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

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 PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

FACTUM OF THE UNDERWRITERS NAMED IN CLASS ACTIONS
(Motion Seeking Leave to Appeal)

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PART I – OVERVIEW

1. This proposed appeal arises from the insolvency and class action proceedings involving Sino-Forest Corporation ("Sino-Forest"). The Underwriters (as defined below in Part II) seek leave to appeal to the Court of Appeal for Ontario from the "Equity Claims Order" made by the Honourable Mr. Justice Morawetz, the judge case-managing the insolvency proceedings. The Equity Claims Order declared that certain independent, third-party indemnification claims against Sino-Forest Corporation (the "Related Indemnity Claims") related to or arose from the ownership, purchase or sale of an equity interest in Sino-Forest Corporation (the "Shareholder Claims") and, accordingly, are "equity claims" as defined in section 2 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA").

2. The definition of "equity claims" is a significant issue for insolvency law, and it arises from recent amendments to the CCAA (and similar amendments to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c, B-3, as amended ("BIA")) that have not been considered by this Court. Determining whether a claim is an "equity claim" within the meaning of the CCAA or BIA affects entitlement to vote on a CCAA plan of compromise or arrangement or BIA proposal, distributions under such plan or proposal, relative priorities among creditors and the statutory subordination of claims. It is a significant issue for the practice as a whole, and a fundamental issue in the Sino-Forest CCAA proceedings.

3. The motions judge in this case found that the Related Indemnity Claims were equity claims for the purpose of the CCAA, except in so far as they consist of legal fees. The motions judge erred in finding that the Related Indemnity Claims are equity claims, and he failed to explain adequately how his conclusion was reached. The proposed appeal will not only allow the Court of Appeal to address this error for the benefit of the ongoing Sino-Forest CCAA

proceedings, but it will also provide guidance to the practice on the application of the relevant provisions of the CCAA and BIA.

PART II – THE FACTS

4. In Part II of the Underwriters' Factum, we set out: (i) background relating to Sino-Forest and the class action proceedings involving Sino-Forest; (ii) an overview of the Sino-Forest CCAA proceedings; and (iii) a summary of the motion below, the motion judge's decision and the scope of the proposed appeal.

A. Background: the Class Action Proceedings

5. *Sino-Forest.* Sino-Forest is a Canadian public company with forestry assets located principally in the People's Republic of China.[1]

6. Sino-Forest has outstanding common shares listed on the Toronto Stock Exchange (since August 26, 2011 trading in Sino-Forest shares has ceased as a result of an order made by the Ontario Securities Commission ("OSC")). Sino-Forest also has outstanding approximately $1.8 billion in unsecured notes, issued in four series.[2]

7. *The class actions.* 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").[3]

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[1] *Monitor's Pre-Filing Report*, Underwriters' Motion Record, Tab 6, pp. 1062-1063, paras. 12-13, Underwriters' Compendium of Evidence, Tab 1, paras. 12-13

[2] *Monitor's Pre-Filing Report*, Underwriters' Motion Record, Tab 6, p. 1067, para. 20(d)(i), Underwriters' Compendium of Evidence, Tab 1, paras. 12-13

[3] *Fimio Affidavit*, Underwriters' Motion Record, Tab 4, p. 26, para. 2, Underwriters' Compendium of Evidence, Tab 2, para. 2

8. 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. None of the Class Actions has been certified, and each was at a very preliminary stage before they were stayed as a result of the CCAA proceedings, as discussed below in section B.

9. *The Underwriters.* The Underwriters are among the defendants named in some of the Class Actions. The Underwriters are: 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.[4]

10. 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.[5]

11. A portion of the Underwriters' claims for indemnification are the Related Indemnity Claims, as discussed below. In addition, the Underwriters' have significant claims for indemnification against Sino-Forest and Sino-Forest Subsidiary Companies relating to, *inter alia*,

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[4] *Fimio Affidavit*, Underwriters' Motion Record, Tab 4, p. 26, para. 2 and Exhibits "A", "B", "C" and "D", Underwriters' Compendium of Evidence, Tab 2, para. 2

[5] *Wise Affidavit*, Underwriters' Motion Record, Tab 5, p. 280, para. 8 and Exhibits "A", "C" and "F", Underwriters' Compendium of Evidence, Tab 3, para. 8

Offerings of notes and regulatory proceedings that are unaffected by the Equity Claims Motion (the "Unaffected Indemnity Claims").

B. The CCAA Proceedings

12. *The commencement of proceedings and the scope of the CCAA stay.* On March 30, 2012, Sino-Forest commenced proceedings under the CCAA. Justice Morawetz granted the Initial Order, among other things appointing FTI Consulting Canada Inc. as the Monitor.[6]

13. As part of the Initial Order made by the motions judge, the Class Actions were stayed. An order made by Justice Morawetz on May 8, 2012 confirmed that the Class Actions were also stayed as against the Underwriters and other Class Action defendants (except one Class Action defendant, Pöyry (Beijing) Consulting Co. Limited, which has negotiated a proposed settlement with the Class Action plaintiffs).[7]

14. The creditors of Sino-Forest consist of the holders of the company's shares and notes, as well as persons with indemnity claims, including the Underwriters.

