

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 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 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**

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, POYRY (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 Bank of America Securities LLC)**

Defendants

Proceedings under the *Class Proceedings Act, 1992*

**FACTUM OF THE APPLICANT, CHUBB
INSURANCE COMPANY OF CANADA**
(Motion Returnable April 20, 2015)

DATE: April 16, 2015

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
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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 A PLAN OF COMPROMISE OR 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 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

Plaintiffs

- and -

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Defendants

Proceedings under the *Class Proceedings Act, 1992*

**FACTUM OF THE APPLICANT, CHUBB
INSURANCE COMPANY OF CANADA
(Motion Returnable April 20, 2015)**

PART I – OVERVIEW

1. This is a motion on an issue of relevance only to Sino-Forest Insureds and two of their insurers, Chubb Insurance Company of Canada ("Chubb") and Travelers Insurance Company of Canada ("Travelers").
2. The Applicant, Chubb, seeks a declaration that all funds paid out by it, including a \$1,033,296.59 overpayment in excess of its Limit of Liability (the "Overpayment"), constitute Loss under the Policies for all purposes, such that any amounts paid by Travelers to reimburse Chubb, to the extent of the Overpayment, reduce the Limit of Liability under the Travelers Policy.
3. All members of the Insurance Tower and known potential Sino-Forest Insureds have been given notice of this motion and have been provided with a copy of the Draft Order.
4. There has been no objection by any party to any aspect of the Draft Order.
5. As the relief sought herein is fair and reasonable, no Sino-Forest Insured opposes such relief, and Travelers supports the granting of the Order sought, Chubb respectfully submits that the Court should grant the relief sought in the Draft Order.

PART II - FACTS

The Insurance Tower

6. ACE-INA issued Policy No. DO 024464 (the "ACE Policy") covering Sino-Forest Corporation ("Sino-Forest"), its Subsidiaries (as defined in the Policies and hereinafter, with Sino-Forest, collectively "Sino-Forest") and their directors and officers ("Insured Persons" and, with Sino-Forest, collectively "Sino-Forest

Insureds"). The ACE Policy bears a \$15,000,000 Limit of Liability (the "ACE Limit").

7. Chubb issued first excess Policy No. 8209-4449 covering the Sino-Forest Insureds (the "Chubb Policy"). In accordance with its terms, coverage under the Chubb Policy is excess to that coverage afforded by the ACE Policy. The Chubb Policy bears a \$15,000,000 Limit of Liability (the "Chubb Limit").
8. There are two further excess layers of coverage provided by Certain Underwriters at Lloyd's, London ("Lloyds"), which issued second excess Policy No. XTFF0420 (the "Lloyds Policy") and by Travelers, which issued third excess Policy No. 10181108 (the "Travelers Policy"), The Lloyds Policy and the Travelers Policy each bear a \$15,000,000 Limit of Liability (the "Lloyds Limit" and "Travelers Limit" respectively)(all of the policies herein collectively the "Policies").
9. With certain exceptions not material to this motion, the Chubb Policy, the Lloyds Policy and the Travelers Policy follow form to the ACE Policy, meaning that they adopt and incorporate all of the Insuring Agreements, definitions, terms and conditions of the ACE Policy.
10. In total, the directors' and officers' liability policies covering the Sino-Forest Insureds afford, in accordance with their terms, Limits of Liability totalling CDN\$62,000,000, as set out below:

<u>Level</u>	<u>Insurer</u>	<u>Policy No.</u>	<u>Limit of Liability (\$Cdn.)</u>
Primary	ACE	DO 024464	\$15,000,000
First Excess	Chubb	8209-4449	\$15,000,000 excess \$15,000,000
Second Excess	Lloyd's, London	XTFF0373	\$15,000,000 excess \$30,000,000
Third Excess	Travelers	101811008	\$15,000,000 excess \$45,000,000
Side A Excess	ACE	as above	\$1,000,000 (Independent Directors only) excess \$60,000,000
Side A Excess	Chubb	as above	\$1,000,000 (Independent Directors only) excess \$61,000,000

11. All Policies and the insurers identified above are sometimes hereinafter referred to as the "Insurance Tower".

Affidavit of Paula Kargas, sworn April 6, 2015 ("Kargas Affidavit"), paras. 2-5, Motion Record, Tab 2, pp. 20-21.

