

Court File No. CV-12-9667-00CL

**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 PLAN OF COMPROMISE AND
ARRANGEMENT OF SINO-FOREST CORPORATION

Court File No. CV-11-431153-00CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

THE TRUSTEES OF THE LABOURER'S PENSION FUND OF CENTRAL AND
EASTERN CANADA, THE TRUSTEES OF THE INTERNATIONAL UNION OF
OPERATING ENGINEERS LOCAL 793 PENSION PLAN FOR OPERATING
ENGINEERS IN ONTARIO, SJUNDE AP-FONDEN, DAVID GRANT and ROBERT
WONG

Plaintiffs

- and -

SINO-FOREST CORPORATION, ERNST & YOUNG LLP, BDO LIMITED (formerly
known as BDO MCCABE LO LIMITED), ALLEN T.Y. CHAN, W. JUDSON MARTIN,
KAI KIT POON, DAVID J. HORSLEY, WILLIAM E. ARDELL, JAMES P. BOWLAND,
JAMES M.E. HYDE, EDMUND MAK, SIMON MURRAY, PETER WANG, GARRY J.
WEST, PÖYRY (BEIJING) CONSULTING COMPANY LIMITED, CREDIT SUISSE
SECURITIES (CANADA), INC., TD SECURITIES INC., DUNDEE SECURITIES
CORPORATION, RBC DOMINION SECURITIES INC., SCOTIA CAPITAL INC., CIBC
WORLD MARKETS INC., MERRILL LYNCH CANADA INC., CANACCORD
FINANCIAL LTD., MAISON PLACEMENTS CANADA INC., CREDIT SUISSE
SECURITIES (USA) LLC and MERRILL LYNCH, PIERCE, FENNER & SMITH
INCORPORATED (successor by merger to Banc of America Securities LLC)

Defendants

Proceeding under the *Class Proceedings Act, 1992*

**FACTUM OF THE MOVING PARTY, DAVID J. HORSLEY
(Returnable: NOVEMBER 18, 2015)**

November 5, 2015

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David J. Horsley

TO: See attached service list

PART I - OVERVIEW

1. This motion involves the interpretation and implementation of Sino-Forest Corporation's ("**Sino-Forest**") Plan of Compromise and Arrangement (the "**Plan**").
2. The Plan is the result of extensive negotiation and compromise. It contains a series of provisions to incentivize a limited class of individuals to make significant contributions to Sino-Forest's restructuring for the benefit of its stakeholders. In exchange, the Plan states that these individuals would receive broad and comprehensive releases.
3. These provisions in the Plan are designed to maximize the potential recovery for stakeholders while ensuring that the individuals who contributed to that recovery would face no further civil or regulatory proceedings relating to their involvement with Sino-Forest.
4. The Court approved the Plan on December 10, 2012.
5. The Applicant David Horsley (the former Chief Financial Officer of Sino-Forest, "**Horsley**") entered into a settlement pursuant to the terms of the Plan in May of 2014. The Monitor, Litigation Trust and Class Action Plaintiffs consented to the settlement. The Court approved the settlement on July 24, 2014.
6. The settlement required a payment by or on behalf of Horsley of \$5.6 million for the benefit of Sino-Forest's stakeholders.
7. In exchange, Horsley received the release and injunction contemplated by the Plan, which bar all civil and regulatory proceedings against him.
8. Nonetheless, the Certified Professional Accountants of Ontario (the "**CPAO**") seeks to commence a regulatory proceeding against Horsley alleging that he engaged in misconduct while at Sino-Forest. The CPAO seeks from Horsley, among other things, a \$75,000 fine and a two-year suspension from the practice of accounting.
9. Horsley brings this motion for a declaration that the release and injunction, which are contained in the Plan and in the Court's order approving his settlement, operate to bar the CPAO's regulatory proceeding.

10. The language of the Plan and of the Court's order is unambiguous and precludes a proceeding by the CPAO.

11. The Court has already approved the Plan and numerous parties, in addition to Horsley, have already effected settlements through the Plan.

12. Thus, the only issue before this Court is whether, under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"), the Court has jurisdiction to bar a regulator from commencing a regulatory proceeding.

