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

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

FACTUM OF THE APPLICANT

PART I—OVERVIEW

1. GrowthWorks Canadian Fund Ltd. (the "**Applicant**" or the "**Fund**") faces a claim against it and other defendants (the "**Offeree Shareholders**") for $650 million by Allen-Vanguard Corporation ("**Allen-Vanguard**"). While the Fund believes that the claim is invalid and prohibited by the agreement on which it is based, it is presently the largest known creditor claim against the Fund. The Fund objects to Allen-Vanguard's efforts to have this claim determined outside the *Companies' Creditors Arrangement Act* ("**CCAA**") proceedings and seeks to have certain key threshold issues determined by the CCAA Court in a trial of an issue.

2. The Fund faced numerous challenges that led to its insolvency and these CCAA proceedings. It is presently implementing a Sale and Investor Solicitation Process (the "**SISP**") under the supervision of FTI Consulting Canada Inc. (in its capacity as court-appointed Monitor in these proceedings, the "**Monitor**") and the CCAA Court in an effort to identify sale or investment solutions for its business.

3. Even though it is baseless, Allen-Vanguard's huge claim of $650 million hangs over the Fund like a cloud during its restructuring process. Of particular concern is its impact on bidders participating in the SISP. If Allen-Vanguard's claim continues to be undetermined and unlimited, it is likely to be fatal to the completion of any possible merger transaction even if such transaction is in the best interests of all legitimate stakeholders of the Fund. For this and other reasons, it is critical to completion of the Fund's restructuring process that this grossly exaggerated and ultimately baseless claim be adjudicated in a timely and efficient manner.

4. In CCAA proceedings, claims against the debtor company are generally adjudicated in a claims process within the CCAA proceedings. In this case, the Fund seeks to follow this usual and accepted methodology.

5. The Offeree Shareholders have also proposed that certain discrete issues be determined in a trial of issues – another well-accepted practice in insolvency proceedings – consistent with the recent direction from the Supreme Court of Canada in *Hyrniak v. Mauldin*.[1] The proposed trial of issues is described in greater detail in the factum of the other Offeree Shareholders filed on this motion, on which the Fund relies.

6. If, on the trial of issues, Allen-Vanguard's claim is dismissed in its entirety (on the basis that an amalgamation extinguished Allen-Vanguard's claims or that Allen-Vanguard released claims against the Offeree Shareholders in its own restructuring process), then transactions, including a merger transaction if appropriate or desirable, and other steps in the Fund's restructuring could proceed unimpeded. If the claim is limited to the amount of the Escrow (defined below) (by the terms of the agreement), then the Fund is relieved of the spectre of possible liability and is left with only a potential asset (to the extent any portion of the Escrow is returned to it). In such circumstances, the Fund could proceed with any identified transaction

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[1] 2014 SCC 7 ("***Hyrniak v. Mauldin***"), Book of Authorities ("**BOA**") Tab 1.

and its restructuring while any remaining – significantly narrowed – litigation continues. In either event, the restructuring of the Fund will be able to proceed for the benefit of its legitimate stakeholders.

7. In its motion, which should be dismissed, Allen-Vanguard seeks to continue its already protracted litigation in the ordinary civil courts by declaring that the stay of proceedings (the "**Stay**") imposed by the initial order of Justice Newbould dated October 1, 2013, as amended and restated (the "**Initial Order**"), does not apply to the Allen-Vanguard action or, alternatively, does not affect the continuation of the Allen-Vanguard action against any party other than the Fund.

8. Firstly, Allen-Vanguard's position that the Stay does not apply to the Allen-Vanguard action is clearly wrong. Secondly, the Allen-Vanguard action cannot proceed against the other defendants without violating the Stay. Thirdly, to the extent Allen-Vanguard is seeking to lift the Stay, Allen-Vanguard does not meet the heavy onus to grant such relief. Fourthly, if necessary, the CCAA Court has the power to, and should, extend the effect of the Stay to proceedings against the other defendants in the Allen-Vanguard action.

9. Allen-Vanguard has been unable to articulate any cogent reason why it should be granted the unusual relief of proceeding with its action against the Fund outside the CCAA proceedings or why it would be prejudiced by proceeding with a trial of key issues in the Allen-Vanguard action through an order of the CCAA Court. Allen-Vanguard's argument is based on its preference for a full trial outside the CCAA process, which is inconsistent with both the purposes behind the CCAA and the recent direction from the Supreme Court of Canada in *Hyrniak v. Mauldin*.[2]

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[2] *Hryniak v. Mauldin*, BOA, Tab 1.

10. While Allen-Vanguard will not be prejudiced by the proposed trial of issues, the Fund and its restructuring would be significantly prejudiced if the Allen-Vanguard action is permitted to continue outside the framework of the CCAA proceedings.

11. The Fund is particularly concerned by Allen-Vanguard's failure to diligently prosecute its action to date. A review of the history of the Allen-Vanguard action reveals repeated failures by Allen-Vanguard to meet its procedural obligations and late amendments of the pleadings, including the amendment in year 5 of the Allen-Vanguard action to increase Allen-Vanguard's claim from the amount in the Escrow account ($40 million) to $650 million.

12. Accordingly, the Fund: 1) opposes Allen-Vanguard's motion in which it seeks an order that the Stay does not apply to the Allen-Vanguard action generally or in respect of any party other than the Fund; and 2) seeks an order directing that certain issues raised in the Allen-Vanguard action be heard by way of a mini-trial before the CCAA Court and related relief.

PART II—FACTS

BACKGROUND OF CCAA PROCEEDINGS

13. The Fund is a labour-sponsored venture capital fund with a diversified portfolio of investments in primarily small and medium-sized Canadian businesses (the "**Portfolio Companies**").[3]

14. The challenges leading to the CCAA filing of the Fund included the following:

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[3] Affidavit of C. Ian Ross sworn November 20, 2013 (the "**Ross Affidavit**") at para. 3, Motion Record of Cross-Motion of the Applicant (Motion re: Allen-Vanguard Mini-Trial) ("**Applicant's Motion Record**"), Tab 2, p. 9.

