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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

B E T W E E N:

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

Applicant

FACTUM OF THE OFFEREE SHAREHOLDERS

(Motion and Cross-Motion returnable February 11, 2014)

January 31, 2014

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TO: THE SERVICE LIST

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I. OVERVIEW

1. The Offeree Shareholders[1] support the Applicant's motion for an order directing the trial of certain issues raised in the action against Allen-Vanguard Corporation ("**Allen-Vanguard**")

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[1] Richard L'Abbé, 1062455 Ontario Inc., Schroder Venture Managers (Canada) Limited in its capacity as General Partner of each of Schroder Canadian Buy-Out Fund II Limited Partnership CLP1, Schroder Canadian Buy-Out Fund II Limited Partnership CLP2, Schroder Canadian Buy-Out Fund II Limited Partnership CLP3, Schroder Canadian Buy-Out Fund II Limited Partnership CLP4, Schroder Canadian Buy-Out Fund II Limited Partnership CLP 5, Schroder Canadian Buy-Out Fund II Limited Partnership CLP 6, Schroder Ventures Holdings Limited in its capacity as General Partner of Schroder Canadian Buy-Out Fund II UKLP, and on behalf of Schroder Canadian Buy-Out Fund II Coinvestment Scheme and SVG Capital Inc. (formerly, Schroder Ventures International Investment Trust plc). **Note, under the Share Purchase Agreement, "Offeree Shareholders" *includes* the Applicant, Growthworks Canadian Fund Ltd.**

and ancillary relief. The Offeree Shareholders oppose Allen-Vanguard's motion to effectively lift the stay of proceedings.

2. The Applicant has explained the "CCAA reasons" for developing a streamlined and summary procedure for determining the claim deemed to have been filed by Allen-Vanguard in these proceedings commenced under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**"). The Offeree Shareholders agree with and rely on those submissions.

3. This factum explains why, separate and apart from the "CCAA reasons" for a mini-trial, this is an appropriate case for a mini-trial to be heard by the Ontario Superior Court of Justice (Commercial List) (the "**CCAA Court**").

4. In addition to the Applicants' submissions, there are three reasons, consistent with the Supreme Court of Canada's recent decision in *Hryniak v. Mauldin,*[2] to grant the relief sought by the Applicant:

(a) The Applicant proposes to resolve discrete issues requiring minimal evidence, the determination of which could be dispositive or significantly influential on the outcome of the litigation with Allen-Vanguard;

(b) The summary trial could avoid the significant time and expense associated with the trial of liability and damages issues, both of which are considerably more complex and time-consuming than the mini-trial issues. Additionally, neither the liability issue nor the damages issue are ready for trial; and

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[2] 2014 SCC 7

(c) One of the issues proposed to be resolved by way of mini-trial directly relates to representations made by Allen-Vanguard *to the CCAA Court* in Allen-Vanguard's own CCAA proceeding in 2009. Another of the issues to be resolved by way of mini-trial directly relates to a release issued *by the CCAA Court*. The CCAA Court is in the best position to decide both of those issues.

5. In short, this is a case where a mini-trial is appropriate, just and convenient. It has the very real potential of avoiding significant expense and saving judicial resources. The evidence for a mini-trial is briefed and ready to be filed, and the matter can be brought on in an expeditious manner. The motion by the Applicant should be granted.

6. The relief sought by Allen-Vanguard, on the other hand, should be denied. There is no basis to lift the stay, either against the Applicant or against the other parties. There is no basis to extricate the Applicant from the matters raised in the Allen-Vanguard litigation. The Offeree Shareholders adopt and rely upon the Applicant's submissions on this issue and will not repeat those submissions here.

II. FACTS

A. Background

7. The Applicant, Growthworks Canadian Fund Ltd. ("**Growthworks**"), obtained an initial order issued under the CCAA on October 1, 2013. The stay of proceedings issued under the

initial order was extended on October 29, 2013 and January 9, 2014, and is currently set to expire on March 7, 2014.[3]

8. The Applicant has also obtained a Sale and Investor Solicitation Process order, whereby the Applicant is seeking out parties interested in purchasing the assets, undertakings and property of the Applicant, or investing or re-investing in the Applicant.[4]

9. Finally, the Applicant has obtained a Claims Procedure Order, whereby Claims against the Applicant are to be filed by March 7, 2014. The Claims Procedure Order has a section dealing with the Allen-Vanguard claim, deeming a Proof of Claim as being filed and a Disallowance as being delivered, with the procedure for resolving the claim to be determined after this motion has been decided.[5]

B. The Dispute over the 2007 Share Purchase Agreement

10. Med-Eng Systems Inc. ("**Med-Eng**") was a corporation in the business of supplying protective products for military, police and security services. One of its major customers was the U.S. military.[6]

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[3] Affidavit of C. Ian Ross sworn November 20, 2013 (the "Ross Affidavit"), paras. 5-6, Motion Record of Cross-Motion of the Applicant (the "Growthworks Record"), Tab 2, p. 10; Stay Extension Order of Justice T. McEwan dated January 9, 2014.