13. Horsley respectfully submits that the Court has that jurisdiction and it should give effect to the release and injunction contained in the Plan.

PART II - THE FACTS

Background

14. On July 20, 2011, a group of shareholders and debtholders commenced a class action proceeding against Sino-Forest and, among others, its former Chief Financial Officer, Horsley.¹

15. On March 30, 2012, Sino-Forest filed for protection from its creditors through the CCAA, pursuant to the Order of Mr. Justice Morawetz (the "**Initial Order**").²

16. As part of the Initial Order, FTI Consulting Canada Inc. was appointed as Monitor of Sino-Forest and ordered to publish notice of the CCAA proceeding in both the Globe and Mail and the Wall Street Journal.³

The Claims Procedure Order

17. On May 14, 2012, the Court made an order establishing a "claims procedure" (the "**Claims Procedure Order**").⁴

¹ Affidavit of Alex Fidler-Wener, at para. 2 (Horsley Motion Record p. 8)

² Affidavit of Fidler-Wener, Exhibit B (the Initial Order) (Horsley Motion Record p. 12)

³ Affidavit of Fidler-Wener, Exhibit B (the Initial Order) at para. 51 (Horsley Motion Record p. 28)

⁴ Affidavit of Dominika Seczyk, Exhibit A (Horsley Supplementary Motion Record p. 3)

18. The Monitor was ordered to publish notice of the Claims Procedure Order through various media, including the Globe and Mail (National Edition) and the Wall Street Journal (Global Edition), by May 19, 2012.⁵

19. The Claims Procedure Order set out a procedure for all “persons” – which included organizations and regulatory bodies – to file proofs of claim against all Sino-Forest directors and officers before June 20, 2012 (*i.e.*, the claims bar date).⁶

20. Any “person” who failed to file a proof of claim by June 20, 2012 was (a) forever barred from bringing any claim or action against a Sino-Forest director or officer; and (b) was disentitled to further notice of any of Sino-Forest’s CCAA proceedings.⁷

21. The CPAO did not file a proof of claim.

Notice and Approval of the Plan of Compromise and Reorganization

22. In the summer of 2012, after months of extensive negotiations, Sino-Forest filed a Plan of Compromise and Reorganization (the “**Plan**”). The filing of the Plan for “court, creditor and regulatory approval” was widely publicized in the popular media, such as the Financial Post.⁸

23. On December 10, 2012, the Court made an order approving the Plan (the “**Plan Sanction Order**”). The approval of the Plan was also widely publicized in the popular media, such as Bloomberg and the CNW Newswire.⁹

24. Aside from publication in the popular media, notice of the Plan was also given to specific Sino-Forest stakeholders.¹⁰

25. The Plan Sanction Order declared that adequate notice of the Plan had been provided to all requisite parties and that all of its terms were fair and reasonable:

⁵ Affidavit of Seczyk, Exhibit A (Claims Procedure Order) at para. 12(d) (Horsley Supplementary Motion Record)

⁶ Affidavit of Seczyk, Exhibit A (Claims Procedure Order) at para. 18 (Horsley Supplementary Motion Record)

⁷ Affidavit of Seczyk, Exhibit A (Claims Procedure Order) at para. 18 (Horsley Supplementary Motion Record)

⁸ Affidavit of Fidler-Wener, at para. 5 and Exhibit C (Horsley Motion Record p. 8)

⁹ Affidavit of Fidler-Wener, at para. 5 and Exhibits D and E (Horsley Motion Record p. 8)

¹⁰ Affidavit of Fidler-Wener, Exhibit B (Plan Sanction Order) at para. 5 (Horsley Motion Record p. 43)

“THIS COURT ORDERS AND DECLARES that there has been good and sufficient notice, service and delivery of the Plan Filing and Meeting Order and the Meeting Materials (including, without limitation, the Plan) to all Persons upon which notice, service and delivery was required.

...

