

COURT OF APPEAL FOR ONTARIO

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 OF SINO-FOREST CORPORATION

Credit Suisse Securities (Canada) Inc., TD Securities Inc., Dundee Securities Corporation
(now known as DWM Securities Inc.), 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

Appellants on Appeal

- and -

Sino-Forest Corporation

Respondent on Appeal

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Tab 1

**Notice of Appeal of the Applicants, the Underwrites,
dated October 16, 2012**

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

COURT OF APPEAL FOR ONTARIO

**IN THE MATTER OF THE COMPANIES' CREDITORS
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- and -

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NOTICE OF APPEAL

CREDIT SUISSE SECURITIES (CANADA) INC., TD SECURITIES INC., DUNDEE SECURITIES CORPORATION (now known as DWM SECURITIES INC.), 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 (the "Appellants" or "Underwriters") APPEAL to the Court of Appeal for Ontario from the Order of Mr. Justice Morawetz of the Ontario Superior Court of Justice (Commercial List) (the "Court"), dated July 27, 2012 (the "Equity Claims Order"), made at Toronto, Ontario.

THE APPELLANTS ASK that the Equity Claims Order be set aside and judgment be granted as follows:

1. An Order abridging the time for service of the Notice of Appeal, Appeal Book and Compendium and other materials relating to this appeal, validating such service and dispensing with any further service such that the appeal is properly returnable on a date to be fixed by the Registrar;
2. An Order dismissing the Equity Claims Motion (as such term is defined below); and
3. Such further and other relief as the lawyers for the Appellants may request and this Appellate Court may permit.

THE GROUNDS OF APPEAL are as follows:

1. *Class Actions.* Sino-Forest Corporation (“Sino-Forest”) and certain of its current and former officers, directors and employees, along with Sino-Forest’s current and former auditors, technical consultants and various underwriters involved in prior equity and debt offerings (the “Offerings”) were named as defendants in one or more proposed class action lawsuits commenced in 2011 in Ontario, Quebec, Saskatchewan and New York (the “Class Actions”).
2. The Class Actions involve allegations that the public disclosure made by Sino-Forest contained misrepresentations, including in prospectus disclosure relating to the Offerings, and in the company’s quarterly and annual continuous disclosure. The plaintiffs in the Class Actions seek to represent classes of owners of debt and equity securities of Sino-Forest. The Underwriters are among the defendants named in certain of the Class Actions.
3. In connection with the Offerings, certain Underwriters entered into agreements with Sino-Forest and certain of its subsidiaries (the “Sino-Forest Subsidiary Companies”) providing that Sino-Forest and, with respect to certain Offerings of notes, the Sino-Forest Subsidiary Companies, have agreed to indemnify and hold harmless the Underwriters in connection with an array of matters that could arise from the Offerings. All such agreements were entered into prior to the Amendments (as such term is defined below).

4. *CCAA Proceedings.* On March 30, 2012, Sino-Forest sought and obtained from the motions judge an Initial Order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"), which provided it with protection from creditors, consisting of the holders of Sino-Forest's shares and notes, as well as persons with indemnity claims, including the Underwriters.

5. On May 14, 2012, the motions judge made the Claims Procedure Order, which required claims against Sino-Forest, its directors and officers, and its subsidiaries to be filed by June 21, 2012 (although with respect to claims against subsidiaries, no court ordered deadline for filing proofs of claim has been set, as the subsidiaries are not Applicants in the CCAA proceedings). The Underwriters duly filed proofs of claim pursuant to the Claims Procedure Order.

6. *Equity Claims Order.* On June 26, 2012, the motions judge heard the motion (the "Equity Claims Motion") by Sino-Forest seeking the Equity Claims Order. Sino-Forest sought declarations that certain independent, third-party indemnification claims (the "Contractual Indemnity Claims") against Sino-Forest given to the Underwriters as part of their contractual retainers to provide underwriting services in connection with certain of the Offerings are "equity claims" as defined in section 2 of the CCAA.

7. On July 27, 2012, the motions judge made the Equity Claims Order, which, *inter alia*, declared that the Contractual Indemnity Claims were equity claims, other than in so far as they consist of defence costs. Such determination affects the Appellants' entitlement to vote on a CCAA plan of compromise or arrangement, distributions under such plan, relative priorities among creditors and the statutory subordination of claims.

8. *Errors of the Motions Judge.* The motions judge erred in determining that the Contractual Indemnity Claims are equity claims at all.

9. The motions judge made the following specific errors:

- (a) The motions judge erred in his interpretation of section 2 of the CCAA (definition of "equity claims", and in particular, subsection (e) of said definition (the "CCAA Equity Claims Definition")), in concluding that the CCAA Equity Claims Definition includes as equity claims the claims of contractual, arm's length

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indemnity claimants such as underwriters who are not shareholders and whose claims are not in respect of equity interests held by such claimants.

- (b) The motions judge failed to properly construe subsections (a) to (e) of the CCAA Equity Claims Definition. The words “contribution or indemnity in respect of a claim” used in subsection (e) are meant to apply to claims arising from an indemnity granted in favour of shareholders of a company and not to claims arising from a contractual indemnity granted in favour of an independent third party.
- (c) The motions judge erred in holding that the amendments (the “Amendments”) to Canadian bankruptcy and insolvency legislation that came into effect in September 2009 substantively altered the law so as to subordinate and treat as equity claims the claims of contractual, arm’s length indemnity claimants such as underwriters who are not shareholders and whose claims are not in respect of equity interests held by such claimants.
- (d) The motions judge erred in finding that the characterization of the Contractual Indemnity Claims as equity claims turns on the nature of the underlying claim that triggers the indemnity claim, as opposed to the nature and origin of the indemnity claim as a contractual term provided as part of a contract for services. The law distinguishes between claimants who hold equity claims and those who hold debt claims. Arm’s length contracting parties who obtain contractual indemnities in relation to their supply of services do not hold equity claims.
- (e) The motions judge erred in finding that the Contractual Indemnity Claims are being used to recover an equity investment. The Contractual Indemnity Claims are not in respect of an equity interest held by the claimant (and therefore are not equity claims) and must be distinguished from the claims of shareholders, themselves. The Underwriters’ indemnity claims are based on their status as contractual counterparties to Sino-Forest that supplied services to Sino-Forest. The relationship between the Underwriters and Sino-Forest bears no hallmarks of an equity relationship, and claims arising from their commercial and contractual

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dealings are, in no sense of the word, equity claims. The claims of the Underwriters and shareholders are legally distinct and should be so considered.

10. In addition, the motion judge's Endorsement failed to properly consider the following issues:

- (a) In the Endorsement, the motions judge does not address the legislative background to the amendments to section 2 of the CCAA or the statutory interpretation consequences flowing from it. The Amendments, including, *inter alia*, the amendments to section 2 of the CCAA, were widely regarded as codifying and articulating existing law rather than changing the law; however, the motions judge erred in construing the language of the amendments as changing the law with respect to the treatment of contractual, third-party indemnity claims in CCAA proceedings. Nor was there extrinsic evidence before the motions judge to support a finding that Parliament intended to change or did, in fact, change the common law as it existed at the time of the Amendments.
- (b) The pre-Amendments case law remains relevant for the reasons discussed above. Historically, common law practice was such that on the insolvency of a company, the claims of creditors rank ahead of the claims of shareholders. This is premised on the notion that shareholders are higher risk takers, having willingly chosen to tie their investment to the fortunes of the corporation, as opposed to creditors who choose a lower level of exposure to risk. The Amendments properly construed are a codification of the established common law prohibitions against various creative attempts by shareholders (not arm's length third parties) upon the bankruptcy or insolvency of a company to characterize as debts claims that were, in substance, claims for the recovery of an equity investment. The motions judge failed to take into account this common law in reaching his conclusion regarding the Contractual Indemnity Claims.
- (c) In the Endorsement, the motions judge does not address the nature of the claims made by the Underwriters. Contractual Indemnity Claims are claims of Underwriters against Sino-Forest, triggered in this instance by claims brought by

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shareholders against the Underwriters, as opposed to direct shareholder claims against Sino-Forest. Third-party Contractual Indemnity Claims, such as those held by the Underwriters, are not of a kind or nature precluded by case law prior to the Amendment, nor the subject of the Amendments, themselves. The Underwriters' indemnity claims are based on their status as contractual counterparties to Sino-Forest that supplied services to Sino-Forest. The Underwriters bargained for, *inter alia*, certain protections in the relevant agreements with Sino-Forest, including the indemnity provisions contained therein. The Contractual Indemnity Claims of the Underwriters are derivative of the Underwriters' status as contractual counterparties to Sino-Forest in respect of the indemnities as opposed to derivative of the claims of shareholders.