[4] Ross Affidavit, paras. 7-9, Growthworks Record Tab 2, pp. 10-11

[5] Claims Procedure Order of Justice T. McEwen issued January 9, 2014, ss. 2, 42-46.

[6] Endorsement of Master MacLeod, Exhibit "O" to the Affidavit of Paul Echenberg sworn November 24, 2013 (the "Echenberg Affidavit"), para. 5, Growthworks Record Tab 3(P), p. 151.

11. In 2007, all of the shareholders of Med-Eng sold their shares to Allen-Vanguard, pursuant to a Share Purchase Agreement made as of August 3, 2007 (the "**SPA**"). The Agreement was made among Med-Eng, Allen-Vanguard, and the Offeree Shareholders.[7]

12. The SPA contains a number of representations and warranties, some of which were made by Med-Eng, and others of which were made by the Offeree Shareholders. Section 3.02 of the SPA sets out typical shareholder representations (that the shareholder is the registered owner of the shares, that it has legal capacity to enter into the agreement, etc.). Section 7.02(3) then creates an indemnification provision in relation to those representations:[8]

> (3) Subject to the provisions of this Article 7, each Shareholder, severally and not jointly, will indemnify and save harmless the Purchaser Indemnitees from and against all Claims incurred by the Purchaser directly or indirectly resulting from any breach of any covenant of that Shareholder contained in this Agreement or resulting from any inaccuracy or misrepresentation in any representation or warranty of that Shareholder set forth in Section 3.02 or in a certificate delivered pursuant to Section 5.01(b) [which also relates to s. 3.02 representations], as the case may be.

13. Also as is customary, the SPA contains a large number of representations and warranties by the vendor company, Med-Eng. Those representations and warranties cover a wide range of matters that include corporate, financial, assets, contracts, intellectual property, employment, environmental, and other representations.[9] Med-Eng, in turn, agreed to indemnify Allen-

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[7] Echenberg Affidavit, para. 6, Growthworks Record, Tab 3, p. 20.

[8] Share Purchase Agreement, s. 7.02(3), Exhibit "A" to the Affidavit of David E. Luxton sworn October 28, 2013 (the "First Luxton Affidavit"), Motion Record of Allen-Vanguard Corporation for the Stay Extension and Scope of Stay Motion (the "First Allen-Vanguard Record"), Tab 2(A), p. 69

[9] Share Purchase Agreement, s. 3.01, First Allen-Vanguard Record, Tab 2(A), pp. 44-57.

Vanguard for claims arising from any inaccuracy or misrepresentation in any of Med-Eng's representations and warranties.[10]

14. As the SPA was an agreement to purchase shares, not assets, the ability for Allen-Vanguard to sue on such representations by Med-Eng was complicated by the fact that Med-Eng would now be owned by Allen-Vanguard: the parent would need to sue the wholly-owned subsidiary to obtain relief. However, as Master Macleod noted in reasons for decision granting Allen-Vanguard's motion to amend its statement of claim (discussed below), "[a]ll of the critical representations and warranties were given in fact and in law by Med Eng management on behalf of the corporation being acquired and not by the vendors, the offeree shareholders."[11]

15. To deal with this, an escrow fund of $40 million (the "**Indemnification Escrow Amount**") was created.[12] Section 7.02(5) of the SPA sets out the conditions under which Allen-Vanguard could make a claim to the Indemnification Escrow Amount:[13]

> (5) The Indemnification Escrow Amount shall be the Purchaser's sole recourse in the event of a successful Claim made by the Purchaser against the Corporation or the Shareholders except in respect of liability of any Shareholder for a Claim based on the absence of, or deficiency in, the title of that Shareholder to its shares, or liability under any Claim attributable to fraud of that shareholder.

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[10] Share Purchase Agreement, s. 7.02(1).

[11] Endorsement of Master MacLeod dated February 21, 2013, para. 19, Exhibit "P" to the Echenberg Affidavit, Growthworks Record Tab 3(P), pp. 154-155

[12] Share Purchase Agreement, s. 2.04(c), First Allen-Vanguard Record, Tab 2(A), p. 42.

[13] Share Purchase Agreement, s. 7.02(5), First Allen-Vanguard Record, Tab 2(A), P. 69.

16. Allen-Vanguard has never alleged any Claim based on the absence of, or deficiency in, the title of any Shareholder to its shares. Nor has it alleged that any Offeree Shareholder committed any fraud.[14]

17. Allen-Vanguard's claim rests on (and the mini-trial being proposed relates to) a limiting provision found in section 7.02(2) of the SPA. Notwithstanding all of the provisions described above, Allen-Vanguard claims that the last phrase of the clause in fact creates *unlimited* liability on Offeree Shareholders for claims of fraud – not by them, but rather, *by Med-Eng*. The clause reads, in full:

