CITATION: Growthworks Canadian Fund Ltd. (Re), 2014 ONSC 1856
COURT FILE NO.: CV-13-10279-00CL
DATE: 20140324

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO Growthworks Canadian Fund Ltd., Applicant

BEFORE: D. M. Brown J.

COUNSEL: K. McElcheran, for the Applicant, Growthworks Canadian Fund Ltd.

J. Dacks, for the Monitor, FTI Consulting Canada Inc.

R. Slaght and I. MacLeod, for Allen-Vanguard Corporation

T. Conway and J. Leon, for the Offeree Shareholders in Ottawa Court Files Nos. 08-CV-43188 and 08-CV-43544

HEARD: February 11, 2014

REASONS FOR DECISION

I. Lift stay and contingent claim process motions in a *CCAA* proceeding

[1] Two events form the backdrop to these competing motions. First, the October, 2007 closing of the sale of shares in Med-Eng Systems Inc. to Allen-Vanguard Corporation ultimately spawned two 2008 lawsuits up in Ottawa: one initiated by the selling shareholders (the "Offeree Shareholders") (Action No. 08-CV-43188: the "Offeree's Action"), and one by the purchaser (08-CV-43544: the "AVC Action"), collectively the "Ottawa Proceedings". Some 5.5 years after their commencement, the Ottawa Proceedings have not yet gone to trial. Indeed, they have not been set down for trial.

[2] Growthworks Canadian Fund Ltd. ("Growthworks" or the "Fund") was one of the selling shareholders of Med-Eng Systems and is a party to the Ottawa Proceedings, which brings me to the second event. On October 1, 2013, Newbould J. granted an initial order in Growthworks' application under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. Paragraph 14 of the Initial Order contained the standard Model Order stay provision which ordered that:'

> no proceeding…in any court…shall be…continued against…the Applicant…or affecting the Business or the Property, except with the written consent of the Applicant and the Monitor, or with leave of this Court, and any and all Proceedings currently under way

against or in respect of the Applicant or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

[3] Against that background, the parties brought two competing motions in the *CCAA* proceeding. First, Allen-Vanguard Corporation ("AVC") moved for an order that the stay of proceedings under the Initial Order did not apply to the continuation of the Ottawa Proceedings or, alternatively, for an order that the stay of proceedings had no effect on the continuation of the Ottawa Proceedings "against or in respect of any other party named therein, except for Growthworks…on such terms as are just".

[4] On its part, Growthworks moved for orders directing the trial of two issues in respect of AVC's claim against it by way of a mini-trial, making the determination of those issues binding on AVC and the Offeree Shareholders for all purposes, and restraining AVC from taking any steps in the AVC Action that would affect Growthworks in any way. The two issues for which Growthworks seeks a determination at a mini-trial are the following:

(i) Were the claims of AVC extinguished at law when it amalgamated with Allen-Vanguard Technologies Inc., formerly Med-Eng Systems Inc., on January 1, 2011? and,

(ii) Assuming that AVC is capable of proving fraud on the part of the former management of Med-Eng, is AVC entitled under the August 3, 2007 Share Purchase Agreement to seek damages from Growthworks and the other Offeree Shareholders in excess of the "Indemnification Escrow Amount" for the alleged breaches and misrepresentations of Med-Eng?

I will refer to these two issues as the "Proposed Claims Issues".

[5] At the hearing of the motion I informed counsel that I would contact RSJ Hackland in Ottawa to ascertain the state of the trial list there. I did so. On March 17, 2014, I received an email from Monitor's counsel advising that McEwen J. had extended the *CCAA* stay of proceedings until April 10, 2014 and informing me about the Sixth Report of the Monitor posted on its website. I have read that report and other court materials posted by the Monitor on the case website. On March 17, 2014, I received an email report from Master MacLeod regarding a case conference held that day in the Ottawa Proceedings, which I forwarded to counsel.

II. Growthworks Canadian Fund Ltd. and its initiation of *CCAA* proceedings

[6] Formed in 1988, Growthworks is a labour-sponsored retail venture capital fund with an investment portfolio focused on small and medium-sized Canadian businesses. Growthworks filed for *CCAA* protection because it could not make a $20 million payment obligation to Roseway Capital S.a.r.l. due on September 30, 2013 under its May, 2010 Participation Agreement with Roseway. The Fund's debt to Roseway is its only outstanding secured debt. Growthworks informed the court that it lacked access to short-term financing and would have difficulty realizing upon assets in its portfolio because of their illiquidity consisting, as they did, of minority equity positions in private companies and restricted equity securities in a publicly traded company. Nevertheless, as of September 30, 2013, the total net asset value of the Fund was about $84.62 million, with assets of approximately $115 million.

[7] Ian Ross, the Fund's Chair, in his September 30, 2013 affidavit sworn in support of the Initial Order, explained why Growthworks needed the benefit of a stay of proceedings:

> If the Fund is protected from the negative effects of a fire sale of its assets by a stay in these proceedings, and if it is able to continue to service its Venture Portfolio to preserve the value of its assets pending a restructuring, the Fund expects to be able to satisfy the obligations owing to Roseway in full through a combination of judicious dispositions, new debt financing and/or a merger or other transaction.
>
> The Fund has been in serious discussions with a possible merger partner and has received a letter agreement setting out a proposed transaction…A stay of proceedings would permit the Fund time to continue discussions with the merger partner, with the goal of a successful merger transaction, while at the same time enabling it to explore other options without the threat of a forced sale of its interests and related losses.
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> …
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> [T]he Fund seeks the protection of the Court pursuant to the [*CCAA*], including a stay of proceedings, 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 and GWC as needed to provide transitional services that enable the Fund to continue to operate and service its Venture Portfolio pending such a restructuring.

