

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

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

B E T W E E N :

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

AND IN THE MATTER OF A PLAN  
OF COMPROMISE OR ARRANGEMENT OF  
GROWTHWORKS CANADIAN FUND LTD.

**TWENTY-THIRD REPORT OF**  
**FTI CONSULTING CANADA INC.,**  
**IN ITS CAPACITY AS MONITOR**

February 14, 2019

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1. On October 1, 2013, GrowthWorks Canadian Fund Ltd. (the “**Fund**” or the “**Applicant**”) made an application under the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36, as amended (the “**CCAA**”) and an initial order (the “**Initial Order**”, a copy of which is attached hereto as Appendix “A”) was made by the Honourable Justice Newbould of the Ontario Superior Court (Commercial List) (the “**Court**”) granting, *inter alia*, a stay of proceedings against the Applicant until October 31, 2013, which stay of proceedings was most recently extended until June 30, 2019 (the “**Stay of Proceedings**”), and appointing FTI Consulting Canada Inc. as monitor of the Fund (the “**Monitor**”).
2. The proceedings commenced by the Fund under the CCAA will be referred to herein as the “**CCAA Proceedings**”.

3. The Fund is a labour sponsored venture capital fund that currently has a mature and diversified portfolio (the “**Portfolio**”) consisting primarily of investments made in small and medium-sized Canadian businesses. The Fund was formed in 1988 with the investment objective of achieving long term appreciation for its Class A shareholders, who principally comprise retail investors.

4. Prior to September 30, 2013 and the commencement of these CCAA Proceedings, the Fund’s day-to-day operations with respect to the Portfolio were delegated to GrowthWorks WV Management Ltd. (the “**Former Manager**”) pursuant to a Management Agreement dated July 15, 2006 (“**Management Agreement**”). On September 30, 2013, the Fund terminated the Management Agreement. In 2018 the Fund and the Former Manager were in litigation with respect to, *inter alia*, the termination of the Management Agreement. Those proceedings resulted in the dismissal of the claim of the Former Manager against the Fund, which at the time represented the largest unsecured claim.

5. Following determination by the Court of the Former Manager’s claim, the Fund, with the assistance of the Monitor, will need to resolve any remaining (albeit nominal) claims that were previously filed against the Fund and will need to implement a claims solicitation process for any post-filing claims as well as claims against the directors & officers, although it is anticipated that there will be relatively few claims.

6. Prior to the appointment of the Monitor, the Fund entered into a Share Purchase Agreement with GWC Limited Partnership (the “**GWC Limited Partnership**”) dated December 31, 2012 (the “**Share Purchase Agreement**”) pursuant to which the Fund sold certain securities to GWC Limited Partnership, largely for the benefit of the limited partner of the GWC Limited Partnership, Newbury Equity Partners II L.P (“**Newbury**”). The Share Purchase Agreement is currently the subject of a contractual interpretation dispute between the Fund and Newbury with respect to whether the Fund is entitled to certain proceeds from the disposition by the GWC Limited Partnership of securities of BTI Systems Inc. and OneChip Photonics Inc. (the “**Underlying Securities**”)

## **PURPOSE OF THIS REPORT**

7. The purpose of this twenty-third report of the Monitor is to provide the Monitor's comments on the contractual dispute between the Fund and Newbury in order to provide greater clarity to the Court on this issue.

## **TERMS OF REFERENCE**

8. In preparing this report, the Monitor has relied upon unaudited financial information, other information available to the Monitor, where appropriate the Applicant's books and records and discussions with various parties and the Fund's investment and other advisors.

9. Unless otherwise stated, all monetary amounts contained herein are expressed in Canadian Dollars.

## **BACKGROUND**

10. In 2012, the Fund sold the Underlying Securities to Newbury through GWC Limited Partnership for a purchase price of \$18,409,824. Newbury is the sole limited partner of GWC Limited Partnership.

11. Between December 2012 and July 2015, GWC Limited Partnership was managed by the Former Manager. From July 2015 onward, GWC Limited Partnership was managed by Gilway Capital Ltd. ("**Gilway**"). Mr. Timothy Lee, the president of Gilway, was also an employee of an affiliate of the Former Manager. At the time the Share Purchase Agreement was negotiated, Mr. Lee was working for the Former Manager and the Former Manager was negotiating the Share Purchase Agreement with Newbury on behalf of the Fund.

12. Following the sale by the Fund of the Underlying Securities to GWC Limited Partnership, GWC Limited Partnership was structured such that the Fund was and is entitled to 0.01% of the income and losses of GWC Limited Partnership and Newbury, as the limited partner, is entitled to 99.99% of such income and losses.

