statements of the Fund. It is recorded as a debt. As an unsecured debt, it should be paid upon dissolution and termination of the Fund. There is no other or later time that the IPA Payment could be made.

24. In any event, the Former Manager is entitled to the payment, pursuant to Part 4.2(e) of the Certification of Amendment, with respect to the rights that accrue to the IPA Shares that are held

by the Former Manager. The “amount equal to the cumulative dividends to which the holder of the IPA Shares would have been entitled pursuant to paragraph [4](d) above, whether or not dividends were actually declared by the directors” (the Dissolution Amount”) is calculated at $672,390.61.

25. The rights of the Class C Shares/IPA Shares are found in Part 4 of the Certificate of Amendment of the Fund dated November 10, 2003. This document is found at Exhibit "L" of the Ross Affidavit.

26. At the Trial, and in the Reasons, the Court considered Part 4.2(f) of the Certification of Amendment, which addressed payment to the Former Manager of the IPA upon "Manager Termination".

27. The Certification of Amendment specifically contains a provision to deal with payment of a "Dissolution Amount" at Part 4.2(e). What is significant is that the language used under "Manager Termination" is materially different from the language for "Dissolution Amount".

28. Part 4.2(e) provides:

> "Dissolution Amount - Upon a Dissolution Event, the holder of IPA Shares **shall be entitled to receive an amount** equal to the sum of:
>
> a. All declared but unpaid dividends on the IPA Shares; and,
>
> b. **An amount equal to the cumulative dividends to which the holder of the IPA Shares would have been entitled pursuant to paragraph (d) above, whether or not dividends were actually declared by the directors**, assuming that all Venture Investments had been disposed of as of the date of the Dissolution Event at the estimated fair value of such investments calculated in accordance with the Corporations' usual valuation policies.”

29. The material difference in the language between “Manager Termination” and “Dissolution Amount” is in subparagraph (ii). Under Manager Termination in Part 42(f)(ii), the word “dividends” precedes “in an amount equal to”.

30. On a Dissolution Event, the language is different. The amount payable to the Former Manager is not a dividend, but rather "an amount equal to the cumulative dividends". As it is not a dividend, then:

a. It is required to be paid whether or not the dividends were actually declared;, and,

b. the solvency test addressed by the Fund in the Ross Affidavit is not applicable in order for "an amount equal to" to be payable on a Dissolution Event.

31. In subparagraph (ii), there is also reference to the disposition of the Venture Investments. As the IPA has already been earned, and is a liability, this provision is not relevant. The Venture Investments in question and as set out in Exhibit "A" were disposed of prior to the trial and result in the determination of the IPA amount as set out above, the quantum was not challenged by the Fund.

32. There is a difference between the terms "earned" and "entitled". There is no question that the IPA Share payment was earned by the Former Manager. This has been found as a fact by Justice Wilton-Siegel in paragraph 380 of the Reasons.

33. The questions becomes whether now, on a dissolution of the Fund, the Former Manager is "entitled" to receive the payment. Justice Wilton-Siegel found that the Board had "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)", but did not determine whether or not that payment is due to the Former Manager at the time of dissolution, which is determined by different contractual language.

Ventas, Inc. et al. v. Sunrise Senior Living Real Estate Investment Trust et al. **85 O.R. (3d) 254, 2007 ONCA 205 (CanLII)**

Prism Resources Inc. v. Detour Gold Corp. **[2022] O.J. 1996, 2022 ONCA 326 (CanLII)**

Sattva Capital Corp. v. Creston Moly Corp. **2014 SCC 53 (CanLII), [2014] 2 SCR 633,**

34. Having "earned" the monies, which was not disputed by the Fund, it would be inequitable to allow the Fund to distribute the funds without recognizing the entitlement of the Former Manager (on a Dissolution Event) to the amount earned on the IPA Shares.

35. To deny the Former Manager its right as a holder of the IPA Shares to payment of an amount equal to the cumulative dividends owing, while at the same time recognizing the rights of other Shareholders, specifically the Class A and Class B Shareholders, would be not only inequitable but would be an inconsistent treatment by both the Monitor and the Fund, based upon the identity of the holder of the Shares, rather than the rights and entitlements, that accrue to all the Shareholders.

36. It is respectfully submitted that the Fund has not identified any principled basis to treat different classes of Shareholders differently in the circumstances.

37. As such, the Former Manager is entitled to a payment of $672,390.61 on a Dissolution Event.

Issue Three: The IPA Payment be paid to Growthworks Before Any Payment to the Class A or Class B Shareholders

38. As an unsecured debt for a specific amount, as stated in the financial statements of the Applicant, Growthworks should be paid before the distribution of the remainder of the Funds assets to the Class A Shareholders and the Class B Shareholders.

39. The balance of assets available in the Fund after payment of the entitlement of the Former Manager as a result of the Dissolution Event, should be paid *pro rata* to the Former Manager with the Class A Shareholders after the Class B Shareholders.

Part V - Order Requested

40. The Respondent, GrowthWorks WV Management Ltd., respectfully request that the Distribution, Termination and Dissolution Order issue with a payment of $672,390.61, and costs of this motion as this Honourable Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED on this 12th day of January, 2023.

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SCHEDULE "A"

LIST OF AUTHORITIES

1. ***Growthworks WV Management Ltd. v. Growthworks Canadian Fund Ltd.*****, 2018 ONSC 3108 (CanLII)**
2. ***Dosen v. Meloche Monnex Financial Services Inc. (Security National Insurance Company*****), 2021 ONCA 141 (CanLII)**
3. ***Danyluk v. Ainsworth Technologies Inc.*****, 2001 SCC 44 (CanLII), [2001] 2 SCR 460**
4. ***Ventas, Inc. et al. v. Sunrise Senior Living Real Estate Investment Trust et al.*** **85 O.R. (3d) 254, 2007 ONCA 205 (CanLII)**
5. ***Prism Resources Inc. v. Detour Gold Corp.*** **[2022] O.J. 1996, 2022 ONCA 326 (CanLII)**
6. ***Sattva Capital Corp. v. Creston Moly Corp.*** **2014 SCC 53 (CanLII), [2014] 2 SCR 633,**

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Canada Business Corporations Act, RSC 1985, c C-44,

Dividends

42 A corporation shall not declare or pay a dividend if there are reasonable grounds for believing that

(a) the corporation is, or would after the payment be, unable to pay its liabilities as they become due; or

(b) the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities and stated capital of all classes.

GROWTHWORKS WV MANAGEMENT LTD.
Applicant

-and-

GROWTHWORKS CANADIAN FUND LTD.
Respondent

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

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FACTUM OF THE RESPONDENT

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File Number: 17529

RCP-F 4C (September 1, 2020)