12. For purposes of this motion, the defined terms Defense Costs and Loss are relevant. These read (in relevant part, emphasis added) as follows:

ACE Policy, Section III.D:

"Defense Costs means reasonable and necessary costs, charges, fees and expenses incurred by any **Insured** in defending **Claims** and the premium for appeal, attachment or similar bonds arising out of covered judgments, but with no obligation to furnish such bonds. **Defense Costs** do not include wages, salaries, fees or other compensation of the **Insured Persons** or **Company** employees." (hereinafter "Defense Costs")

ACE Policy, Section III.I:

"**Loss** means the damages, judgments, any award of pre-judgment and post-judgment interest, settlements and **Defense Costs** which the **Insured** becomes legally obligated to pay on account of any **Claim** first made against any **Insured** during the **Policy Period** or, if elected, the **Extended Reporting Period**, for **Wrongful Acts** to which this **Policy** applies. **Loss** does not include:..." (hereinafter "Loss")

13. The Limits of all Policies in the Insurance Tower are self-depleting, meaning that payment of Defense Costs reduces the Limit available under each.

Kargas Affidavit, paras. 6-7, Motion Record, Tab 2, pp. 22-23.

Exhaustion of the ACE Policy

14. Commencing in approximately the summer of 2011, certain Sino-Forest Insureds requested coverage from ACE for various Claims (as defined by the ACE Policy)

made against them. Accounts rendered by defence counsel retained by Sino-Forest Insureds and by experts and other professionals retained by them with ACE's consent (hereinafter "Defence Accounts") were presented to ACE, reviewed by ACE or its coverage counsel for compliance with ACE's litigation management guidelines, and paid, to the extent of what ACE's review confirmed constituted Loss under the ACE Policy.

15. By approximately January 2014, ACE had paid out the ACE Limit in respect of Defence Accounts. In this Court's Order dated July 23, 2014 approving the settlement made by David Horsley with the Plaintiffs in various securities class actions and with Sino-Forest's Litigation Trustee (the "Horsley Settlement Approval Order" and the "Horsley Settlement"), this Court declared that the ACE Limit was reduced accordingly, which exhausted the ACE Policy. Upon exhaustion of the ACE Policy, the Chubb Policy was engaged.

Kargas Affidavit, paras. 8-10, Motion Record, Tab 2, p. 23.

Horsley Settlement Approval Order, para. 24, Exhibit A to Kargas Affidavit, Motion Record, Tab 2A, pp. 39-40.

Payment of Loss by Chubb

16. Loss has two components - settlement amounts (damages if a Claim is tried, both referred to as "Indemnity Payments") and Defense Costs.
17. In this case the only Indemnity Payment made by Chubb was the \$5,000,000 which Chubb contributed to the Horsley Settlement. Paragraph 24 of the Horsley Settlement Approval Order declared that this amount (as well as all Defense Costs paid to that

date by Chubb) constituted covered Loss and reduced the Chubb Limit for all purposes, to the extent thereof. All other amounts paid by Chubb since that date were in respect of Defense Costs.

Kargas Affidavit, paras. 11-13, Motion Record, Tab 2, p. 24.

Horsley Settlement Approval Order, para. 24, Exhibit A to Kargas Affidavit, Motion Record, Tab 2A, pp. 39-40.

18. Timing issues, explained below, resulted in Chubb making the Overpayment. Payment of Defense Costs by Chubb involves two steps – assessment of covered Loss and payment of covered Loss.

Kargas Affidavit, paras. 14-16, Motion Record, Tab 2, p. 24.

(i) *Assessment*

19. In the first step, Defence Accounts are reviewed for compliance with Chubb's own litigation management guidelines (the "Chubb Guidelines"). This review is concluded by a separate unit known as the Litigation Cost Management Group ("LCMG"). With very few exceptions, all Defence Accounts, including accounts rendered by experts and other professionals retained by defence counsel, are sent to LCMG for review for compliance with the Chubb Guidelines. The LCMG then reports back to Chubb's claims handler, indicating the amount payable as covered Loss.

