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

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

Factum of BDO Limited

(Motions by Sino-Forest Corporation and the Plaintiffs, returnable October 9 and 10, 2012)

October 4, 2012

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PART I - INTRODUCTION

1. This two-day motion is, for the most part, about two months.

2. In particular, Sino-Forest Corporation ("SFC"), seeks to extend the current stay of proceedings by slightly less than two months to finalize and seek ratification of its restructuring plan; and the Ad Hoc Committee of Purchasers of the Applicant's Securities (the "Class Action Plaintiffs") do not want to wait another two months to pursue the leave and certification motions in their class actions while that restructuring occurs.

3. BDO Limited is one of the third party defendants covered by the stay granted in the Initial Order in this proceeding on March 30, 2012. This was made clear in a further order on May 8, 2012 (the "May 8th Stay Order") that expressly provided that the stay applies to all parties to the class proceedings brought against SFC.

4. When the May 8th Stay Order was granted, it was important that the stay extend to third party defendants because:

(a) The claims against the third party defendants are so intertwined with those against SFC that it would be impractical, improper and unfair to the parties and the Court to permit the claims against the third parties to proceed in isolation from those against SFC;

(b) The third party defendants all will have contribution and indemnity cross-claims against SFC and its officers and directors;

(c) The evidence and participation of SFC and its officers and directors is essential to the determination of the issues in the Class Proceeding; and

(d) To try the class proceedings only against some defendants before the same or similar issues are determined as against SFC-related parties runs the risk of inconsistent judicial findings on key issues and could cause irreparable prejudice to both the third party defendants and to SFC.

5. Nothing material to the Class Actions has changed since May 8, 2012. No limitation periods have expired and none are close to expiring in either Ontario or Quebec, thanks to executed tolling agreements that were contemplated when the May 8th Stay Order was made and executed shortly thereafter. The Class Action Plaintiffs have not shown that any prejudice will result from having to wait a bit longer.

6. BDO accepts SFC's submission that it is moving expeditiously toward completion of its restructuring plan and that it needs be able to focus on that plan for these next two months.

7. SFC's restructuring appears to be coming to an end and there is no reason why the class proceedings cannot wait at least another two months to proceed with what are certain to be hotly contested and time-consuming motions for leave under the *Securities Act* and certification as class actions.

8. It would be especially inappropriate to lift the stay only as against the third party defendants to the class proceedings, including BDO, for all of the same reasons that the May 8th Stay Order was appropriate. The claims against the various parties for which leave and

certification are sought are so intertwined that they cannot be dealt with separately without unfairness to the parties and the very real possibility of inconsistent results.

9. Further, the Class Action Plaintiffs do not come to this Court with clean hands. Contrary to the stay currently in place, the Class Action Plaintiffs brought a motion in Quebec without prior notice to any of the parties for leave to add several defendants to the Quebec Class Action, including BDO Limited and the Underwriters. Leave was apparently granted to add these parties on August 30, 2012.

10. In doing this, the Class Action Plaintiffs ignored the stay of proceedings and this Court's directions, as they were never given leave to seek to add parties to any Class Proceedings – especially without notice. BDO says that the Class Action Plaintiffs' clear breach of the current stay of proceedings should deprive them of any relief from that stay.

11. BDO also says that the motion by the Plaintiffs for disclosure of documents placed into the Data Room should be dismissed – largely for the reasons expressed by SFC.

PART II - THE FACTS

A. BDO's role as auditor of Sino-Forest for 2005 and 2006:

12. BDO is a Hong Kong-based accounting firm formerly known as BDO McCabe Lo Limited that, among other things, conducts audits of the annual financial statements of publicly traded companies.

13. BDO Limited ("BDO") was the auditor of Sino-Forest Corporation between 2005 and August 2007, when it was replaced by Ernst & Young LLP ("E&Y").

14. BDO audited the annual financial statements for the Applicant, Sino-Forest Corporation for the years ended December 31, 2005 and December 31, 2006. BDO was the auditor for Sino until on or about August 12, 2007, when BDO was replaced by Ernst & Young LLP ("E&Y").

15. As with any auditor, BDO relied upon SFC and its management to bear the primary responsibility for preparing its annual financial statements in accordance with Generally Accepted Accounting Principles ("GAAP"), including the maintenance of appropriate internal controls. This was reflected in BDO's Engagement Agreements with SFC for the 2005 and 2006 audit years (the "BDO Engagement Agreements").

> Engagement letters, dated August 1,2005 and December 29, 2006; Responding Motion Record of BDO Limited on the Scope of Stay Motion heard on May 8, 2012 ("BDO Record"), Tabs 2A and 2B, pp. 13 and 21

16. Under the terms of the BDO Engagement Agreements, SFC also agreed that its management bore primary responsibility to implement appropriate internal controls to detect fraud and error.

> Engagement letters, dated August 1,2005 and December 29,2006; BDO Record, Tabs 2A and 2B, pp. 13 and 21

17. BDO issued audit reports (the "BDO Audit Reports") in respect of the 2005 and 2006 annual financial statements for SFC, the latter of which was issued in March 2007.

18. One or both of BDO's audit reports were incorporated by reference into one SFC Prospectus issued in June 2007, and three SFC Offering Memoranda, issued in July 2008, June 2009 and December 2009.

B. The Ontario Class Action:

19. BDO has been named as a defendant in an Ontario class action, *The Trustees of the Labourers' Pension Fund of Central and Eastern Canada et al. v. Sino-Forest Corporation et al.* (CV-11-431153-00CP) (the "Ontario Class Action").

20. The Ontario Class Action seeks to certify a class action on behalf of all persons who purchased SFC securities – both SFC shares and SFC Notes - in Canada during the Class Period (which is defined as March 19, 2007 to June 2, 2011), as well as all Canadian residents who purchased Sino's securities outside of Canada.

21. The foundation of the Ontario Class Action is a single misrepresentation (defined in the Claim as the "Representation") that is alleged to have been repeatedly made, condoned, verified, stated, re-stated or participated in by SFC and the 25 other named defendants during the relevant Class Period: that SFC's financial statements had been prepared in accordance with generally accepted accounting principles ("GAAP").