(a) A $20 million payment obligation to Roseway Capital S.a.r.l. ("**Roseway**"), along with certain related obligations (together, the "**Roseway Obligations**"), became due on September 30, 2013, which the Fund was unable to pay; and

(b) The Fund does not have access to short-term financing and its investments in the Portfolio Companies are held in primarily illiquid securities consisting of minority equity interests in private companies and restricted equity securities in a publicly traded company.[4]

15. On October 1, 2013, the Fund sought and received Court protection pursuant to the CCAA in the form of the Initial Order. On October 29, 2013, the Honourable Justice Mesbur extended the Stay Period, as defined in the Initial Order, to January 14, 2014, and amended and restated the Initial Order.[5]

16. On November 18, 2013, the Honourable Justice Morawetz granted an order approving the SISP pursuant to which the Fund is seeking parties interested in purchasing the assets, undertakings and property of the Fund and/or parties interested in investing in or refinancing the business of the Fund.[6]

17. The SISP consists of two "Phases". The deadline for bids in Phase 1 was December 13, 2013. Phase 2, presently underway, runs for 45 days, which date may be extended in accordance with the SISP by an additional 15 days.[7]

18. On January 9, 2014, the Honourable Justice McEwen approved a Claims Procedure Order with a claims bar date of March 6, 2014 and specific provisions to address the claim of

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[4] Ross Affidavit at para. 4, Applicant's Motion Record, Tab 2, p. 9.
[5] Ross Affidavit at paras. 5-6, Applicant's Motion Record, Tab 2, p. 10.
[6] Ross Affidavit at para. 7, Applicant's Motion Record, Tab 2, p. 10.
[7] Ross Affidavit at paras. 8-9, Applicant's Motion Record, Tab 2, pp. 10-11.

Allen-Vanguard including: 1) deemed filing of a Proof of Claim, Notice of Revision and Disallowance and Dispute Notice (as defined therein); and 2) deferring the procedure for determining the Allen-Vanguard claim until after the hearing of this motion.[8]

19. The Claims Procedure Order is expressly without prejudice to Allen-Vanguard's rights in respect of Allen-Vanguard's action and this motion and the Fund's and the Monitor's rights to object to or oppose the validity and amount of Allen-Vanguard's claims.[9]

ALLEN-VANGUARD LITIGATION

Brief Overview of the Dispute

20. The litigation between the Fund and Allen-Vanguard relates to Allen-Vanguard's acquisition of all of the shares of Med-Eng Systems Inc. ("**Med-Eng**") from the Med-Eng shareholders (including the Fund, which held approximately 12.4% of the shares) pursuant to a Share Purchase Agreement dated as of August 3, 2007 (the "**SPA**").[10]

21. The Fund received approximately $72,388,000 in return for its shares representing approximately 12.4% of the total cash proceeds released at that time. The balance of the purchase price, $40 million, has been held in escrow pursuant to the terms of the SPA (the "**Escrow**"). [11]

22. The Escrow was to be used to satisfy valid claims made by Allen-Vanguard pursuant to the terms of the SPA and, to the extent any of the Escrow remained after payment of such valid claims, to be distributed to the Fund and the other former shareholders of Med-Eng in proportion

[8] Claims Procedure Order of the Honourable Justice T. McEwen issued January 9, 2014 ("**Claims Procedure Order**"), paras. 42-43 and 46, BOA, Tab 2.

[9] Claims Procedure Order, paras. 44-45, BOA, Tab 2.

[10] Ross Affidavit at para. 11, Applicant's Motion Record, Tab 2, p. 11

[11] Ross Affidavit at para. 12, Applicant's Motion Record, Tab 2, p. 11.

to their former holdings as deferred purchase price. The Escrow continues to be held by an escrow agent pursuant to the terms of the Escrow Agreement dated as of September 17, 2007 (the "**Escrow Agreement**").[12]

23. The Offeree Shareholders commenced an action on November 12, 2008 in Court File No. 08-CV-43188 (the "**Offeree Shareholder Action**") seeking, among other things, a declaration that they are entitled to payment of the Escrow and ordering distribution of the Escrow in accordance with the Escrow Agreement.[13]

24. In December, 2008, Allen-Vanguard commenced a separate claim against the Offeree Shareholders in Court File #08-CV-43544 (the "**Allen-Vanguard Action**").[14] In their action, Allen-Vanguard alleges Med Eng management acted fraudulently and made misrepresentations to it. There is no allegation of fraud on the part of the Offeree Shareholders.[15]

Late Amendment to Claim Funds in Excess of Escrow

25. In the original Statement of Claim issued in 2008 in the Allen-Vanguard Action, Allen-Vanguard alleged that it had valid claims totalling $40 million arising under the SPA which should be satisfied from the Escrow.[16]

26. In 2013, more than 4 years after the issuance of the original Statement of Claim, Allen-Vanguard amended the Statement of Claim in the Allen-Vanguard Action to, among other things, increase the quantum claimed against the Defendants to $650 million, of which they note $40 million would be distributed from the Escrow, plus interest and costs. The balance of the

[12] Ross Affidavit at para. 13, Applicant's Motion Record, Tab 2, p. 12.

[13] Ross Affidavit at para. 14, Applicant's Motion Record, Tab 2, p. 12.

[14] Ross Affidavit at para. 15, Applicant's Motion Record, Tab 2, p. 12.

[15] Reasons of Master MacLeod in Allen-Vanguard Action dated February 21, 2013 ("**Master's Decision on Claim Amendment**"), Exhibit "P" to the Affidavit of Paul Echenberg, sworn November 24, 2013 ("**Echenberg Affidavit**") at paras 8 and 11, Applicant's Motion Record, Tab 3(P), pp. 151-152.

[16] Ross Affidavit at para. 16, Applicant's Motion Record, Tab 2, p. 12.

claim is asserted by Allen-Vanguard as a joint and several claim against all of the Offeree Shareholders, including the Fund.[17]

27. Therefore, for almost 6 years - between September, 2007 when the Escrow was set aside to satisfy Allen-Vanguard's valid claims under the SPA, if any, and June, 2013, when Allen-Vanguard amended its claim - Allen-Vanguard's claim was limited to the amount of the Escrow and the Fund's portion of the Escrow was a contingent asset of the Fund. It was not until nearly 6 years after the transaction that Allen-Vanguard, for unknown reasons, changed the entire face of the action and the risk faced by the Fund by advancing a claim for $650 million (including damages exceeding the Escrow amount (the "**Excess Claim**") totalling approximately $610 million).[18]

28. While it is the position of the Offeree Shareholders that, among other things, the SPA limits any claims against them to the amount of the Escrow and that, with the benefit of evidence that could be adduced at a trial of issues, if necessary, the Excess Claim will be dismissed, until it is dismissed the Excess Claim is a significant potential liability of the Fund.[19]

29. Master MacLeod, the Master hearing Allen-Vanguard's motion to amend the Statement of Claim called the amendment potentially "game changing"[20] and noted as follows:

> "...there can be no doubt that the change to the prayer for relief from $40,000,000 to $650,000,000 read in combination with this change is a fundamental change to the litigation in substance if not in form. What is happening is that instead of simply laying claim to the entire escrow fund, Allen Vanguard is now seeking a full refund of the purchase price. The original claim was almost a claim *in rem* since, apart from the claim for pre-judgment interest and costs, it sought damages to be distributed to the plaintiff from the escrow

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[17] Ross Affidavit at para. 17, Applicant's Motion Record, Tab 2, p. 13.