11. The CCAA, and, in particular, the CCAA Equity Claims Definition.
12. Such further and other grounds as the lawyers for the Appellants may advise and this Appellate Court may permit.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

13. By motion dated August 16, 2012 the Appellants sought leave to appeal the final Equity Claims Order of Mr. Justice Morawetz of the Ontario Superior Court of Justice (Commercial List), in accordance with sections 13 and 14 of the CCAA and Rule 61.03.1 of the *Rules of Civil Procedure* (Ontario);
14. The Court of Appeal for Ontario has jurisdiction to hear appeals from final orders of the Ontario Superior Court of Justice pursuant to section 6(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43;
15. Leave to appeal was granted by Order of the Court of Appeal for Ontario by Endorsement dated October 10, 2012, together with the related appeals in Court File No. M41654 and Court File No. M41655, with the appeals to be heard on an expedited basis on a date to be fixed by the Registrar; and

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16. Rule 61 of the *Rules of Civil Procedure* (Ontario), R.R.O. 1990, O. Reg. 194.

October 16, 2012

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

**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 OR ARRANGEMENT
OF SINO-FOREST CORPORATION**

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 Canada

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS
AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST
CORPORATION

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

COURT OF APPEAL FOR ONTARIO

**NOTICE OF APPEAL OF THE UNDERWRITERS
NAMED IN CLASS ACTIONS**

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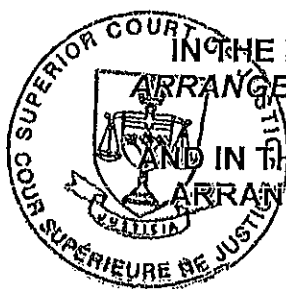
Tab 2

**Equity Claims Order of Justice Morawetz
dated July 27, 2012**

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE MR.)	FRIDAY, THE 27 th
)	
JUSTICE MORAWETZ)	DAY OF JULY, 2012



**IN THE MATTER OF THE COMPANIES' CREDITORS
ARRANGEMENT ACT, R.S.C. 1985, c.C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF SINO-FOREST CORPORATION**

ORDER

THIS MOTION made by the Applicant, Sino-Forest Corporation ("**SFC**") regarding the status of shareholder claims and related indemnity claims was heard this day, at the courthouse at 330 University Avenue, Toronto, Ontario,

ON READING the Motion Record of the Applicant, the Responding Motion Record of Ernst & Young LLP, the Book of Previously Filed Materials and Court Orders, and the Responding Motion Record of BDO Limited and the facts of the parties, and on hearing the submissions of counsel for the Moving Party, Sino-Forest Corporation, the Monitor, the Ad Hoc Committee of Noteholders, Ernst & Young, BDO, and certain underwriters named as defendants in the Ontario Class Action:

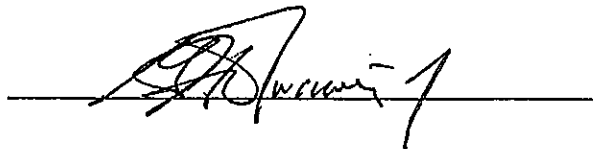
1. **THIS COURT ORDERS** that further service of the Notice of Motion and Motion Record on any party not already served is hereby dispensed with, such that this motion is properly returnable today.
2. **THIS COURT ORDERS** that the claims against SFC resulting from the ownership, purchase or sale of an equity interest in SFC, including, without

- limitation, the claims by or on behalf of current or former shareholders asserted in the proceedings listed in Schedule "A", (collectively, the "Shareholder Claims") are "equity claims" as defined in section 2 of the *Companies' Creditors Arrangement Act* (the "CCAA"), being claims in respect of monetary losses resulting from the ownership, purchase or sale of an equity interest.
3. **THIS COURT ORDERS** that any indemnification claims against SFC related to or arising from the Shareholder Claims, including, without limitation, by or on behalf of any of the other defendants to the proceedings listed in Schedule "A", (the "Related Indemnity Claims") are "equity claims" under the CCAA, being claims for contribution or indemnity in respect of claims that are equity claims.
 4. **THIS COURT ORDERS** that nothing in paragraph 3 determines whether this Order extends to the aspect of any Related Indemnity Claims that corresponds to defence costs in connection with the defence of any Shareholder Claims.
 5. **THIS COURT ORDERS** that the order is without prejudice to SFC's right to apply for a similar order with respect to (i) any claims that are in respect of Securities other than shares and (ii) any indemnification claims against SFC related thereto.

ENTERED AT / INSERIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

AUG 03 2012

PER/PAR:



Schedule "A"

1. *Trustees of the Labourers' Pension Fund of Central and Eastern Canada et al. v. Sino-Forest Corporation et al.* (Ontario Superior Court of Justice, Court File No. CV-11-431153-00CP)
2. *Guining Liu v. Sino-Forest Corporation et al.* (Quebec Superior Court, Court File No: 200-06-000132-111)
3. *Allan Haigh v. Sino-Forest Corporation et al.* (Saskatchewan Court of Queen's Bench, Court File No. 2288 of 2011)
4. *David Leopard et al. v. Allen T.Y. Chan et al.* (District Court of the Southern District of New York, Court File No. 650258/2012)

**IN THE MATTER OF THE COMPANIES CREDITORS' ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE
MATTER OF A PLAN OR COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION**

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

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

Proceedings commenced in Toronto

**ORDER
(Regarding the Status of Shareholder
Claims and Related Indemnity Claims
under the CCAA)**

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Tab 3

**Endorsement of Justice Morawetz
dated July 27, 2012**

CITATION: Sino-Forest Corporation (Re), 2012 ONSC 4377
COURT FILE NO.: CV-12-9667-00CL
DATE: 20120727

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION, Applicant

BEFORE: MORAWETZ J.

COUNSEL: Robert W. Staley and Jonathan Bell, for the Applicant

Jennifer Stam, for the Monitor

Kenneth Dekker, for BDO Limited

Peter Griffin and Peter Osborne, for Ernst & Young LLP

Benjamin Zarnett, Robert Chadwick and Brendan O'Neill, for the Ad Hoc Committee of Noteholders

James Grout, for the Ontario Securities Commission

Emily Colc and Joseph Marin, for Allen Chan

Simon Bieber, for David Horsley

David Bish, John Fabello and Adam Slavens, for the Underwriters Named in the Class Action

Max Starnino and Kirk Baert, for the Ontario Plaintiffs

Larry Lowenstein, for the Board of Directors

HEARD: June 26, 2012

ENDORSEMENT

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Overview

[1] Sino-Forest Corporation ("SFC" or the "Applicant") seeks an order directing that claims against SFC, which result from the ownership, purchase or sale of an equity interest in SFC, are "equity claims" as defined in section 2 of the *Companies' Creditors Arrangement Act* ("CCAA") including, without limitation: (i) the claims by or on behalf of current or former shareholders asserted in the proceedings listed in Schedule "A" (collectively, the "Shareholder Claims"); and (ii) any indemnification claims against SFC related to or arising from the Shareholder Claims, including, without limitation, those by or on behalf of any of the other defendants to the proceedings listed in Schedule "A" (the "Related Indemnity Claims").