THIS COURT ORDERS AND DECLARES that the Plan, and all the terms and conditions thereof, and matters and transactions contemplated thereby, are fair and reasonable.”¹¹

26. The Court also declared that the Plan was binding all Persons:

“THIS COURT ORDERS AND DECLARES that the Plan and all associated steps, compromises, releases, discharges ... effected thereby are approved and shall be deemed to be implemented, binding and effective ... [against] all other Persons and parties named or referred to in, affected by, or subject to the Plan...”¹²

Releases and Injunctions Provided for in the Plan

27. The Plan sets out a procedure through which Sino-Forest’s directors and officers can enter into a settlement, make meaningful contributions to Sino-Forest’s restructuring, and obtain the broad releases and injunctions provided for in the Plan.¹³

28. More specifically, the Plan contemplates the release of, and an injunction prohibiting, all “causes of action” by all “persons”.

29. “Causes of action” is broadly defined in the Plan as follows:

“[A]ny and all claims, actions, causes of action, demands... suits, ... litigation, arbitration, proceeding, hearing, complaint, debt, obligation, sums of money ... damages, judgments, orders, including for injunctive relief or specific performance and compliance orders...”¹⁴

¹¹ Affidavit of Fidler-Wener, Exhibit B (Plan Sanction Order) at paras. 3, 7 (Horsley Motion Record pp. 43-44)

¹² Affidavit of Fidler-Wener, Exhibit B (Plan Sanction Order) at para. 9 (Horsley Motion Record p. 44)

¹³ Affidavit of Fidler-Wener, Exhibit B (the Plan) at section 11.2 (Horsley Motion Record pp. 136-137)

¹⁴ Affidavit of Fidler-Wener, Exhibit B (the Plan) at section 1.1 (Horsley Motion Record p. 68)

30. “Persons” is broadly defined in the Plan to include “any individual ... limited or unlimited liability corporation ... unincorporated association ... unincorporated organization, body corporate ... [and] Governmental Entity.”¹⁵ The term “governmental entity” is in turn defined in the Plan as follows:

“[A]ny government, regulatory authority ... agency, commission ... court, board, tribunal or dispute settlement panel or other law, rule or regulation-making organization or entity.”¹⁶

31. In short, the Plan provides for the release of all claims and proceedings – including those by organizations and regulatory bodies – as part of a settlement, which must be approved by the Court.

32. The only exception to this is a carve-out for the Ontario Securities Commission in the Plan such that its proceedings for “non-monetary remedies” are untouched by the compromises contained in the Plan. Any other regulatory proceedings are expressly made subject to the terms of the Plan and the compromises therein.¹⁷

33. The carve-out would not be necessary if the Plan was not intended to compromise regulatory proceedings.

Horsley Enters Into a Settlement Pursuant to the Plan

34. In May of 2014, Horsley entered into a proposed settlement agreement pursuant to the terms of the Plan (the “**Horsley Settlement**”).¹⁸ News of the proposed settlement was widely publicized in the popular media, such as Reuters and Business Wire.¹⁹

35. The Monitor, Litigation Trust, and the Class Actions Plaintiffs consented to the Horsley Settlement.²⁰

¹⁵ Affidavit of Fidler-Wener, Exhibit B (the Plan) at section 1.1 (Horsley Motion Record p. 82)

¹⁶ Affidavit of Fidler-Wener, Exhibit B (the Plan) at section 1.1 (Horsley Motion Record p. 75)

¹⁷ Affidavit of Fidler-Wener, Exhibit B (the Plan) at section 7.2(h) (Horsley Motion Record p. 121)

¹⁸ Affidavit of Fidler-Wener, at para. 6 and Exhibit F (Horsley Motion Record pp. 9, 161)

¹⁹ Affidavit of Fidler-Wener, at para. 7 and Exhibits G and H (Horsley Motion Record pp. 9, 192, 194)

²⁰ Affidavit of Fidler-Wener, Exhibit F (Minutes of Settlement) (Horsley Motion Record p. 161)

36. On June 5, 2014, the Court approved a “Notice Plan” to distribute notice of the Horsley Settlement to Sino-Forest’s stakeholders.²¹ The Court approved the Notice Plan, and stated that the proposed settlement would “resolve all causes of action, claims and/or demands, on all accounts howsoever arising in all jurisdictions, made against Mr. Horsley”.²²

37. The Notice Plan did not require that a copy of the Horsley Settlement be sent to the CPAO before approval, and there is no dispute that the CPAO (i) was not on the CCAA service list, and (ii) was unaware of the Horsley Settlement before it was approved.