[18] Ross Affidavit at para. 18, Applicant's Motion Record, Tab 2, p. 13.

[19] Ross Affidavit at paras. 17-18, Applicant's Motion Record, Tab 2, p. 13.

[20] Master's Decision on Claim Amendment, at para. 15, Applicant's Motion Record, Tab 3(P), p. 153, cited with approval in the decision of Hackland R.S.J. in the Allen-Vanguard Action, dated May 22, 103, at para 2, Applicant's Motion Record, Tab 3(Q), p. 161.

> fund. Now the damages in excess of the escrow fund will be sought at large against the "defendants" jointly and severally.[21]

30. It is unclear why Allen-Vanguard amended its claim in this manner after it had limited its claim (in a manner consistent with the Fund's interpretation of the SPA) to the amount of the Escrow in its original Statement of Claim and then litigated the action on that basis for over 4 years. It is also unclear why, when undergoing its own CCAA restructuring process, Allen-Vanguard made no reference to a potential $650 million claim against the Offeree Shareholders.[22] Master MacLeod rejected the explanation provided by Allen-Vanguard in this regard and speculated that it appeared Allen-Vanguard "reconsidered its upside on damages" and now wants to "go for broke":

> "...There is however nothing in the affidavit that asserts that anything has occurred to suggest that the damages incurred by Allen Vanguard have changed or why Allen Vanguard earlier believed it was limited to claiming against the escrow fund and has now apparently changed its view. It appears the explanation is simply that encouraged by the discovery evidence and believing it has a better chance of success, the plaintiff has reconsidered its upside on damages and now wants to "go for broke".[23]

Delays and Further Procedural Steps

31. Allen-Vanguard has caused various procedural issues and delays in the Allen-Vanguard Action to date, including "breaching production obligations and failing to meet times set out in court orders,"[24] its late amendment of the Statement of Claim, which led to the adjournment of a scheduled trial date,[25] and "inappropriately assert[ing] privilege over broad categories of documents..."[26]

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[21] Master's Decision on Claim Amendment, at para. 13, Applicant's Motion Record, Tab 3(P), p. 153.

[22] Echenberg Affidavit at para. 22, Applicant's Motion Record, Tab 3, p. 26 and Exhibits to the Affidavit of Doreen Navarro, sworn November 26, 2013, Applicant's Motion Record, Tab 4(A)-(J).

[23] Master's Decision on Claim Amendment, at para. 24, Applicant's Motion Record, Tab 3(P), pp. 155-156.

[24] Echenberg Affidavit at para. 47, Applicant's Motion Record, Tab 3, p. 32.

[25] Echenberg Affidavit at paras. 63-65, Applicant's Motion Record, Tab 3, pp. 37-38.

[26] Echenberg Affidavit at para. 74, Applicant's Motion Record, Tab 3, p. 40.

32. In considering the next steps after the Statement of Claim was amended, Master MacLeod suggested that additional time-consuming activity would be required in the Allen-Vanguard Action, stating: "Given the disagreements that have already taken place over production and discovery and indeed the issues that remain outstanding it is inevitable there will be further time consuming motion activity before this case as now constituted can be tried."[27]

33. Prior to the issuance of the Initial Order, the Offeree Shareholders were in the process of bringing a summary judgment motion to seek to determine the same questions that the Fund proposes be determined in a mini-trial within the CCAA proceedings.[28] These key threshold questions (the "**Key Issues**"), which may dispose of the Allen-Vanguard Action entirely or limit the claim to the amount of the Escrow (and thereby determine that the Fund has no further liability in relation thereto but rather only a potential asset), are as follows:

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

(b) Did Allen-Vanguard release the Offeree Shareholders from any and all claims and causes of action in its Plan of Arrangement and Reorganization?

(c) Assuming Allen-Vanguard is capable of proving fraud on the part of the former management of Med-Eng, is it entitled under the SPA to seek damages from the Fund and other Offeree Shareholders in excess of the Escrow for alleged breaches and misrepresentations of Med-Eng?

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[27] Reasons of Master MacLeod in Allen-Vanguard Action dated May 30, 2013 ("**Master's May 30 Decision**"), Exhibit "U" to the Echenberg Affidavit, at para. 7, Applicant's Motion Record, Tab 3(U), p. 329.

[28] Echenberg Affidavit at para. 86, Applicant's Motion Record, Tab 3, p. 43 and Ross Affidavit at para. 19, Applicant's Motion Record, Tab 2, p. 13.

PART III—ISSUES AND THE LAW

34. The issues to be determined on this motion are as follows:

(a) Is Allen-Vanguard stayed from proceeding with the Allen-Vanguard Action or is Allen-Vanguard somehow permitted to proceed with the Allen-Vanguard Action against the other Offeree Shareholders without participation by the Fund?

(b) Should the Stay be lifted?

(c) Should the Key Issues be determined by the CCAA Court (which issues may dispose of the claims of Allen-Vanguard in whole or reduce them to claims against the Escrow) by way of a mini-trial?

Allen-Vanguard Action Stayed: Should be Determined as a Claim in the CCAA Proceedings

CCAA Regime: Importance of CCAA Stay and Unified Claims Procedure

35. The purpose of the CCAA is to permit a compromise or an arrangement between an insolvent company and its creditors with a view to allowing the business to continue and thereby preserving the goodwill of the company, maximizing the return available to creditors, shareholders and other stakeholders and avoiding the social and economic costs of liquidating its assets.[29]

36. The CCAA is intended to be flexible and must be given a broad and liberal interpretation to achieve its objectives. The CCAA's effectiveness in achieving its objectives is dependent

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[29] Ontario Court of Appeal in *Stelco Inc., Re,* (2005), 75 O.R. (3d) 5 at para. 36 ("***Stelco***"), BOA, Tab 3; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 (CanLII) at para. 15, BOA, Tab 4.

upon a broad and flexible exercise of jurisdiction to facilitate a restructuring and continue the debtor as a going concern in the interim.[30]

37. The CCAA stay of proceedings is the "key to the successful operation of the CCAA restructuring process"[31] and the "engine" that drives the CCAA regime:

> In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme...[32]

38. While claims against a debtor company are stayed to allow it to focus on the restructuring for the benefit of its stakeholders, such claims are not simply ignored but rather are dealt with in a claims process under the supervision of the CCAA monitor and the Court. Such a process is designed to deal with claims against the debtor in a unified process and in a flexible and expeditious manner.[33]

39. The Supreme Court of Canada, in describing this unified process or "single control", clarified that this includes not only control of assets and property of the debtor but also control over all litigation against the debtor company rather than allowing each party to "pursue his own notions of his rights of litigation":

> "[26] The trustees will often (and perhaps increasingly) have to deal with debtors and creditors residing in different parts of the country. They cannot do that efficiently, to borrow the phrase of Idington J. in *Stewart v. LePage*... "if everyone is to be at

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[30] *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R (3d) 165 at para. 48 (ON GD), BOA, Tab 5; *Nortel Networks Corporation (Re)*, 2009 CanLII 39492 (ON SC) at para. 47, BOA, Tab 6.