> (2) Notwithstanding any of the other provisions of this Agreement, the Corporation will not be liable to any Purchaser Indemnitee in respect of:
>
> > (a) any representation and warranty of the Corporation set forth in Section 3.01 or any contravention or any contravention of, non-compliance with or other breach, on or before the Closing Date, of the GD Teaming Agreement unless any claim or demand by the Purchaser against the Corporation with respect thereto is given to the Corporation and the Offeree Shareholders by the Purchaser prior to December 21, 2008, except in the case of fraud, in which case there will be no time limit for the Purchaser to make a demand or claim against the Corporation in respect thereof; or
> >
> > (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:
> >
> > > (i) unless and until the aggregate of all Claims exceeds $4.0 million, and then only to the extent that such aggregate exceeds $2.0 million; or
> > >
> > > (ii) in excess of the Indemnification Escrow Amount;
>
> *other than, in all cases, any Claim attributable to fraud.*

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[14] Endorsement of Master MacLeod dated February 21, 2013, para. 11, Exhibit "P" to the Echenberg Affidavit, Growthworks Record Tab 3(P), p. 152

18. The italicized portion of the phrase, "a Claim attributable to fraud", is the foundation of Allen-Vanguard's amended claim for $650 million against the Offeree Shareholders, vastly in excess of the $40 million claim that Allen-Vanguard litigated for many years. Master MacLeod described this change in position in the following terms: "the plaintiff has reconsidered its upside on damages and now wants to 'go for broke'."[15]

C. The Motion to Amend

19. In late January 2013, Allen-Vanguard provided the Offeree Shareholders with notice of its intention to amend its statement of claim and increase its claim for damages from $40 million to $650 million. The notice came five years after the commencement of the litigation and eight months before the trial was scheduled to commence. The Offeree Shareholders disputed that Allen-Vanguard's claim in excess of the Indemnification Escrow Amount was "a tenable plea" and opposed Allen-Vanguard's motion to amend its statement of claim. In particular, the Offeree Shareholders pointed to the fact that section 7.02(5) of the SPA expressly states that Allen-Vanguard's sole recourse for any claim – whether against Med-Eng or the Offeree Shareholders – was the Indemnification Escrow Amount. The only exception to this limit was for claims relating to fraud *of that Shareholder*. Allen-Vanguard has never alleged fraud as against any of the shareholders.

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[15] Endorsement of Master MacLeod dated February 21, 2013, para. 24, Exhibit "P" to the Echenberg Affidavit, Growthworks Record Tab 3(P), p. 156

20. Allen-Vanguard's motion to amend its pleading was heard by Master MacLeod on February 21, 2013. On the overall question of whether the amended claim was tenable in law, Master MacLeod commented that:[16]

> [I]t may not be. This is because the rights of the parties are governed by the SPA and as described above the intent of that document is in part to protect the offeree shareholders from liability by limiting any claims to claims against the escrow fund.

21. With respect to section 7.02(5) and the sole recourse, Master MacLeod acknowledged the merit to this argument, but given the low standard for granting leave to amend, found sufficient ambiguity in the SPA to allow Allen-Vanguard's proposed amendments. He held:[17]

> 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. [...] 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.

22. Master MacLeod's decision was upheld on appeal to Regional Senior Justice Hackland. On this point regarding the interpretation of the agreement, Hackland R.S.J. said:[18]

> It is less than clear what the exclusion of fraud from Article 7.02 actually means. This may be a matter for parol evidence. The Master held that he

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[16] Endorsement of Master MacLeod dated February 21, 2013, para. 19, Exhibit "P" to the Echenberg Affidavit, Growthworks Record Tab 3(P), p. 154

[17] Endorsement of Master MacLeod dated February 21, 2013, para. 22, Exhibit "P" to the Echenberg Affidavit, Growthworks Record Tab 3(P), p. 155

[18] Reasons of Hackland R.S.J. dated May 22, 2013, Exhibit "Q" to the Echenberg Affidavit, Growthworks Record Tab 4(Q), pp. 161-162

> was unable to find only one possible interpretation of the contract and accordingly could not definitely say that the proposed amendment was untenable. I respectfully agree with the Master's analysis, which is captured in paragraph 22 [quoted in the preceding paragraph of this factum, above] of his careful reasons [...]

23. Therefore, both Master MacLeod and Hackland R.S.J. found that there was some ambiguity in the SPA. Hackland R.S.J. specifically suggested that parol evidence might be helpful. Of course, the principal reason for receiving parol evidence is to help to resolve ambiguities.[19] It is also one of the circumstances in which subsequent conduct evidence is admissible.[20]

D. The Proposed Mini-Trial

24. Consistent with the decisions of Master MacLeod and Hackland R.S.J., Growthworks is proposing a mini-trial to resolve the interpretation dispute described above. Although the Offeree Shareholders' position is that there is no ambiguity, given the comments of Master MacLeod and Hackland R.S.J., the Offeree Shareholders intend to offer evidence to resolve any ambiguity that may exist.

25. At the mini-trial, parol evidence – the admission of which was specifically contemplated by Hackland R.S.J. – will be tendered. Rather than simply having these issues decided by way of summary judgment – which motion the Offeree Shareholders would be fully entitled to bring – a summary trial procedure resolves one of the usual objections of the resisting party, that credibility issues necessitate a trial.