In his discussion about why the Fund required a stay of proceedings Ross did not refer to the Ottawa Proceedings.

[8] Ross appended to his affidavit filed in support of the Initial Order the 2012 audited financial statements of the Fund (as of August 31, 2012). Those statements did not refer specifically to the Ottawa Proceedings. Note 10, dealing with "Contingencies", stated:

> In the normal course of operations, various claims and legal proceedings are initiated against the Fund. Legal proceedings are often subject to numerous uncertainties and it is not possible to predict the outcome of individual cases. In management's opinion, the Fund has made adequate provision or has adequate insurance to cover all claims and legal proceedings. Consequently, any settlements reached should not have a material effect on the Fund's net assets.

[9] The stay of proceedings granted under the Initial Order ran until October 31, 2013. Growthworks moved to extend the stay period until January 15, 2014. In his October 25, 2013 affidavit in support of that extension Ross reported on the Fund's on-going efforts to finalize and execute a merger agreement with a potential merger partner by November 15, 2013. Ross stated: "[O]ne of the elements of that transaction will be the ability for the Fund to canvass the market to seek competing bids…in an attempt to identify a superior offer to any merger transaction". Ross made no mention of the Ottawa Proceedings in that affidavit.

[10] In its First Report (October 8, 2013), the Monitor stated that "there are no known creditors of the Fund who have a claim of more than $1,000..." Neither the Monitor's First Report nor its Second Report (October 28) mentioned the Ottawa Proceedings.

[11] On October 28, the day before the stay extension hearing, AVC delivered its motion materials seeking relief in respect of the Ottawa Proceedings. The hearing of that motion ultimately was adjourned to February 11, 2014. I will turn shortly to the subject-matter of the Ottawa Proceedings, but first it would be worthwhile to provide an overview of how the *CCAA* proceeding has unfolded since October 29, 2013, because that history provides a necessary part of the context for consideration of the competing motions.

[12] First, by order made October 29, 2013, Mesbur J. extended the stay period until January 15, 2014.

[13] Next, by order made November 18, 2013, Morawetz J. approved a sale and investor solicitation process ("SISP") for all of the Fund's property which used a Phase 1 Bid Deadline of December 13 and a final, Phase 2 Bid Deadline of roughly late January or early February, 2014. Running the second phase depended upon receipt of a qualified letter of intent in Phase 1 and a determination by the Fund's special committee of directors that there existed a reasonable prospect of obtaining a qualified bid.

[14] In its Third Report (November 15) dealing with the SISP motion, the Monitor commented on the Ottawa Proceedings:

> The outcome of this dispute could potentially impact the timing of distributions from any proceeds realized in the SISP process to stakeholders other than Roseway. Accordingly, it is the view of the Fund and the Monitor that this limited issue should be resolved quickly.

[15] By order made November 28, 2013, Mesbur J. authorized Growthworks to make distributions of collateral to Roseway under its security agreement and to repay Roseway from any proceeds of the SISP, subject to the payment of certain priority payables.

[16] By order made January 9, 2014, McEwen J. extended the stay period to March 7, 2014 and approved a claims process (the "Claims Procedure Order"). According to the affidavit filed by Ross, the Fund proposed a claims process to identify and ultimately quantify and adjudicate claims against the Fund "to provide potential bidders with clarity, to the extent required for the form of transaction they may propose, regarding the claims against the Fund". In his affidavit Ross explained in some detail why the Fund thought clarity about claims was "important and likely essential for any proposed merger transaction":

> [A]ny potential merger partner (and possibly other bidders depending on the type of transaction proposed) will want to identify the claims against the Fund and either adjudicate and quantify such claims prior to closing or specifically identify the disputed and undisputed claims and address them in their bid.
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> ...

> Accordingly, identifying the disputed and undisputed claims against the Fund may be required shortly after the Phase 2 Bid Deadline, depending on the form of transaction identified and the closing date of any such transaction.
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> ...
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> The timely identification of claims against the Fund is also important for the restructuring process generally and for the Fund's stakeholders, in particular, in order to permit distributions to be made (beyond distributions to Roseway Capital S.a.r.l... in relation to its agreed upon secured obligations) to the extent possible.

[17] Ross identified two types of known claims against the Fund. First, Roseway and the Fund's manager were asserting contractual claims. Second, the Fund was named as defendant in two lawsuits – the AVC Action in which $650 million was claimed, and a Nova Scotia proceeding in which AGTL Shareholders claimed $28 million in damages from the Fund.

[18] The approved claims process set March 6, 2014 as the claims bar date. The process required the filing of proofs of claim with the Monitor, review by the Monitor, and a dispute resolution process before the Monitor with the Monitor able to seek directions from the court concerning an appropriate process to resolve the dispute. The AVC claim received separate treatment in the Claims Procedure Order, with the order deeming AVC to have submitted a proof of claim in the amount of $650 million (the "AVC Claim"), deeming the Monitor to have disallowed the claim, and deeming AVC to have submitted a dispute notice. The order stated that the procedure for determining the AVC Claim would not be determined until after the determination of the two present motions "or by further Order of the Court".