## CONTRACTUAL INTERPRETATION DISPUTE

13. The crux of the dispute between the Fund and Newbury concerns the contractual interpretation of section 2.04 of the Share Purchase Agreement, which provides for a payment to the Fund of the sum of \$1,000,000 in certain circumstances. The relevant provision of the Share Purchase Agreement, in which the term "Vendor" refers to the Fund, is replicated in full below:

### 2.04 Deferred Proceeds

If either:

(1) the Partnership or GWC III or any successor thereof, in one or more transactions (including pursuant to any amalgamation, winding-up or dissolution), disposes of the Underlying BTI Securities and/or the GWC III ULC Shares and any Follow-on Securities of BTI or GWC III held by it to a third party, or

(2) the Partnership or GWC IV or any successor thereof, in one or more transactions (including pursuant to any amalgamation, winding-up or dissolution), disposes of the Underlying OneChip Securities and/or the GWC IV ULC Shares and any Follow-on Securities of OneChip or GWC IV held by it to a third party,

(each disposition referred to in (1) or (2) a "**Disposition Event**"),

in either case without any applicable Canadian Exit Tax being incurred by the Partnership or, in the case of Section 2.04(1), GWC III or, in the case of Section 2.04(2), GWC IV, as applicable, or any successor thereof

and either

(a) the Partnership, GWC III or GWC IV, as applicable, or any successor thereof distributes the proceeds from such disposition or dispositions (whether or not the amount so distributed is net of any costs (other than applicable Canadian Exit Tax) or expenses incurred in connection therewith or otherwise) to the Limited Partner without any applicable Canadian Exit Tax being incurred, or

(b) the Partnership, GWC III or GWC IV, as applicable, or any successor thereof could, at the time of the completion of such disposition or dispositions, have made such a

distribution to the Limited Partner without any applicable Canadian Exit Tax being incurred,

then the Partnership will, within two (2) Business Days of the occurrence of a Disposition Event, concurrently give written notice of such occurrence to the Vendor and pay to the Vendor or as the Vendor may in writing direct the sum of \$1,000,000 (the "**Deferred Proceeds**"), such amount to be payable in immediately available funds to an account specified by the Vendor or as the Vendor may in writing direct. For greater certainty, (i) the Deferred Proceeds, if any, can only be paid once in respect of a disposition of the Underlying BTI Securities and/or the GWC III ULC Shares and subsequent distribution of proceeds and once in respect of a disposition of the Underlying OneChip Securities and/or the GWC IV ULC Shares and subsequent distribution of proceeds, and (ii) the obligations of the Partnership under this Section 2.04 to pay Deferred Proceeds are not contingent on a Disposition Event occurring in respect of an event described in both Sections 2.04(1) and 2.04(2).

14. Canadian Exit Tax is defined in section 1.01 of the Share Purchase Agreement as follows:

**"Canadian Exit Tax"** means, without duplication, (i) the Taxes, if any, imposed under the laws of Canada and the provinces thereof on taxable capital gains or income realized by the Partnership on the sale of any ULC Shares, Underlying Securities or any Follow on Securities and by the Corporations on the sale of any Underlying Securities or any Follow-on Securities, and (ii) withholding Taxes under Part XIII of the Tax Act imposed on any holder of limited partnership interests in the Partnership, non-voting securities of the Corporations, or a successor thereof in respect of any amounts paid or credited by Corporations, or any successor thereof, to the Partnership or to any holder of limited partnership interests in the Partnership or non-voting securities of a Corporation.

15. In the Monitor's view, the clear contractual language of the aforementioned provision would suggest that upon: (i) a disposition of the Underlying Securities; and (ii) a distribution to Newbury of the proceeds of such disposition (or where a distribution of the disposition of the proceeds could have been made), then, provided in each case that there is no Canadian Exit Tax (capital gains, income or withholding tax) incurred by either GWC Limited Partnership or Newbury (or the applicable holding companies- GWC III or GWC IV (as each are defined in the Share Purchase Agreement)), then GWC Limited Partnership is required to pay to the Fund the sum of \$1,000,000.

16. The Monitor has been advised by the Fund that all preconditions to the payment of the \$1,000,000 (the “**Deferred Proceeds**”) pursuant to section 2.04 were satisfied in that: (i) GWC Limited Partnership disposed of the Underlying Securities; (ii) the proceeds from such disposition have been distributed or could have been distributed to Newbury; and (iii) no Canadian Exit Tax was incurred by GWC Limited Partnership or Newbury.

17. The Monitor and its counsel have read the materials filed by the Fund, Newbury and 2638475 Ontario Inc. (the current general partner of GWC Limited Partnership), including the affidavit of Mr. Tim Lee sworn December 21, 2018. These materials and affidavits raise a number of disputed issues. However, in the view of the Monitor, these disputes are not relevant to the main issue of importance, namely, the contractual interpretation of section 2.04 of the Share Purchase Agreement which determines whether GWC Limited Partnership owes the Fund the Deferred Proceeds amount.

#### **BREACH OF THE STAY OF PROCEEDINGS**


18. The Monitor understands that the Fund’s claim includes a breach of the Stay of Proceedings imposed in these CCAA Proceedings as a result of Newbury’s removal of GWC GP Inc. (a company controlled by the Fund) as the general partner of GWC Limited Partnership. Newbury disputes that the removal of the general partner was a breach of the Stay of Proceedings. This issue is not addressed herein, as the main issue effecting the recovery to Fund shareholders is the contractual interpretation issue referenced above.

The Monitor respectfully submits to the Court this Twenty-Third Report.

Dated this 14th day of February 2019.

FTI Consulting Canada Inc.

In its capacity as Monitor of GrowthWorks Canadian Fund Ltd. and not in its personal or corporate capacity

A handwritten signature in black ink, appearing to read "Paul Bishop". The signature is written in a cursive, flowing style.

Paul Bishop  
Senior Managing Director

## APPENDIX “



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Proceeding commenced at Toronto

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**IN ITS CAPACITY AS MONITOR**

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