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[19] *Dunn v. Chubb Insurance Company of Canada*, 2009 ONCA 538 at para. 34.

[20] *Thomas Cook Canada Inc. v. Skyservice Airlines Inc.*, 2011 ONSC 5756 at para. 15; *Montreal Trust Co. of Canada v. Birmingham Lodge Ltd.* (1995), 24 O.R. (3d) 97 (C.A.) at p. 108.

26. The Offeree Shareholders' evidence in chief would be adduced by way of affidavits. Those affidavits are complete and ready to be served. They were offered to Allen-Vanguard in advance of this motion, but Allen-Vanguard's counsel declined the offer. Three affidavits have been prepared:

(a) ***Robert Chapman:*** Robert Chapman was counsel to the Offeree Shareholders and Med-Eng with respect to the Allen-Vanguard transaction. He will provide the parol evidence suggested by Hackland R.S.J. Specifically, he will testify that, in negotiations, Allen-Vanguard specifically requested indemnification by the Med-Eng shareholders, and this was specifically rejected.[21] Language to that effect was specifically removed from the SPA. In effect, Allen-Vanguard is seeking by judicial windfall rights that were specifically negotiated away.

(b) ***Cecile Ducharme***: Cecile Ducharme is the Vice-President of a company acting as advisor to two of the principal Offeree Shareholders.[22] She will testify that she specifically instructed counsel that the shareholders would not agree to indemnify Allen-Vanguard for breaches of representations and warranties given by Med-Eng.

(c) ***Paul Echenberg***: Paul Echenberg, the President and Chief Executive Officer of the advisors to two of the Offeree Shareholders, had a similar understanding as Ms. Ducharme with respect to the indemnification provisions, and this

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[21] Echenberg Affidavit, para. 17, Growthworks Record, Tab 3, p. 23.

[22] Echenberg Affidavit, para. 18, Growthworks Record, Tab 3, p. 24.

understanding was reflected in language that was specifically removed from the drafts of the agreement.[23]

27. Beyond that, the only other materials to be filed and relied upon are: (a) materials already filed with the CCAA Court in Allen-Vanguard's own CCAA proceedings, and (b) materials relating to Allen-Vanguard's amalgamation. The relevance of these materials is as follows:

(a) ***Allen-Vanguard CCAA Materials:*** Allen-Vanguard had a "pre-pack" CCAA proceeding where the vote of creditors was held the day after the initial order. In the process, Allen-Vanguard shareholders were wiped out. Allen-Vanguard never once advised the CCAA Court of the existence of its $650 million claim.[24] If it had such a claim, it was required in the CCAA proceedings to advise its creditors, its shareholders and the court of such a claim prior to entering into a reorganizing transaction. Instead, a hedge fund made a $20 million capital contribution and assumed $54 million in debt, and shareholders were wiped out in the process. The Offeree Shareholders will assert that this is "subsequent conduct" evidence showing that Allen-Vanguard did not act in a manner that was consistent with having the type of claim it now asserts.

(b) ***Allen-Vanguard's CCAA Release:*** As part of its pre-pack CCAA, Allen-Vanguard sought and obtained a broad release, which released a number of parties

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[23] Echenberg Affidavit, para. 19, Growthworks Record, Tab 3, pp. 24-25.

[24] Echenberg Affidavit, paras. 22-23, Growthworks Record, Tab 3, p. 26.

from any claims that anyone might have against them.[25] Included in the beneficiaries of the release were the "present and former ... equity holders" of the "Allen-Vanguard Parties". The "Allen-Vanguard Parties" meant Allen-Vanguard, and each of its direct and indirect subsidiaries. The Offeree Shareholders are former equity holders of an Allen-Vanguard subsidiary, Med-Eng. They will therefore argue that they have been released from any claim advanced by Allen-Vanguard.

(c) ***Allen-Vanguard's Amalgamation:*** As set out in detail in Allen-Vanguard's Amended Statement of Claim, Allen-Vanguard's claim is based on the alleged misrepresentations *of Med-Eng*. It is not alleged that any Offeree Shareholder made any misrepresentation. Rather, as stated in the Amended Statement of Claim, "the Defendants are directly liable to indemnify Allen-Vanguard for the breaches of the representations, warranties and covenants made by [Med-Eng], up to $40,000,000, and they are further liable for any damages caused to Allen-Vanguard as a result of any fraud committed by or on behalf of [Med-Eng]."[26] However, the Claims against Med-Eng are extinguished, because Med-Eng (which amalgamated with Allen-Vanguard Holdings Limited in 2007 and subsequently changed its name to Allen-Vanguard Technologies Inc.) amalgamated with Allen-Vanguard in 2011. By operation of law, an

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[25] The scope of the release was discussed in *Allen-Vanguard Corporation (Re)*, 2011 ONSC 5017

[26] Amended Statement of Claim, para. 19, Exhibit "P" to the First Luxton Affidavit, First Allen-Vanguard Motion Record, Tab 2(P), p. 282

amalgamation of two entities eliminates any intercompany debts between them.[27] There is therefore nothing left to indemnify, even if there was such a right.