[2] SFC takes the position that the Shareholder Claims are "equity claims" as defined in the CCAA as they are claims in respect of a monetary loss resulting from the ownership, purchase or sale of an equity interest in SFC and, therefore, come within the definition. SFC also takes the position that the Related Indemnity Claims are "equity claims" as defined in the CCAA as they are claims for contribution or indemnity in respect of a claim that is an equity claim and, therefore, also come within the definition.

[3] On March 30, 2012, the court granted the Initial Order providing for the CCAA stay against SFC and certain of its subsidiaries. FTI Consulting Canada Inc. was appointed as Monitor.

[4] On the same day, the Sales Process Order was granted, approving Sales Process procedures and authorizing and directing SFC, the Monitor and Houlihan Lokey to carry out the Sales Process.

[5] On May 14, 2012, the court issued a Claims Procedure Order, which established June 20, 2012 as the Claims Bar Date.

[6] The stay of proceedings has since been extended to September 28, 2012.

[7] Since the outset of the proceedings, SFC has taken the position that it is important for these proceedings to be completed as soon as possible in order to, among other things, (i) enable the business operated in the Peoples Republic of China ("PRC") to be separated from SFC and put under new ownership; (ii) enable the restructured business to participate in the Q4 sales season in the PRC market; and (iii) maintain the confidence of stakeholders in the PRC (including local and national governmental bodies, PRC lenders and other stakeholders) that the business in the PRC can be successfully separated from SFC and operate in the ordinary course in the near future.

[8] SFC has negotiated a Support Agreement with the Ad Hoc Committee of Noteholders and intends to file a plan of compromise or arrangement (the "Plan") under the CCAA by no later than August 27, 2012, based on the deadline set out in the Support Agreement and what they submit is the commercial reality that SFC must complete its restructuring as soon as possible.

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[9] Noteholders holding in excess of \$1.296 billion, or approximately 72% of the approximately \$1.8 billion of SFC's noteholders' debt, have executed written support agreements to support the SFC CCAA Plan as of March 30, 2012.

Shareholder Claims Asserted Against SFC

(i) Ontario

[10] By Fresh as Amended Statement of Claim dated April 26, 2012 (the "Ontario Statement of Claim"), the Trustees of the Labourers' Pension Fund of Central and Eastern Canada and other plaintiffs asserted various claims in a class proceeding (the "Ontario Class Proceedings") against SFC, certain of its current and former officers and directors, Ernst & Young LLP ("E&Y"), BDO Limited ("BDO"), Poyry (Beijing) Consulting Company Limited ("Poyry") and SFC's underwriters (collectively, the "Underwriters").

[11] Section 1(m) of the Ontario Statement of Claim defines "class" and "class members" as:

All persons and entities, wherever they may reside who acquired Sino's Securities during the Class Period by distribution in Canada or on the Toronto Stock Exchange or other secondary market in Canada, which securities include those acquired over the counter, and all persons and entities who acquired Sino's Securities during the Class Period who are resident of Canada or were resident of Canada at the time of acquisition and who acquired Sino's Securities outside of Canada, except the Excluded Persons.

[12] The term "Securities" is defined as "Sino's common shares, notes and other securities, as defined in the OSA". The term "Class Period" is defined as the period from and including March 19, 2007 up to and including June 2, 2011.

[13] The Ontario Class Proceedings seek damages in the amount of approximately \$9.2 billion against SFC and the other defendants.

[14] The thrust of the complaint in the Ontario Class Proceedings is that the class members are alleged to have purchased securities at "inflated prices during the Class Period" and that absent the alleged misconduct, sales of such securities "would have occurred at prices that reflected the true value" of the securities. It is further alleged that "the price of Sino's Securities was directly affected during the Class Period by the issuance of the Impugned Documents".

(ii) Quebec

[15] By action filed in Quebec on June 9, 2011, Guining Liu commenced an action (the "Quebec Class Proceedings") against SFC, certain of its current and former officers and directors, E&Y and Poyry. The Quebec Class Proceedings do not name BDO or the Underwriters as defendants. The Quebec Class Proceedings also do not specify the quantum of damages sought, but rather reference "damages in an amount equal to the losses that it and the other members of the group suffered as a result of purchasing or acquiring securities of Sino at inflated prices during the Class Period".

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[16] The complaints in the Quebec Class Proceedings centre on the effect of alleged misrepresentations on the share price. The duty allegedly owed to the class members is said to be based in "law and other provisions of the *Securities Act*", to ensure the prompt dissemination of truthful, complete and accurate statements regarding SFC's business and affairs and to correct any previously-issued materially inaccurate statements.

(iii) **Saskatchewan**

[17] By Statement of Claim dated December 1, 2011 (the "Saskatchewan Statement of Claim"), Mr. Allan Haigh commenced an action (the "Saskatchewan Class Proceedings") against SFC, Allen Chan and David Horsley.

[18] The Saskatchewan Statement of Claim does not specify the quantum of damages sought, but instead states in more general terms that the plaintiff seeks "aggravated and compensatory damages against the defendants in an amount to be determined at trial".

[19] The Saskatchewan Class Proceedings focus on the effect of the alleged wrongful acts upon the trading price of SFC's securities:

The price of Sino's securities was directly affected during the Class Period by the issuance of the Impugned Documents. The defendants were aware at all material times that the effect of Sino's disclosure documents upon the price of its Sino's [sic] securities.

(iv) **New York**

[20] By Verified Class Action Complaint dated January 27, 2012, (the "New York Complaint"), Mr. David Leopard and IMF Finance SA commenced a class proceeding against SFC, Mr. Allen Chan, Mr. David Horsley, Mr. Kai Kit Poon, a subset of the Underwriters, E&Y, and Ernst & Young Global Limited (the "New York Class Proceedings").

[21] SFC contends that the New York Class Proceedings focus on the effect of the alleged wrongful acts upon the trading price of SFC's securities.

[22] The plaintiffs in the various class actions have named parties other than SFC as defendants, notably, the Underwriters and the auditors, E&Y, and BDO, as summarized in the table below. The positions of those parties are detailed later in these reasons.

	Ontario	Quebec	Saskatchewan	New York
E&Y LLP	X	X	-	X
E&Y Global	-	-	-	X
BDO	X	-	-	-

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Poyry	X	X	-	-
Underwriters	11	-	-	2

Legal Framework

[23] Even before the 2009 amendments to the CCAA dealing with equity claims, courts recognized that there is a fundamental difference between shareholder equity claims as they relate to an insolvent entity versus creditor claims. Essentially, shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditor claims are not being paid in full. Simply put, shareholders have no economic interest in an insolvent enterprise: *Blue Range Resource Corp. (Re)*, (2004) 4 W.W.R. 738 (Alta. Q.B.) [*Blue Range Resources*]; *Stelco Inc. (Re)*, (2006) CanLII 1773 (Ont. S.C.J.) [*Stelco*]; *Royal Bank of Canada v. Central Capital Corp.* (1996), 27 O.R. (3d) 494 (C.A.).

[24] The basis for the differentiation flows from the fundamentally different nature of debt and equity investments. Shareholders have unlimited upside potential when purchasing shares. Creditors have no corresponding upside potential: *Nelson Financial Group Limited (Re)*, 2010 ONSC 6229 [*Nelson Financial*].

[25] As a result, courts subordinated equity claims and denied such claims a vote in plans of arrangement: *Blue Range Resource, supra*; *Stelco, supra*; *EarthFirst Canada Inc. (Re)* (2009), 56 C.B.R. (5th) 102 (Alta. Q.B.) [*EarthFirst Canada*]; and *Nelson Financial, supra*.

[26] In 2009, significant amendments were made to the CCAA. Specific amendments were made with the intention of clarifying that equity claims are subordinated to other claims.

[27] The 2009 amendments define an "equity claim" and an "equity interest". Section 2 of the CCAA includes the following definitions:

"Equity Claim" means a claim that is in respect of an equity interest, including a claim for, among others, (...)

(d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or

(e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d);

"Equity Interest" means

(a) in the case of a company other than an income trust, a share in the company – or a warrant or option or another right to acquire a share in the company – other than one that is derived from a convertible debt,

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[28] Section 6(8) of the CCAA prohibits a distribution to equity claimants prior to payment in full of all non-equity claims.