15. *The nature and status of the CCAA proceedings.* The CCAA proceedings initially contemplated two tracks: a sale of the company to a third party, and in the alternative a plan of arrangement and compromise that would involve the noteholders ultimately owning Sino-Forest. Those two tracks are reflected in a restructuring and support agreement between Sino-Forest and

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[6] *Initial Order*, Underwriters' Motion Record, Tab 10, p. 1545-1574, Underwriters' Compendium of Evidence, Tab 4

[7] *Scope of the Stay Order*, Underwriters' Motion Record, Tab 12, Underwriters' Compendium of Evidence, Tab 5

a group of noteholders (the "Support Agreement").[8] Extensions of the stay of proceedings were sought by Sino-Forest and recommended by the Monitor to permit the two tracks to proceed.[9]

16. The CCAA motions judge made an order approving a sales process at the same time that he made the initial order on March 30, 2012, but he has not otherwise considered (much less approved) the Support Agreement.[10]

17. The Monitor has advised that the expressions of interest received by Sino-Forest in phase one of the sales process did not meet the necessary prerequisites so as to proceed to phase two of the sales process, and that the sale process was terminated pursuant to the terms of the Support Agreement. The Monitor has also advised that Sino-Forest would therefore be proposing a CCAA plan that will result in Sino-Forest transferring substantially all of its assets to a newly formed entity to be owned primarily by the noteholders, with Sino-Forest's other creditors and stakeholders to receive certain participation rights in such entity. Irrespective of the outcome of this motion and the proposed appeal, the Underwriters are among the creditors of Sino-Forest as a result of the Unaffected Claims of the Underwriters.[11]

18. *Claims Procedure Order.* On May 14, 2012, the motions judge made the Claims Procedure Order.[12] The Claims Procedure Order 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 bar order has been set, as the subsidiaries are not Applicants in the

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[8] *Monitor's Pre-Filing Report*, Underwriters' Motion Record, Tab 6, pp. 1075-1076, paras. 41-42, Underwriters' Compendium of Evidence, Tab 1, paras. 41-42

[9] *Monitor's First Report*, Underwriters' Motion Record, Tab 7, p. 1101, para. 42, Underwriters' Compendium of Evidence, Tab 6, para. 42

[10] *Sales Process Order*, Underwriters' Motion Record, Tab 11, pp. 1575-1596, Underwriters' Compendium of Evidence, Tab 7

[11] *Monitor's Fourth Report*, Underwriters' Motion Record, Tab 8, pp.1181-1182, paras. 23-24, Underwriters' Compendium of Evidence, Tab 8, paras. 23-24

[12] *Claims Procedure Order*, Underwriters' Motion Record, Tab 13, pp. 1601-1649, Underwriters' Compendium of Evidence, Tab 9

CCAA proceedings). The Underwriters filed proofs of claim in respect of the Related Indemnity Claims and the Unaffected Indemnity Claims. No response has been received in respect of those proofs of claim, and Sino-Forest has yet to take a position as to the validity and quantum of such claims and ay resulting dispute resolved.[13]

C. The Equity Claims Order

19. *The motion.* On June 26, 2012, the motions judge heard the motion by Sino-Forest seeking the Equity Claims Order. Sino-Forest sought declarations that Shareholder Claims and the Related Indemnity Claims were "equity claims" within the meaning of section 2 of the CCAA.

20. The Equity Claims Order does not address the validity or quantum of the Related Indemnity Claims; it instead addresses the priority of such claims.

21. The impact of the declaration sought would be to subordinate equity claims in the CCAA proceedings such that, among other things, no vote would be available to holders of equity claims without leave of the court, and that the court could not approve a plan that provides for a payment of an equity claim before other claims are paid in full. The effect of the Equity Claims Order is to confirm that Sino-Forest may compromise and release the Related Indemnity Claims under a CCAA plan for no consideration and without any right of the Underwriters to vote on such plan, and in doing so to undermine the claims process and render moot a determination of the validity and quantum of such claims.

22. The motion seeking the Equity Claims Order was opposed by, among others, the Underwriters. The Underwriters' position was that:

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[13] *Monitor's Sixth Report*, Underwriters' Motion Record, Tab 9, pp. 1216-1217, paras. 22-25, Underwriters' Compendium of Evidence, Tab 10, paras. 22-25

(a) it was premature to determine the issue of the characterization of the Related Indemnity Claims, and that in accordance with due process and to avoid a multiplicity of proceedings the issue should be addressed in connection with a determination of claims in the CCAA proceedings (which has not occurred); and

(b) in any event, the Related Indemnity Claims were not "equity claims" within the meaning of section 2 of the CCAA.

23. *The motion judge's decision.* The motions' judge released his decision on July 27, 2012.[14] In granting the Equity Claims Order, the motions judge declared that: (i) it was not premature to determine the issue at hand; (ii) the Shareholder Claims were equity claims; and (iii) the Related Indemnity Claims were also equity claims, other than in so far as they consist of defence costs.

24. *The appeal.* The Underwriter's appeal is concerned only with the determination that the Related Indemnity Claims are equity claims. The appeal does not deal with either the Shareholder Claims or the prematurity issue outline above in paragraph 22(b).