Kargas Affidavit, para. 17, Motion Record, Tab 2, p. 25.

(ii) *Payment*

20. The Overpayment occurred in the payment phase, resulting from Chubb's internal processes as described below. As a result of the Overpayment, Chubb's processes have been changed.
21. When payment by cheque is processed, Chubb's claim specific financial system, which is available to the responsible claims handler, automatically updates itself to indicate the declining policy balance.
22. Wire transfers have always been processed differently, in that they are paid by Chubb's Finance staff. Prior to the change in process referred to above, the claim specific financial system was not automatically, or contemporaneously, updated. Rather, it was manually updated after the wire transfer was processed, at which time Chubb "reimbursed" itself from the Chubb Policy for the amount of the wire transfer.
23. To the extent that the claim specific financial system was not updated concurrently with a wire transfer payment having been made, the claim specific financial record available to Chubb's claims handler was not accurate, in that the balance remaining on the Chubb Limit would not reflect the fact of the wire transfer payment having been made.

Kargas Affidavit, paras. 18-21, Motion Record, Tab 2, pp. 25-26.

The Overpayment

24. Three wire transfers were made by Chubb's Finance staff on July 23 and August 12, 2014, totalling \$1,500,780.84, but internal "reimbursement" did not occur contemporaneously. Unaware of this, Chubb received and paid (in accordance with

the above process), various Defence Accounts believing (by reference to the claim specific financial system) that there were sufficient funds remaining in the Chubb Limit. When the Chubb Limit was exhausted, Chubb advised Lloyd's, which assumed payment of further Defence Accounts.

25. The Overpayment was discovered thereafter, when Chubb's Finance department found itself unable to "reimburse" Chubb from the Chubb Policy for the amount of the wire transfers.

Kargas Affidavit, paras. 22-23, Motion Record, Tab 2, p. 26.

Request for Reimbursement

26. Upon discovery of the Overpayment, Chubb sought reimbursement from Lloyd's on the basis that, had the Chubb Policy exhausted on payment of the Chubb Limit as it should have, the Defence Accounts representing the Overpayment would have been payable by Lloyd's. For reasons expressed in the Kargas Affidavit, Lloyd's expressed reluctance to reimburse Chubb without further information.
27. By the time that Chubb provided detailed information required by Lloyd's, the Lloyds Limit had been reduced to a balance insufficient to cover the Overpayment. The Lloyds Limit has since been exhausted. It is therefore necessary for Chubb to seek reimbursement from Travelers.

Kargas Affidavit, paras. 24-25, Motion Record, Tab 2, p. 27.

28. In order to satisfy Travelers, the Insurance Tower, and this Court that all amounts paid by Chubb constitute covered Loss, and the precise amount of the Overpayment, Chubb Finance has prepared a further and detailed spreadsheet (the "Chubb Payments Spreadsheet"). A copy of the Chubb Payments Spreadsheet has been provided to the Insurance Tower.
29. The version of the Chubb Payments Spreadsheet provided to the Insurance Tower shows (from left to right) the name of the firm rendering the Defence Account (all such firms being defence counsel approved by the Insurance Tower or experts or

other professionals retained by such defence counsel), the invoice number, invoice date, the currency in which the account was rendered, the invoiced amount, the audited amount (i.e., the result of the LCMG review), the amount paid by Chubb in Canadian dollars, and the date upon which payment was made. It also shows a number of instances in which, as a result of further discussions between defence counsel, Chubb, or Chubb's coverage counsel on Chubb's instructions, the amount determined to constitute covered Loss was agreed to be increased and paid.

Kargas Affidavit, paras. 26-27, Motion Record, Tab 2, pp. 27-28.

30. In the interests of protecting any privileged information belonging to the Sino-Forest Insureds, a redacted copy of the Chubb Payments Spreadsheet was prepared for purposes of this motion.

Kargas Affidavit, para. 28, Motion Record, Tab 2, p. 28.