[31] *Sproule v. Nortel Networks Corporation*, 2009 ONCA 833 ("***Nortel***") at para. 33, leave to appeal dismissed 2010 CanLII 14818 (SCC), BOA, Tab 7.

[32] *Nortel* at para. 33, citing *Stelco*, BOA, Tab 7.

[33] *ScoZinc Ltd. (Re)*, 2009 NSSC 136 ("***ScoZinc***"), BOA, Tab 8.

liberty to interfere and pursue his own notions of his rights of litigation"...Anglin J. commented at p.349:

> ...Parliament probably thought it necessary in the interests of prudent and economical winding-up that the court charged with that duty should have control not only of the assets and property found in the hands or possession of the company in liquidation, but also of all litigation in which it might be involved. The great balance of convenience is probably in favour of such single control though it may work hardship in some few cases.

[27] *Stewart* was, as stated, a winding-up case, but the legislative policy in favour of "single control" applies as well to bankruptcy. There is the same public interest in the expeditious, efficient and economical clean-up of the aftermath of a financial collapse...[34]

40. It is important for the CCAA Court to have control over litigation involving the debtor company since, among other reasons, CCAA proceedings are "real time" litigation in which efficient resolution of disputes is critical to preserve value, permit successful restructurings and further the objectives of the CCAA. Moreover, the CCAA Court is in a position to balance competing interests of stakeholders in the restructuring as a whole and is equipped to, and experienced in, responding efficiently and effectively to meet those requirements.[35]

41. Accordingly, in CCAA proceedings, claims against the debtor company, including very complex litigation[36], are generally adjudicated in a claims process within the CCAA proceedings[37] in order to further the purposes of the CCAA and to prevent the "real time" restructuring from turning into "autopsy litigation" to the detriment of all stakeholders of the debtor:

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[34] *Sam Levy & Associes Inc. v. Azco Mining Inc.*, 2001 SCC 92 at paras 26-27, citing *Stewart v. LePage* 1916 CanLII 40 (SCC), BOA, Tabs 9 and 10, respectively.

[35] *Transglobal Communications Group Inc. (Re)*, 2009 ABQB 195 at para. 48, BOA, Tab 11,

[36] See for instance *Stelco*, BOA, Tab 3; *Campeau v. Olympia & York Developments Ltd.*, 1992 CarswellOnt 185 (OCJ (Gen Dlv)) ("***Olympia & York***"), BOA, Tab 12.

[37] There have been cases in which specific issues arising under the CCAA were sent for resolution to a forum outside the CCAA court; however, the Alberta Court of Appeal in *Luscar Ltd. v. Smoky River Coal*, 1999 ABCA 179 ("***Smoky River Coal***") at para. 63, BOA, Tab 14 noted that "In each of those cases, however, it has been determined that resolution in the other forum would promote the objectives of the CCAA. In each such case, moreover, the CCAA judge has retained control over the impact of the outside determination."

> [7] ...Allow me to emphasize that this type of litigation as we have in the subject case is what has been termed "real time" litigation (vs. "autopsy" litigation). If it develops into "autopsy" litigation then clearly under those circumstances there will be a diminution in "value" over which all interested parties would be staking their claims in this type of litigation. This is not "hurried up" justice since, if so, this could be justice denied in the same way as justice delayed is. It is, however, justice on a timing to meet the exigencies of the circumstances. Therefore, axiomatically the Court cannot (and will not in the interests of ensuring that there is justice for all concerned) allow the case to be "hijacked" by tactics.[38]

Prejudice to the Fund if Allen-Vanguard Action not Determined within these CCAA Proceedings

42. It is essential to determine all litigation claims against a CCAA debtor within the CCAA proceedings in order to maintain the integrity of the CCAA proceedings and prevent significant prejudice to the CCAA debtor and its restructuring. This is true even if the claim is complicated:

> "Counsel for the plaintiffs argued that the Campeau claim must be dealt with, either in the action or in the C.C.A.A. proceedings and that it cannot simply be ignored. I agree. However, in my view, it is more appropriate, and in fact is essential, that the claim be addressed within the parameters of the C.C.A.A. proceedings rather than outside, in order to maintain the integrity of those proceedings. Were it otherwise, the numerous creditors in that mammoth proceeding would have no effective way of assessing the weight to be given to the Campeau claim in determining their approach to the acceptance or rejection of the Olympia & York plan filed under the Act.[39]

43. The Allen-Vanguard claim is the largest presently-known potential claim against the Fund.[40] However, if the Fund is correct and the entire claim or the Excess Claim is dismissed, Allen-Vanguard is not a true stakeholder of the Fund and the litigation of its disputed claim must not be allowed to frustrate the Fund's restructuring efforts for the benefit of its true stakeholders.

44. The SISP brings the importance of determining Allen-Vanguard's claim into focus: If the Fund's primary stakeholders (after payment of Roseway) are its shareholders, the most beneficial transaction must preserve the positive tax treatment of the shareholders' investment

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[38] *Cadillac Fairview Inc., Re*, 1995 CanLII 7362 (ON SC) at para. 7, BOA, Tab 16.
[39] Blair J in *Olympia & York* at para. 25, BOA, Tab 12.
[40] Ross Affidavit at para. 21, Applicant's Motion Record, Tab 2, p. 14.

in the Fund, possibly through a merger. If the primary stakeholders of the Fund are its creditors, a merger transaction will likely not be as beneficial and may not be possible at all.[41]

45. The assessment and quantification of claims against the Fund is also important for potential bidders in the SISP, particularly those considering a merger transaction. A merger can only preserve the favourable tax treatment the existing public shareholders of the Fund receive as holders of shares in a labour sponsored investment fund if ***all*** of the shares issued to the Fund as consideration for its assets in a "merger" transaction are distributed to the Fund's shareholders. That means that any creditor claims must either be paid in cash or assumed by the merger partner and any potential merger partner will need to be able to assess the value of such claims.[42]

46. Because the disputed claim of Allen-Vanguard is so large in face amount relative to the value of the assets of the Fund, it would likely be impossible to complete a merger transaction with the Allen-Vanguard claim outstanding even if the merger transaction was in the best interests of all legitimate stakeholders of the Fund.[43]

47. Accordingly, it is essential that the Allen-Vanguard claim be determined promptly, within these CCAA proceedings, to, among other things:

(a) enable the Fund to know whether Allen-Vanguard is a creditor at all, which is extremely important to the Fund's decision with respect to what kind of transaction is in the best interest of the Fund and its stakeholders;

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[41] Ross Affidavit at para. 23, Applicant's Motion Record, Tab 2, pp. 14-15.
[42] Ross Affidavit at para. 24, Applicant's Motion Record, Tab 2, p. 15.
[43] Ross Affidavit at para. 25, Applicant's Motion Record, Tab 2, p. 15.