PART III – LAW & ARGUMENT

A. Test for Leave to Appeal

25. An appeal of the Equity Claims Order requires leave of this Court. In order to obtain leave, it must be considered whether:

(a) the point on appeal is of significance to the practice;

(b) the point is of significance to the action;

(c) the appeal is *prima facie* meritorious or frivolous; and

[14] *Equity Claims Order* and *Endorsement*, Underwriters' Motion Record, Tab 2, pp. 4-7 and Tab 3, pp. 8-25, Underwriters' Compendium of Evidence, Tabs 11 and 12

(d) the appeal will not unduly hinder the progress of the action.[15]

26. For the reasons set out in the balance of Part III of the Factum, the Underwriters submit that leave test is met in this case.

B. The Issue Has Significance to the Practice

27. The new definition of "equity claims" in the CCAA and BIA has not been considered by the Court of Appeal. As set out below in section D, the new definition in the CCAA and BIA was the result of a considered process leading to amendments of insolvency legislation. The guidance that would be provided in connection with the Underwriters' appeal and the application of the relevant provisions of the CCAA would assist the practice with respect to this significant issue.

28. In *Return On Innovation Capital Ltd. v. Gandi Innovations Limited*, this Court refused leave on an issue relating to the characterization of claims in an insolvency proceeding as equity claims, but in doing so noted that the issue in that case did not involve the application of the new definition of equity claim in section 2 of the CCAA.[16] This case does involve that issue, making the proposed appeal significant to the practice.

C. The Issue is Significant in the Action

29. Given that the only significant creditors of Sino-Forest appear to be the noteholders and parties making claims against Sino-Forest for indemnification, the characterization of the indemnification claims for the purposes of voting and distributions in the CCAA could not be more significant to the proceeding.

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[15] CCAA, sections 13 and 14, Schedule "B"; *Re Stelco Inc.*, [2005] O.J. No. 1171 at para. 24 (C.A.), Brief of Authorities of the Underwriters, Tab 1

[16] *Return On Innovation Capital Ltd. v. Gandi Innovations Limited*, 2012 ONCA 10 (CanLII) at para. 12, refusing leave to appeal from (2011), 83 C.B.R. (5th) 123 (Ont. S.C.J.), Brief of Authorities of the Underwriters, Tab 2

30. The importance of the issue to the CCAA proceedings was recognized by the motions judge, who stated in the Endorsement (when dealing with the Underwriters' prematurity argument) that resolving the issue is a necessary step in the CCAA proceedings: "[i]t has been clear from 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 'equity claims' – would have to be determined."[17]

D. The Appeal is Meritorious

31. *The motion judge's conclusion was incorrect.* The issue in the proposed appeal is a question of law, and the standard of review for the appeal is therefore correctness.

32. The Underwriters submit that the motions judge erred in determining that the Related Indemnity Claims are equity claims at all. With respect to this determination, the Underwriters submit that: (i) the motion judge made certain specific errors; and (ii) the motion judge's Endorsement generally failed to set out the reasons for making the Equity Claims Order. Such errors and issues that should have been considered in the Endorsement are discussed together in greater detail below beginning at paragraph 35 below.

33. The Underwriters submit that that the motions judge made the following specific errors:

(a) The motions judge erred in finding that the amendments to section 2 of the CCAA did more than codify the pre-existing common law on the treatment of equity claims by virtue of the inclusion of subsection (e) in the CCAA definition of equity claims which refers to "contribution or indemnity" in respect of an equity claim.[18] It has previously been held by Canadian courts that, generally speaking, the Amendments (as defined below) merely codify existing case law on point and

[17] *Endorsement*, Underwriters' Motion Record, Tab 3, p. 20, para. 73, Underwriters' Compendium of Evidence, Tab 12, para. 73

[18] *Endorsement*, Underwriters' Motion Record, Tab 3, p. 22, para. 87, Underwriters' Compendium of Evidence, Tab 12, para. 87

do not represent a departure from the law in this regard. Prior to the Amendments, the Alberta Court of Queen's Bench actually considered the contractual indemnity claims of underwriters in *National Bank of Canada v. Merit Energy Ltd.* ("*Merit*"), and distinguished such claims of the underwriters from shareholder indemnification claims.[19] In light of *Merit* and the recommendations of the Senate Report (as defined below), the inclusion of indemnity claims in subsection (e) ought to be interpreted to cover the disguised or creatively characterized equity claims of *shareholders* as opposed to indemnities granted to independent third-parties dealing at arm's length, such as the Underwriters.[20] The inclusion of subsection (e) in the CCAA definition of equity claims does not require a finding that the Amendments did anything more than codify the pre-existing common law on the treatment of equity claims.

(b) The motions judge erred in finding that the characterization of the Related Indemnity Claims turns on the nature of the underlying claim as opposed to the identity of the claimant.[21] The relevant provisions of the CCAA do not exclude the consideration of the identity of the claimant for purposes of determining whether or not a particular claim is an equity claim. In fact, the recommendations of the Senate Report with respect to the relative priorities of equity claims holders and ordinary creditors specifically referred to the identity of the claimant in recommending that claims of a "seller or purchaser of equity securities"[22] be subordinated to ordinary creditors and *Merit* was decided, in part, based on the identity of the claimant.