> Fresh as Amended Statement of Claim, paras. 1(yy), 2(b), 64, 203, 224, and 228; Motion Record of the Ad Hoc Committee of Purchasers of the Applicant's Securities for a motion returnable on August 28, 2012 ("August 28th Motion Record"), Tab 5, pp. 326, 328, 350, 402, and 420-421.

22. The common issues sought to be certified against all parties in the Ontario Class Action all ultimately relate to whether, and to the extent to which, each defendant can be held liable for the Representation.

23. The largest claim sought to be certified in the Ontario Class Action seeks $6.5 Billion on behalf of all purchasers of SFC securities on the secondary market during the Class Period (the "Secondary Market Claim").

24. As against BDO, the Secondary Market Claim stems entirely from BDO's audit report regarding the 2005 and 2006 financial statements prepared by SFC and its management team. The Secondary Market Claim stems entirely from the alleged actions and/or omissions of SFC and its management in the preparation of financial statements and BDO's alleged failure to identify those acts or omissions.

> Fresh as Amended Statement of Claim, paras. 198; Sino-Forest Motion Record, Tab 2E, pp. 225 - 227

25. Subject to certification, BDO has also been sued on behalf of primary market purchasers of SFC securities – again including purchasers of both shares and debt securities. Those claims (collectively the "Primary Market Claims") are as follows:

(a) On behalf of all of the Class Members who purchased SFC common shares in the distribution to which a June 2007 Prospectus issued by SFC (the "June 2007 Prospectus") related, a claim for general damages in the sum of $175,835,000;

(b) On behalf of all of the Class Members who purchased SFC common shares in the distribution to which a December 2009 Prospectus issued by SFC (the "December 2009 Prospectus") related, a claim for general damages in the sum of $319,200,000;

(c) On behalf of all the Class Members who purchased SFC's 5% Convertible Senior Notes due 2013 pursuant to a July 2008 Offering Memorandum issued by SFC (the "July 2008 Offering Memorandum"), a claim for general damages in the sum of US$345 million;

(d) On behalf of all the Class Members who purchased SFC's 10.25% Guaranteed Senior Notes due 2014 pursuant to the June 2009 Offering Memorandum issued by SFC (the "June 2009 Offering Memorandum"), a claim for general damages in the sum of US$400 million; and

(e) On behalf of all the Class Members who purchased SFC's 4.25% Convertible Senior Notes due 2016 pursuant to the December 2009 Offering Memorandum issued by SFC (the "December 2009 Offering Memorandum"), a claim for general damages in the sum of US$460 million.

26. Again, it is alleged in the Ontario Class Action that the 2005 Audit Report and the 2006 Audit Report, as well as those issued by the later auditor of SFC, E&Y, each contain the Representation.

Fresh as Amended Statement of Claim, para. 198; August 28th Record, Tab 5, pp. 399-400

C. BDO's claims against SFC and its officers and directors:

27. As indicated above, the BDO Audit Reports were prepared pursuant to engagement agreements under which SFC and its management agreed to bear primary responsibility to ensure the accuracy of SFC's financial statements and to ensure that their preparation accorded with GAAP.

28. The claims against BDO in the Ontario Class Action are inextricably intertwined with those advanced against SFC and its officers and directors. They cannot be defended or even fairly or efficiently tried without those parties. After all, all of these claims relate to the Representation by SFC.

29. Similar to the Underwriters and E&Y, BDO has potential crossclaims against SFC and the SFC officers and directors named as defendants in the Ontario Class Action – both under its engagement agreements with SFC and at common law.

30. BDO has filed a Proof of Claim against SFC pursuant to the Claims Procedure Order of this Honourable Court, dated May 14, 2012 (the "Claims Procedure Order").

31. BDO claims in relation to the breach by SFC of fundamental obligations in relation to the quality and accuracy of SFC's financial reporting and disclosure; obligations that were owed directly to BDO under the terms of the BDO Engagement Agreements.

32. Again, these claims for indemnity all relate to the single Representation originating with SFC for which BDO and the other defendants are said to share responsibility.

D. The SFC CCAA Proceedings:

33. On March 30, 2012, Sino-Forest sought and obtained from this Court an Initial Order (the "Initial Order") under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, which provides in relevant part as follows:

> "THIS COURT ORDERS that until and including April 29, 2012 or such further date a this Court may order (the "Stay Period"), no proceeding or enforcement process in nay court or tribunal (each, a "Proceeding") shall be commenced or continued against or in respect of the Applicant or the Monitor, or affecting the Business or Property [of the Applicant], except with the written consent of the Applicant and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicant or affecting the business or the Property are hereby stayed and suspended pending further Order of the Court."
>
> Initial Order, para. 17; Motion Record of Sino-Forest Corporation, Tab 2B, p. 90

34. On May 8, 2012, this Court made the May 8th Stay Order that confirmed that the Stay of Proceedings covered third parties involved in litigation in which Sino-Forest is a defendant, including BDO (the "Third Party Stay Order"). The Third Party Stay Order provides that:

> "...no Proceeding (as defined in the initial order granted by this Court on March 30, 2012 (as the same may be amended from time to time, the "Initial Order")) against or in respect of the Applicant, the Business or the Property (each as defined in the Initial Order), including without limitation the Ontario Class Action and any litigation in which the Applicant and the Directors, or any of them, are defendants, shall be commenced or continued as against any other party to such Proceeding or between or amongst such other parties (cross-claims and third party claims if any), until and including the expiration of the Stay Period (as defined in the Initial Order and as the same may be extended from time to time), provided that, notwithstanding the foregoing and anything to the contrary in the Initial Order, there shall be no stay of any Proceeding against Pöyry (Beijing) Consulting Co. Limited and/or any affiliate, any other Pöyry entity, representative or agent."

Third Party Stay Order, dated May 8, 2012; August 28th Record, Tab 6, p. 432

35. Pöyry (Beijing) Consulting Co. Limited ("Pöyry Beijing") and its affiliates were exempted from the stay, given the settlement that the plaintiffs had previously reached with that defendant. Leave to proceed with the motions to approve the Pöyry Beijing settlement in the Quebec and Ontario Class Actions was granted in another order made on May 8, 2012 (the "Pöyry Settlement Lift Stay Order").

36. There is no indication that SFC's CCAA proceedings are stalled or that there has been any delay in those proceedings. A Plan Filing and Meeting Order was issued on August 31, 2012, and SFC indicates that it intends to hold a meeting of creditors and to seek the ratification of the Plan by this Court very shortly - by the end of November 2012.