[19] The AVC and Growthworks motions were heard on February 11, 2014.

[20] Finally, by order made March 6, 2014, McEwen J. extended the stay period until April 10, 2014. On that motion the Fund reported that by the SISP's final deadline it had received two proposals, but neither was a qualifying bid that would pay in full and in cash the claims of Roseway. Growthworks did not receive an offer to complete a merger transaction, only a bid to purchase a portion of the Fund's assets and one to take over management of the portfolio. In his supporting affidavit Ross deposed that the Fund was recommending that it continue to manage and realize its assets to repay Roseway and to preserve value for other stakeholders. The Fund advised that it would discuss with Roseway "an appropriate cost reduction and asset management proposal" and it sought an extension of the stay period to allow the Fund to develop a management arrangement, identify exit opportunities to realize on the value of its investments, and assess and address tax implications for its shareholders.

[21] In its Sixth Report (March 5) the Monitor provided additional details about the SISP process: it had seen overtures to 157 parties, the execution of confidentiality agreements by 55 parties, 36 of whom were deemed to be qualified bidders and who had received a confidential information memorandum, with 30 bidders gaining access to the electronic data room. In Phase 1 seven (7) letters of intent were received and six of the parties were invited to participate in Phase 2. By the Phase 2 deadline only two proposals had been received, neither of which constituted qualified bids, and neither of which was pursued. The Monitor made no suggestion

that the existence of unresolved claims against the Fund, including the AVC Claim, had influenced the results of the SISP.

[22] The Monitor also reported that since there was no deadline by which it was required to review and adjudicate received proofs of claim, it would:

> use its discretion to respond to and, if necessary, adjudicate disputed claims only when and if circumstances necessitate doing so. Other than in accordance with the Claims Procedure, the Monitor does not anticipate responding to or adjudicating disputed claims until such time as Roseway is paid in full and there are, or are likely to be, remaining funds for distribution to unsecured creditors of the Fund.

[23] So, there sits the Fund's *CCAA* proceeding. Let me now turn to consider the dispute involving AVC.

III. The Med-Eng share sale

[24] Growthworks, Schroder Venture Managers (Canada) Limited, Schroder Ventures Holding Limited, Richard L'Abbé and 1062455 Ontario Inc. (collectively the "Offeree Shareholders") owned approximately 80% of the shares of Med-Eng; Growthworks held about 12.4% of the Med-Eng shares.

[25] By Share Purchase Agreement made as of August 3, 2007, the Offeree Shareholders sold their shares in Med-Eng to AVC for about $650 million. The transaction closed on September 17, 2007, with the Fund receiving about $72 million for its 12.4% shareholding. Shortly thereafter Med-Eng was amalgamated with Allen-Vanguard Holdings Ltd., which changed its name the following year to Allen-Vanguard Technologies Inc. ("AVTI"), which ultimately merged with AVC on January 1, 2011.

[26] The SPA included an Escrow Agreement which provided that $40 million of the purchase price paid by AVC was to be held in escrow to indemnify AVC should certain types of claims arise (the "Indemnification Escrow Amount"). Section 4.1(a) of the Escrow Agreement stipulated that if AVC was entitled to indemnification in accordance with sections 7.02 or 7.04 of the SPA, it could draw upon the Indemnification Escrow Amount for such claims. Section 7.02 of the SPA specified the circumstances in which Med-Eng was required to indemnify AVC from claims incurred by the purchaser resulting from Med-Eng's breach of covenants, certain reps and warranties, or breach of a Teaming Agreement. Section 7.04 dealt with third party indemnification.

[27] Section 7.02(2) placed a $40 million cap, or limit, on the amount for which AVC could seek indemnification under section 7.02:

> 7.02(2) Notwithstanding any of the other provisions of this Agreement, the Corporation will not be liable to any Purchaser Indemnitee in respect of:
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> ...

> (b) any inaccuracy or misrepresentation in any representation or warranty set forth in Section 3.01 or any contravention of, non-compliance with or other breach, on or before the Closing Date, of the GD Teaming Agreement:
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> ...
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> (ii) in excess of the Indemnification Escrow Amount;
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> other than, in all cases, any Claim attributable to fraud.

[28] The Escrow Agreement provided that on December 21, 2008, the Indemnification Escrow Amount was to be reduced by the value of any claims made by AVC under SPA ss. 7.02 and 7.04 which remained pending as of that date, with the balance of the amount to be distributed to the Offeree Shareholders.

[29] On September 10, 2008, about a year after the closing, AVC delivered a notice of claim under the SPA and Escrow Agreement alleging breaches of representations and warranties, and contending that the aggregate amount of its claims was $40 million. AVC did not break-down the dollar amount of its claim by category of alleged breach. On October 6, 2008, the Offeree Shareholders delivered a notice of objection.

[30] Litigation then ensued.

IV. The Ottawa Proceedings

A. The Offeree's Action

[31] First to file were the Offeree Shareholders who issued their Statement of Claim in the Offeree's Action on November 12, 2008 seeking a declaration that they were entitled on December 21, 2008 to the payment and distribution of the Indemnification Escrow Amount of $40 million. AVC and AVTI filed a statement of defence dated December 18, 2008.