28. The balance of the arguments to be made by the Offeree Shareholders do not necessitate additional evidence: the Offeree Shareholders will rely on the plain meaning of the words in the SPA, read in context, harmoniously with the agreement as a whole, in a manner that is commercially reasonable and does not lead to absurdities. The Offeree Shareholders will also argue that the failure to name Med-Eng as a party is fatal to Allen-Vanguard's claim. But these are legal arguments, and it is not anticipated that any evidence will be led beyond what is described above.

E. Allen-Vanguard's Proposed Evidence at the Mini-Trial

29. None of the evidence described above was contradicted by Allen-Vanguard and the affiants were not cross-examined. That evidence should be treated as being unchallenged.

30. Instead, Allen-Vanguard's affiant, David Luxton, made two points in his reply affidavit. First, he appears to suggest that the only way to interpret the indemnification provisions is to actually determine whether there was a fraud committed by Med-Eng's former management. He testified:[28]

> [...] I do not see how specific provisions of the Share Purchase Agreement can be interpreted without considering the surrounding factual circumstances, which include the fraud that Allen-Vanguard says was being perpetrated against it at the very same time that it was negotiating

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[27] *Armstrong v. Shaw*, [1996] O.J. No. 4443 (Gen. Div.), aff'd, [1998] O.J. No. 58 (C.A.); *Halsbury's Laws of Canada – Business Corporations*, HBC-343

[28] Affidavit of David E. Luxton sworn December 10, 2013 (the "Second Luxton Affidavit"), para. 18, Responding Motion Record of Allen-Vanguard Corporation (the "Second Allen-Vanguard Motion Record"), p. 4.

> and executing the Share Purchase Agreement with the Offeree Shareholders.

31. To be clear, Allen-Vanguard has not alleged that Med-Eng or the Offeree Shareholders acted fraudulently with respect to the negotiation of the SPA. Allen-Vanguard has not repudiated the SPA. Allen-Vanguard relies instead on the language of the SPA to support its argument that the Offeree Shareholders are liable to indemnify claims incurred against Med-Eng.

32. In his affidavit, Mr. Luxton conflates the allegations of fraud made against the former management of Med-Eng with the question of whether the SPA creates a contractual liability against the Offeree Shareholders for the alleged fraud of Med-Eng former's management. Proof of the allegations of fraud against the former management of Med-Eng is not necessary, and is indeed irrelevant, to the determination of whether the Offeree Shareholders are liable for that alleged fraud under the SPA.

33. The question for the mini-trial relates to whether the Offeree Shareholders agreed to indemnify Allen-Vanguard for any fraud committed by Med-Eng. Whether Med-Eng actually committed fraud is the second question, not the first. Mr. Luxton's evidence on this is not particularly clear, although in fairness, he candidly acknowledged himself that "I do not completely understand all the legal issues that are involved in either the mini-trial or the full trial."[29]

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[29] Second Luxton Affidavit, para. 23, Second Allen-Vanguard Motion Record, p. 5.

34. The second point that Allen-Vanguard appears to want to make is that Allen-Vanguard would never have agreed "to contract out of making a claim for fraud". On this, Mr. Luxton stated:[30]

> Allen-Vanguard never agreed (and would never agree) to contract out of making a claim for fraud. On the contrary, while Allen-Vanguard was prepared to limit its claims to the Indemnification Escrow Amount for MES' breaches of specified representations and warranties contained in the Share Purchase Agreement, it did not, and would never, limit its claim against the Offeree Shareholders in the event of a fraud.

35. While the Offeree Shareholders disagree with that and will tender evidence to show that to be manifestly not true, the question is whether that contest in fact can be fairly adjudicated by way of a mini-trial. It appears to be inadmissible opinion evidence of a single witness, who presumably can put that statement in an affidavit and be cross-examined in front of a CCAA judge on the issue. There is nothing in the evidence put forward by Mr. Luxton that suggests it cannot be fairly adjudicated by way of a summary trial.

F. What is Left to Be Tried

36. Contrary to Mr. Luxton's allegations that a motion for a mini-trial constitutes "legal maneuvering", in fact it makes sense to resolve this discrete issue – the scope of the indemnity – first, before wading into the considerably more factually-intensive issues of (a) whether there was in fact any fraud and (b) what damages would flow if there were. Those issues are nowhere near being ready for trial.

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[30] Second Luxton Affidavit, para. 22, Second Allen-Vanguard Motion Record, p. 5.