[29] Section 22(1) of the CCAA provides that equity claimants are prohibited from voting on a plan unless the court orders otherwise.

Position of Ernst & Young

[30] E&Y opposes the relief sought, at least as against E&Y, since the E&Y proof of claim evidence demonstrates in its view that E&Y's claim:

- (a) is not an equity claim;
- (b) does not derive from or depend upon an equity claim (in whole or in part);
- (c) represents discreet and independent causes of action as against SFC and its directors and officers arising from E&Y's direct contractual relationship with such parties (or certain of such parties) and/or the tortious conduct of SFC and/or its directors and officers for which they are in law responsible to E&Y; and
- (d) can succeed independently of whether or not the claims of the plaintiffs in the class actions succeed.

[31] In its factum, counsel to E&Y acknowledges that during the periods relevant to the Class Action Proceedings, E&Y was retained as SFC's auditor and acted as such from 2007 until it resigned on April 5, 2012.

[32] On June 2, 2011, Muddy Waters LLC ("Muddy Waters") issued a report which purported to reveal fraud at SFC. In the wake of that report, SFC's share price plummeted and Muddy Waters profited from its short position.

[33] E&Y was served with a multitude of class action claims in numerous jurisdictions.

[34] The plaintiffs in the Ontario Class Proceedings claim damages in the aggregate, as against all defendants, of \$9.2 billion on behalf of resident and non-resident shareholders and noteholders. The causes of action alleged are both statutory, under the *Securities Act (Ontario)* and at common law, in negligence and negligent misrepresentation.

[35] In its factum, counsel to E&Y acknowledges that the central claim in the class actions is that SFC made a series of misrepresentations in respect of its timber assets. The claims against E&Y and the other third party defendants are that they failed to detect these misrepresentations and note in particular that E&Y's audit did not comply with Canadian generally accepted accounting standards. Similar claims are advanced in Quebec and the U.S.

[36] Counsel to E&Y notes that on May 14, 2012 the court granted a Claims Procedure Order which, among other things, requires proofs of claim to be filed no later than June 20, 2012. E&Y takes issue with the fact that this motion was then brought notwithstanding that proofs of claim and D&O proofs of claim had not yet been filed.

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[37] E&Y has filed with the Monitor, in accordance with the Claims Procedure Order, a proof of claim against SFC and a proof of claim against the directors and officers of SFC.

[38] E&Y takes the position that it has contractual claims of indemnification against SFC and its subsidiaries and has statutory and common law claims of contribution and/or indemnity against SFC and its subsidiaries for all relevant years. E&Y contends that it has stand-alone claims for breach of contract and negligent and/or fraudulent misrepresentation against the company and its directors and officers.

[39] Counsel submits that E&Y's claims against Sino-Forest and the SFC subsidiaries are:

- (a) creditor claims;
- (b) derived from E&Y retainers by and/or on behalf of Sino-Forest and the SFC subsidiaries and E&Y's relationship with such parties, all of which are wholly independent and conceptually different from the claims advanced by the class action plaintiffs;
- (c) claims that include the cost of defending and responding to various proceedings, both pre- and post-filing; and
- (d) not equity claims in the sense contemplated by the CCAA. E&Y's submission is that equity holders of Sino-Forest have not advanced, and could not advance, any claims against SFC's subsidiaries.

[40] Counsel further contends that E&Y's claim is distinct from any and all potential and actual claims by the plaintiffs in the class actions against Sino-Forest and that E&Y's claim for contribution and/or indemnity is not based on the claims against Sino-Forest advanced in the class actions but rather only in part on those claims, as any success of the plaintiffs in the class actions against E&Y would not necessarily lead to success against Sino-Forest, and vice versa. Counsel contends that E&Y has a distinct claim against Sino-Forest independent of that of the plaintiffs in the class actions. The success of E&Y's claims against Sino-Forest and the SFC subsidiaries, and the success of the claims advanced by the class action plaintiffs, are not co-dependent. Consequently, counsel contends that E&Y's claim is that of an unsecured creditor.

[41] From a policy standpoint, counsel to E&Y contends that the nature of the relationship between a shareholder, who may be in a position to assert an equity claim (in addition to other claims) is fundamentally different from the relationship existing between a corporation and its auditors.

Position of BDO Limited

[42] BDO was auditor of Sino-Forest Corporation between 2005 and 2007, when it was replaced by E&Y.

[43] BDO has a filed a proof of claim against Sino-Forest pursuant to the Claims Procedure Order.

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[44] BDO's claim against Sino-Forest is primarily for breach of contract.

[45] BDO takes the position that its indemnity claims, similar to those advanced by E&Y and the Underwriters, are not equity claims within the meaning of s. 2 of the CCAA.

[46] BDO adopts the submissions of E&Y which, for the purposes of this endorsement, are not repeated.

Position of the Underwriters

[47] The Underwriters take the position that the court should not decide the equity claims motion at this time because it is premature or, alternatively, if the court decides the equity claims motion, the equity claims order should not be granted because the Related Indemnity Claims are not "equity claims" as defined in s. 2 of the CCAA.

[48] The Underwriters are among the defendants named in some of the class actions. In connection with the offerings, certain Underwriters entered into agreements with Sino-Forest and certain of its subsidiaries providing that Sino-Forest and, with respect to certain offerings, the Sino-Forest subsidiary companies, agree to indemnify and hold harmless the Underwriters in connection with an array of matters that could arise from the offerings.

[49] The Underwriters raise the following issues:

- (i) Should this court decide the equity claims motion at this time?
- (ii) If this court decides the equity claims motion at this time, should the equity claims order be granted?

[50] On the first issue, counsel to the Underwriters takes the position that the issue is not yet ripe for determination.

[51] Counsel submits that, by seeking the equity claims order at this time, Sino-Forest is attempting to pre-empt the Claims Procedure Order, which already provides a process for the determination of claims. Until such time as the claims procedure in respect of the Related Indemnity Claims is completed, and those claims are determined pursuant to that process, counsel contends the subject of the equity claims motion raises a merely hypothetical question as the court is being asked to determine the proper interpretation of s. 2 of the CCAA before it has the benefit of an actual claim in dispute before it.

[52] Counsel further contends that by asking the court to render judgment on the proper interpretation of s. 2 of the CCAA in the hypothetical, Sino-Forest has put the court in a position where its judgment will not be made in the context of particular facts or with a full and complete evidentiary record.

[53] Even if the court determines that it can decide this motion at this time, the Underwriters submit that the relief requested should not be granted.

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Position of the Applicant

[54] The Applicant submits that the amendments to the CCAA relating to equity claims closely parallel existing U.S. law on the subject and that Canadian courts have looked to U.S. courts for guidance on the issue of equity claims as the subordination of equity claims has long been codified there: see e.g. *Blue Range Resources, supra*, and *Nelson Financial, supra*.

[55] The Applicant takes the position that based on the plain language of the CCAA, the Shareholder Claims are "equity claims" as defined in s. 2 as they are claims in respect of a "monetary loss resulting from the ownership, purchase or sale of an equity interest".

[56] The Applicant also submits the following:

- (a) the Ontario, Quebec, Saskatchewan and New York Class Actions (collectively, the "Class Actions") all advance claims on behalf of shareholders.
- (b) the Class Actions also allege wrongful conduct that affected the trading price of the shares, in that the alleged misrepresentation "artificially inflated" the share price; and
- (c) the Class Actions seek damages relating to the trading price of SFC shares and, as such, allege a "monetary loss" that resulted from the ownership, purchase or sale of shares, as defined in s. 2 of the CCAA.

[57] Counsel further submits that, as the Shareholder Claims are "equity claims", they are expressly subordinated to creditor claims and are prohibited from voting on the plan of arrangement.

[58] Counsel to the Applicant also submits that the definition of "equity claims" in s. 2 of the CCAA expressly includes indemnity claims that relate to other equity claims. As such, the Related Indemnity Claims are equity claims within the meaning of s. 2.