38. On July 24, 2014, the Court approved the Horsley Settlement (the “**Settlement Order**”).²³ The Settlement Order confirms that the Notice Plan was adhered to and applies the broad release provisions in the Plan to Horsley as against all Persons:

“THIS COURT FINDS that all applicable parties have adhered to and acted in accordance with the Notice Order and that **the procedures provided in the Notice Order have provided good and sufficient notice of the hearing of this Motion, and that all Persons shall be and are hereby forever barred from objecting to the Horsley Settlement and the Horsley Release.** [Emphasis added].²⁴

39. The Settlement Order tracks the language of the Plan and contains (i) a release of all “causes of action” by any “person”, and (ii) an injunction prohibiting any “person” from asserting a “cause of action” against Horsley.

40. On January 29, 2015, the Monitor executed a certificate confirming that all settlement funds have been paid and received (the “**Monitor’s Certificate**”).²⁵

Horsley Settles with the OSC

41. On June 16, 2014, counsel for Horsley wrote to the CPAO informing it of Horsley’s intention to enter into a settlement with respect to a regulatory proceeding brought against

²¹ Affidavit of Fidler-Wener, at para. 8 (Horsley Motion Record p. 9)

²² Affidavit of Fidler-Wener, Exhibit I (Endorsement of Morawetz J.) at para. 1 (Horsley Motion Record p. 196)

²³ Affidavit of Fidler-Wener, at para. 9 (Horsley Motion Record p. 9)

²⁴ Affidavit of Fidler-Wener, Exhibit K (Settlement Order) at para. 2 (Horsley Motion Record p. 215)

²⁵ Affidavit of Seczyk, at para. 2 and Exhibit B (Monitor’s Certificate) (Horsley Supplementary Motion Record p. 28)

him by the OSC.²⁶ This letter did not notify the CPAO of the pending motion before this Court to approve the Horsley Settlement.

42. On June 26, 2014, Horsley executed a settlement agreement with the OSC. This settlement was approved by the OSC on July 21, 2014, although it remained conditional on the approval of the Horsley Settlement by the CCAA Court.²⁷

43. On July 28, 2014, counsel for Horsley wrote to the CPAO informing it that Horsley's settlement with the OSC had been approved.²⁸ This letter also advised the CPAO of the approval of the Horsley Settlement and provided the CPAO with a copy of the settlement agreement.

44. Both Horsley and the CPAO agree that there was no intent to mislead or misdirect the CPAO about the Horsley Settlement.

The CPAO Proceeding against Horsley

45. The CPAO is a corporation without share capital, established pursuant to the *Chartered Accountants Act, 2010*, S.O. 2010, c. 6, Sched. C. It functions to regulate the practice of individuals and firms as chartered accountants.²⁹

46. Ordinarily, the CPAO has the authority to convene tribunals to adjudicate complaints against members and to impose both monetary and non-monetary sanctions.³⁰

47. In January 2015, the CPAO informed Horsley that it had begun to investigate him with respect to his conduct as an officer of Sino-Forest.³¹

48. On April 16, 2015, the CPAO informed Horsley that it intended to commence a regulatory proceeding against him. Counsel for Horsley responded that any regulatory proceeding against Horsley is *prima facie* barred by the Plan and the Settlement Order.³²

²⁶ Affidavit of Fidler-Wener, at para. 12 (Horsley Motion Record p. 9)

²⁷ Affidavit of Fidler-Wener, at para. 13 and Exhibit M (Horsley Motion Record pp. 10, 233)

²⁸ Affidavit of Fidler-Wener, at para. 14 (Horsley Motion Record p. 10)

²⁹ *Chartered Accountants Act, 2010*, S.O. 2010, c. 6, Sched. C, at section 3 (Horsley Book of Authorities at Tab 1). Note that the "Institute of Chartered Accountants of Ontario" now operates under the umbrella of the CPAO.

³⁰ *Chartered Professional Accountants of Ontario Regulation 7-3*, at section 2 (Horsley's Book of Authorities Tab 2)

³¹ Affidavit of Fidler-Wener, at para. 15 (Horsley Motion Record p. 10)

49. On May 26, 2015, the CPAO served its Statement of Allegations and advised that it would seek the following sanctions against Horsley (the “**CPAO Proceeding**”).³³

- (a) A fine in the amount of \$75,000;
- (b) A reprimand and a two-year suspension from membership in the CPAO; and
- (c) Recovery of 2/3 of the costs of the investigation and prosecution.