(b) enable any potential merger partner (and possibly other bidders in the SISP depending on the type of transaction proposed) to assess the claims against the Fund, an assessment that is particularly important given the constraint that any merger partner will have to pay all creditor claims in cash or assume them on closing in order to preserve the favourable tax treatment for the Fund's shareholders;

(c) enable the Fund to determine and be in a position to implement the most appropriate restructuring method based on an understanding of its true stakeholders; and,

(d) enable the Fund to proceed with its restructuring process generally, in particular to be in a position to make distributions (beyond distributions to Roseway in relation to its agreed upon secured obligations) to the extent possible.

48. If the Key Issues are adjudicated and the Excess Claim is dismissed, the continuation of the Allen-Vanguard 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.[44] Accordingly, it is critical to the completion of the restructuring process that the Key Issues and Excess Claim be litigated in a timely and efficient manner in the CCAA proceedings and subject to the case management of the CCAA court.[45]

49. The Fund would be significantly prejudiced it the Allen-Vanguard Action is permitted to proceed in the usual course outside the CCAA proceedings. Because of the length of time the Allen-Vanguard Action and Offeree Shareholder Action have taken to date, the failures of Allen-Vanguard to meet its procedural obligations in those actions and the delays and costs caused

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[44] Ross Affidavit at para. 27, Applicant's Motion Record, Tab 2, p. 15.
[45] Ross Affidavit at para. 28, Applicant's Motion Record, Tab 2, p. 15.

by such failures and the recent amendment to increase the quantum of damages claimed, among other amendments, there is a significant threat that continued procedural wrangling would kill the Fund's restructuring efforts if the Key Issues are not determined in a timely manner within the CCAA proceedings.[46]

Stay of Proceedings Stays Allen-Vanguard Action

50. The Initial Order includes the following broad stay of proceedings:

> NO PROCEEDINGS AGAINST THE APPLICANT OR THE PROPERTY
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> 14. THIS COURT ORDERS that until and including October 31,2013 [later extended to March 7, 2014[47]], or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against or in respect of the Applicant or the Monitor, 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.
>
> NO EXERCISE OF RIGHTS OR REMEDIES
>
> 15. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entity (all of the foregoing, collectively being "Persons" and each being a "Person") against or in respect of the Applicant or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Applicant and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the Applicant to carry on any business which the Applicant is not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

51. The Allen-Vanguard Action is a proceeding in a court in respect of the Applicant, which affects the Business and the Property of the Fund. It is, therefore, stayed by the Initial Order.

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[46] Ross Affidavit at para. 29, Applicant's Motion Record, Tab 2, p. 16.

[47] Stay Extension Order of the Honourable Justice McEwen dated January 9, 2014 at para. 2, BOA, Tab 13.

52. The terms of the Stay are broad, staying a "Proceeding" against or in respect of the Applicant or affecting the Business or Property. There is no limitation or carve-out in the Stay purporting to restrict the Stay to staying the Allen-Vanguard Action only as against the Fund; rather, it expressly stays the "Proceeding".

Proceeding with Action without the Fund Present Untenable

53. Allen-Vanguard suggests that "the Initial Order stays the proceedings against Growthworks" but that it should not be precluded from proceeding against the other Offeree Shareholders.[48] It is unclear exactly how Allen-Vanguard envisions it could proceed against the other Offeree Shareholders in its action, in which $650 million is claimed on a joint and several basis from the defendants, including the Fund, without offending the Stay.

54. Allen-Vanguard has not indicated that it would refrain from seeking relief from the Fund and as such is simply asking to either 1) proceed with its action against the Offeree Shareholders without the Fund present to defend itself and yet with the potential for a binding finding of multiple millions of dollars against the Fund; or 2) proceed with its action against the Offeree Shareholders other than the Fund with the intention of re-litigating the very same cause of action, on the very same facts against the Fund separately. Neither option is tenable.

55. The first option is nonsensical and contrary to the fundamental principles of justice. Every defendant is entitled to participate in proceedings against it and to defend itself. To the extent the Allen-Vanguard Action is proceeding with the potential to impose a substantial finding against the Fund – which would potentially be ruinous to the Fund's restructuring – the Fund must be permitted to defend itself, participate in discussions and instructions to counsel, attend hearings, participate in any settlement discussions, and other steps in the proceeding. As a

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[48] Notice of Motion of Allen-Vanguard at para. (p), Motion Record of Allen-Vanguard Corporation, Tab 1, p.5.

result, there would be no true stay of proceedings and "the efficacy of CCAA proceedings" would be "seriously undermined."[49]

56. Moreover, if the Allen-Vanguard Action is permitted to proceed outside of the CCAA proceedings with the potential to bind the Fund, the Fund would be forced to await the conclusion of the Allen-Vanguard Action – proceeding on its own timetable outside the CCAA proceedings and without supervision of the CCAA Court – for this massive claim against it to be determined. As set out in paragraphs 42 to 49, above, it is essential that the Allen-Vanguard Action be determined in a 'unified process' supervised by the CCAA Court, proceeding on an efficient basis that is mindful of the many stakeholders in a CCAA proceeding.

57. The second option is untenable since the claims are based on the same cause of action or, at its highest, results in an unnecessary multiplicity of proceedings and the possibility of inconsistent findings, burdens the Fund with litigation costs that would otherwise have been shared with the other Offeree Shareholders, gives rise to the spectre of Allen-Vanguard relying on findings made in the proceeding against the other Offeree Shareholders, and wastes judicial resources.

CCAA Courts Stay Claims Against All Defendants

58. In any event, to interpret the language of the Stay as permitting a proceeding in which the CCAA debtor is a named defendant (with one cause of action against all defendants) would be contrary to decisions of CCAA Courts on this very issue.