Affidavit of W. Judson Martin, sworn October, 2012 at para. 15, October Motion Record of Sino Forest, Tab 2

E. The Class Action Plaintiffs' breach of the stay under the CCAA:

37. In the Class Action Plaintiffs' motion record, they indicate that they took steps in August of this year to amend their Quebec class action to, among other things, add parties. Those added parties were BDO and the Underwriters.

38. The Class Action Plaintiffs purport to have done this pursuant to the partial lifting of the stay of proceedings that was granted on May 8, 2012 so that they could have their settlement with Pöyry Beijing approved in both Ontario and Quebec.

39. Under the Pöyry Settlement Lift Stay Order the Class Action Plaintiffs were given leave to proceed with a motion scheduled on May 17, 2012 to have their notice protocol approved, as well as a similar motion to be brought in Quebec.

40. Also under the Pöyry Settlement Lift Stay Order, the Class Action Plaintiffs were given leave to bring further motions in Ontario and Quebec necessary to give effect to the anticipated motions for approval of the Pöyry Settlement, as follows:

> "THIS COURT ORDERS that the Ontario Plaintiffs and the Quebec Plaintiff may proceed **after September 1, 2012** with (1) the balance of the relief sought in the Ontario Pöyry Settlement Motion and the Quebec Pöyry Settlement Motion, (2) a motion for approval of the settlement between the Ontario Plaintiffs, the Quebec Plaintiff and Pöyry and **(3) any motions that are necessary to give effect to the motions mentioned in (1) and (2) above, on dates to be fixed by the Courts supervising the Ontario Class Action and the Quebec Class Action, such motions to be brought on notice to the parties in the Ontario Class Action and the Service List.**" [Emphasis added]
>
> Order (Pöyry Settlement Leave Order), dated May 8, 2012.

41. Under the Pöyry Settlement Lift Stay Order, any additional motions were only to be those necessary to give effect to the relief being sought in the Pöyry Settlement Motion and they had to be brought **only** on notice to all parties and **only** after September 1, 2012.

42. In the Class Action Plaintiffs' materials on this motion they indicate that in the Quebec Action:

(a) On August 3, 2012 a motion for permission to amend the Quebec petition for authorization to institute a class action was filed in order to add defendants; and

(b) On August 30, 2012, Justice Jean-François Émond of the Quebec Superior Court, granted this motion to add defendants.

Affidavit of Daniel Bach, sworn September 24, 2012, paras. 36 – 40; Motion Record of the Plaintiffs, Tab 2, pp. 18 - 19

43. Such relief is clearly far outside the ambit of the Pöyry Settlement Lift Stay Order and of the motion brought to obtain that order, which made no mention of the intention to add parties to the Quebec Class Action.

44. The intention to add parties to the Quebec Class Action was not disclosed to the parties on the Pöyry Settlement Motion before this Court, nor did them Class Action Plaintiffs seek to lift the stay under the CCAA so that they could add parties to the Quebec Class Action before doing this.

45. The addition of parties to the Quebec Class Action was far outside the scope of the steps contemplated by the Pöyry Settlement Lift Stay Order.

46. However, even if the addition of parties was within the scope of the Order, the motion by the Plaintiffs to add BDO as a defendant to the Quebec Class Action was brought without notice to BDO and the Class Action Plaintiffs did not wait until after September 1, 2012 to

bring their motion to add parties in Quebec – as would have been required under the Pöyry Settlement Lift Stay Order, even if this type of motion had been contemplated thereunder.

PART III - ISSUES AND THE LAW

A. The stay should remain in place:

47. The stay imposed by the Initial Order has been in place for just over six months. SFC asks for another two. There is no sufficiently compelling reason to deny SFC some more time to pursue its restructuring.

48. In particular, the courts will normally lift the stay only when the moving party would be significantly prejudiced by a refusal to lift the stay, where there would be no resulting prejudice to the debtor company or the positions of creditors, or where it is otherwise in the interests of justice to do so.

> R.H. McLaren, *Canadian Commercial Reorganization: Preventing Bankruptcy* looseleaf (Aurora: Canada Law Book, 2009) at 3.3400; Underwriters' Book of Authorities, TAB 3

49. On this issue, BDO accepts the submissions of SFC and the Underwriters that there are no sufficiently compelling reasons to lift the stay and deny SFC additional time to focus on its restructuring.

50. It would appear that the restructuring is proceeding forward, it cannot be shown that the Plan will likely fail and, given the tolling agreements in place to preserve any unexpired limitation periods, there is no prejudice to the plaintiffs that would result from the continuation of the stay.

B. It would be prejudicial and improper to lift the stay only as against BDO and the other Third Party Defendants:

51. While the factual background to the class actions is complex, the focus of all of the class actions is a single Representation (as defined in the Claim) made or acquiesced in by the SFC and members of its management team in numerous documentary and oral statements made during the Class Period.

52. BDO has been sued in relation to that same Representation because BDO audited two of the SFC financial statements that contained the Representation – those issued for 2005 and 2006.

53. It is impossible to resolve any aspect of the claims as against BDO without also dealing with the other claims arising from the same Representation – including those against SFC and its officers and directors.

54. In fact, BDO will suffer serious prejudice from having to address the pending leave and certification motions without any evidence from SFC and its officers and directors – thereby depriving BDO of potential defences.

55. Further, it is well-established that, the Court should not encourage a situation where there will be two different inquiries at two different times into the same facts and damages.

> *Campeau v. Olympia & York Developments Ltd* (1992), 14 C.B.R. (3d) 303 (Gen. Div.) at paras. 25 - 26 (QL); Underwriters' Book of Authorities, Tab 11

56. That is what would occur, should the stay be lifted against some, but not all, parties to the Ontario and Quebec Class Actions.

57. The March 26, 2012 decision of this Court in very similar circumstances refused to lift a stay of proceedings against any of the defendants to the pending class proceeding, *Penneyfeather v. Timminco*, including as against those parties that were unrelated to Timminco.

Re. Timminco Limited 2012 ONSC 2515; Underwriters' Book of Authorities, Tab 9

58. In deciding it would be unfair to lift the stay against only some parties, this Court in observed that such a result could lead to adverse findings being made regarding Timminco in its absence and thereby cause unfairness to Timminco.