PART III - ISSUE

50. The only issue on this motion is whether the Plan and Settlement Order bar the CPAO from bringing a regulatory proceeding against Horsley.

PART IV - LAW & ANALYSIS

51. The language of the Settlement Order and the Plan is clear and unequivocal: all proceedings regarding Horsley’s conduct at Sino-Forest, including those of regulatory bodies, are forever barred as against Horsley. This Court had the jurisdiction to make that order.

52. In Horsley’s respectful submission, his settlement cannot now be undone or amended. He paid a significant amount of money to Sino-Forest’s stakeholders in exchange for the comfort that he would not have to defend any sort of civil or regulatory proceeding in relation to his conduct at Sino-Forest.

53. That was the compromise. It was subject to extensive negotiation and input from Sino-Forest’s stakeholders, including the underwriters, BDO Canada Ltd., the Class Action Plaintiffs, the Monitor, the Ontario Securities Commission, and the Litigation Trust.

54. It was approved by this Court and the United States Bankruptcy Court for the Southern District of New York.³⁴

³² Affidavit of Fidler-Wener, at para. 16 (Horsley Motion Record p. 10)

³³ Affidavit of Fidler-Wener, at para. 17 and Exhibit O (Horsley Motion Record pp. 10, 263)

³⁴ Affidavit of Fidler-Wener, at para. 9 (Horsley Motion Record p. 9)

55. The settlement was specifically contemplated by the terms of the Plan, which was itself the subject of extensive negotiation. In fact, to undo or alter the Horsley Settlement would require an amendment to the Plan.

56. Horsley respectfully submits that his settlement should be given effect in accordance with its terms.

The CPAO's Proceeding is Barred from Proceeding Against Horsley by the Settlement Order and the Plan

57. The Settlement Order and the Plan provide broad releases to directors and officers that have effected a settlement through the Plan. Indeed, the Plan has a specific mechanism to compromise claims against Third-Party Defendants, such as Horsley.

58. Horsley followed that mechanism and reached a settlement. His settlement is consistent with the Plan and contains a comprehensive release. In particular, sections 14(a)-(b) of the Settlement Order states the following:

(a) any and all Horsley Claims shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled, barred and deemed satisfied and extinguished as against Horsley in accordance with section 11.2(c) of the Plan; [and]

(b) the Horsley Release [as set out in section 11.2(c) of the Plan] shall be binding according to its terms on any Person.³⁵

59. Together, these provisions define what types of proceedings are released (*i.e.*, "Horsley Claims"), and who the release applies to (*i.e.*, all "persons").

60. In this case, the CPAO Proceeding is barred because (a) the CPAO Proceeding is a "Horsley Claim"; (b) the CPAO is a "person" as defined by the Settlement Order and the Plan.

61. Finally, the CPAO is also enjoined from initiating the proceeding by virtue of section 14(c) of the Settlement Order, which states that "[the injunction in] section 7.3 of the Plan shall apply to Horsley and the Horsley Claims *mutatis mutandis*."³⁶

³⁵ Affidavit of Fidler-Wener, Exhibit K (Settlement Order) at ss. 14 (a)-(b) (Horsley Motion Record p. 217)

The CPAO Proceeding is a “Horsley Claim”

62. The term “Horsley Claims” is defined in the Settlement Order to include “any and all demands, claims, actions, Causes of Action (as defined in the Plan)”. This applies to Horsley’s conduct as a director or officer of Sino-Forest, including “any statutory or common law duties he may have owed”.

63. The term “causes of action” is defined by the Plan to include any and all “claims”, “actions”, “demands”, “litigation”, “proceeding”, “hearing”, “complaint”, “judgments” and “orders”.