(c) The motions judge erred in finding that the Related Indemnity Claims are being used to recover an equity investment.[23] The Related Indemnity Claims are not in respect of an equity interest (and therefore are not equity claims). The Related

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[19] *National Bank of Canada v. Merit Energy Ltd.* (2001), 28 C.B.R. (4th) 228 (Alta. Q.B.) [*Merit*] at para. 64, Brief of Authorities of the Underwriters, Tab 3

[20] Standing Senate Committee on Banking Trade and Commerce, *Debtors and Creditors Sharing the Burden,* 2003 ("*Standing Senate Committee Report*") at pp. 158-159, Brief of Authorities of the Underwriters, Tab 4

[21] *Endorsement*, Underwriters' Motion Record, Tab 3, p. 21, para. 79, Underwriters' Compendium of Evidence, Tab 12, para. 79

[22] *Standing Senate Committee Report* at pp. 158-159, Brief of Authorities of the Underwriters, Tab 4

[23] *Endorsement*, Underwriters' Motion Record, Tab 3, para. 79, Underwriters' Compendium of Evidence, Tab 12, para. 79

> Indemnity Claims must be distinguished from the claims of shareholders, themselves. Shareholder Indemnity Claims are claims of Underwriters against Sino-Forest in respect of claims brought by shareholders against the Underwriters, as opposed to direct shareholder claims against Sino-Forest. 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 and their claims should not be conflated with those of shareholders. The claims of the Underwriters and shareholders are legally distinct and should be so considered.

34. However, what is most striking about the motion judge's Endorsement is that it fails to set out the reasons for making the Equity Claims Order, including a proper consideration of: (i) the statutory framework for defining equity claims; (ii) the historical treatment of equity claims and indemnity claims, respectively; and (iii) the nature of the claims made by the Underwriters in this case. Those issues and the motions judge's errors are addressed below, with reference to the Endorsement.

35. *Statutory framework for defining equity claims.* The general rule under Canadian bankruptcy and insolvency legislation is that all unsecured debt claims against a bankrupt or insolvent entity rank *pari passu*.

36. The amendments (the "Amendments") to Canadian bankruptcy and insolvency legislation that came into effect in September 2009, added new provisions to both the CCAA and BIA concerning the treatment of equity claims against a bankrupt or insolvent entity to clarify what, in fact, constitutes an equity as opposed to a debt claim.

37. As noted below, the Amendments were widely regarded as codifying existing law rather than changing the law; however, the motions judge concluded that the Amendments changed the

law with respect to the treatment of indemnity claims in CCAA proceedings but provided inadequate reasoning and support in reaching this conclusion.

38. A determination of whether the Related Indemnity Claims are unsecured debt claims or equity claims requires an analysis of the statutory provisions relating to claims provable and equity claims. Section 2 of the CCAA incorporates the BIA framework for the determination of what is a claim provable in CCAA proceedings, as follows:

> 2.(1) In this Act, "claim" means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 the *Bankruptcy and Insolvency Act*.[24]

39. Section 121(1) of the BIA provides as follows:

> 121(1) Claims provable – All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.[25]

40. The Amendments introduced two new definitions: that of "equity claims" and "equity interests". Equity claims are defined in Section 2(1) of the CCAA as follows:

> 2.(1) - "equity claim" means a claim that is in respect of an equity interest, including a claim for, among others,
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> (a) a dividend or similar payment,
>
> (b) a return of capital,
>
> (c) a redemption or retraction obligation,
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> (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

[24] CCAA, section 2(1), Schedule "B"

[25] CCAA, section 2(1), Schedule "B"

> (e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d).[26]

41. By definition, an equity claim must be a claim "in respect of an equity interest". Equity interest is, in turn, defined in Section 2(1) of the CCAA as follows:

> 2.(1) - "equity interest" means
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> (a) in the case of a corporation other than an income trust, a share in the corporation — or a warrant or option or another right to acquire a share in the corporation — other than one that is derived from a convertible debt, and
>
> (b) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt.[27]

42. The Amendments then make clear that equity claims are subordinate to general unsecured claims. Section 6(8) of the CCAA provides as follows:

> 6.(8) Payment – equity claims – No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not Equity Claims are to be paid in full before the equity claim is to be paid.[28]

43. In reviewing these provisions of the CCAA, it is helpful to consider the following statutory interpretation principles:

(a) The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.

(b) Every Act "shall be deemed to be remedial" and ... every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the

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[26] CCAA, section 2(1), Schedule "B"

[27] CCAA, section 2(1), Schedule "B"

[28] CCAA, section 6(8), Schedule "B"

> attainment of the object of the Act according to its true intent, meaning, and spirit."[29]

44. To a large extent, Parliament's intent, especially with respect to the Amendments, is reflected in the Standing Senate Committee on Banking Trade and Commerce's *Debtors and Creditors Sharing the Burden* (the "Senate Report"). With reference to the Senate Report, equity claims are generally understood to be those claims that are not based on the supply of goods, services or credit to a corporation, but rather are based on some wrongful or allegedly wrongful act committed by an issuer of an instrument reflecting equity in the capital of a corporation.[30]

45. In the examples of equity claims provided in the Senate Report, indemnity claims of independent third-parties dealing at arm's length, such as underwriters, are notably absent. The Senate Report, citing the Joint Task Force on Business Insolvency Law Reform, states that "all [equity] claims against a debtor in an insolvency proceeding ... including claims for payment of dividends, redemption or retraction or repurchase or shares, and damages (including securities fraud claims) are to be treated as equity claims subordinate to all other secured and unsecured claims against the debtor ... ."[31]