59. If the stay were to be lifted, even for the purpose solely of permitting the leave and certification motions as against BDO and the other non-SFC defendants, the same concerns would arise.

60. Not only would the response to such motions by the Third Party Defendants be hampered, but SFC and the other SFC-related parties would be forced at a later date to re-litigate many of the same complex factual and legal matters at issue against the third party defendants.

61. This could lead to either inconsistent findings on the same issues or, more likely, SFC being stuck with whatever findings have already been made regarding the third party defendants on issues that are in common as between them.

62. For example, it is hard to imagine how SFC would be able to appear before the court and deny that reliance on its financial statements by secondary market investors presents an

acceptable common issue for certification after the same issue has already been certified for the same class(es) of persons against the auditors of those same financial statements!

63. Conversely, it is hard to imagine how the Court could be asked to determine whether a misrepresentation claim against auditors presents common issues or is sufficiently strong to grant leave to proceed under Part XXIII.1 of the *Securities Act* without even assessing the claim against the company that issued the financial statements they audited.

64. It is clear that a partial lifting of the stay, as proposed by the Class Action Plaintiffs, would cause prejudice to all defendants – both those related to SFC and to the other Third Party Defendants – and that that prejudice could be irreparable.

C. The Class Action Plaintiffs have already breached the current stay:

65. A stay under the CCAA is aimed at preserving the status quo while the Applicant company attempts to restructure. It is also intended to prevent manoeuvres for positioning amongst the creditors of the company.

> *Re. Canadian Airlines Corp.*, (2000) 19 CBR (4th) 1 (Alta.Q.B.) at para. 19; Underwriters' Book of Authorities, Tab 4

66. In this case, it has been abundantly clear since at least May 8, 2012 that the stay under the CCAA includes BDO and the other Third Party Defendants. Since the Third Party Stay Order was made, the Class Action Plaintiffs have been made well-aware that any step they wish to take in the class actions would have to be preceded by an order of this Court lifting the stay to permit them to do so.

67. Notwithstanding this, the Class Action Plaintiffs, without leave and without prior notice to any of the affected parties, obtained an order granting them leave to add the Underwriters and BDO as parties to the Quebec Class Action.

68. According to the Class Action Plaintiffs' materials, that Order was sought on August 3, 2012 and subsequently granted by the Quebec Superior Court on August 30, 2012 – the last business day before the mediation in this matter.

> Affidavit of Daniel Bach, sworn September 24, 2012, paras. 36 – 40; Motion Record of the Plaintiffs, Tab 2, pp. 18 - 19

69. The Class Action Plaintiffs claim that the step to add BDO to the Quebec Class Action was contemplated by the Pöyry Settlement Lift Stay Order. However, there is no mention in either the Notice of Motion or the Pöyry Settlement Lift Stay Order of any intention to seek to expand the class actions or add parties or any leave being granted to do so.

70. Further, the Pöyry Settlement Leave Order is very clear that only those motions necessary for the approval of the Pöyry Settlement may be proceeded with and, even then, (1) such motions may be brought only on prior notice to all parties to the CCAA Proceedings and the Class Action; and (2) they may be brought only after September 1, 2012. Both of these requirements were also breached.

71. It is clear that the steps taken to amend the Quebec Class Action and add parties were contrary to both the policy under the CCAA of preventing manoeuvres for positioning amongst the creditors of the company during a stay, as well as contrary to the express terms of

the stay imposed under the Initial Order, the Third Party Stay Order and the Pöyry Settlement Lift Stay Order.

72. On this motion, in their Amended Notice of Motion and Return of Motion, the Class Action Plaintiffs purport to seek this Court's blessing to do what they have already done, namely, amend their Quebec Claim and add BDO as a party.

Amended Notice of Motion and Return of Motion of the Plaintiffs, paragraph (b)(vi).

73. In fact, the Class Action Plaintiffs have already filed yet another motion in the Quebec Superior Court – this time apparently on notice to the parties – that seeks to do what has already been ordered, amend the Quebec proceeding and add BDO. The only difference is that the new Quebec motion seeks to *partially* fix the Class Action Plaintiffs' past transgressions by removing the Underwriters from the Quebec claim.

74. While BDO does not object to an attempt by the Class Action Plaintiffs on this motion to fix their erroneous addition of the Underwriters to the Quebec Class Action, the remainder of the Plaintiffs' current Quebec motion is also a breach of the stay currently in place and is improper.

75. The decision on whether or not to lift a stay is a discretionary one and one involving the exercise of equity. As observed by the Class Action Plaintiffs in their factum on this motion in support of their claim for a representation order:

> "....fairness and reasonableness – the two keynote concepts underscoring the philosophy and workings of the CCAA – drive the analysis. As the courts have made clear, fairness is the quintessential expression of the court's equitable jurisdiction. **Although the jurisdiction is statutory, the broad**

discretionary powers given to the judiciary by the legislation make its exercise an exercise in equity." [Emphasis added]

> Factum of the plaintiffs, para. 73, relying upon *Ontario v. Canadian Airlines Corporation*, 2001 ABQB 983 (CanLII), [2001] A.J. No. 1457, at para. 38; Moving Party's Book of Authorities at Tab 21

76. Similarly, a motion to lift a stay involves this Court's equitable jurisdiction. The failure of a party to come to the court with clean hands because they have not abided by an existing stay of proceedings can mean that the party's motion to lift the stay should fail. This has been the finding in motions to lift stays imposed in the bankruptcy context and it should apply equally here.

> *Re Adler*, [2008] O.J. No. 3631 (SCJ – Registrar in Bankruptcy) at paras. 21 - 24

77. In this case, the Class Action Plaintiffs' blatant disregard of the existing stay should be an additional major factor in dismissing their motion to lift the stay.

78. At a minimum, the plaintiffs' after-the-fact motion asking this court to lift the stay so that they can seek to add BDO to the Quebec Class Action should be dismissed, given the improper conduct of the Class Action Plaintiffs in Quebec and their disregard of the stay they now seek to lift.

D. The Class Action Plaintiffs should not be entitled to production of documents made available for the mediation

79. BDO supports and agrees with the opposition of SFC to the production of documents made available in the Data Room for the purposes of a mediation ordered in this proceeding on July 25, 2012.

80. BDO agrees with the reasoning contained in SFC's factum on this issue. There is no legal authority to order productin of these documents – whether under the CCAA, the *Class Proceedings Act* or at common law.