64. The CPAO is now seeking to bring a proceeding against Horsley to sanction him on the basis of his conduct “while employed as Senior Vice President and Chief Financial Officer of Sino-Forest”, which is alleged to have contravened the CPAO’s Rules of Professional Conduct.³⁷

65. The CPAO Proceeding can only be described as a “proceeding” and as such it is a “Horsley Claim”.

The CPAO is a “Person”

66. The Settlement Order defines the term “person” as having the “same meaning ascribed to it by the Plan.” The Plan defines the term “person” broadly to include all “corporations” and “Governmental Entities” (*i.e.*, regulatory authority, commission, court, board, tribunal, dispute settlement panel, or other law, rule or regulation-making organization).³⁸

67. Pursuant to the *Chartered Accountants Act*, the CPAO is a “corporation” that has the ability to make regulations (*e.g.*, Rules of Professional Conduct) and to convene tribunals to adjudicate complaints made against its members.

68. Thus, the CPAO falls squarely within the definition of a “person” and it is therefore bound by the Plan and Settlement Order.

³⁶ Affidavit of Fidler-Wener, Exhibit K (Settlement Order) at s. 14(c) (Horsley Motion Record p. 217)

³⁷ Affidavit of Fidler-Wener, Exhibit O (CPAO Allegations) (Horsley Motion Record p. 263)

³⁸ Affidavit of Fidler-Wener, Exhibit B (the Plan) at section 1.1 (Horsley Motion Record p. 75)

The CPAO is Enjoined from Initiating a Proceeding Against Horsley

69. Finally, the CPAO is also enjoined from initiating the CPAO Proceeding pursuant to section 7.3 of the Plan:

All Persons are permanently and forever barred, estopped, stayed and enjoined, on and after the Effective Time, with respect to any and all Released Claims, from (i) commencing, conducting or continuing in any manner, directly or indirectly, any action, suits, demands or other proceedings of any nature or kind whatever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against the Released Parties; (ii) enforcing, levying, attaching, collecting or otherwise recovering or enforcing by any manner or means, directly or indirectly, any judgment, award, decree or order against the Released parties...³⁹

70. By virtue of section 14(c) of the Settlement Order, this injunction also applies to Horsley and all Horsley Claims as of the “effective date”. This is defined as the date of the Monitor’s Certificate,⁴⁰ which means that the CPAO was enjoined from bringing this proceeding as of January 29, 2015.

The Court has the jurisdiction to release the CPAO Proceeding under the CCAA

71. The Court’s jurisdiction to make the Settlement Order and the Plan is found in the CCAA.⁴¹ The CCAA provides the Court with broad jurisdiction to restructure the affairs of debtor companies and effect releases of third parties, such as directors and officers. The Plan and Settlement Order release Horsley from both monetary and non-monetary claims. In Horsley’s respectful submission, the Court had jurisdiction to order the release of both types of claims.

³⁹ Affidavit of Fidler-Wener, Exhibit B (the Plan) at s. 7.3 (Horsley Motion Record p. 122)

⁴⁰ Affidavit of Fidler-Wener, Exhibit B (the Plan) at s. 1.1 (Horsley Motion Record p. 72)

⁴¹ *Ted Leroy Trucking (Century Services) Ltd., Re*, 2010 SCC 60, at para. 66 (Horsley Book of Authorities Tab 4)

The Court has the jurisdiction to release monetary sanctions by the CPAO

72. The Court's jurisdiction to compromise claims against directors is set out in section 5.1(1) of the CCAA. This provision has been held to apply equally to officers:⁴²

“A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.”⁴³

73. The CPAO Proceeding is *prima facie* captured by this provision: it alleges that Horsley is liable in his capacity as an officer of Sino-Forest and seeks a \$75,000 fine plus costs.

The Court has the jurisdiction to release non-monetary sanctions by the CPAO

74. Pursuant to section 11 of the CCAA, Courts have broad discretion to make any order that it considers appropriate – with or without notice:

“[I]f an application is made under [the CCAA] in respect of a debtor company, **the court, on application of any person interested in the matter, may, subject to the restrictions set out in [the CCAA], on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.**” [Emphasis added].⁴⁴

75. The Court has jurisdiction to compromise regulatory proceedings against directors and officers. That jurisdiction is limited only in the context of the initial stay of proceedings. Indeed, section 11.1 specifically states that the Court can order an initial “stay” of a regulatory proceeding **only** in two circumstances. First, the Court can order that the regulatory proceeding is subject to the initial stay insofar as it seeks to enforce a monetary sanction. Second, the Court can order an initial stay of a regulatory proceeding seeking non-monetary