37. Documentary production relating to the new amendments asserting the $650 million claim is not yet complete. On this, Master MacLeod stated "the offeree shareholders have persuaded me that there will be further production and discovery disputes necessitating motions and it will be impractical to hold the parties to the September dates."[31]

38. Allen-Vanguard produced an additional 167 documents, but by letter dated August 23, 2013, stated that "we are still reviewing the list of documents described in [counsel for the Offeree Shareholders] letter and will respond in due course as to whether we believe that the documents listed are relevant, whether they have already been produced, and whether the request is proportionate."[32] As at February 2014, Allen-Vanguard appears to still be considering that position, as no further substantive response has been provided.[33]

39. Beyond considerations of relevance, there are still outstanding issues of privilege that must be resolved. Allen-Vanguard has claimed privilege over 4,649 documents.[34] It does so, notwithstanding that the Court has previously held that Allen-Vanguard "inappropriately asserted privilege over broad categories of documents", and continued to assert privilege even though it had been waived in several respects.[35] The issues of privilege will need to be resolved prior to adjudicating the balance of the liability issues.

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[31] Echenberg Affidavit, para. 67, Growthworks Record, Tab 3, p. 39.

[32] Echenberg Affidavit, para. 71, Growthworks Record, Tab 3, p. 39.

[33] Echenberg Affidavit, para. 72, Growthworks Record, Tab 3, p. 40.

[34] Echenberg Affidavit, para. 76, Growthworks Record, Tab 3, p. 40.

[35] Echenberg Affidavit, para. 74, Growthworks Record, Tab 3, p. 40.

40. Moreover, further examinations for discovery are anticipated, based on the amendments and on the damages report provided by Allen-Vanguard.[36] In addition, insofar as there are further documents to be produced, either voluntarily or by another court order requiring Allen-Vanguard to comply with its production obligations, the Offeree Shareholders anticipate the need for further examinations for discovery on such documents.

41. Allen-Vanguard still has outstanding undertakings and refusals, and there is a motion pending, but not yet scheduled, on those undertakings and refusals.[37] Further examinations might be required in relation to those undertakings and refusals as well.

42. Counsel for Allen-Vanguard has stated that he intends to re-examine Mr. Luxton.[38] That has not taken place yet, not has it been scheduled.

43. Finally, a number of other steps must take place prior to a trial.[39] The parties have not yet held a mediation. The parties have not yet had a pre-trial conference. And the parties have not obtained a trial date.[40]

44. In short, there is a raft of steps left to occur before the liability and damage issues are ready for trial. If the Offeree Shareholders are not required to indemnify Allen-Vanguard for

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[36] Echenberg Affidavit, para. 78-79, Growthworks Record, Tab 3, p. 41.

[37] Echenberg Affidavit, paras. 80-81, Growthworks Record, Tab 3, pp. 41-42.

[38] Echenberg Affidavit, para. 82, Growthworks Record, Tab 3, p. 42.

[39] Echenberg Affidavit, paras. 83-85, Growthworks Record, Tab 3, pp. 42-43.

[40] In addition, Allen-Vanguard is involved in litigation with a former executive of Med-Eng, Paul Timmis, in which it has made identical allegations to those made in its litigation with the Offeree Shareholders. As such, in order to avoid inconsistent findings and to promote judicial economy, that action is to be heard at the same time. It is not anticipated that the mini-trial would in any way affect the action involving Mr. Timmis. It would be affected by the bifurcation proposed by Allen-Vanguard.

Med-Eng's fraud, or if Allen-Vanguard's claim has been eliminated by means of amalgamation or the releases provided in its CCAA proceeding (for example), none of those subsequent steps will be necessary. That is exactly the type of motion that is appropriate for summary determination, as the Supreme Court of Canada described last month in *Hryniak v. Mauldin.*

III. LAW AND ARGUMENT

45. This is a motion brought by a CCAA debtor to a CCAA court in a CCAA proceeding. Clearly, insolvency considerations will be the paramount concern. In this respect, Growthworks has set out the relevant CCAA principles and caselaw relating to the procedures for adjudicating contested disputes. There are the additional CCAA connections in the present case described above, namely, that the mini-trial will ask the CCAA Court to interpret the scope of the release this Honourable Court granted in Allen-Vanguard's CCAA proceedings, and will also involve other aspects of Allen-Vanguard's CCAA proceedings described above.

46. However, beyond the CCAA reasons, even if this were a standalone motion brought by the Offeree Shareholders in the Allen-Vanguard litigation, not involving the CCAA, it would *still* be an appropriate case for a mini-trial. This is particularly so, given the Supreme Court of Canada's game-changing decision released January 23, 2014, in *Hryniak v. Mauldin.*

A. The Relevant Rules

47. Prior to 2010, it was extremely difficult to succeed on a motion for summary judgment. As applied, the summary judgment rules largely only succeeded in weeding out clearly unmeritorious claims or defences.[41]

48. In 2007, the Ontario Government commissioned Osborne A.C.J.O. to consider reforms to the Ontario civil justice system to make it more accessible and affordable. His recommendations, found in the report of the Civil Justice Reform Project (the Osborne Report), included a recommendation that the summary judgment rule had to be made more widely available, judges had to be given the power to weigh evidence in summary judgment motions, and that judges needed to be given discretion to direct that oral evidence be presented (i.e., a mini-trial).[42]

49. Those reforms were implemented in 2010. The relevant provisions are found in Rule 20.04:[43]

> 20.04 (2) [General] The court shall grant summary judgment if,
>
> > (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
> >
> > (b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.
>
> (2.1) [Powers] In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence

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[41] *Hyrniak v. Mauldin*, para. 37.