81. Further, the documents were made available to the Class Action Plaintiffs not by court order but, rather, pursuant to a Non-disclosure Agreement (the "NDA").

82. In signing the NDA, the Class Action Plaintiffs have already agreed not to use these documents for any purposes other than the CCAA proceeding and there is no valid legal basis upon which this Court can forcibly amend that agreement or relieve the Class Action Plaintiffs from their contractual obligations.

83. Finally, BDO agrees with SFC that the public policy reasons not to order such production are significant. Why would any party agree to produce documents as part of a without prejudice mediation, if the recipient will be entitled to then use those documents to gain an advantage in the underlying proceedings?

84. The relief being sought would provide an extreme disincentive to future mediations and other without prejudice attempts to resolve proceedings before discoveries by leaving parties open to having their without prejudice productions used against them at a later date. This cannot be permitted.

PART IV - RELIEF SOUGHT

85. BDO respectfully requests that this Court dismiss the motion brought by the Class Action Plaintiffs to lift the stay and for other relief as set out in the Amended Notice of

Motion and Return of Motion of the Class Action Plaintiffs and further requests that the current stay remain in place.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of October, 2012.

Peter R. Greene

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Lawyers for BDO Limited

SCHEDULE "A"
LIST OF AUTHORITIES

1. R.H. McLaren, *Canadian Commercial Reorganization: Preventing Bankruptcy* looseleaf (Aurora: Canada Law Book, 2009) at 3.3400

2. *Campeau v. Olympia & York Developments Ltd* (1992), 14 C.B.R. (3d) 303 (Gen. Div.)

3. *Re. Timminco Limited* 2012 ONSC 2515

4. *Re. Canadian Airlines Corp.*, (2000) 19 CBR (4^{th}) 1 (Alta.Q.B.)

5. *Re Adler*, [2008] O.J. No. 3631 (SCJ – Registrar in Bankruptcy)

Case Name:

Adler (Re)

IN THE MATTER OF Edwin Wayne Adler, of the City of Hamilton, in the Province of Ontario

[2008] O.J. No. 3631

[2008] I.L.R. I-4740

47 C.B.R. (5th) 77

2008 CarswellOnt 5478

171 A.C.W.S. (3d) 787

Estate No. 32-151616

Ontario Superior Court of Justice
In Bankruptcy and Insolvency

Registrar S.W. Nettie

Heard: September 19, 2008.
Judgment: September 22, 2008.

(34 paras.)

!!INV1690 !!INV00

Bankruptcy and insolvency law -- Proceedings in bankruptcy and insolvency -- Practice and procedure -- Stays -- Motion to lift the stay under s. 69.3 of the Bankruptcy and Insolvency Act in two actions successful with respect to the second action only -- The court was not convinced that s. 69.3 would have applied to it, had it been amended more carefully -- The moving party was placed in the position it expected when dealing with a solicitor (the bankrupt) -- If the solicitor was negligent, there would be a claim on the professional liability insurer, and the opportunity to litigate that claim if necessary -- Bankruptcy and Insolvency Act, s. 69.3.

Two motions by Westpark Development Inc. In the first, it sought relief under s. 38 of the Bankruptcy and Insolvency Act. In the second it moved to lift the s. 69.3 stay in two actions commenced in Hamilton (the "05 action" and the "06 action". Westpark alleged it was in either or both of a solicitor-and-client relationship or a fiduciary relationship with the bankrupt barrister and solicitor. Westpark alleged it paid over to him $1.5 million which the bankrupt disbursed inappropriately. In 2005 it commenced the "05 action" which was stayed after the bankrupt made an assignment in bankruptcy in July, 2005. Westpark failed to obtain an order lifting the stay, and improperly obtained a default judgment on March 28, 2006. The motion under s. 69.4 of the Act, in respect of the 05 action, was an attempt to correct this mistake. Westpark commenced the 06 action against the Lawyers' Professional Indemnity Company, intending to avail itself of s. 132 of the Insurance Act, which permitted parties who had obtained an unsatisfied judgment to claim directly against an insurer of its judgment debtor in order to overcome the lack of privity between the tort victim and the tortfeasor's insurer. LPIC successfully moved to strike the action.

HELD: Motion to lift stay in 05 action dismissed and judgment in said action of no further force and effect. Stay of 06 action lifted to permit the further amendment of the statement of claim therein to remove any claim against the bankrupt for damages and to include a claim for a declaration that he was a trustee of the LPIC policy for the benefit of Westpark. The bankrupt's rights under the LPIC policy were to be assigned to Westpark by the Trustee. There was no sound policy reason to lift the stay in the 05 action. The only reason for lifting the stay in such cases was to permit the tort victim to get at the insurance funds. In Ontario, this was not possible when a tort victim was trying to access a professional liability policy. The bankrupt would either receive his discharge and be released from the negligence claim, or the trustee would be discharged without the bankrupt being discharged, and Westpark might pursue its claims at that point. The argument that Westpark's claims would survive bankruptcy under s. 178 of the Act were rejected, as no fraud, embezzlement, misappropriation or defalcation was pleaded, only negligence. Parliament clearly intended s. 178(1)(d) of the Act to have some element of misconduct or wrongdoing, and there was none sufficiently pleaded. To come to court having breached the stay, as Westpark did, seeking not only to advance the claims in the 05 Action, but to be bootstrapped to the position of a judgment creditor, nunc pro tunc, when the bankrupt may have chosen not to defend, was not appropriate. Westpark did not have clean hands, and equity ought not to intervene to assist it from the consequences of its own breach of s. 69.3 of the Act. As for the 06 action, the court was not convinced that s. 69.3 would have applied to it, had it been amended more carefully. The trustee was to forthwith assign to Westpark all the bankrupt's rights under the LPIC policy, and notice of this order was to be given to all creditors. Since it is quite foreseeable that LPIC might deny the claim to be advanced by Westpark on behalf of the bankrupt, it was foreseeable that Westpark might need to commence an action, similar to the 05 Action, to liquidate its claim, or to litigate the denial of the policy claim. Such an action would necessarily be against the bankrupt, and it was appropriate to lift the s. 69.3 stay for that purpose. As the court had declined to lift the stay in the 05 Action, the two results combined would serve to place Westpark in the position it expected when dealing with a solicitor: if the solicitor was negligent, there would be a claim on LPIC, and the opportunity to litigate that claim if necessary. This also gave LPIC what it was entitled to: the opportunity to defend such an action, unhindered by the existence of a judgment against its insured, already, and without having to move to set that Judgment aside.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 38, s. 69.3, s. 178

Insurance Act, R.S.O. 1990, c. I.8, s. 132

Counsel:

Barry L. Yellin - for Westpark Development Inc.