[59] Counsel further submits that there is no distinction in the CCAA between the source of any claim for contribution or indemnity; whether by statute, common law, contractual or otherwise. Further, and to the contrary, counsel submits that the legal characterization of a contribution or indemnity claim depends solely on the characterization of the primary claim upon which contribution or indemnity is sought.

[60] Counsel points out that in *Return on Innovation Capital v. Gandi Innovations Limited*, 2011 ONSC 5018, leave to appeal denied, 2012 ONCA 10 [*Return on Innovation*] this court characterized the contractual indemnification claims of directors and officers in respect of an equity claim as "equity claims".

[61] Counsel also submits that guidance on the treatment of underwriter and auditor indemnification claims can be obtained from the U.S. experience. In the U.S., courts have held that the indemnification claims of underwriters for liability or defence costs constitute equity claims that are subordinated to the claims of general creditors. Counsel submits that insofar as

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the primary source of liability is characterized as an equity claim, so too is any claim for contribution and indemnity based on that equity claim.

[62] In this case, counsel contends, the Related Indemnity Claims are clearly claims for "contribution and indemnity" based on the Shareholder Claims.

Position of the Ad Hoc Noteholders

[63] Counsel to the Ad Hoc Noteholders submits that the Shareholder Claims are "equity claims" as they are claims in respect of an equity interest and are claims for "a monetary loss resulting from the ownership, purchase or sale of an equity interest" per subsection (d) of the definition of "equity claims" in the CCAA.

[64] Counsel further submits that the Related Indemnity Claims are also "equity claims" as they fall within the "clear and unambiguous" language used in the definition of "equity claim" in the CCAA. Subsection (e) of the definition refers expressly and without qualification to claims for "contribution or indemnity" in respect of claims such as the Shareholder Claims.

[65] Counsel further submits that had the legislature intended to qualify the reference to "contribution or indemnity" in order to exempt the claims of certain parties, it could have done so, but it did not.

[66] Counsel also submits that, if the plain language of subsection (e) is not upheld, shareholders of SFC could potentially create claims to receive indirectly what they could not receive directly (*i.e.*, payment in respect of equity claims through the Related Indemnity Claims) – a result that could not have been intended by the legislature as it would be inconsistent with the purposes of the CCAA.

[67] Counsel to the Ad Hoc Noteholders also submits that, before the CCAA amendments in 2009 (the "CCAA Amendments"), courts subordinated claims on the basis of:

- (a) the general expectations of creditors and shareholders with respect to priority and assumption of risks; and
- (b) the equitable principles and considerations set out in certain U.S. cases: see *e.g.* *Blue Range Resources, supra*.

[68] Counsel further submits that, before the CCAA Amendments took effect, courts had expanded the types of claims characterized as equity claims; first to claims for damages of defrauded shareholders and then to contractual indemnity claims of shareholders: see *Blue Range Resources, supra* and *EarthFirst Canada, supra*.

[69] Counsel for the Ad Hoc Noteholders also submits that indemnity claims of underwriters have been treated as equity claims in the United States, pursuant to section 510(b) of the U.S. Bankruptcy Code. This submission is detailed at paragraphs 20-25 of their factum which reads as follows:

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20. The desire to more closely align the Canadian approach to equity claims with the U.S. approach was among the considerations that gave rise to the codification of the treatment of equity claims. Canadian courts have also looked to the U.S. law for guidance on the issue of equity claims where codification of the subordination of equity claims has been long-standing.

Janis Sarra at p. 209, Ad Hoc Committee's Book of Authorities, Tab 10.

Report of the Standing Senate Committee on Banking, Trade and Commerce, "Debtors and Creditors Sharing the Burden: A Review of the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act*" (2003) at 158, [...]

Blue Range [Resources] at paras. 41-57 [...]

21. Pursuant to § 510(b) of the *U.S. Bankruptcy Code*, all creditors must be paid in full before shareholders are entitled to receive any distribution. § 510(b) of the *U.S. Bankruptcy Code* and the relevant portion of § 502, which is referenced in § 510(b), provide as follows:

§ 510. Subordination

(b) For the purpose of distribution under this title, a claim arising from rescission of a purchase or sale of a security of the debtor or of an affiliate of the debtor, for damages arising from the purchase or sale of such a security, or for reimbursement or contribution allowed under 502 on account of such a claim, shall be subordinated to all claims or interests that are senior to or equal the claim or interest represented by such security, except that if such security is common stock, such claim has the same priority as common stock.

§ 502. Allowance of claims or interests

(e) (1) Notwithstanding subsections (a), (b) and (c) of this section and paragraph (2) of this subsection, the court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured the claim of a creditor, to the extent that

...

(B) such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution; or

...

(2) A claim for reimbursement or contribution of such an entity that becomes fixed after the commencement of the case shall be determined,

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and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) of this section, the same as if such claim had become fixed before the date of the filing of the petition.

22. U.S. appellate courts have interpreted the statutory language in § 510(b) broadly to subordinate the claims of shareholders that have a nexus or causal relationship to the purchase or sale of securities, including damages arising from alleged illegality in the sale or purchase of securities or from corporate misconduct whether predicated on pre or post-issuance conduct.

Re Telegroup Inc. (2002), 281 F. 3d 133 (3rd Cir. U.S. Court of Appeals) [...]

American Broadcasting Systems Inc. v. Nugent, U.S. Court of Appeals for the Ninth Circuit, Case Number 98-17133 (24 January 2001) [...]

23. Further, U.S. courts have held that indemnification claims of underwriters against the corporation for liability or defence costs when shareholders or former shareholders have sued underwriters constitute equity claims in the insolvency of the corporation that are subordinated to the claims of general creditors based on: (a) the plain language of § 510(b), which references claims for "reimbursement or contribution" and (b) risk allocation as between general creditors and those parties that play a role in the purchase and sale of securities that give rise to the shareholder claims (i.e., directors, officers and underwriters).

In re Mid-American Waste Sys., 228 B.R. 816, 1999 Bankr. LEXIS 27 (Bankr. D. Del. 1999) [*Mid-American*] [...]

In re Jacom Computer Servs., 280 B.R. 570, 2002 Bankr. LEXIS 758 (Bankr. S.D.N.Y. 2002) [...]

24. In *Mid-American*, the Court stated the following with respect to the "plain language" of § 510(b), its origins and the inclusion of "reimbursement or contribution" claims in that section:

... I find that the plain language of § 510(b), its legislative history, and applicable case law clearly show that § 510(b) intends to subordinate the indemnification claims of officers, directors, and underwriters for both liability and expenses incurred in connection with the pursuit of claims for rescission or damages by purchasers or sellers of the debtor's securities. The meaning of amended § 510(b), specifically the language "for reimbursement or contribution . . . on account of [a claim arising from rescission or damages arising from the purchase or sale of a security]," can be discerned by a plain reading of its language.

... it is readily apparent that the rationale for section 510(b) is not limited to preventing shareholder claimants from improving their position vis-a-

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vis general creditors; Congress also made the decision to subordinate based on risk allocation. Consequently, when Congress amended § 510(b) to add reimbursement and contribution claims, it was not radically departing from an equityholder claimant treatment provision, as NatWest suggests; it simply added to the subordination treatment new classes of persons and entities involved with the securities transactions giving rise to the rescission and damage claims. The 1984 amendment to § 510(b) is a logical extension of one of the rationales for the original section — because Congress intended the holders of securities law claims to be subordinated, why not also subordinate claims of other parties (e.g., officers and directors and underwriters) who play a role in the purchase and sale transactions which give rise to the securities law claims? As I view it, in 1984 Congress made a legislative judgment that claims emanating from tainted securities law transactions should not have the same priority as the claims of general creditors of the estate. [emphasis added]

[...]

25. Further, the U.S. courts have held that the degree of culpability of the respective parties is a non-issue in the disallowance of claims for indemnification of underwriters; the equities are meant to benefit the debtor's direct creditors, not secondarily liable creditors with contingent claims.