B. The AVC Action

[32] Instead of filing a counter-claim in the Offeree Action, AVC commenced its own action on December 18, 2008 seeking:

> Indemnification and/or damages for fraudulent and/or negligent misrepresentation and breach of contract in the amount of $40,000,000, which shall be distributed to Allen-Vanguard Corporation in accordance with the terms of the Escrow Agreement.

The Offeree Shareholders defended on February 10, 2009.

[33] As originally framed, both actions put in play entitlement to the $40 million Indemnification Escrow Amount, and Growthworks was not exposed to any liability beyond foregoing its notional *pro rata* share of the funds held in escrow.

C. History of the Ottawa Proceedings: 2009 - 2013

[34] On these motions the parties filed evidence describing the (slow) progress of the Ottawa Proceedings. The slow pace to date of the Ottawa Proceedings will inform, in part, my exercise of discretion under the *CCAA*, so let me highlight the key points.

[35] The proceedings went into case management in September, 2009 at which time the court ordered productions to be completed by the end of that year. That did not occur. In February, 2010 Master MacLeod was continuing to order AVC to complete its productions.

[36] He also ordered the parties to agree on dates in June, 2010 for the start of discoveries. That did not occur. The first discovery did not start until December, 2010. Most discoveries were completed by the summer of 2011, with a few further days of examination of AVC's representative in late 2012 and early 2013. To date the scorecard of examination dates has been: 21 days of examination of AVC's representative, 6 days of Schroder Venture, 1 day for Richard L'Abbé, 2 days for 1062455 Ontario, and one (1) day for Growthworks' representative, for a total of 31 days of examinations for discovery. As put by David Luxton, AVC's chair, in his affidavit in support of AVC's motion:

> The single day of discovery of Richard Charlebois (a retired employee of Growthworks Capital Ltd.) reflects the very limited involvement and role of Growthworks in the litigation.

[37] I highlight these delays in productions and discoveries not to ascribe blame to one side or the other – Master MacLeod has commented on the conduct of some parties during the course of his various decisions - but to illustrate the on-going non-compliance with judicial case management timetables which, in turn, causes me to discount representations made on these motions about the feasibility of quickly moving the Ottawa Proceedings to trial. The track record of these proceedings cannot support such optimism.

[38] On September 10, 2008, AVC defended a separate, earlier action brought by Paul Timmis, a former executive with Med-Eng, in respect of an escrow fund related to his compensation. Master MacLeod in Ottawa case managed both the Ottawa Proceedings and the Timmis action.

[39] By case conference endorsement made April 16, 2012, Master MacLeod ordered that a 10-week trial of the Ottawa Proceedings commence September 3, 2013, and he issued detailed and comprehensive pre-trial management directions to ensure that the parties would meet that trial date. On December 4, 2012, Master MacLeod confirmed that the Offeree Action and AVC Action would be tried together, and his order contemplated the conduct of discoveries in the Timmis proceeding in January, 2013. (The materials did not explain why, given that the Timmis Action pre-dated the commencement of the Ottawa Proceedings, AVC only got around to conducting substantive examinations of Timmis after most of the discoveries had been completed in the Ottawa Proceedings.)

[40] As a result of its examination for discovery of Timmis in late December, 2012 and early January, 2013, AVC sought to make radical changes to its Statement of Claim in the AVC Action. I say radical because AVC increased its claim for damages from the $40 million

Indemnification Escrow Amount to $650 million, essentially asking for the return of the purchase price under the SPA. AVC alleged that the former management of Med-Eng had known, before the closing, that one of the company's largest customers intended to test a Med-Eng product against that of a competitor, yet deliberately withheld that information in order to ensure AVC completed the share purchase transaction. Although its initial claims had included one for indemnification based on fraudulent misrepresentation, AVC moved to add a second fraudulent misrepresentation claim.

[41] On February 19, 2013, Master MacLeod granted AVC leave to issue its proposed amended statement of claim. The Offeree Shareholders appealed. By reasons dated May 22, 2013, RSJ Hackland dismissed their appeal. The amended statement of claim was issued on June 11, 2013. Inexorably the September 3, 2013 trial date went out the window, as Master MacLeod directed in his May 30, 2013 endorsement. As Master MacLeod pointed out, in an understated fashion: "I see no option but to adjourn the matter if it is the intention of the parties to try all of the issues".

[42] It is worth considering parts of the analysis undertaken by RSJ Hackland in his reasons dismissing the appeal. He described the significance of the proposed amendments:

> The Master was well aware of the fact that the amendment if granted would expose the Med-Eng shareholders to potential liability for the full purchase price of the business and not simply for their respective interests in the $40 million holdback fund created on closing in order to secure any possible claims for misrepresentation and breach of warranty, as provided for in an escrow agreement. *The amendment in issue is indeed potentially "game changing"*, as the Master observed.[1]

He then commented on the essential nature of the amended claim:

> On the facts of this case, it is common ground that *all of the critical representations and warranties were given by Med-Eng management on behalf of the corporation being acquired and not by the vendors, the offeree shareholders…*
>
> It would appear to be common ground in this case that *any liability on the part of the vendor shareholders could only be based on an obligation arising from the Share Purchase Agreement in the context of fraud.* As the Master accurately observed, the effect of this amendment to the pleading will be totally dependent on proving fraud…[2]

RSJ Hackland agreed with the analysis conducted by Master MacLeod:

> I respectfully agree with the Master's analysis, which is captured in paragraph 22 of his careful reasons:

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[1] 2013 ONSC 2950, para. 2 (emphasis added).
[2] *Ibid.*, paras. 4 and 5 (emphasis added).