46. Also notably absent from the Senate Report's recommendation, is any reference to the indemnity claims of independent third-parties dealing at arm's length. The Senate Report recommended that:

> [t]he *Bankruptcy and Insolvency Act* be amended to provide that the claim of a seller or purchaser of equity securities, seeking damages or rescission in connection with the transaction, be subordinated to the claims of ordinary creditors. Moreover, these claims should not participate in the proceeds of a restructuring or

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[29] *Rizzo & Rizzo Shoes Ltd.*, Re, [1998] 1 S.C.R. 27 at paras. 6 and 21, Brief of Authorities of the Underwriters, Tab 5

[30] *Standing Senate Committee Report* at pp. 158-159, Brief of Authorities of the Underwriters, Tab 4

[31] *Standing Senate Committee Report* at pp. 158-159, Brief of Authorities of the Underwriters, Tab 4

> bankruptcy until other creditors of the debtor have been paid in full.[32]

47. In light of the Senate Report's recommendations, the inclusion of indemnity claims in subparagraph (e) of the CCAA definition of equity claim ought to be interpreted narrowly so as to restrict this provision to instances of indemnities in favour of shareholders only and not indemnities granted to independent third-parties dealing at arm's length.

48. The definition of "equity claims" in the CCAA lists five examples of ***shareholder*** claims that are not to be permitted to rank *pari passu* with unsecured debt claims. The motions judge erroneously concluded that subparagraph (e), unlike (a) through (d), extended to non-shareholder claimants.

49. At the time of the Amendments, the existing case law (which was codified by the Amendments) was that shareholders having obtained indemnities at the time they acquired their shares and in respect of such share purchase could not assert claims in respect of such indemnities that ranked pari passu with other unsecured claims.

50. Subparagraph (e) ought to be interpreted to apply to shareholder indemnity claims such as those in respect of indemnities provided by companies to shareholders that in effect guarantee the performance of their shares, shareholders framing their actual tort claims as indemnities, shares with indemnity components or other hybrid securities and other similar indemnity claims.[33] If interpreted less narrowly, subparagraph (e) could include indemnity claims of company insiders, such as directors and officers. However, the inclusion of indemnities granted to independent third-parties dealing at arm's length requires too broad an interpretation that is not supported by the Senate Report or the public policy considerations discussed in greater detail

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[32] *Standing Senate Committee Report* at pp. 158-159, Brief of Authorities of the Underwriters, Tab 4

[33] An example of such an indemnity claim was at issue in *Re EarthFirst Canada Inc.* (2009), 56 C.B.R. (5th) 102 (Alta. Q.B.) at para. 5, Brief of Authorities of the Underwriters, Tab 6

below. There was no evidence before the motion judge that supported that Parliament intended to change the common law as it existed at the time of the Amendments, and the motions judge cannot correctly have concluded that Parliament had such an intention in the absent of any evidence of this.

51. In the Endorsement, the motions judge does not address this legislative background or the statutory interpretation consequences flowing from it.

52. *The historical treatment of equity claims.* It has been held by Canadian courts in subsequent decisions that, generally speaking, the Amendments merely codify existing case law on point and do not represent a departure from the law in this regard.[34] Therefore, the pre-Amendments case law discussed below remains relevant. The motions judge failed to take into account this case law in reaching his conclusion regarding the Related Indemnity Claims.

53. Historically, common law practice, as explained by the Ontario Court of Justice in *Re Central Capital Corp.*, was such that on the insolvency of a company, the claims of creditors rank ahead of the claims of shareholders for the return of their capital and are only entitled to share in the assets of an insolvent corporation until after all the ordinary creditors have been paid in full. 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.[35]

54. Elements considered in subordination cases were summarized by the Alberta Court of Queen's Bench in *Re Blue Range Resources Corp.* as:

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[34] *Re Nelson Financial Group Ltd.* (2010), 71 C.B.R. (5th) 153 (Ont. S.C.J.) at para. 27, Brief of Authorities of the Underwriters, Tab 7

[35] *Re Central Capital Corp.* (1995), 29 C.B.R. (3d) 33 (Ont. C.J. (Gen. Div. – Commercial List)) at para. 36, Brief of Authorities of the Underwriters, Tab 8

(a) the claims of shareholders rank behind the claims of creditors in bankruptcy;

(b) creditors do business on the assumption that they will rank ahead of shareholders in the event of their debtor's insolvency;

(c) shareholders are not entitled to rescind their shares on the basis of misrepresentation after the company has become insolvent;

(d) United States jurisprudence supports the priority of creditors in "stockholder fraud" cases; and

(e) to allow the shareholders to rank *pari passu* with the unsecured creditors could open the floodgates to aggrieved shareholders launching misrepresentation claims.[36]

55. *The Related Indemnity Claims.* The Amendments codify the established common law prohibitions against various creative attempts by shareholders (not arm's length third parties) to characterize as debts claims that were, in substance, claims for the recovery of an equity investment.