[42] *Hyrniak v. Mauldin*, para. 39.

[43] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R. 20.04

> submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
>
> 1. Weighing the evidence.
>
> 2. Evaluating the credibility of a deponent.
>
> 3. Drawing any reasonable inference from the evidence.
>
> (2.2) [Oral Evidence (Mini-Trial)] A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

50. The Offeree Shareholders thus have an absolute right to bring a summary judgment motion and in considering that motion, the judge could decide to order a mini-trial. The principles a court would apply in determining whether to order a mini-trial are thus relevant for the present motion.

B. The "Culture Shift": A New Framework towards Civil Justice in Ontario

51. The Supreme Court of Canada's decision in *Hryniak v. Mauldin*, released on January 23, 2014, was a watershed moment for civil litigation in Canada. The unanimous decision rendered by the Court re-wrote the rules for dealing with summary judgments, and in so doing, the Court also discussed the appropriateness of summary trials such as what is being proposed here.

52. The Supreme Court stated that litigants and courts need a "culture shift". Conventional trials should no longer be considered the best and most appropriate manner of resolving disputes. To the contrary:[44]

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[44] *Hyrniak v. Mauldin*, para. 2

> Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just. Summary judgment motions provide one such opportunity.

53. The Court repeated this need for a shift in culture later in its reasons:[45]

> There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for adjudication, and impacts the role of counsel and judges. This balance must recognize that a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.
>
> This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible — proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.

54. Many of the comments made by Mr. Luxton in his affidavit – about his expectations to be able to testify on all issues (save damages) at once, for example – are the types of old-school thinking that the Supreme Court of Canada has now directed litigants to jettison. The trial called for by Allen-Vanguard is no longer viewed as the best solution for resolving disputes. And while the stakes in this case are large and this is hardly a slip-and-fall case between litigants of limited means, the Supreme Court is equally talking about the appropriate use of judicial

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[45] *Hyrniak v. Mauldin*, paras. 27-28 [emphasis added]

resources in its discussion about the need for a culture shift. A mega-trial of the type desired by Allen-Vanguard is the type of case that causes significant strains on limited judicial resources, and contributes to delays and backlogs that are inconsistent with effective and timely access to justice.

C. The New Approach to Summary Judgment Motions

55. The Supreme Court in *Hyrniak* noted what the legislature drafted: the dominant question is not whether a trial is to be *preferred.* Rather, the overarching question is whether a trial is *required.* The Court set out its overall approach on this issue as follows:[46]

> In my view, a trial is not required if a summary judgment motion can achieve a fair and just adjudication, if it provides a process that allows the judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial.
>
> To that end, I conclude that summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims.

56. The broad interpretation of the summary judgment rules described by the Supreme Court requires a court to consider whether it can reach a fair and just determination on the merits without a trial. The Court stated:[47]

> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result. [...] It bears reiterating that the standard

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[46] *Hryniak, supra* at paras. 4-5

[47] *Hryniak, supra* at paras. 49-50, 57

> for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute.
>
> [...]
>
> On a summary judgment motion, the evidence need not be equivalent to that at trial, but must be such that the judge is confident that she can fairly resolve the dispute. A documentary record, particularly when supplemented by the new fact-finding tools, including ordering oral testimony, is often sufficient to resolve material issues fairly and justly.

57. Here, there is more than a good argument that the issues raised by the Offeree Shareholders could be resolved by way of summary judgment (under the new *Hyrniak* test) without even resorting to a mini-trial. The necessary findings of fact can be made on the paper record. The law can be applied to the facts on a summary judgment motion. The determination would be proportionate, more expeditious and less expensive than the alternative proposed by Allen-Vanguard. It may not be the equivalent of a trial, but the Court could be confident that the procedure would fairly resolve the dispute.

D. Mini-Trial Considerations

58. Notwithstanding that this matter may be fairly resolved by summary judgment without resort to oral evidence, the Offeree Shareholders were influenced in part by Master MacLeod, who stated in recent (but pre-*Hryniak*) reasons:[48]

> On the other hand there was some discussion at the hearing concerning the possibility of bifurcating the trial and Mr. Conway 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

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[48] Decision of Master MacLeod dated May 30, 2013 at paras. 8-10, Growthworks Record, Tab 3(U), pp. 329-330

> 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 inclined 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.
>
> 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.
>
> [...] Losing on any one of those issues is either fatal or would confine the remedy to the escrow fund.