> Since there is no fraud asserted against any defendant offeree shareholder, the defendants contend that this provision in article 7.02 (5) is a complete defence to a claim beyond the $40 million in the escrow fund. *They may be right.* Mr. Conway puts this argument persuasively and it is consistent with the intent of the agreement to limit the exposure of the vendors. Nevertheless I am not able to say with certainty that this is the only possible interpretation of the agreement. Mr. Lederman argues that no court can condone an interpretation which would unjustly enrich the former shareholders at the expense of the plaintiff if it was a victim of fraudulent misrepresentation. *There is sufficient ambiguity in these interrelated provisions that I am unable to find only one possible interpretation of the contract. I cannot say that on the face of the agreement the plaintiff could never succeed.*[3]
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> ...
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> Like the Master, *I cannot say that the proposed amendment was untenable in the sense that it could never succeed.* And I specifically do not accept the appellants' submission that it was an error of law for the Master to fail to articulate the specific ambiguity in the Share Purchase Agreement on which the respondent's amendment could succeed.[4]

[43] It is also worth noting several of the observations made by Master MacLeod in his May 30, 2013 endorsement adjourning the trial of the Ottawa Proceedings:

> [6] ...[T]he amendment effects a fundamental change to the exposure of the offeree shareholders and it also adds issues that were either not before the court previously or which now attract enhanced significance.
>
> [7] For example, it is now pleaded that the misrepresentations of Med-Eng and the completion of the purchase based on those misrepresentations caused Allen-Vanguard to spiral into insolvency...
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> [8] On the other hand there was some discussion at the hearing concerning the possibility of bifurcating the trial and [counsel for the Offeree Shareholders] wishes to bring a summary judgment motion. *I have ruled that it is not possible based on the wording of the SPA alone to determine that there are no circumstances that would permit recovery of more than $40 million from the offeree shareholders. RSJ Hackland has come to the same conclusion. In his decision he notes that it may be necessary to consider parol evidence.* Of course the admission of parol evidence requires that the court first find that the exceptions to the "parol evidence rule" apply and the nature and extent of the evidence that will then be admitted is itself open to argument. I am included to agree with the submissions of Mr. Slaght that it is quite unlikely that a judge will make that kind of decision on a summary judgment motion.

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[3] *Ibid.*, para. 7 (emphasis added).
[4] *Ibid.*, para. 9 (emphasis added).

> [9] *On the other hand it might be possible to try that question. The question is whether or not the SPA caps the liability of the offeree shareholders even if there was fraud providing it is not fraud on the part of those shareholders. Counsel could agree to try that issue.*
>
> [10] There are other threshold questions. Allen Vanguard must prove that there were misrepresentations. They must prove that the misrepresentations were relied upon and that it was reasonable to do so in the face of Allen-Vanguard's own due diligence. In order to have any possibility of a claim above the amount in the escrow fund they must prove that the misrepresentations were fraudulent. Losing on any one of those issues is either fatal or would confine the remedy to the escrow fund.

[44] Luxton, in his October 28, 2013 affidavit, clarified the nature of AVC's amended claim against Growthworks:

> Allen-Vanguard has not alleged that Growthworks made any fraudulent misrepresentations, but rather that it is liable (along with the other Offeree Shareholders) *under the terms of the Share Purchase Agreement* for the fraudulent misrepresentations committed by [Med-Eng] and its former management… (emphasis added)

[45] The Offeree Shareholders filed an Amended Statement of Defence (June 28, 2013) and AVC delivered a Reply (August 22, 2013). Five weeks later Growthworks obtained the *CCAA* Initial Order.

[46] On October 2, 2013, Master MacLeod set December 10 as the date for a privilege motion in the Ottawa Proceedings and advised that RSJ Hackland would hear a summary judgment motion by the Offeree Shareholders. Evidently the existence of the Initial Order was not disclosed at that case conference, and it appears that none of the counsel present at that case conference knew about it.

[47] In subsequent correspondence with Master MacLeod, counsel for the Offeree Shareholders, including Growthworks, took the position that his clients would not be delivering any motion materials in light of the stay of proceedings in the Initial Order until issues with Growthworks were sorted out in the *CCAA* proceeding.

[48] Paul Echenberg, the President of a firm advising the Offeree Shareholders in the Ottawa Proceedings, expressed the view in his November 24, 2013 affidavit that those proceedings were "nowhere ready for trial", an assessment that I accept as reasonably accurate. The evidence filed on these motions disclosed that production, discovery, refusals and privilege issues remain outstanding in the Ottawa Proceedings. That state of affairs was confirmed by the information provided by Master MacLeod in his March 17, 2014 email report to me, which I circulated to counsel:

> Ordinarily if such a trial is then adjourned because the timetable goes awry we will not provide a new fixed date until at least one of the parties is in a position to set the matter down. We have not reached that point. In fact there are motions contemplated which would make that unlikely and our current timetable has been put on hold due to the allegation in Toronto that everything about the Ottawa action is currently stayed.