56. In addition to confirming this long-standing principle of bankruptcy and insolvency law that shareholders cannot recover on their equity claims until all creditors of a corporate entity have been paid in full, the Amendments addressed the application of this rule to certain categories of claims over which confusion had arisen as a result of difficulties in determining debt claims from equity claims. Such determination is conducted against the backdrop of the public policy considerations discussed in the Senate Report and in the case law above. The Senate Report observed that:

> [i]n view of recent corporate scandals in North America, the Committee believes that the issue of equity claim must be addressed in insolvency legislation. In our view, the law must recognize the facts in insolvency proceedings: since holders of

[36] *Re Blue Range Resources Corp.* (2000), 15 C.B.R. (4th) 169 (Alta. Q.B.) at paras 35-45, Brief of Authorities of the Underwriters, Tab 9

> equity have necessarily accepted - through their acceptance of equity rather than debt - that their claims will have a lower priority than claims for debt, they must step aside in a bankruptcy proceeding. Consequently, their claims should be afforded lower ranking than secured and unsecured creditors, and the law, in the interests of fairness and predictability - should reflect both this lower priority for holders of equity and the notion that they will not participate in a restructuring or recover anything until all other creditors have been paid in full.[37]

57. The consequences of such a determination have a direct impact on the claim holders' priority, as equity claims will be subordinated to the claims of unsecured creditors, while debt claims will share *pro rata* with the claims of unsecured creditors. The Amendments were intended, in part, to make this characterization exercise easier and more consistent.

58. In the present case, the consequence of characterizing the Related Indemnity Claims as equity claims is to subordinate the Related Indemnity Claims to unsecured claims against Sino-Forest. The Related Indemnity Claims are not in respect of an equity interest (and therefore are not equity claims), contrary to the conclusion stated by the motions judge in paragraph 82 of the Endorsement. The Related Indemnity Claims must be distinguished from the claims of shareholders, themselves. The Related Indemnity Claims are not of a kind or nature precluded by case law prior to the Amendment, nor the subject of the Amendments, themselves. Related Indemnity Claims are claims of Underwriters against Sino-Forest in respect of claims brought by shareholders against the Underwriters, as opposed to direct shareholder claims against Sino-Forest.

59. Creditors of Sino-Forest had notice of the contractual indemnities provided by Sino-Forest to the Underwriters, as the relevant underwriting and related agreements were publicly disclosed by Sino-Forest and filed with securities regulators pursuant to applicable securities

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[37] *Standing Senate Committee Report* at pp. 158-159, Brief of Authorities of the Underwriters, Tab 4

legislation. The services supplied to Sino-Forest by the Underwriters had the effect of providing Sino-Forest with additional capital to, *inter alia*, fund its operations and ongoing obligations to creditors and others.

60. In addition, the inclusion of indemnity claims in subparagraph (e) of the CCAA definition of equity claim ought to be interpreted narrowly so as to restrict this provision to instances of indemnities in favour of shareholders only and not indemnities granted to independent third-parties dealing at arm's length, such as the Underwriters. 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.

61. Cases decided by Canadian courts in which shareholders' direct indemnity claims were rejected as being claims in equity rather than debt ought to be distinguished from the present case insofar as they deal with shareholders' direct indemnity claims, as opposed to indemnity claims by independent third-parties dealing at arm's length, such as the Underwriters.[38]

62. There is divergent case law on the characterization of indemnity claims as equity claims. In *Merit*, the Alberta Court of Queen's Bench considered the contractual indemnity claims of underwriters, and distinguished such claims of the underwriters from shareholder indemnification claims. The Court held (at paras. 62-65):

> 62. The fundamental premise of the Trustee's argument is that the Underwriters' indemnity simply "flows through" or "passes on" the Flow-Through Shareholders' claim to Merit. This ignores the nature of the causes of action being advanced by the Underwriters and the existence of a contractual indemnity freely given by Merit for good and valuable consideration. The Trustee did not suggest that the indemnity was invalid or unenforceable, rather, it argued

[38] *Merit* at para. 64, Brief of Authorities of the Underwriters, Tab 3

> that this valid and enforceable right should be treated as a "shareholders' claim" and subordinated. With respect, I cannot agree with the Trustee's position.
>
> 63. The Trustee's argument attempts to shift the Court's focus from the Underwriters' claim against Merit to the claim being asserted against the Underwriters, even though it is the former that the Trustee wants the Court to subordinate. The Flow-Through Shareholders' cause of action against the Underwriter's is predicated on the Underwriters' alleged failure to discharge a statutory duty and their liability is not contingent in any way on a successful claim by the Underwriters against Merit under the indemnity.
>
> 64. The Underwriters' indemnity claims against Merit are not made as a shareholder or for any return of investment made by the Underwriters. Rather, they are based on contractual, legal and equitable duties owed directly by Merit to the Underwriters. Similarly, the other causes of action advanced by the Underwriters against Merit in the Third Party Notice do not arise from any equity position in the company, but are based on agency, fiduciary and contractual relationships between the Underwriters and Merit, to which the Flow-Through Shareholders are strangers and are unavailable for them to assert.
>
> 65. For example, the Underwriters are entitled to an indemnity for defence costs even if the Flow-Through Shareholders' claims fail completely. The ultimate success or failure of the Flow-Through Shareholders' claims makes no difference to the existence and enforceability of this right against Merit.