⁴² *Allen-Vanguard Corp., Re*, 2011 ONSC 5017, at paras. 47-48 (Horsley Book of Authorities Tab 5)

⁴³ *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (as amended), at s.5.1(1) (Horsley Book of Authorities Tab 3)

⁴⁴ *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (as amended), at s. 11 (Horsley Book of Authorities Tab 3)

sanctions only (i) if a viable plan or compromise could not be reached without the stay; (ii) it is not contrary to the public interest; and (iii) with notice to the regulatory body.⁴⁵

76. These restrictions make sense at the initial stay stage. The stay is meant to prevent a “free-for-all” amongst creditors.⁴⁶ In *AbitibiBowater Inc., Re*, the Supreme Court of Canada stated that, “[u]nder this model, the court can stay the enforcement of most claims against the debtor’s assets in order to maintain the *status quo* during negotiations with the creditors.”⁴⁷

77. Accordingly, it is only when a regulator is acting as a creditor and advancing a monetary claim that it becomes subject to an initial stay under the CCAA.⁴⁸

78. However, the same rationale does not apply to the releases contained in the Plan and Settlement Order. At the settlement stage, the Court is attempting to maximize the recovery to Sino-Forest and its stakeholders by incentivizing third parties, such as Horsley, to contribute to the restructuring of Sino-Forest in exchange for a full and comprehensive release.⁴⁹

79. There is no principled basis for a distinction between monetary and non-monetary claims when it comes to releasing claims against directors and officers of a debtor company.

80. This is evidenced by the fact that, unlike the stay provisions, the CCAA contains no equivalent restrictions on the Court’s jurisdiction to release the claims of a regulator as part of a compromise.

81. On the contrary, the only restrictions that Parliament included on releasing claims against directors and officers are listed in section 5.1(2), which relate to contractual rights, allegations of misrepresentations, or wrongful or oppressive conduct.

82. In Horsley’s respectful submission, the compromises that were made as part of his settlement cannot be undone now as that would undermine the objectives of the CCAA.

⁴⁵ *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (as amended), at s. 11.1 (Horsley Book of Authorities Tab 3)

⁴⁶ *Ted Leroy Trucking (Century Services) Ltd., Re*, 2010 SCC 60, at para. 22 (Horsley Book of Authorities Tab 4)

⁴⁷ *AbitibiBowater Inc., Re*, 2012 SCC 67, at para. 21 (Horsley Book of Authorities Tab 6)

⁴⁸ *Northstar Aerospace Inc.*, 2012 ONSC 4423, at paras. 52-55 (Horsley Book of Authorities Tab 7); *Nortel Networks Corp., Re*, 2013 ONCA 599, at paras. 43-45 (Horsley Book of Authorities Tab 8); *AbitibiBowater Inc., Re*, 2012 SCC 67, at paras. 26-30 (Horsley Book of Authorities Tab 6)

⁴⁹ *Robertson v. ProQuest Information & Learning Co.*, 2011 ONSC 1647, at para.22 (Horsley Book of Authorities Tab 9); *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, at para. 50 (Horsley Book of Authorities Tab 10)

83. Indeed, by approving the Horsley Settlement, the Court has already determined that the release and injunction contained therein (a) are fair and reasonable; (b) provide substantial benefits to other stakeholders; and (c) are consistent with the purpose and spirit of the CCAA.⁵⁰

84. Other settlements have also been approved through the Plan, including the Ernst & Young Settlement⁵¹ and a settlement by the Sino-Forest “dealers”.⁵² Each of these settlements contain the same release and injunction that is disputed on this motion. It would be manifestly unfair to single out the Horsley Settlement and permit the CPAO Proceeding only against Horsley.

85. Courts have recognized that a compromise requires “certainty and finality.”⁵³ Unwinding or amending the Plan and Settlement Order at this stage would not be fair and disturb the finality of the Horsley Settlement.

The Issue of Notice Is A Red Herring

86. It is unfortunate that the CPAO did not receive actual, direct notice of the Horsley Settlement and the motion for approval of that settlement. However, in Horsley’s submission, this is ultimately irrelevant for two reasons.