> All that said, it remains theoretically possible in the view of the regional manager to accommodate a 10 week trial in 2014 particularly, if as I suspect, another long civil trial currently on the list has settled in whole or in part. *I would be very surprised however if either counsel for the offeree shareholders or counsel for Allen-Vanguard is prepared (or able) to set the Ottawa action down and certify that they are ready for trial at this time.* It would be possible to accommodate a trial of 10 weeks in early 2015 or in the fall of that year. (emphasis added)

My inquiries to RSJ Hackland about the availability of trial dates yielded similar information. Realistically, then, the Ottawa Proceedings will not proceed to trial until sometime in 2015 and continued litigation skirmishing between the parties might well push that date back further if past history is any indicator of future conduct.

V. Positions of the parties

[49] Growthworks, supported by the other Offeree Shareholders, seeks the holding of a "mini-trial" on the two Proposed Claims Issues in the context of its *CCAA* proceeding. It offered some details on how such a "mini-trial" would operate. Growthworks would file affidavit evidence on the process of negotiating the SPA. Specifically, it would tender evidence from:

(i) Robert Chapman, a lawyer at McCarthy Tetrault involved in negotiating and drafting the SPA;

(ii) Cécile Ducharme, an advisor to Schroder Venture Managers (Canada) Ltd. who provided instructions to Chapman on behalf of some Offeree Shareholders during the negotations; and,

(iii) Paul Echenberg, who would discuss some of the positions taken by Offeree Shareholders during the SPA negotiations.[5]

In addition, the Fund would file documentary evidence on two issues: (i) the history of AVC's amalgamations; and, (ii) evidence that during its own 2009 – 2010 *CCAA* proceeding AVC did not suggest that it had a potential claim of $650 million against the Offeree Shareholders;

[50] On its part, AVC opposed the continuation of the stay as against the Ottawa Proceedings arguing that that litigation would not affect the Fund's ability to continue its business or to restructure and that Growthworks would have "very limited involvement in the litigation with" AVC. That said, AVC did not back down from its pleaded position that the Fund's maximum exposure in the AVC Action would be joint and several liability for the full $650 million damage claim.

[51] As to the "mini-trial" proposed by Growthworks, AVC argued that it (i) would not finally dispose of the dispute between the parties, (ii) would result in additional litigation costs, perhaps

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[5] I make no comment on the admissibility of any part of that proposed evidence.

in the range of hundreds of thousands of dollars, (iii) could not be completed within one week, but would require three weeks, (iv) would require an examination of AVC's allegations of fraud in order to interpret provisions of the SPA, albeit AVC couched this part of its argument in terms of the "factual matrix" necessary for contractual interpretation, and (v) would unfairly restrict AVC's rights of appeal. AVC did not describe the type of evidence it might call on a "mini-trial", which I must confess was quite unhelpful given that the issue was four-square on the table in these motions. Instead, AVC proposed that the most efficient way of proceeding was to bifurcate the liability and damages issues in the Ottawa Proceedings and "secure an early trial date for the liability trial". Luxton deposed:

> The bottom line is that this case is ready to proceed to trial on all of the liability issues and there is no practical reason why it should not proceed.

I do not accept Luxton's assessment; it is belied by the evidence of the history of the Ottawa Proceedings to date.

VI. Analysis

A. What the parties really are seeking on their motions

A.1 AVC really is asking to lift the stay of proceedings in respect of the Ottawa Proceedings

[52] AVC submitted that it was not moving to lift the *CCAA* stay of proceedings, but "rather to confirm that the stay imposed by the Initial Order will not be extended to apply to the Allen-Vanguard Proceedings". The simple response to that submission is that the Initial Order, by its terms, applied to the Ottawa Proceedings, at least to the extent of the Fund's involvement in them. Paragraph 14 of the Initial Order could not be clearer:

> [A]ny and all Proceedings currently under way against or in respect of the Applicant or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

Growthworks is a party to the Offeree Action and the AVC Action. Both are proceedings "in respect of the Applicant or affecting the Business or the Property". Both therefore are stayed in respect of the participation of Growthworks in those proceedings. Master MacLeod accurately summarized the effect of the stay of proceedings in paragraphs 3 through 5 of his November 12, 2013 endorsement.

[53] Although the stay does not extend, by its terms, to a person other than Growthworks – and no request was made to extend the Initial Order to non-parties – the practical consequence of the pleading of joint and several liability underpinning AVC's claim against Growthworks is that it is most difficult for the Ottawa Proceedings to move forward without the Fund's involvement, and AVC is not abandoning its joint and several liability claim against the Fund.

[54] Accordingly, although AVC sought, as its primary relief, an order that the stay of proceedings in the Initial Order did not apply to the continuation of the Ottawa Proceedings, I

regard its request as one, in substance, to lift the stay of proceedings in respect of Growthworks' involvement in the Ottawa Proceedings – i.e. the Fund's potential liability in those proceedings.

[55] AVC sought, by way of alternative relief, an order confirming that the stay had no effect on the Ottawa Proceedings in respect of any party other than Growthworks. The Initial Order did not purport to stay any proceeding except one "against or in respect of" the Fund or "affecting the Business or the Property". So, AVC's articulation of its alternative relief does nothing more than describe the actual scope of the stay in the Initial Order. Yet, based on the evidence filed by AVC, it really is not seeking the alternative relief because it wants to proceed to a full, traditional, expensive, conventional trial against all Offeree Shareholders, including Growthworks, and it wants any finding of liability and damages to bind Growthworks. As a practical matter, then, one must treat AVC's motion as a request to lift the stay of proceedings against Growthworks.