In re Drexel Burnham Lambert Group, 148 B.R. 982, 1992 Bankr. LEXIS 2023 (Bankr. S.D.N.Y. 1992) [...]

[70] Counsel submits that there is no principled basis for treating indemnification claims of auditors differently than those of underwriters.

Analysis

Is it Premature to Determine the Issue?

[71] The class action litigation was commenced prior to the CCAA Proceedings. It is clear that the claims of shareholders as set out in the class action claims against SFC are "equity claims" within the meaning of the CCAA.

[72] In my view, this issue is not premature for determination, as is submitted by the Underwriters.

[73] The Class Action Proceedings preceded the CCAA Proceedings. It has been clear since the outset of the CCAA Proceedings that this issue — namely, whether the claims of E&Y, BDO and the Underwriters as against SFC, would be considered "equity claims" — would have to be determined.

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[74] It has also been clear from the outset of the CCAA Proceedings, that a Sales Process would be undertaken and the expected proceeds arising from the Sales Process would generate proceeds insufficient to satisfy the claims of creditors.

[75] The Claims Procedure is in place but, it seems to me that the issue that has been placed before the court on this motion can be determined independently of the Claims Procedure. I do not accept that any party can be said to be prejudiced if this threshold issue is determined at this time. The threshold issue does not depend upon a determination of quantification of any claim. Rather, its effect will be to establish whether the claims of E&Y, BDO and the Underwriters will be subordinated pursuant to the provisions of the CCAA. This is independent from a determination as to the validity of any claim and the quantification thereof.

Should the Equity Claims Order be Granted?

[76] I am in agreement with the submission of counsel for the Ad Hoc Noteholders to the effect that the characterization of claims for indemnity turns on the characterization of the underlying primary claims.

[77] In my view, the claims advanced in the Shareholder Claims are clearly equity claims. The Shareholder Claims underlie the Related Indemnity Claims.

[78] In my view, the CCAA Amendments have codified the treatment of claims addressed in pre-amendment cases and have further broadened the scope of equity claims.

[79] The plain language in the definition of "equity claim" does not focus on the identity of the claimant. Rather, it focuses on the nature of the claim. In this case, it seems clear that the Shareholder Claims led to the Related Indemnity Claims. Put another way, the inescapable conclusion is that the Related Indemnity Claims are being used to recover an equity investment.

[80] The plain language of the CCAA dictates the outcome, namely, that the Shareholder Claims and the Related Indemnity Claims constitute "equity claims" within the meaning of the CCAA. This conclusion is consistent with the trend towards an expansive interpretation of the definition of "equity claims" to achieve the purpose of the CCAA.

[81] In *Return on Innovation*, Newbould J. characterized the contractual indemnification claims of directors and officers as "equity claims". The Court of Appeal denied leave to appeal. The analysis in *Return on Innovation* leads to the conclusion that the Related Indemnity Claims are also equity claims under the CCAA.

[82] It would be totally inconsistent to arrive at a conclusion that would enable either the auditors or the Underwriters, through a claim for indemnification, to be treated as creditors when the underlying actions of the shareholders cannot achieve the same status. To hold otherwise would indeed provide an indirect remedy where a direct remedy is not available.

[83] Further, on the issue of whether the claims of E&Y, BDO and the Underwriters fall within the definition of equity claims, there are, in my view, two aspects of these claims and it is necessary to keep them conceptually separate.

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[84] The first and most significant aspect of the claims of E&Y, BDO and the Underwriters constitutes an "equity claim" within the meaning of the CCAA. Simply put, but for the Class Action Proceedings, it is inconceivable that claims of this magnitude would have been launched by E&Y, BDO and the Underwriters as against SFC. The class action plaintiffs have launched their actions against SFC, the auditors and the Underwriters. In turn, E&Y, BDO and the Underwriters have launched actions against SFC and its subsidiaries. The claims of the shareholders are clearly "equity claims" and a plain reading of s. 2(1)(e) of the CCAA leads to the same conclusion with respect to the claims of E&Y, BDO and the Underwriters. To hold otherwise, would, as stated above, lead to a result that is inconsistent with the principles of the CCAA. It would potentially put the shareholders in a position to achieve creditor status through their claim against E&Y, BDO and the Underwriters even though a direct claim against SFC would rank as an "equity claim".

[85] I also recognize that the legal construction of the claims of the auditors and the Underwriters as against SFC is different than the claims of the shareholders against SFC. However, that distinction is not, in my view, reflected in the language of the CCAA which makes no distinction based on the status of the party but rather focuses on the substance of the claim.

[86] Critical to my analysis of this issue is the statutory language and the fact that the CCAA Amendments came into force after the cases relied upon by the Underwriters and the auditors.

[87] It has been argued that the amendments did nothing more than codify pre-existing common law. In many respects, I accept this submission. However, I am unable to accept this submission when considering s. 2(1) of the CCAA, which provides clear and specific language directing that "equity claim" means a claim that is in respect of an equity interest, including a claim for, among other things, "(e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d)".

[88] Given that a shareholder claim falls within s. 2(1)(d), the plain words of subsections (d) and (e) lead to the conclusions that I have set out above.

[89] I fail to see how the very clear words of subsection (e) can be seen to be a codification of existing law. To arrive at the conclusion put forth by E&Y, BDO and the Underwriters would require me to ignore the specific words that Parliament has recently enacted.

[90] I cannot agree with the position put forth by the Underwriters or by the auditors on this point. The plain wording of the statute has persuaded me that it does not matter whether an indemnity claim is seeking no more than allocation of fault and contribution at common law, or whether there is a free-standing contribution and indemnity claim based on contracts.

[91] However, that is not to say that the full amount of the claim by the auditors and Underwriters can be characterized, at this time, as an "equity claim".

[92] The second aspect to the claims of the auditors and underwriters can be illustrated by the following hypothetical: if the claim of the shareholders does not succeed against the class action defendants, E&Y, BDO and the Underwriters will not be liable to the class action plaintiffs. However, these parties may be in a position to demonstrate that they do have a claim against

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SFC for the costs of defending those actions, which claim does not arise as a result of "contribution or indemnity in respect of an equity claim".

[93] It could very well be that each of E&Y, BDO and the Underwriters have expended significant amounts in defending the claims brought by the class action plaintiffs which, in turn, could give rise to contractual claims as against SFC. If there is no successful equity claim brought by the class action plaintiffs, it is arguable that any claim of E&Y, BDO and the Underwriters may legitimately be characterized as a claim for contribution or indemnity but not necessarily in respect of an equity claim. If so, there is no principled basis for subordinating this portion of the claim. At this point in time, the quantification of such a claim cannot be determined. This must be determined in accordance with the Claims Procedure.

[94] However, it must be recognized that, by far the most significant part of the claim, is an "equity claim".

[95] In arriving at this determination, I have taken into account the arguments set forth by E&Y, BDO and the Underwriters. My conclusions recognize the separate aspects of the Related Indemnity Claims as submitted by counsel to the Underwriters at paragraph 40 of their factum which reads:

...it must be recognized that there are, in fact, at least two different kinds of Related Indemnity Claims:

- (a) indemnity claims against SFC in respect of Shareholder Claims against the auditors and the Underwriters; and
- (b) indemnity claims against SFC in respect of the defence costs of the auditors and the Underwriters in connection with defending themselves against Shareholder Claims.

Disposition

[96] In the result, an order shall issue that the claims against SFC resulting from the ownership, purchase or sale of equity interests in SFC, including, without limitation, the claims by or on behalf of current or former shareholders asserted in the proceedings listed in Schedule "A" are "equity claims" as defined in s. 2 of the CCAA, being claims in respect of monetary losses resulting from the ownership, purchase or sale of an equity interest. It is noted that counsel for the class action plaintiffs did not contest this issue.