Antonio R. Dimilta -for Invar.

Reasons

1 REGISTRAR S.W. NETTIE:-- This matter commenced before me on September 15, 2008, as a motion for relief under s. 38 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"). As a result of certain inquiries by me at that hearing, the moving party, Westpark Development Inc., ("Westpark"), sought and received an adjournment to September 19, 2008, to provide further materials, if available, and to bring any other motions it thought necessary.

2 In the result, Westpark argued not only its s. 38 BIA motion, but also a motion to lift the s. 69.3 BIA stay in each of Action No. 05-17316 (the "05 Action") and Action No. 06-27601 (the "06 Action"), [2007] O.J. No. 3436, both commenced at Hamilton.

3 The facts are that Westpark alleges that it was in either or both of a solicitor and client relationship or a fiduciary relationship with Edwin Wayne Adler (the "Bankrupt"), who was, at all material times, a barrister and solicitor in the Province of Ontario. Westpark alleges that it paid over to the Bankrupt $1,500,000.00, which the Bankrupt disbursed inappropriately. Westpark commenced, in March, 2005, the 05 Action. The Bankrupt made an assignment in bankruptcy in July, 2005. That assignment had the effect of staying the 05 Action pursuant to s. 69.3 BIA. Westpark, and its counsel, did not obtain an Order lifting that stay, pursuant to s. 69.4 BIA, and, in the face of the stay, improperly obtained a default Judgment from the Honourable Mr. Justice Whitten on March 28, 2006. To be fair, it appears that Westpark and its counsel were under the mistaken belief that a Continuation Order by a local registrar of the Superior Court, pursuant to R. 11 of the *Rules of Civil Procedure*, ("RCP") was sufficient. The motion under s. 69.4 BIA, in respect of the 05 Action, is an attempt to correct this mistake.

4 Throughout this period, being March, 2005, to the present, it would appear that the Bankrupt has failed or neglected to report the claim against himself to Lawyers' Professional Indemnity Company ("LPIC"), the captive and mandatory insurer for lawyers in the Province of Ontario. I understand it to be the practice of LPIC, generally, to only accept claims from the insured member of the Law Society of Upper Canada, or from the Law Society itself, the latter being the actual policy owner, on behalf of its members, from time to time. Accordingly, Westpark has been unable to look to LPIC for any compensation for its losses, to the extent, if any, that those losses were the result of insured actions of the Bankrupt.

5 In an attempt to overcome this hurdle, Westpark commenced the 06 Action against LPIC. It was amended in 2007 to add the Bankrupt and John Doe as party Defendants. Once again, no Order was obtained from this Court to commence an action against the Bankrupt. The 06 Action was in-

tended to permit Westpark to avail itself of the provision of s. 132 of the *Insurance Act*, R.S.O. 1990, c. I-8 (the "Act"). That provision permits a party who has obtained a judgment, which is unsatisfied, to claim directly against an insurer of its judgment debtor, in order to overcome the lack of privity between the tort victim and the tortfeasor's insurer.

6 LPIC brought a motion, in the 06 Action, under R. 21 RCP to have the claim against it struck as disclosing no reasonable cause of action. That motion was heard by the Honourable Mr. Justice Fedak on September 12, 2007. His Honour held that the motion ought to succeed, as he felt that he was bound by the decision of the Court of Appeal in *Perry v. General Security Insurance Co.* (1984), 47 O.R. (2d) 472.

7 *Perry* stands for the proposition that s. 132 of the Act cannot be used by a victim to claim directly against her tortfeasor's insurer if she has not suffered injury or damage to property, and that, accordingly, the section has no application to policies of insurance for professional liability, such as the LPIC policy for Ontario lawyers.

8 The Court of Appeal recognized, in 1984, the unfairness of this situation, as it results in an unfair distinction between the clients of a remorseful, but negligent, solicitor, who makes the appropriate claim herself against LPIC for coverage for her clients, and those of the callous, but negligent, solicitor, who takes no steps under her mandatory insurance policy to assist her harmed clients. The Court of Appeal went on to exhort the Law Society and the Provincial Parliament to take action to remediate this unfairness. It would appear that for nearly a quarter of a century, nothing has been done by the Legislative Assembly, and *Perry* remains the settled law of our Province. So found Fedak J., and I, regretfully, concur.

9 The appeal of the decision of Fedak J. is, I am advised, set for hearing by a five member panel of the Court of Appeal on September 29, 2008.

10 Westpark now seeks, in the 05 Action, to have me lift the s. 69.3 BIA stay, pursuant to s. 69.4 BIA. This is not surprising, since, without a lifting of the stay, its default Judgment was improperly obtained, and is an irregularity. The Judgment is not a nullity, but an irregularity, obtained in breach of a statutory stay. It cannot be enforced or relied upon, so long as the stay remains in force. Until then, it is of no force and effect. That stay will be lifted either by Court Order, under s. 69.4 BIA, or by operation of the BIA upon discharge of the Trustee in this Estate. It will be up to the Court which purported to issue the Judgment to determine, at that time, what, if any, further force or effect its Judgment may be.

11 The test for lifting the stay is either material prejudice to the moving party by its continued operation, or that it is, in the Court's opinion, equitable and just to lift the stay.

12 The Court of Appeal, in *Re Ma*, [2001] O.J. No. 1189, found that the proper role of a Court on a s. 69.4 BIA motion "is one of ensuring that sound reasons, consistent with the scheme of the [BIA] exist for relieving against the otherwise automatic stay of proceedings". That Court went on to articulate that while the test is not one of whether or not there is a *prima facie* case, it is appropriate to consider if there is any case at all, as the complete absence of a case by the applicant would make it difficult to find sound reasons or material prejudice.