Chubb Payments Spreadsheet, Exhibit C to Kargas Affidavit, Motion Record, Tab 2C, pp. 65-68.

31. The Overpayment was the result of regrettable timing issues produced by Chubb's internal processes. There can be no question, however, that:
- (a) all amounts paid by Chubb as detailed on in the Chubb Payments Spreadsheet were paid to defence counsel or other experts/professionals retained by Sino-Forest Insureds with the consent of the Insurance Tower;
 - (b) all such amounts were "vetted" by Chubb's LCMG and/or by Chubb's coverage counsel on Chubb's instructions; and that
 - (c) Chubb was, and still is, satisfied that all such amounts constituted covered Loss under the Chubb Policy and the Policies.

Kargas Affidavit, para. 30, Motion Record, Tab 2, p. 30.

32. Chubb therefore respectfully submits that the declarations and the Order requested in the Notice of Motion, requiring Travelers to reimburse Chubb for the Overpayment, are fair, reasonable, and should be approved by the Court.

PART III – ISSUES AND THE LAW

33. The only issue on this motion is whether the amounts paid by Chubb constitute Loss under the Policies. Chubb's evidence confirms this and there is no evidence to the contrary.
34. The amounts constituting the Overpayment would have, but for the Overpayment, constituted Loss payable by Lloyds. Reimbursement from Lloyds is precluded due to exhaustion of the Lloyds Limit.
35. The terms of the Draft Order are the result of consultation with and agreement reached between Chubb and Travelers. Travelers is prepared to reimburse Chubb for the Overpayment, provided that it receives the necessary protection in the form of the relief proposed in the Draft Order.
36. The Sino-Forest Insureds have been given notice of this motion and been provided with a copy of the Draft Order. None of the Sino-Forest Insureds has raised any objection to this motion and Travelers supports it on the terms indicated above.
37. The provisions of the Draft Order are reasonable and are limited to protecting Chubb and Travelers against being required to pay more than their respective Limits of Liability. This Court has previously recognized the legitimacy of insurers requiring such protection and has granted such relief.

Re Laidlaw Inc. (2003), 46 C.C.L.I. (3d) 263 (S.C.J.) at para.17, citing *Cox v. Bankside Members Agency Ltd.* [1995] 2 Lloyd's Law Reports 437 (C.A.), Chubb's Book of Authorities, Tab 1

Re Hollinger International Inc. v. American Home Assurance Company, [2006] O.J. No. 140 at paras. 126 – 129 (S.C.J.), Chubb's Book of Authorities, Tab 2

38. This Court has jurisdiction to grant the declaratory relief sought herein.

39. Chubb respectfully submits that the terms of the Draft Order are reasonable and should be approved by this Court.

PART VI – ORDER SOUGHT

40. Chubb therefore respectfully requests that the Court grant the relief sought herein, in the form of the Draft Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of April, 2015 by



Mary Margaret Fox



Paul Emerson

Lawyers for Chubb Insurance Company of
Canada

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Re Laidlaw Inc.* (2003), 46 C.C.L.I. (3d) 263 (S.C.J.)
2. *Re Hollinger International Inc. v. American Home Assurance Company*, [2006] O.J. No. 140
3. *Onex Corp. v. American Home Assurance Co.* [2011] O.J. No. 3031 (S.C.J.)
4. *Insurance Law in Canada*, (Toronto: Carswell, 1999), Professor Craig Brown, p. 18-164.7-18-164.8

SCHEDULE "B"
RELEVANT STATUTES AND REGULATIONS

Courts of Justice Act, R.S.O. 1990, c. C.43

Declaratory orders

97. The Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may make binding declarations of right, whether or not any consequential relief is or could be claimed. 1994, c. 12, s. 39; 1996, c. 25, s. 9 (17).

**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**

**THE TRUSTEES OF THE LABOURER'S PENSION FUND OF
CENTRAL AND EASTERN CANADA et al**
Plaintiffs

v. **SINO-FOREST CORPORATION et al**
Defendants

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

Proceeding under the *Class Proceedings Act*, 1992

**FACTUM OF THE APPLICANT, CHUBB
INSURANCE COMPANY OF CANADA**

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