59. In *Campeau v. Olympia & York Developments Ltd.*[50], Blair J. considered the issue before the Court in this case when he was asked to balance "the interests of a debtor which has been

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[49] *Smoky River Coal*, BOA, Tab 14.
[50] *Olympia & York*, BOA, Tab 12.

granted the protection of the [CCAA] and the "breathing space" offered by a s.11 stay in such proceedings" with "the interests of a unliquidated contingent claimant to pursue an action against that debtor and an arm's length third party"[51]. Blair J. found that the action should be stayed as against the CCAA debtor *and* the third party, noting:

> "... The potential of two different inquiries at two different times into those same facts and damages is not something that should be encouraged. Such multiplicity of inquiries should in fact be discouraged, particularly where – as is the case here – the delay occasioned by the stay is relatively short (at least in terms of the speed with which an action like this Campeau action is likely to progress)."[52]

60. In *Timminco Limited (Re)*[53], Justice Morawetz – in a decision that assumes that the CCAA stay of proceedings stays the "Proceeding" against the CCAA debtor, including as against third party defendants, and seeks to have that stay lifted as against the third party defendant – also stresses the potential harm that could result from proceeding against a co-defendant in the absence of the CCAA debtor:

> [23] With respect to the claim against Photon, as pointed out by their counsel, it makes no sense to lift the stay only as against Photon and leave it in place with respect to the Timminco Entities. As counsel submits, the Timminco Entities have an interest in both the legal issues and the factual issues that may be advanced if Mr. Penneyfeather proceeds as against Photon, as any such issues as are determined in Timminco's absence may cause unfairness to Timminco, particularly, if Mr. Penneyfeather later seeks to rely on those findings as against Timminco. I am in agreement with counsel's submission that to make such an order would be prejudicial to Timminco's business and property. In addition, I accept the submission that it would also be unfair to Photon to require it to answer Mr. Penneyfeather's allegations in the absence of Timminco as counsel has indicated that Photon will necessarily rely on documents and information produced by Timminco as part of its own defence.
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> [24] I am also in agreement with the submission that it would be wasteful of judicial resources to permit the class proceedings to proceed as against Photon but not Timminco as, in addition to the duplicative use of court time, there would be the

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[51] *Olympia & York* at para. 1, BOA, Tab 12.
[52] *Olympia & York* at para. 25(4), BOA, Tab 12.
[53] 2012 ONSC 2515 (OSCJ) ("***Timminco***"), BOA, Tab 15.

> possibility of inconsistent findings on similar or identical factual issues and legal issues. For these reasons, I have concluded that it is not appropriate to lift the stay as against Photon.

61. Accordingly, the Stay must be interpreted as staying the Allen-Vanguard Action in its entirety. Such a conclusion is consistent with a plain reading of the Stay language and with the purposes of the CCAA, including the CCAA stay and claims procedures. It is also consistent with CCAA case law considering this very issue. To conclude otherwise would undermine the CCAA stay and the purposes behind the CCAA and would seriously jeopardize if not devastate the Fund's restructuring.

Stay Should Not be Lifted

62. To the extent Allen-Vanguard is seeking to lift the Stay, it does not meet the heavy onus to lift the Stay and thereby deprive the Fund of this fundamental protection designed to enable it to restructure, consistent with the purposes behind the CCAA. As Justice Morawetz stated in *Timminco*[54]:

> [15] The stay of proceedings is one of the main tools available to achieve the purpose of the CCAA. The stay provides the Timminco Entities with a degree of time in which to attempt to arrange an acceptable restructuring plan or sale of assets in order to maximize recovery for stakeholders. The court's jurisdiction in granting a stay extends to both preserving the status quo and facilitating a restructuring. See Re Stelco Inc., (2005) O.J. No. 1171 (C.A.) at para. 36.
>
> [16] Further, the party seeking to lift a stay bears a heavy onus as the practical effect of lifting a stay is to create a scenario where one stakeholder is placed in a better position than other stakeholders, rather than treating stakeholders equally in accordance with their priorities. See Canwest Global Communications Corp. (Re), [2011] O.J. No. 1590 (S.C.J.) at para. 27.
>
> [17] Courts will consider a number of factors in assessing whether it is appropriate to lift a stay, but those factors can generally be grouped under three headings: (a) the relative prejudice to parties; (b) the balance of convenience; and (c) where relevant, the merits (i.e. if the matter has little chance of success, there may

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[54] *Timminco*, at paras. 15-17, BOA, Tab 15.

> not be sound reasons for lifting the stay). See Canwest Global Communications (Re), supra, at para. 27.

63. As set out above in paragraphs 42 to 50, the Fund would suffer significant prejudice if the Allen-Vanguard Action is permitted to proceed in the usual course in the Ottawa Court. In addition, unlike in *Timminco* where the party seeking to lift the stay was seeking recovery only against insurance proceeds, in this case Allen-Vanguard is seeking its massive claim against the Fund and other defendants directly. Such a finding against the Fund would utterly destroy any possibility of a restructuring. As set out above, it is crucial that the matter be adjudicated promptly and efficiently under the supervision of the CCAA Court.

64. Conversely, determining the Allen-Vanguard Action within the CCAA proceedings is not prejudicial to Allen-Vanguard. The Fund is not seeking to stay the determination of Allen-Vanguard's claim. To the contrary, the Fund has proposed a procedure to address it in the CCAA process.

65. Allen-Vanguard has not articulated any plausible prejudice that could result to it from having its claim adjudicated efficiently and effectively in the CCAA process. In fact, the proposed procedure meets Allen-Vanguard's expressed concern that it not be precluded from continuing its action against the Offeree Shareholders.

66. In *Olympia & York* where Blair J. refused to lift the stay as against the CCAA debtor company and specifically stayed proceedings against third party defendants, requiring instead that the action be determined as a claim in the CCAA process, Blair J. noted that there is no prejudice to the plaintiff in having its claim determined in a CCAA claims process:

> In making these orders, I see no prejudice to the Campeau plaintiffs. The processing of their action is not being precluded, but merely postponed. Their claims may, indeed, be addressed more expeditiously than might have otherwise been the case, as they may be dealt with – at least for the purposes of that proceeding – in the

> C.C.A.A. proceeding itself. On the other hand, there might be great prejudice to Olympia & York if its attention is diverted from the corporate restructuring process and it is required to expend time and energy in defending an action of the complexity and dimension of this one...[55]

67. Accordingly, the potential prejudice to the Fund and its restructuring far outweighs any prejudice to Allen-Vanguard in having its claim determined in a timely manner before an Ontario judge. The balance of convenience strongly favours permitting the Fund to focus on its restructuring and addressing the Allen-Vanguard claims within the CCAA proceedings in an efficient manner as proposed.