[97] In addition, an order shall also issue that any indemnification claim against SFC related to or arising from the Shareholders Claims, including, without limitation, by or on behalf of any of the other defendants to the proceedings listed in Schedule "A" are "equity claims" under the CCAA, being claims for contribution or indemnity in respect of a claim that is an equity claim. However, I feel it is premature to determine whether this order extends to the aspect of the Related Indemnity Claims that corresponds to the defence costs of the Underwriters and the auditors in connection with defending themselves against the Shareholder Claims.

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[98] A direction shall also issue that these orders are made without prejudice to SFC's rights to apply for a similar order with respect to (i) any claims in the statement of claim that are in respect of securities other than shares and (ii) any indemnification claims against SFC related thereto.



MORAWETZ J.

Date: July 27, 2012

SCHEDULE "A" – SHAREHOLDER CLAIMS

1. *Trustees of the Labourers' Pension Fund of Central and Eastern Canada et al. v. Sino-Forest Corporation et al.* (Ontario Superior Court of Justice, Court File No. CV-11-431153-00CP)
2. *Guining Liu v. Sino-Forest Corporation et al.* (Quebec Superior Court, Court File No.: 200-06-000132-111)
3. *Allan Haigh v. Sino-Forest Corporation et al.* (Saskatchewan Court of Queen's Bench, Court File No. 2288 of 2011)
4. *David Leopard et al. v. Allen T.Y. Chan et al.* (District court of the Southern District of New York, Court File No. 650258/2012)

Tab 4

**Notice of Motion of Sino-Forest Corporation
dated June 8, 2012**

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 OR
ARRANGEMENT IN THE MATTER OF SINO-FOREST
CORPORATION**

NOTICE OF MOTION

**(Motion Regarding the Status of Shareholder Claims
and Related Indemnity Claims under the CCAA)**

The applicant, Sino-Forest Corporation ("SFC"), will make a motion to the Honourable Mr. Justice Morawetz of the Commercial List court on Friday, June 15th, 2012 at 10:00 a.m., or as soon after that time as the motion can be heard, at 330 University Avenue, Toronto, Ontario.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THE MOTION IS FOR:

1. An order that the claims against SFC resulting from the ownership, purchase or sale of an equity interest in SFC, including, without limitation, the claims by or on behalf of current or former shareholders asserted in the proceedings listed in Schedule "A" (collectively, the "Shareholder Claims") are "equity claims" as defined in section 2 of the *Companies' Creditors Arrangement Act* (the "CCAA"), being claims in respect of monetary losses resulting from the ownership, purchase or sale of an equity interest, being shares in SFC;

2. An order that any indemnification claims against SFC related to or arising from the Shareholder Claims, including, without limitation, by or on behalf of any of the other defendants to the proceedings listed in Schedule "A" (the "Related Indemnity Claims"), are "equity claims" under the CCAA, being claims for contribution or indemnity in respect of a claim that is an equity claim;
3. A direction that the order is without prejudice to SFC's right to apply for a similar order with respect to (i) any claims in the Statement of Claim that are in respect of Securities other than shares and (ii) any indemnification claims against SFC related thereto; and
4. Such further and other relief as counsel may request and this Honourable Court deems just.

THE GROUNDS FOR THE MOTION ARE:

BACKGROUND

1. On March 30, 2012, this Honourable Court made an Initial Order granting a stay of proceedings in relation to SFC and its business and property and appointing FTI Consulting Canada Inc. as the Monitor in the CCAA proceedings;
2. Also on March 30, 2012, this Honourable Court made the Sale Process Order approving the sale process procedures attached thereto and authorizing and directing SFC, the Monitor and Houlihan Lokey to carry out the sale process;
3. At the commencement of these proceedings, SFC advised that it was very important for these proceedings to be successfully completed as soon as possible in order to, among

other things, (i) enable the business operated in the People's Republic of China (the "PRC") to be separated from SFC and put under new ownership; (ii) enable the restructured business to participate in the Q4 sale season in the PRC market, and (iii) maintain the confidence of stakeholders in the PRC (including local and national governmental bodies, PRC lenders and other stakeholders) that the business in the PRC can be successfully separated from SFC and operate in the ordinary course in the near future. As summarized by the Monitor in paragraph 21 of its Report dated March 30, 2012, "In summary, Sino-Forest's state of affairs is such that it cannot maintain a status quo for much longer."

4. To that end, and consistent with the Support Agreement that SFC has negotiated with the ad hoc committee of noteholders, SFC intends to file a plan of compromise or arrangement (the "Plan") under the CCAA by no later than August 27, 2012, based on the deadlines set out in the Support Agreement and the commercial reality that SFC must complete its restructuring as soon as possible;
5. Noteholders holding in excess of \$1,296,000 and approximately 72% of the total debt of approximately \$1.8 billion of SFC's noteholder debt have executed written support agreements to support the plan outlined in the announced SFC CCAA plan of March 30, 2012. Accordingly, there is significant support for SFC to emerge from CCAA to maximize value for all stakeholders and ensure certainty with the overall business of SFC and its subsidiaries;
6. On May 14, 2012, this Honourable Court issued a Claims Procedure Order which established June 20, 2012 as the Claims Bar Date;

7. By Statement of Claim (as defined below), the class action plaintiffs have made significant Shareholder Claims against SFC and other defendants, and certain of these defendants have stated in these proceedings that they have significant, related indemnity claims against SFC in respect of the Shareholder Claims made against them, and have not confirmed that these claims are not "equity claims";
8. In light of the need to complete these restructuring proceedings as soon as possible, and with a view to having a meeting of creditors in August, 2012, it is necessary to have the legal status of these Shareholder Claims against SFC and Related Indemnity Claims confirmed as "equity claims" as soon as possible in order to ensure that the CCAA proceedings advance in an efficient and effective manner so as to best ensure the business and operations of SFC are protected under the current circumstances;

SHAREHOLDER CLAIMS

9. By Fresh as Amended Statement of Claim dated April 26, 2012 (the "Statement of Claim"), the Trustees of the Labourers' 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 have asserted various claims against SFC, certain of its current and former officers and directors, Ernst & Young LLP ("E&Y"), BDO Limited ("BDO"), and SFC's underwriters (collectively, the "Underwriters");
10. The Statement of Claim purports to advance claims on behalf of: (i) all persons "who purchased [SFC's] Securities in the secondary market from March 19, 2007 to and including June 2, 2011"; and (ii) all persons who purchased SFC shares and notes in

various offerings from 2009 to 2010. The term "Securities" used in the Statement of Claim refers to SFC shares and SFC notes;

11. The Statement of Claim seeks damages in the amount of approximately \$9.2 billion against SFC and the other defendants;
12. The Statement of Claim states on several occasions that the damages suffered relate to purchasing Securities "at inflated prices during the Class Period" and that absent the alleged misconduct, sales of such Securities "would have occurred at prices that reflected the true value" of the Securities. It is further alleged that "the price of Sino's securities was directly affected during the Class Period by the issuance of the Impugned Documents";
13. Similar Shareholder class actions have also been commenced in other jurisdictions in Canada and the United States, asserting the same or substantially similar allegations with respect to SFC shares;
14. As such, the Shareholder Claims in these actions are "equity claims" as defined in the CCAA, being claims asserting a monetary loss from the ownership, purchase or sale of an equity interest in a debtor, SFC;

RELATED INDEMNITY CLAIMS

15. In connection with the Statement of Claim, E&Y has asserted that it has contractual claims of indemnification against SFC in respect of the claims against it for all relevant years in respect of its annual audits, the prospectuses and the note offerings. It has stated

that it has "statutory and common law claims of contribution and/or indemnity against Sino-Forest and its subsidiaries for all relevant years";

16. In connection with the Statement of Claim, BDO has asserted that it has claims of indemnification against SFC, including contractual rights of indemnity in respect of the claims against it in the Statement of Claim in each of the engagement letters signed in relation to BDO's audit reports;
17. In connection with the Statement of Claim, the Underwriters have asserted that certain agreements with SFC and certain of its subsidiaries contain indemnity provisions in connection with "an array of matters that could arise from the Offerings" and that these provisions are applicable to support claims for indemnification in respect of the claims against the Underwriters in the Statement of Claim;
18. The foregoing are only examples of the indemnification claims which have been advanced to date by certain parties;
19. As the Related Indemnity Claims are claims for contribution or indemnity in respect of the Shareholder Claims, the Related Indemnification Claims are "equity claims" under section 2 of the CCAA;

MISCELLANEOUS

20. It is just and convenient and in the interests of all creditors and interested parties, and this restructuring proceeding overall, that the order sought herein be granted;

21. The making of the order sought will assist the Company to proceed with its restructuring in an efficient and effective manner;
22. The making of the order sought will assist in the efficient administration of the CCAA proceedings and with matters related to the CCAA plan;
23. The ad hoc committee of noteholders support the motion;
24. The provisions of the CCAA and the inherent and equitable jurisdiction of this Honourable Court; and
25. Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. the affidavit of Elizabeth Fimio sworn June 8, 2012;
2. the Motion Records and Factums filed by E&Y, BDO and the Underwriters in connection with the May 8, 2012 scope of stay motion in this proceeding; and
3. such further or other material as counsel may advise and this Honourable Court deems just.