A.2 Growthworks really is asking for a two-stage claims process under the *CCAA*

[56] Looked at one from one perspective, one could regard the Fund's request for a "mini-trial" within the *CCAA* proceeding as nothing more than an attempt to re-schedule its proposed summary judgment motion in the Ottawa Proceedings from a judge in Ottawa to a judge on the Toronto Region Commercial List. Indeed, Echenberg contended that the proposed mini-trial would deal with the same issues as those in the intended summary judgment motion which RSJ Hackland is scheduled to hear. If the request was based on nothing more than that, it would be a misuse of the *CCAA* process. But, the record disclosed that more was at play on the Fund's motion.

[57] Growthworks did secure protection from this Court under the *CCAA* and this Court has made a Claims Procedure Order. That order referred the issue of the process to determine the AVC Claim to a later consideration by this Court. Section 20(1)(a)(iii) of the *CCAA* provides that the amount represented by a claim of any unsecured creditor is the amount "proof of which might be made under the *Bankruptcy and Insolvency Act*". Section 121(2) of the *BIA* requires that the determination whether any contingent claim is a provable claim and the valuation of such a claim must be made in accordance with *BIA* s. 135. Section 135(1.1) of the *BIA* requires a trustee to determine whether any contingent claim is a provable claim and, if it is, to value it. *CCAA* s. 20(1)(a)(iii) modifies that process because it states that if the amount of a provable contingent claim "is not admitted by the company, the amount is to be determined by the court on *summary application* by the company or by the creditor".

[58] Against that statutory background, I regard the motion brought by Growthworks, in essence, as one seeking to establish, under paragraph 46 of the Claims Procedure Order, a procedure for determining the Allen-Vanguard Claim.[6] Growthworks, in effect, proposes a two-

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[6] I see no merit in the bifurcation argument advanced by AVC in paras. 66 *et seq.* of its February 5, 2014 Factum. The Fund's proposal for a "mini-trial" was made in the context of developing a summary claims process in a *CCAA* proceeding. If AVC does not wish to proceed with a claim against Growthworks in the *CCAA* proceeding, it can so

stage claims process. First, the court would determine the two Proposed Claims Issues. Then, second…well, the second stage is difficult to discern from the Fund's materials; it is somewhat shrouded in the mists of the future. But, as I understand the position of Growthworks, if a court determines the two Proposed Claims Issues, the parties would have a clearer picture of what issues remained in play regarding the Allen-Vanguard Claim against Growthworks and, presumably, in light of that clearer picture, could make a concrete proposal about the second step in the claims procedure.

[59] In any event, in light of the deeming provisions in paragraphs 42 and 43 of the Claims Procedure Order, there now exists in the Growthworks *CCAA* proceeding a contingent claim advanced by AVC which "is not admitted by the company", so *CCAA* s. 20(1)(a)(iii) directs the court to determine the amount "on summary application". What that summary application process should look like is at the heart of the Fund's motion.

B. What to do

[60] A stay of proceedings is a key element of any *CCAA* process. It affects the positions of a company's secured and unsecured creditors, as well as others who could potentially jeopardize the success of the restructuring plan and the continuance of the company. A stay affords a company breathing room in which to re-organize its affairs and compromise its obligations, or to divest assets to enable the business to operate under different ownership while generating funds to pay obligations or, in complex situations, to effect an orderly liquidation of the business enterprise. As stated by Farley J. in *Lehndorff General Partner Ltd. (Re)*:

> It has been held that the intention of the *CCAA* is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed....The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the *CCAA* because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the *CCAA* must be for the debtor and *all* of the creditors.[7]

A party seeking to lift a stay bears a heavy onus of persuading a court to do so.[8]

[61] Although many of AVC's submissions focused on opposing any extension of the stay of proceedings, the reality of this *CCAA* proceeding is that a stay remains in place until April 10, 2014. Growthworks will have to apply to this Court before that time for a further extension if it wishes to continue to benefit from the protection of the *CCAA*. Given the proximity of the

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advise the Monitor and be bound by the consequences of a final order in the *CCAA* proceeding. If it does wish to continue with a claim against Growthworks, then it must face the reality that a *CCAA* proceeding is underway.

[7] (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.), p. 32.

[8] *Re Timminco*, 2012 ONSC 2515, para. 16.

forthcoming stay extension motion, I see no point in considering, at this point of time, whether to lift the stay of proceedings in respect of the Fund's involvement in the Ottawa Proceedings.

[62] Instead, I am seizing myself of the motion to extend the stay of proceedings which expires on April 10, 2014, and I will put over to that date my formal consideration of the two competing motions now before me.

[63] On the return of that stay extension motion, not only must Growthworks file evidence to address the requirements for an extension specified in *CCAA* s. 11.02(3), but both it and AVC must also adduce evidence to address certain factors identified by this Court in *Canwest Global Communications*[9] relating to a request to lift a stay of proceedings.