68. Finally, the Fund is of the view that the Allen-Vanguard Action has little chance of success – and is utterly baseless for amounts beyond the Escrow (without admitting that any amount may be properly claimed by Allen-Vanguard pursuant to the Escrow). Even Allen-Vanguard appears to have been of the view that its claim was limited to the amount of the Escrow when it: 1) commenced the Allen-Vanguard Action seeking recovery only from the Escrow; 2) litigated the Allen-Vanguard Action for the almost 4.5 years on the basis that its recovery was limited to the Escrow; and 3) filed for CCAA protection itself and did not disclose any potential $650 million asset, an amount that would have clearly been material. Even the Master who heard the motion to amend the Statement of Claim noted there was no explanation provided as to "why Allen-Vanguard earlier believed it was limited to claiming against the escrow fund and has now apparently changed its view" noting that it appeared Allen-Vanguard "has reconsidered its upside on damages and now wants to "go for broke"."[56]

69. On the motion to amend the Statement of Claim to expand the amount claimed from $40 million to $650 million, Master MacLeod concluded simply that he was unable to say with certainty (on the basis of the evidence before him) that Allen-Vanguard could never succeed

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[55] *Olympia & York* at para. 24, BOA, Tab 12.

[56] Master's Decision on Claim Amendment, at para. 24, Applicant's Motion Record, Tab 3(P), p. 156.

with the Excess Claim. However, he noted that the Offeree Shareholders "may be right" that Allen-Vanguard is unable to claim against them for amounts beyond the Escrow as a result of the terms of the SPA and that such an interpretation is "consistent with the intent of the agreement to limit the exposure of the [Offeree Shareholders]":

> [22] 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.[57]

70. The Fund believes that the Allen-Vanguard Action should be dismissed and that, when this issue is adjudicated, Allen-Vanguard's claim for damages exceeding the Escrow should be and will be dismissed.[58] Further, the Fund believes that the evidence necessary to consider the Offeree Shareholders' contention that the SPA should be interpreted to limit damages to the Escrow could be effectively heard in a trial of that issue. There is no allegation of fraud by the Offeree Shareholders and, therefore, there is no need to hear evidence of the fraud allegedly committed by others.

71. Accordingly, Allen-Vanguard has not met the heavy burden imposed upon it to lift the stay of proceedings - a fundamental tool to facilitate a restructuring – and to take the unusual step of proceeding with its action outside of the CCAA claims process. To the contrary, the balance of convenience favours having the Allen-Vanguard dispute litigated within the CCAA

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[57] Master's Decision on Claim Amendment, at para. 22, Applicant's Motion Record, Tab 3(P), p. 155.
[58] Ross Affidavit at para. 26, Applicant's Motion Record, Tab 2, p. 15.

proceedings rather than exposing the Fund to delay and uncertainty in relation to this massive claim, which may be fatal to a successful restructuring.

Trial of An Issue Appropriate

72. The Offeree Shareholders propose that the trial of issues or "mini-trial" of the Key Issues (relative to the trial of all issues raised in the Allen-Vanguard Action) proceed with, among other things, affidavit evidence tendered as evidence-in-chief and cross-examinations on the affidavit occurring in court before the judge hearing the mini-trial. The Fund submits that this methodology will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation and restructuring process as a whole. In particular, it ensures that the evidence is targeted in affidavits, which will reduce the time required for the hearing, yet allows *viva voce* cross-examination before the CCAA judge such that the Court can assess the credibility of witnesses, if necessary.

73. A mini-trial or "trial of an issue" is a well-accepted tool for determining issues in insolvency proceedings. It is codified in the *Bankruptcy and Insolvency Act*[59] that judges have discretion to "direct any issue to be tried or inquiry to be made by any judge or officer of any of the courts of the province"[60] and such relief may be directed by the CCAA Court pursuant to its inherent jurisdiction.[61]

74. The CCAA does not dictate the process for determining claims against the CCAA debtor but rather leaves that to the discretion of the CCAA Court to mandate by Court order, thereby ensuring an efficient process that is appropriate to the facts of the case:

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[59] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("*BIA*"), Schedule "B".
[60] *BIA*, s 187(8), Schedule "B".
[61] *CCAA*, s 11, Schedule "B"; See also *Stelco*, BOA, Tab 3.

> [18] [...] as noted by McElcheran in Commercial Insolvency in Canada (LexisNexis Canada Inc., Markham, Ontario, 2005 at p. 279-80) the CCAA does not set out a process for identification or determination of claims; instead, the Court creates a claims process by court order [...]
>
> [22] [...] the CCAA does not set out the procedure beyond the language in s.12 [now s. 20].The language only accomplishes two things. The first is that the debtor company can agree on the amount of a secured or unsecured claim; and secondly, if there is a disagreement, then on application of either the company or the creditor, the amount shall be determined by the court on "summary application".[62]

75. It is appropriate for the CCAA Court to exercise its discretion to allow a trial of an issue in the circumstances of this case particularly given that determination of the Key Issues, if the Fund is successful, will either dispose of the Allen-Vanguard Action or limit the claim to the Escrow – either of which outcome is critical to the Fund's restructuring. There is absolutely no basis to prevent the CCAA debtor from seeking to achieve that result – particularly given the significance a positive finding would have for the Fund's restructuring.

76. The Master overseeing the Allen-Vanguard Action in Ottawa, who is extremely familiar with the action and the issues, himself suggested to the parties that a trial of an issue with respect to the Excess Claim issue may be appropriate:

> [8] 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 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.
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> [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

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[62] *ScoZinc* at paras. 18 and 22, BOA, Tab 8.

could agree to try that issue.

> [10]...Losing on any one of those issues is either fatal or would confine the remedy to the escrow fund." (emphasis added)[63]

77. Allen-Vanguard cannot be permitted to risk destroying any possibility of a successful restructuring for the benefit of the Fund's stakeholders simply to have its case tried in the manner it prefers ('going for broke' in terms of the damages claimed and the multitude of arguments advanced) when the CCAA claims process provides an effective procedure to determine the claim in a manner that respects the competing interests in the CCAA process. In the CCAA proceedings of Cadillac Fairview, Farley J. cautioned that parties are not entitled as of right to have their case tried "in such manner as they thought fit" and made clear that counsel have a duty to assist the judge by "simplification and concentration" rather than advancing "a multitude of ingenious arguments in the hope that out of ten bad points the judge will be capable of fashioning a winner."[64]

78. Similarly, in the CCAA restructuring of Stelco Inc., the Ontario Court of Appeal rejected objections to what the appellants called "an expedited, summary 'CCAA-style' claims process" for the determination of certain inter-creditor claims, rejecting the appellants' argument that they should have the right to require claims to be proven in an ordinary civil lawsuit "with all the bells and whistles that go with such a proceeding:"

> "[9] Mr. Macdonald argues that the appellants should be entitled to their full rights of process under the Rules of Civil Procedure and to put the respondents to compliance with the Class Proceedings Act. We do not agree. That is not what the Plan calls for, nor is it what we would expect in the context of a complicated and time-driven CCAA proceeding such as the Stelco restructuring...[65]

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[63] Master's May 30 Decision at paras. 8-10, Applicant's Motion Record, Tab 3(U), pp. 329-330.