13 There is a well known decision of Registrar Ferron, *Re Advocate Mines Limited* (1984), 52 C.B.R. (N.S.) 277 (S.C.O.), in which a list of the types of matters where it is appropriate to lift the stay is set forth. Many cases have held that, while the list is not exhaustive, it does set forth a num-

ber of kinds of matters where there are sound policy reasons to lift the stay, and, hence, material prejudice may be found and the stay lifted. I do not propose to list them. However, two were referred to by counsel for Westpark. They are: where the proposed action is to pursue a policy of insurance for the benefit of the moving creditor, and where the debt being pursued is claimed to be a s. 178 BIA debt.

14 Turning first to the motion to lift the stay in the 05 Action, Westpark argues that I lift the stay, *nunc pro tunc*, on the basis that the 05 Action is to liquidate a claim which will be pursued against the insurer of the Bankrupt. Those proceeds, if any, will not be available for the general benefit of creditors, but only for Westpark, and it will advantage the Estate in having all or part of Westpark's claim satisfied from funds not otherwise available for the Estate.

15 This type of claim is commonly the subject matter of an Order lifting the stay. In fact, in *Re Miller*, [2001] O.J. No. 3244 (S.C.J.), Deputy Registrar Sproat, of this Court, as she then was, addressed just this issue, in a matter where the bankrupt was also a solicitor. Deputy Registrar Sproat saw fit to lift the stay as she found that there was "the possibility that [the bankrupt] has insurance to answer for Walton's damages" (paragraph 26). She was referring to the same type of policy, also with LPIC, as in the case at bar. Deputy Registrar Sproat found it a compelling reason to lift the stay where there was such a possibility.

16 I agree. If there is a possibility of such a policy, then that would be, and very often is, a sound reason to lift the stay, and meet the test under s. 69.4 BIA.

17 However, there is nothing to indicate that *Perry* was drawn to the Deputy Registrar's attention. *Perry*, which is clearly binding on this Court, appears well settled law that there is no possibility of Westpark getting at the LPIC policy, as the Bankrupt has not seen fit to make a claim on it (for over three years), and Westpark cannot use any Judgment in the 05 Action to compel LPIC to address the alleged negligence of the Bankrupt.

18 In such a case, is there any sound policy reason to lift the stay? I find not. The only reason for lifting the stay in such cases, as in motor vehicle accidents and slip and fall claims, is to permit the tort victim to get at the insurance funds. In Ontario, this is not possible when a tort victim is trying to access a professional liability policy. Therefore, what possible reason could there be to lift the stay based on there being such a policy? In due course, the Bankrupt will either receive his discharge, and be released from the negligence claim, or the Trustee will be discharged, without the Bankrupt being discharged, and Westpark may pursue its claims at that point. However, even then, *Perry* will make such a pursuit a hollow and pointless exercise.

19 Westpark also argues that, under *Advocate Mines*, it should have the stay lifted because its claims are for a debt which would survive bankruptcy under s. 178 BIA. Counsel specifically argued that the claims advanced in the 05 Action set out a claim under s. 178(1)(d) BIA. This is for a debt or liability resulting from fraud, embezzlement, misappropriation or defalcation whilst acting in a fiduciary capacity. I accept that, for the purposes of this motion, the Bankrupt was acting in a fiduciary capacity towards Westpark. Mr. Yellin concedes that no fraud or embezzlement is pleaded in the 05 Action. This leaves one with misappropriation or defalcation.

20 I have reviewed the very helpful decision of Mr. Justice Blair, sitting *ad hoc* (at the time) as a justice of the Court of Appeal, in *Simone v. Daley*, [1999] O.J. No. 571, 1999 CarswellOnt 551 (C.A.), and agree with him that for there to be misappropriation or defalcation, there must be some allegation of bad conduct or wrongdoing. If one reviews the pleading of Westpark in the 05 Action,

and in particular paragraph 22, only conduct amounting to negligence is pleaded. The default Judgment is not helpful on the point either, as there are no findings with respect to conduct. Parliament clearly intended s. 178(1)(d) BIA debts to have some element of misconduct or wrongdoing, and I cannot find any sufficiently pleaded, even reading the Statement of Claim generously, to support a finding that a s. 178 BIA claim exists or is being sought sufficient to merit lifting the stay in the 05 Action.

21 In addition, I note that the Bankrupt made his assignment into bankruptcy with knowledge of either the Westpark claim or the 05 Action, or both. I am satisfied that it was served on him, as a default Judgment was obtained.

22 Bankrupts are entitled to notice of any s. 69.4 BIA motion to lift the stay, and can take solace in the fact that absent any such notice to them, the statutory, and automatic, BIA stay will remain in place. Thus, the Bankrupt is entitled to sit back, in the face of the stay, and not defend the 05 Action, secure in the knowledge that nothing will proceed further in the absence of notice to him, or at least until his Trustee is discharged. To come to Court having breached the stay, as Westpark does, and seek not only to advance the claims in the 05 Action, but to be boot strapped to the position of a judgment creditor, *nunc pro tunc*, when the Bankrupt may have chosen not to defend, is not appropriate. I do not find it any more appropriate by the absence of the Bankrupt on the lift stay motion.

23 The third ground advanced for lifting the stay in the 05 Action was that it would be equitable to do so. The submissions on this point related chiefly to the fact that there is an upcoming hearing in the Court of Appeal, which becomes moot if I find that the stay ought not to be lifted, and that the default Judgment is, therefore, not enforceable due to the stay. Arguably, it does not even exist, as even the noting in default was a step in the face of the stay, as were any and all steps after the July, 2005, assignment. Westpark has expended much in effort and expense to obtain its Judgment, take action against LPIC, defend the R. 21 RPC motion, and prepare to appeal the decision of Fedak J. However, I am not persuaded that that constitutes a reason to exercise my discretion and lift the stay. I find this for two reasons.

24 Firstly, I do not find that equity ought to intervene to assist Westpark from the consequences of its own breach of s. 69.3 BIA. It does not come to this Court with clean hands on this point.