June 8, 2012

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TO: THE SERVICE LIST

SCHEDULE A

1. *Trustees of the Labourers' Pension Fund of Central and Eastern Canada et al. v. Sino-Forest Corporation et al.* (Ontario Superior Court of Justice, Court File No. CV-11-431153-00CP)
2. *Guining Liu v. Sino-Forest Corporation et al.* (Quebec Superior Court, Court File No: 200-06-000132-111)
3. *Allan Haigh v. Sino-Forest Corporation et al.* (Saskatchewan Court of Queen's Bench, Court File No. 2288 of 2011)
4. *David Leopard et al. v. Allen T.Y. Chan et al.* (District Court of the Southern District of New York, Court File No. 650258/2012)

Court of Appeal File No. C56115

COURT OF APPEAL FOR ONTARIO

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 OF SINO-FOREST CORPORATION

Credit Suisse Securities (Canada) Inc., TD Securities Inc., Dundee Securities Corporation
(now known as DWM Securities Inc.), 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

Appellants on Appeal

- and -

Sino-Forest Corporation

Respondent on Appeal

Appellants' Certificate

The Appellants hereby certify that the following evidence is required for the appeal, in
the Appellants' opinion:

1. Affidavit of Elizabeth Fimio, sworn June 8, 2012
2. Affidavit of Rebecca L. Wise, sworn April 23, 2012

DATE: October 29, 2012

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

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

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

Proceedings commenced in Toronto

NOTICE OF MOTION
**(Motion Re the Status of Shareholder
Claims and Related Indemnity Claims
under the CCAA)**

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Lawyers for the Applicant 10

Tab 5

**Copies of exhibits and other documents referred to in the
Underwriters' Factum, dated October 26, 2012**

Please see the Compendium of Evidence of the Underwriters (Motion Seeking Leave to Appeal), filed on August 16, 2012, which is incorporated by reference herein. References made in the Underwriters' Factum, dated October 26, 2012, to evidence are references to the Compendium of Evidence of the Underwriters (Motion Seeking Leave to Appeal.)

Tab 6

**Underwriters' Certificate Respecting Evidence
dated October 29, 2012**

Court of Appeal File No. C56115

COURT OF APPEAL FOR ONTARIO

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 OF SINO-FOREST CORPORATION

Credit Suisse Securities (Canada) Inc., TD Securities Inc., Dundee Securities Corporation
(now known as DWM Securities Inc.), 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

Appellants on Appeal

- and -

Sino-Forest Corporation

Respondent on Appeal

Appellants' Certificate

The Appellants hereby certify that the following evidence is required for the appeal, in
the Appellants' opinion:

1. Affidavit of Elizabeth Fimio, sworn June 8, 2012
2. Affidavit of Rebecca L. Wise, sworn April 23, 2012

DATE: October 29, 2012

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79 Wellington Street West
Suite 3000, TD Centre
Toronto, Ontario
M5K 1N2 Canada

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- 2 -

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Lawyers for the Underwriters
named in Class Actions

IN THE MATTER OF THE COMPANIES' CREDITORS
ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF SINO-FOREST CORPORATION

Court of Appeal File No. C56115

COURT OF APPEAL FOR ONTARIO

APPELLANTS' CERTIFICATE

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Lawyers for the Underwriters (Appellants)

Tab 7

**Disposition of Motion Seeking Leave to Appeal
dated October 10, 2012**

IN THE MATTER OF THE COMPANIES CREDITORS' ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

Court of Appeal File No: M411654
Court File No: CV-12-9667-00-CL

COURT OF APPEAL FOR ONTARIO
BEFORE **O'CONNOR, A.C.J.C. GOUDGE JA**
DATE: OCT 10 2012
DISPOSITION OF MOTION

JURIANSZ, A ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

MOTION RECORD OF ERNST & YOUNG LLP
SUPPLEMENTAL TO THE MOTION RECORD OF
THE UNDERWRITERS NAMED IN CLASS ACTIONS
(Motion for leave to appeal)
VOLUME I OF II

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Lawyers for Ernst & Young LLP

*leave to appeal is granted. The amended class
is expelled as a date to be fixed by the
Registrar. The parties may use the best
available as they see fit.
Since the plaintiffs' pending leave
is subject to the meeting to create the
trust will be postponed pending disposition
of the appeal. If any of the parties have
difficulty with the written responses
please to A.C.J.C. O'Connor
costs of the leave is pursuant to
returned to the Panel for the Court
A.C.J.C.
Ernst & Young
Rat JA*

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
SINO-FOREST CORPORATION

APPLICATION UNDER THE COMPANIES CREDITORS
ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

COURT OF APPEAL FOR ONTARIO
BEFORE **CONNOR A.C.J.O.**

DATE **OCT 10 2012**

DISPOSITION OF MOTION

**COURT OF APPEAL FOR ONTARIO
JURIAN SZ J.A.**

Motion Record of BDO Limited
(motion seeking Leave to Appeal)

AFFLECK GREENE McMURTRY LLP
Barristers & Solicitors
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Lawyers for BDO Limited

See summary for M41654

[Handwritten signatures and initials: A.C.J.O., P. R. Greene, M. E. Booth, K. A. Dekker]

COURT OF APPEAL FOR ONTARIO

BEFORE **O'CONNOR A.C.J.O.**

JURIANSZ J.A.

BOUDGE J.A.

DATE **OCT 10 2012**

DISPOSITION OF MOTION

COURT OF APPEAL FOR ONTARIO

MOTION RECORD OF THE UNDERWRITERS NAMED IN CLASS ACTION (Motion Seeking Leave to Appeal) VOLUME I OF V

See endorsement on M471654

[Signature] A.C.J.O.

[Signature] SA

[Signature] SA

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Lawyers for the Underwriters named in Class Actions

Tab 8

**Underwriters' Lawyer's Certificate Respecting Completeness
dated October 29, 2012**

Court of Appeal File No. C56115

COURT OF APPEAL FOR ONTARIO

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

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Credit Suisse Securities (Canada) Inc., TD Securities Inc., Dundee Securities Corporation
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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

Appellants on Appeal

- and -

Sino-Forest Corporation

Respondent on Appeal

Lawyer's Certificate

Counsel for the Underwriters (Appellants) hereby certify that the appeal book and
compendium in this appeal is complete and legible.

DATE: October 29, 2012



David Bish

TORYS LLP

Counsel for the Underwriters (Appellants)

IN THE MATTER OF THE COMPANIES' CREDITORS
ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF SINO-FOREST CORPORATION

Court of Appeal File No. C56115

COURT OF APPEAL FOR ONTARIO

LAWYER'S CERTIFICATE

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Lawyers for the Underwriters (Appellants)

IN THE MATTER OF THE COMPANIES' CREDITORS
ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF SINO-FOREST CORPORATION

Court of Appeal File No. C56115

COURT OF APPEAL FOR ONTARIO

**APPEAL BOOK AND COMPENDIUM OF
THE APPELLANTS, THE UNDERWRITERS**

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