63. The Court in *Merit* accepted that an underwriter's contractual indemnification claims are distinct from the claims of shareholders for a return of their investment, and the Court acknowledged that the policy rationale behind subordinating shareholder claims does not hold in the case of an underwriter's contractual indemnification claims.

64. Although *Merit* was decided prior to the Amendments, as discussed above, Canadian courts have held that the Amendments are intended to codify rather than change the pre-existing common law on point. Therefore, the Amendments ought to be interpreted in a manner

consistent with the holding in *Merit* (i.e., excluding indemnification claims of underwriters from being equity claims based on policy considerations).

65. The decision of the Ontario Superior Court of Justice in *Return on Innovation Capital Ltd. v. Gandi Innovations Ltd.* ("*Gandi*") considered the case of a third-party indemnity in favour of directors and officers.[39] In *Gandi*, the Gandi companies were insolvent and in CCAA proceedings. A shareholder sued, *inter alia*, the directors and officers for recovery of its equity investment in the debtor corporation. The shareholder's claims were framed as claims for such things as breach of contract, fraud, rescission, negligent misrepresentation, and breach of fiduciary duty. The Court concluded that if the claims of the plaintiff are themselves equity claims, then any resulting claims for indemnity or contribution by the defendants are also equity claims.[40]

66. *Gandi*, however, can be distinguished from *Merit* and the present case due to the fact that the third parties in that case were insiders (i.e., directors and officers) of the Gandi companies, as opposed to independent third parties dealing at arm's length, as is the case with the Underwriters in the present case. Correspondingly, the treatment of each group of indemnified parties should differ to reflect this essential dissimilarity in position.

67. Fundamentally, the postponement of equity claims (both at common law prior to the Amendments and now pursuant to the Amendments) is a policy-driven outcome. Independent third-parties dealing at arm's length, such as underwriters, cannot reasonably be said to have accepted the risks that a shareholder has with respect to its claims. Returning to first principles, the policy reason for treating equity claims as subordinate to the claims of creditors is that equity

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[39] *Return On Innovation Capital Ltd. v. Gandi Innovations Limited* (2011), 83 C.B.R. (5th) 123 (Ont. S.C.J.) [*Gandi*], Brief of Authorities of the Underwriters, Tab 10

[40] *Gandi* at para. 61, Brief of Authorities of the Underwriters, Tab 10

owners always take the risk of not being paid together with the possible reward of the upside of ownership, and that is their bargain. When an owner seeks to recover its investment as a debt, it is trying to resile from the bargain it struck. Underwriters don't take on the same risk-reward bargain when they supply services to a company. Underwriters strike their own bargain with a company, and a central part of their contractual compensation is the indemnity they receive from a company. Importantly, the amount of the indemnity claims of Underwriters are capped by the value of the securities underwritten by them, and such amount is not a function of the profits lost by trading in the securities, further distancing the Underwriters from the risk-reward profile of shareholders.

68. The Related 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 Shareholder Claims. The risk-reward profile of the shareholder and underwriter is fundamentally different and a policy-driven analysis of equity claims should account for this dissimilarity in position.

E. The Appeal Will Not Unduly Delay the Action

69. Given the nature and status of these CCAA proceedings and of Sino-Forest, the appeal will not unduly delay the action. In considering this part of the test, the Alberta Court of Appeal in *Re Canadian Airlines Corp.* held that:

> [t]he fourth element of the general criterion is whether the appeal will unduly hinder the progress of the action. In other words, will the delay involved in prosecuting, hearing and deciding the appeal be of such length so as to unduly impede the ultimate resolution of the matter by a vote or court sanction?[41]

[41] *Re Canadian Airlines Corp.*(2000), 19 C.B.R. (4th) 33 (Alta. C.A.) at para. 41, Brief of Authorities of the Underwriters, Tab 11

70. Notwithstanding any position taken by Sino-Forest or the Monitor with respect to the appeal unduly delaying of the action, there are numerous issues that remain to be address before a plan can be presented, voted on or considered by the Court, including the commencement of a court-ordered mediation process in September, 2012. The Underwriters have other claims against Sino-Forest that are not the subject of the Equity Claims Order, and the resolution of these claims has not been commenced by Sino-Forest and must be completed before a final determination as to distribution of value can be made. As noted above, Sino-Forest is a holding company holding the shares of its subsidiaries as its principle assets, which subsidiaries hold the operating businesses and employees of the group and which subsidiaries are not part of the CCAA proceedings. Sino-Forest has terminated the sales process and there is no further sales process ongoing. There is no looming restructuring transaction that must imminently be completed; there is only the ultimate distribution of the value of Sino-Forest to its creditors. There is no urgency in finalizing such distribution so as to make inappropriate the granting of the leave to appeal sought herein, and, to the extent there is any urgency, it is outweighed by the significance of the issue to the practice and to the action.

71. However, if Sino-Forest or the Monitor believe that there is urgency they may apply to expedite this motion for leave to appeal. The Underwriters will not oppose a reasonable request to expedite the motion and the appeal.