59. In *Hyrniak*, the Supreme Court stated the following propositions relating to when it is appropriate for a judge to order oral evidence in connection with a summary judgment motion:[49]

> This power should be employed when it allows the judge to reach a fair and just adjudication on the merits and it is the proportionate course of action. While this is more likely to be the case when the oral evidence required is limited, there will be cases where extensive oral evidence can be heard on the motion for summary judgment, avoiding the need for a longer, more complex trial and without compromising the fairness of the procedure.
>
> Where a party seeks to lead oral evidence, it should be prepared to demonstrate why such evidence would assist the motion judge in weighing the evidence, assessing credibility, or drawing inferences and to provide a "will say" statement or other description of the proposed evidence so that the judge will have a basis for setting the scope of the oral evidence.
>
> Thus, the power to call oral evidence should be used to promote the fair and just resolution of the dispute in light of principles of proportionality, timeliness and affordability. In tailoring the nature and extent of oral evidence that will be heard, the motion judge should be guided by these principles, and remember that the process is not a full trial on the merits but is designed to determine if there is a genuine issue requiring a trial.

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[49] *Hyrniak, supra* at paras. 63-65

60. Here, the Offeree Shareholders have done as the Supreme Court directed, which is to provide a "will say" statement or other description of the proposed evidence, so that the judge will have a basis for setting the scope of the oral evidence. The evidence is manageable, with what appears to be only four witnesses on the issue, and even there, the evidence from the Offeree Shareholders is quite discrete and narrow in its scope. Insofar as there are credibility issues between Mr. Luxton and the three witnesses tendered by the Offeree Shareholders, that can be resolved at the hearing.

61. Allen-Vanguard has not established that it would suffer any prejudice by the mini-trial that is not compensable in an award of costs. In his argumentative affidavit, Mr. Luxton can only point to the fact that, under the CCAA, "parties' rights of appeal would be significantly restricted".[50] Mr. Luxton is referring to the requirement for leave to appeal to the Court of Appeal from decisions of the Court under the CCAA.[51] It is not entirely certain that, in the circumstances, the leave requirement would apply. However, if it does, the Offeree Shareholders are prepared to agree with Allen-Vanguard in advance that neither party would oppose a motion for leave to appeal from any decision rendered in the mini-trial. Such an order could even be granted by the CCAA Court itself, as was done in the intra-bondholder litigation in *Stelco (Re.)*.[52]

62. The relief sought by Growthworks, supported by the Offeree Shareholders, is appropriate not just for the CCAA (and consistent with how the Commercial List operates), but for this case as a whole. As Master MacLeod noted, the result of the mini-trial could be dispositive or

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[50] Second Luxton Affidavit, para. 31.

[51] CCAA, s. 13.

[52] *Re Stelco,* Order of Justice Wilton-Siegel dated November 16, 2006.

significantly influential for the case, potentially obviating the need to spend significant time, money and judicial resources on further discovery motions, documentary production, examinations for discovery, mediation and pre-trial conferences. It is exactly the type of case that the Supreme Court of Canada described as being appropriate for summary determination.

IV. RELIEF SOUGHT

63. The Offeree Shareholders request that this Court grant the relief sought by Growthworks, and dismiss the relief sought by Allen-Vanguard, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

CAVANAGH LLP/s.r.l. BENNETT JONES LLP

Lawyers for the Offeree Sharheolders

SCHEDULE "A" – AUTHORITIES CITED

Authority

1. *Hyrniak v. Mauldin*, 2014 SCC 7
2. *Dunn v. Chubb Insurance Company of Canada*, 2009 ONCA 538
3. *Thomas Cook Canada Inc. v. Skyservice Airlines Inc.*, 2011 ONSC 5756
4. *Montreal Trust Co. of Canada v. Birmingham Lodge Ltd.* (1995), 24 O.R. (3d) 97 (C.A.)
5. *Allen-Vanguard Corporation (Re),* 2011 ONSC 5017
6. *Armstrong v. Shaw*, [1996] O.J. No. 4443 (Gen. Div.), aff'd, [1998] O.J. No. 58 (C.A.)
7. *Halsbury's Laws of Canada – Business Corporations*, HBC-343
8. *Re Stelco,* Order of Justice Wilton-Siegel dated November 16, 2006

SCHEDULE B – STATUTORY REFERENCES

***Rules of Civil Procedure*, RRO 1990, Reg 194, R. 20.04**

General

20.04 (1) Revoked

(2) The court shall grant summary judgment if,

(a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or

(b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

Powers

(2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.
2. Evaluating the credibility of a deponent.
3. Drawing any reasonable inference from the evidence.

Oral Evidence (Mini-Trial)

(2.2) A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

Only Genuine Issue Is Amount

(3) Where the court is satisfied that the only genuine issue is the amount to which the moving party is entitled, the court may order a trial of that issue or grant judgment with a reference to determine the amount.

Only Genuine Issue Is Question Of Law

(4) Where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly, but where the motion is made to a master, it shall be adjourned to be heard by a judge.

Only Claim Is For An Accounting

(5) Where the plaintiff is the moving party and claims an accounting and the defendant fails to satisfy the court that there is a preliminary issue to be tried, the court may grant judgment on the claim with a reference to take the accounts.

***Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-34, s. 13**

Leave to appeal

13. Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

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 OR COMPROMISE OR ARRANGEMENT OF GROWTHWORKS CANADIAN FUND LTD.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced in Toronto

FACTUM OF THE OFFEREE SHAREHOLDERS
(Motion for a Mini-Trial, Returnable February 11, 2014)

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