[64] The first factor involves whether the plan is likely to fail or, whether after the passage of almost half a year, the *CCAA* applicant, Growthworks, is no closer to a proposal than at the commencement of the stay period. The ground has shifted significantly since the argument of these motions on February 11, 2014. The SISP did not succeed. No merger transaction materialized. Growthworks remains in discussions with its only secured creditor, Roseway, about where to go from here. And although the Monitor ran a claims process, in its Sixth Report it stated that it did not "anticipate responding to or adjudicating disputed claims until such time as Roseway is paid in full and there are, or are likely to be, remaining funds for distribution to unsecured creditors of the Fund". In light of that state of affairs, Growthworks must explain certain matters to the Court:'

(i) Why does a need continue to exist to develop a *CCAA* claims process for the AVC Claim? Ross, in his November 20, 2013 affidavit, cast the need for some determination of the extent of AVC's Claim in terms of establishing the necessary groundwork for a possible merger transaction. In his view, if a court were to determine the issue of whether the Offeree Shareholders' exposure under the SPA was limited to the $40 million Indemnification Escrow Amount and AVC's Claim in excess of that amount was dismissed, then "the continuation of the [AVC] Action would not impede the completion of a merger transaction or the completion of any other restructuring transaction that may arise from the implementation of the SISP". In light of the failure of the SISP process, why does a continued, practical need exist for the determination of the AVC Claim in a summary fashion? Why is the determination of the AVC Claim in the *CCAA* proceeding needed to maintain the integrity of the *CCAA* process in light of the failure of the SISP?[10]

(ii) What tangible benefits, including dollars and cents benefits, would a *CCAA* claims process offer to the restructuring objectives underlying this particular *CCAA* proceeding at this point of time?

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[9] 2009 CarswellOnt 7882 (S.C.J.), para. 33.
[10] *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.), para. 25.

(iii) How would Growthworks' proposed two-stage claims process, involving an initial determination of the two Proposed Claims Issues, advance the ultimate determination of AVC's Claim and offer tangible dollars and cents benefits to the company in its efforts to re-organize?

(iv) On the latter point, the record was devoid of any evidence about the amount of litigation costs Growthworks has incurred and is incurring in the Ottawa Proceedings. That kind of evidence is most relevant to crafting a proportionate *CCAA* summary claims process. Proportionality is a hard-nosed, concrete concept, not an airy, theoretical one. Stripped down to its basics, proportionality requires parties to demonstrate, with respect to any proposed litigation step, what litigation bang will be achieved for the expenditure of each litigation buck. Translated to the present motions:

(a) What has been the Fund's legal fees "burn rate" to date in the Ottawa Proceedings?

(b) How much does the Fund expect it will have to spend on the proposed one-week "mini-trial"?

(c) What litigation cost savings would result from proceeding with a "mini-trial" on the two Proposed Claims Issues in contrast to lifting the stay of proceedings and allowing the Ottawa Proceedings to continue in the fashion which they have to date?

In other words, what would be the effect on the Fund's restructuring process of spending money on legal fees in a mini-trial type of summary claims process as compared to the Fund's litigation costs of continued Ottawa Proceedings?

I would appreciate the Monitor weighing in on these issues, especially given that it did not file a report on the initial return of the motions.

[65] The second factor is how AVC, an unsecured contingent creditor, would be significantly prejudiced by a refusal to lift the stay and instead be required to prove its claim against Growthworks in a summary *CCAA* claims process. As mentioned, the record disclosed little prospect of the Ottawa Proceedings going to trial until sometime in 2015, if then. A 10-week trial of all issues sometime in 2015 hardly qualifies as a "summary application" of a claim for purposes of *CCAA* s. 20(1)(a)(iii). In my lexicon "summary application" equates to "quick and lean".[11] A one-week hearing using primarily written evidence, with only limited, focused *viva voce* cross-examination, strikes me not only as "quick and lean", but also reasonable should I direct a Stage One claims hearing on the two Proposed Claims Issues, a decision I have not yet made. In its motion materials AVC did not address the type of evidence it would file at such a summary hearing. That was not helpful. I expect it to do so on the return of the extension motion.

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[11] As to the summary nature of *CCAA* claims procedures, see *Re Stelco Inc.*, 2006 CanLII 16526 (ON CA), para. 9.

[66] Indeed, I expect a higher degree of co-operation amongst counsel in these *CCAA* proceedings than that revealed in the record of the Ottawa Proceedings. On the return of the stay motion I expect all parties to have co-operated in order to place before me a clear picture of what a *motionless*, one-week hearing of the Proposed Claims Issues would look like, employing the assumption that (i) written openings would be filed in advance, (ii) all evidence-in-chief would be adduced by way of affidavit, (iii) *viva voce* cross-examinations would not exceed 3.5 days of hearing time, and (iv) closing arguments would be a combination of one day of oral arguments supplemented by written submissions. If, in the light of the additional evidence which I have directed be filed, I conclude that such a summary *CCAA* claims hearing should be held, I would be inclined to schedule it for early July, with reasons to be released just after Labour Day.

VII. Summary

[67] By way of summary, in light of the material events which have transpired in the Fund's *CCAA* proceeding since the hearing of these motions last month and in light of the material evidentiary gaps in the records filed on those motions, I defer my disposition of those motions until consideration of the forthcoming motion to extend the stay period, of which I seize myself, and I direct the filing of the additional evidence described above.

[68] I would conclude by observing that there is a certain "tail wagging the dog" aspect to these motions, if such a metaphor remains culturally acceptable. Growthworks was a 12.5% shareholder in Med-Eng, with its litigation exposure initially capped at foregoing 12.5% of $40 million, or $5 million. For business reasons which were accepted by this Court, Growthworks secured protection under the *CCAA*, a reality which all parties must accept. As I mused at the hearing, it is always open to the parties to find some way that the tail stops wagging the dog.

D. M. Brown J.

Date: March 24, 2014