[64] *Cadillac Fairview Inc., Re*, 1995 CanLII 7362 (ON SC) at paras. 8-9, BOA, Tab 16.

[65] *Stelco Inc., Re*, 2006 CanLII 16526 (ONCA) at para. 9, BOA, Tab 17.

79. Moreover, this approach is consistent with the recent Supreme Court of Canada decision of *Hryniak v. Mauldin*[66] in which the Supreme Court highlighted the need for proportionate, timely and affordable processes in which Courts recognize that the best forum for resolving a dispute is not always that with "the most painstaking procedure". That decision makes it clear that parties do not have a right to a trial even under the Rules of Civil Procedure.

80. To the extent Allen-Vanguard's objection is that a second trial will still be required to adjudicate this dispute, that is not true if the Offeree Shareholders are successful on either of the first two Key Issues, which would finally determine the matter. If the Offeree Shareholders are successful in restricting damages to the Escrow, a trial may proceed seeking this more limited amount; however, the reduction in damages to the Escrow will undoubtedly result in a change in perspective (with this change being "game-changing" in the exact opposite direction than was the apparently ill-fated amendment to expand the damages claim) and the parties would be able to make use of the evidence and determinations reached in the mini-trial. In either event, however, the Fund – as a CCAA Debtor – will receive a significantly valuable result and the objectives of the CCAA and these proceedings would have been achieved.

81. Indeed, failing to try this method and thereby leaving the claim to be determined in a trial of all issues may be fatal to the Fund's restructuring because the grossly exaggerated Allen-Vanguard claim will have been undetermined for too long to complete a successful transaction.

82. Accordingly, the Fund seeks to have the Key Issues determined by mini-trial in the form proposed. This Court has discretion to impose such a methodology to determine the Allen-Vanguard claim and it should exercise its discretion in this case. The proposed process will assist the Fund with its restructuring, is consistent with the purposes of the CCAA, is efficient, effective and substantially similar to the method that would be imposed outside of the CCAA

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[66] at para. 28, BOA, Tab 1.

proceedings in any event, it is proportional in all of the circumstances, including the restructuring as a whole, and it is likely to lead to a fair and just result.

PART IV—ORDER REQUESTED

83. Accordingly, it is respectfully submitted that Allen-Vanguard's motion should be dismissed and an order granted directing a mini-trial as requested by the Offeree Shareholders.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Kevin McElcheran/Heather Meredith/Kelly Peters

McCarthy Tétrault LLP
Lawyers for GrowthWorks Canadian Fund Ltd.

Tab A

SCHEDULE "A" – LIST OF AUTHORITIES

1. *Hyrniak v. Mauldin*, 2014 SCC 7
2. Claims Procedure Order of Justice T. McEwen issued January 9, 2014
3. *Stelco Inc., Re*, 2005 CanLII 8671 (ONCA)
4. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60
5. *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R (3d) (OCJ (Gen Div))
6. *Nortel Networks Corporation (Re),* 2009 CanLII 39492 (ON SC)
7. *Sproule v. Nortel Networks Corporation*, 2009 ONCA 833
8. *ScoZinc Ltd. (Re)*, 2009 NSSC 136
9. *Sam Levy & Associes Inc. v. Azco Mining Inc.*, 2001 SCC 92
10. *Stewart v. LePage*, 1916 CanLII 40 (SCC)
11. *Transglobal Communications Group Inc. (Re)*, 2009 ABQB 195
12. *Campeau v. Olympia & York Developments Ltd.*, 1992 CarswellOnt 185 (OCJ (Gen Dlv))
13. Stay Extension Order of Justice McEwen dated January 9, 2014
14. *Luscar Ltd. V. Smoky River Coal Ltd.,* 1999 ABCA 179
15. *Timminco Limited (Re)*, 2012 ONSC 2515 (OSCJ)
16. *Cadillac Fairview Inc., Re,* 1995 CanLII 7362 (ON SC)
17. *Stelco Inc., Re*, 2006 CanLII 16526 (ONCA)

Tab B

SCHEDULE "B" – LIST OF STATUTES

***Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36**

General power of court

11. Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

11.02(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

11.02(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction

11.02(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

Determination of amount of claims

20. (1) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor is to be determined as follows:

(a) the amount of an unsecured claim is the amount

(i) in the case of a company in the course of being wound up under the Winding-up and Restructuring Act, proof of which has been made in accordance with that Act,

(ii) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act, proof of which has been made in accordance with that Act, or

(iii) in the case of any other company, proof of which might be made under the Bankruptcy and Insolvency Act, but if the amount so provable 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; and

(b) the amount of a secured claim is the amount, proof of which might be made under the Bankruptcy and Insolvency Act if the claim were unsecured, but the amount if not admitted by the company is, in the case of a company subject to pending proceedings under the Winding-up and Restructuring Act or the Bankruptcy and Insolvency Act, to be established by proof in the same manner as an unsecured claim under the Winding-up and Restructuring Act or the Bankruptcy and Insolvency Act, as the case may be, and, in the case of any other company, the amount is to be determined by the court on summary application by the company or the creditor.

Admission of claims

(2) Despite subsection (1), the company may admit the amount of a claim for voting purposes under reserve of the right to contest liability on the claim for other purposes, and nothing in this Act, the Winding-up and Restructuring Act or the Bankruptcy and Insolvency Act prevents a secured creditor from voting at a meeting of secured creditors or any class of them in respect of the total amount of a claim as admitted.

***Bankruptcy and Insolvency Act,* RSC 1985, c B-3**

Trial of issue, etc.

187 (8) The court may direct any issue to be tried or inquiry to be made by any judge or officer of any of the courts of the province, and the decision of that judge or officer is subject to appeal to a judge in bankruptcy, unless the judge is a judge of a superior court when the appeal shall, subject to section 193, be to the Court of Appeal.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO GROWTHWORKS CANADIAN FUND LTD

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

Proceeding Commenced at Toronto

FACTUM OF THE APPLICANT
(Allen-Vanguard Motion)

McCarthy Tétrault LLP
Barristers and Solicitors
Box 48, Suite 5300
Toronto Dominion Bank Tower
Toronto, ON M5K 1E6

Kevin McElcheran LSUC# 22119H
Tel.: (416) 601-7730
Fax: (416) 868-0673

Heather Meredith LSUC# 48354R
Tel.: (416) 601-8242
Fax: (416) 868-0673

Lawyers for Growthworks Canadian Fund Ltd.

#13115979