25 Secondly, while I do not, with the utmost of respect, think it my role to second guess the Court of Appeal, from my vantage point, the law is presently well settled, and the tack taken by Westpark in trying to use s. 132 of the Act, and in appealing the decision of Fedak J, is inappropriate. The Court of Appeal spoke on this matter nearly 25 years ago, and asked the Legislative Assembly to act. It has not, and in my view, lifting the stay, especially *nunc pro tunc*, to somehow correct Westpark's error, and pave the way for a full blown Court of Appeal hearing would be inappropriate. Of course, this does not remove the Court of Appeal's right to hear the matter on September 29, 2008, if it wants to deal with a moot issue, as that will be what it is without a Judgment to actually use to pursue LPIC under s. 132 of the Act, even if the Court of Appeal overturns or distinguishes *Perry*, and finds that Westpark may even use that section in this matter. However, if I decline to exercise my discretion to cure this irregularity, for which, I note, no explanation has been proffered to the Court, then the Court of Appeal need not waste scarce judicial resources on the hearing, unless it specifically desires to do so. A desire for judicial economy, therefore, also persuades me that it is not equitable to lift the stay, and that I ought not to exercise my discretion in that regard.

26 With respect to the 06 Action, I am not, based on counsel's submissions, convinced that s. 69.3 BIA would have applied to it, if it had been amended more carefully.

27 The 06 Action was initially against LPIC alone. That would not breach the stay against the Bankrupt. The 06 Action was amended in 2007, to add the Bankrupt and John Doe. That was a breach of the stay of proceedings against the Bankrupt, as the 06 Action, as amended, actually seeks to enforce a claim provable in bankruptcy. Although the Amended Statement of Claim, in the 06 Action, is poorly drafted, and appears to claim payment of the same $1.3 million dollars from the Bankrupt which, in Westpark's view, it already has judgment for, from Whitten J., Mr. Yellin indicated that the only purpose for adding the Bankrupt to the 06 Action was for a declaration that he is a trustee of the LPIC policy for the benefit of Westpark. As pleaded, the 06 Action is stayed, as it does claim money damages against the Bankrupt, which claim is a claim provable in bankruptcy. I find it appropriate to lift the stay, to permit Westpark to further amend the Statement of Claim, in full compliance with the RCP, to remove any claims for damages on account of a claim provable in bankruptcy, and to add a prayer for relief of a declaration that the Bankrupt is a trustee of the policy. I further find it equitable to lift the stay in the 06 Action, after said amendment. Although a remedy against the Bankrupt's property will still be being sought, by way of a declaration that his interest in the LPIC policy is that of a trustee, thereby triggering s. 69.3 BIA, the Trustee has evinced no interest in the property, and the outcome of that declaration, if obtained, will have little if any, impact on the Bankrupt. Morally, he should support every reasonable effort by Westpark to properly obtain any compensation to which it may be entitled.

28 Arguably, the seeking of a determination of the Bankrupt's status under the policy of insurance ought to be determined in the Bankruptcy Court, by way of a property proof of claim by Westpark, and litigation of the denial or allowance of that claim by the Trustee. The ordinary civil Court has jurisdiction as framed, and the only interested parties (the Trustee apparently not opposing the s. 38 BIA motion) have already joined battle in the civil Courts.

29 Finally, Westpark sought an Order under s. 38 BIA that it have the right to exercise the Bankrupt's rights under the LPIC insurance policy to make a claim on the policy, and to require a defence by LPIC to any action brought against the Bankrupt for damages covered by the policy.

30 I am satisfied, and so find, that this is the proper subject matter of a s. 38 BIA Order. Section 38 BIA provides that where a creditor requests a trustee to take an action for the general benefit of the creditors, and the trustee refuses, the Court may order that the trustee assign to that creditor the right to take said action in its own name, and expense, on notice to the other creditors, and on such terms and conditions as the Court imposes.

31 Westpark has asked the Trustee to make a claim, in the Bankrupt's stead, on the LPIC policy with respect to Westpark's allegation of damages flowing from alleged negligent acts of the Bankrupt. The Trustee declines. I find that it is in the interest of the creditors generally for Westpark to be able to advance its claim on LPIC, as any monies recovered by Westpark under the LPIC policy will reduce its claims as an ordinary unsecured creditor in the Estate, thereby necessarily benefiting the other creditors.

32 I am not, however, satisfied that the usual conditions of allowing any other creditors to join into such a claim, and any proceedings which might flow from litigation of a denial of the claim, is appropriate. Westpark should not have to share any insurance proceeds with creditors who never bargained in their dealings with the Bankrupt to have insurance available for their claims. Thus, I

find it appropriate to order that while the Trustee is to forthwith assign to Westpark all of the Bankrupt's rights under the LPIC policy, and that notice of this Order is to be given to all creditors, no other creditors may join into the claim, or any litigation flowing therefrom. The claim is to be prosecuted at Westpark's sole expense, and for its sole benefit, subject only to further Order of this Court.

33 Since it is quite foreseeable that LPIC may deny the claim to be advanced by Westpark on behalf of the Bankrupt, it is foreseeable that Westpark may need to commence an action, similar to the 05 Action, to liquidate its claim, or to litigate the denial of the policy claim. Such an action would necessarily be against the Bankrupt, and I find it appropriate to lift the s. 69.3 BIA stay for that purpose. As I have declined to lift the stay in the 05 Action, the two results combined will serve to place Westpark in the position it expected when dealing with a solicitor: if the solicitor was negligent, there would be a claim on LPIC, and the opportunity to litigate that claim if necessary. This also gives LPIC what it is entitled to: the opportunity to defend such an action, unhindered by the existence of a Judgment against its insured, already, and without having to move to set that Judgment aside.

34 For the reasons aforesaid, Order to go dismissing the motion to lift the stay in the 05 Action, and declaring that the Judgment in the 05 Action is of no further force and effect; that the stay of the 06 Action be lifted to permit the further amendment of the Statement of Claim therein to remove any claim against the Bankrupt for damages and to include a claim for a declaration that he is a trustee of the LPIC policy for the benefit of Westpark, as presently set out in paragraph 7 thereof, all to be effected in compliance with the RCP; and that the rights of the Bankrupt under the LPIC policy are to be assigned to Westpark by the Trustee, on notice to the other creditors, and that only Westpark may pursue those rights, including any litigation to enforce those rights, together with a lifting of the s. 69.3 BIA stay to permit any such litigation.

REGISTRAR S.W. NETTIE

cp/e/qlkxl/qlmxt/qlltl/qlrxg/qlaxw/qlhcs/qlbrl/qlaxw/qlana

SCHEDULE "B"
RELEVANT STATUTES

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

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 File No: CV-12-9667-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

Factum of BDO Limited

(Motions returnable October 9 and 10, 2012)

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