87. First, notice was provided *in rem* through repeated publications in the popular media.

88. The Monitor gave notice to the world at large at almost every stage of the proceedings, including the Initial Order, the Claims Procedure Order, prior to the approval of the Plan, after approval of the Plan, prior to the Horsley Settlement, and after approval the Horsley Settlement.

⁵⁰ See *Robertson v. ProQuest Information & Learning Co.*, 2011 ONSC 1647, at para. 22 (stating the test that the Court must apply in approving CCAA settlements) (Horsley Book of Authorities Tab 9); see also Affidavit of Fidler-Wener, Exhibit K (Settlement Order) at s. 10 (Horsley Motion Record p. 216)

⁵¹ See *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp.*, 2013 ONSC 1078 (Horsley Book of Authorities Tab 11).

⁵² See *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp.*, 2015 CarswellOnt 6975 (S.C.) (Horsley Book of Authorities Tab 12). The “dealers”, more specifically, refer to Credit Suisse Securities (Canada) Inc., TD Securities Inc., Dundee Securities Ltd., RBC Dominion Securities Inc., Scotia Capital Inc., CIBC World Markets Inc., Merrill Lynch Canada Inc., Canaccord Financial Ltd. (now known as Canaccord Genuity Corp.), Maison Placements Canada Inc., Credit Suisse Securities (USA) LLC and Merrill Lynch, Pierce, Fenner & Smith Incorporated, successor by merger to Banc of America Securities LLC.

⁵³ *Nortel Networks Corp., Re*, 2010 ONSC 1708, at para. 91 (Horsley Book of Authorities Tab 13)

89. Second, the Court has already found that the Notice Plan has provided “good and sufficient notice” such that the Order shall be binding as against “all Persons” and that the Horsley Settlement is “fair and reasonable in all the circumstances.” In fact, the Notice Order precludes a “person” (including the CPAO) from objecting to the terms of the Horsley Settlement.


90. In any event, it is the Plan that contains (i) the structure for the Horsley Settlement (section 11.2 of the Plan specifically outlines a process through which individuals such as Horsley can compromise claims against them), and (ii) the scope and nature of the release that Horsley could obtain in exchange for a contribution to Sino-Forest’s restructuring. The time for the CPAO to challenge the scope and nature of the release that Horsley received was when the Plan was approved. After that, the die was cast.

91. The Plan was approved with overwhelming support from Sino-Forest’s stakeholders, and it is the Plan that facilitated and allowed the compromise of the CPAO’s claims.

PART V - CONCLUSION

92. The CPAO is barred from bringing a proceeding against Horsley for his conduct as an officer of Sino-Forest by the clear and unequivocal language of the Settlement Order and the Plan.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th of November, 2015.


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SCHEDULE "A"
LIST OF AUTHORITIES

Statutes and Regulations

1. *Chartered Accountants Act, 2010*, S.O. 2010, c. 6, Sched. C
2. *Chartered Professional Accountants of Ontario Regulation 7-3*
3. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (as amended)

Cases

4. *Ted Leroy Trucking (Century Services) Ltd., Re*, 2010 SCC 60
5. *Allen-Vanguard Corp., Re*, 2011 ONSC 5017
6. *AbitibiBowater Inc., Re*, 2012 SCC 67
7. *Northstar Aerospace Inc.*, 2012 ONSC 4423
8. *Nortel Networks Corp., Re*, 2013 ONCA 599
9. *Robertson v. ProQuest Information & Learning Co.*, 2011 ONSC 1647
10. *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587
11. *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp.*, 2013 ONSC 1078
12. *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp.*, 2015 CarswellOnt 6975 (S.C.)
13. *Nortel Networks Corp., Re*, 2010 ONSC 1708

SCHEDULE "B"
RELEVANT STATUTES

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as amended)

5. Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

(2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

...

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.

...

11.03 (1) An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

...

11.1 (1) In this section, "regulatory body" means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.

(2) Subject to subsection (3), no order made under section 11.02 affects a regulatory body's investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.

(3) On application by the company and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion

(a) a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and

(b) it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C.
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IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c.
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Court File No: CV-12-9667-00CL;
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**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at TORONTO

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