PART IV - RELIEF REQUESTED

For the reasons set out above, the Underwriters respectfully submit that leave to appeal Equity Claims Order should be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

David Bish

John Fabello

Adam M. Slavens

Lawyers for the Underwriters
named in Class Actions

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Re Stelco Inc.,* [2005] O.J. No. 1171 (C.A.)
2. *Return On Innovation Capital Ltd. v. Gandi Innovations Limited*, 2012 ONCA 10 (CanLII), refusing leave to appeal from (2011), 83 C.B.R. (5th) 123 (Ont. S.C.J.)
3. *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27
4. Standing Senate Committee on Banking Trade and Commerce, *Debtors and Creditors Sharing the Burden,* 2003
5. *Re EarthFirst Canada Inc.* (2009), 56 C.B.R. (5th) 102 (Alta. Q.B.)
6. *Re Nelson Financial Group Ltd.* (2010), 71 C.B.R. (5th) 153 (Ont. S.C.J.)
7. *Re Central Capital Corp.* (1995), 29 C.B.R. (3d) 33 (Ont. C.J. (Gen. Div. – Commercial List))
8. *Re Blue Range Resources Corp.* (2000), 15 C.B.R. (4th) 169 (Alta. Q.B.)
9. *Return On Innovation Capital Ltd. v. Gandi Innovations Limited* (2011), 83 C.B.R. (5th) 123 (Ont. S.C.J.)
10. *National Bank of Canada v. Merit Energy Ltd.* (2001), 28 C.B.R. (4th) 228 (Alta. Q.B.)
11. *Re Canadian Airlines Corp.*(2000), 19 C.B.R. (4th) 33 (Alta. C.A.)

SCHEDULE "B"

LEGISLATION

COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C. C-36

Definitions

□ 2. (1) In this Act,

…

"claim" means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*;

…

□ "equity claim" means a claim that is in respect of an equity interest, including a claim for, among others,

- o (*a*) a dividend or similar payment,
- o (*b*) a return of capital,
- o (*c*) a redemption or retraction obligation,
- o (*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
- o (e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d);

□ "equity interest" means

- o (*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, and
- o (*b*) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt;

…

Compromises to be sanctioned by court

□ 6. (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of

creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

- (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and
- (b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act* or is in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

□ ***Court may order amendment***

(2) If a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

□ ***Restriction — certain Crown claims***

(3) Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under

- *(a)* subsection 224(1.2) of the *Income Tax Act*;
- *(b)* any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or
- *(c)* any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum
  - (i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
  - (ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(4) If an order contains a provision authorized by section 11.09, no compromise or arrangement is to be sanctioned by the court if, at the time the court hears the application for sanction, Her Majesty in right of Canada or a province satisfies the court that the company is in default on any remittance of an amount referred to in subsection (3) that became due after the time of the application for an order under section 11.02.

(5) The court may sanction a compromise or an arrangement only if

- *(a)* the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court's sanction, of
  - (i) amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(d) of the *Bankruptcy and Insolvency Act* if the company had become bankrupt on the day on which proceedings commenced under this Act, and
  - (ii) wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company's business during the same period; and
- *(b)* the court is satisfied that the company can and will make the payments as required under paragraph (a).

(6) If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

- *(a)* the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:
  - (i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,
  - (ii) if the prescribed pension plan is regulated by an Act of Parliament,
    - (A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that was required to be paid by the employer to the fund, and
    - (B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, and
  - (iii) in the case of any other prescribed pension plan,
    - (A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and
    - (B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, if the prescribed plan were regulated by an Act of Parliament; and
- *(b)* the court is satisfied that the company can and will make the payments as required under paragraph (a).

(7) Despite subsection (6), the court may sanction a compromise or arrangement that does not allow for the payment of the amounts referred to in that subsection if it is satisfied that the relevant

parties have entered into an agreement, approved by the relevant pension regulator, respecting the payment of those amounts.

(8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

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

14. (1) An appeal under section 13 lies to the highest court of final resort in or for the province in which the proceeding originated.

(2) All appeals under section 13 shall be regulated as far as possible according to the practice in other cases of the court appealed to, but no appeal shall be entertained unless, within twenty-one days after the rendering of the order or decision being appealed, or within such further time as the court appealed from, or, in Yukon, a judge of the Supreme Court of Canada, allows, the appellant has taken proceedings therein to perfect his or her appeal, and within that time he or she has made a deposit or given sufficient security according to the practice of the court appealed to that he or she will duly prosecute the appeal and pay such costs as may be awarded to the respondent and comply with any terms as to security or otherwise imposed by the judge giving leave to appeal.

BANKRUPTCY AND INSOLVENCY ACT, R.S.C., 1985, C. B-3

Claims provable

□ 121. (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

□ ***Contingent and unliquidated claims***

(2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.

□ ***Debts payable at a future time***

(3) A creditor may prove a debt not payable at the date of the bankruptcy and may receive dividends equally with the other creditors, deducting only thereout a rebate of interest at the rate of five per cent per annum computed from the declaration of a dividend to the time when the debt would have become payable according to the terms on which it was contracted.

□ ***Family support claims***

(4) A claim in respect of a debt or liability referred to in paragraph 178(1)(b) or (c) payable under an order or agreement made before the date of the initial bankruptcy event in respect of the bankrupt and at a time when the spouse, former spouse, former common-law partner or child was living apart from the bankrupt, whether the order or agreement provides for periodic amounts or lump sum amounts, is a claim provable under this Act.

□

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

FACTUM OF THE UNDERWRITERS NAMED IN CLASS ACTIONS
(Motion Seeking Leave to Appeal)

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