

Court of Appeal File No.: C56961  
Court File No. CV-12-9667-00-CL

**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 AND  
ARRANGEMENT OF SINO-FOREST CORPORATION**

Court of Appeal File No.: M42404  
Court File No.: CV-11-431153-00CP

**COURT OF APPEAL FOR ONTARIO**

**B E T W E E N :**

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

Plaintiffs

- and -

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

Defendants

**FACTUM OF ERNST & YOUNG LLP  
(Motion to Quash Appeal Returnable June 28, 2013)**

May 10, 2013

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TO: **ATTACHED SERVICE LIST**

## PART I - OVERVIEW

1. The Moving Parties, a small group of Objectors representing 1.6% of the equity of Sino-Forest Corporation:

(a) say that they appeal as of right and without leave from the decisions of the Honourable Justice Morawetz:

(i) approving a settlement between Ernst & Young LLP (“Ernst & Young”) and the representative Plaintiffs in class proceedings brought in Ontario and Quebec, under the *Companies Creditors’ Arrangement Act*, R.S.C. 1985, c. C-36 (the “*CCAA*”) and the *Class Proceedings Act, 1992*, S.O. 1992, c C-6 (the “*CPA*”); and

(ii) denying representative status to the Objectors;

(b) seek leave to appeal under the *CCAA* in any event in respect of the same orders;

(c) now seek leave to act in a representative capacity for the purposes of their purported appeal citing subsection 30(3) of the *Class Proceedings Act, 1992*, S.O. 1992, c C-6 (the “*CPA*”) as authority to appeal to this Court directly.

2. The Objectors have no statutory right of appeal. The proper avenue for appeal, if any, is by way of leave to appeal, which the Objectors have sought.

3. In any event, their appeal is without merit.

4. The relief the Objectors seek for representative status is exactly what was denied them by the Honourable Justice Morawetz (after they failed to even argue for it), and from which they now seek leave to appeal. They do not represent the interests of the Class nor of any other potential Class members.

## **PART II - THE FACTS**

5. In July 2011, Sino-Forest Corporation (“Sino-Forest” or the “Applicant”), Ernst & Young and a variety of other parties were served with a multitude of class action claims in Ontario, Quebec and New York (the “Class Actions”). Three proposed class proceedings were commenced in Ontario relating to Sino-Forest. Kim Orr PC acted for the plaintiffs in one of the Ontario actions and now acts for the Moving Parties (the “Objectors”).

<b>Reference</b>	Reasons for Decision of Justice Perell dated January 6, 2012, Responding Motion Record of Ernst & Young LLP dated May 10, 2013 (“Ernst & Young Motion Record”), Tab 9 pages 186-240.
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6. In December 2011, a carriage motion was argued to determine which of the three actions in Ontario should be permitted to proceed and which should be stayed. By Order dated January 6, 2012, the Honourable Justice Perell granted carriage to the Plaintiffs. The court stayed the other actions, including an action brought by Kim Orr PC, and appointed Siskinds LLP and Koskie Minsky LLP to prosecute the Ontario action on behalf of the proposed class. Kim Orr PC represents the Objectors.

<b>Reference</b>	Carriage Order of Justice Perell dated January 6, 2012, Ernst & Young Motion Record, Tab 8, pages 177-185 and Reasons for Decision of Justice Perell dated January 6, 2012, Ernst & Young Motion Record, Tab 9, pages 186-240.
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7. On March 30, 2012, due primarily to the claims in the Class Actions, Sino-Forest sought and obtained protection from its creditors pursuant to the *CCAA*. Various steps were taken in the *CCAA* proceedings, including: a stay of proceedings against the Applicant, Sino-Forest, and other third party defendants; a claims process; and a court-ordered mediation. The Objectors were aware of but elected not to participate in any of these steps in the *CCAA* proceedings. Numerous *CCAA* orders directly affect the Objectors and impact the rights they now belatedly seek to assert.

**Reference** Fifteenth Report of the Monitor at para. 15, Ernst & Young Motion Record, Tab 17, pages 797-798.

8. On November 29, 2013, Ernst & Young and the Plaintiffs entered into a settlement agreement. Following the execution of the Minutes of Settlement, Ernst & Young negotiated with the Applicant and a group of the major secured creditors, the Ad Hoc Committee of Noteholders, for the inclusion of the framework for the Ernst & Young Settlement and the Ernst & Young Release into the Plan.

**Reference** November 29 Martin Affidavit at paras. 61-72, Ernst & Young Motion Record, Tab 10, page 258-259.

Letter from Torys LLP to Gowlings LLP dated November 26, 2012, Ernst & Young Motion Record, Tab 20, page 874-877.

Responding letter from Gowlings LLP to Torys LLP et al dated November 28, 2012 Ernst & Young Motion Record, Tab 21, pages 878-902.

9. The meeting of creditors was adjourned from November 29, 2012 to December 3, 2012. Prior to the meeting on December 3, 2012, a Plan incorporating the framework for the Ernst & Young Settlement and a broad release of Ernst & Young (at Article 11) was distributed to the

major stakeholders. The Plan was approved by an overwhelming majority of stakeholders and supported by the Applicant and the senior creditors.

**Reference** Fifteenth Report of the Monitor, Ernst & Young  
Motion Record, Tab 17, pages 790-812.

10. Following the meeting of creditors, the Objectors (representing 1.6% of the equity stakeholders) sought for the first time standing in the *CCAA* proceedings and objected to the Ernst & Young Settlement. All other institutional investors either supported the settlement (including Paulson & Co. Inc. (which held 14% of Sino-Forest's shares at June 2, 2011) and Davis Selected Advisors LP (which held 12% of Sino-Forest's shares at June 2, 2011)) or withdrew their objections prior to the settlement hearing on February 4, 2013.

**Reference** Supplemental affidavit of Charles Wright,  
Sworn January 22, 2013 at paras. 11-15,  
Ernst & Young Motion Record, Tab 12,  
pages 321-322.

11. With respect to the retail investors who filed and maintained their notices of objection, they (almost universally) articulated no substantive basis for their objection other than preference for a higher (or complete) recovery or a desire that this motion ought to await the outcome of other proceedings (such as proceedings before the Ontario Securities Commission).

**Reference** Fourteenth Report of the Monitor, Ernst &  
Young Motion Record, Tab 15, pages 356-  
685.

Supplemental Fourteenth Report of the  
Monitor, Ernst & Young Motion Record,  
Tab 16, pages 686-789.

12. The Objectors were the only institutional shareholders purporting to “opt out” in the Ontario Class Action. The other opt outs constitute a small number of individual retail investors.

**Reference** Supplemental affidavit of Charles Wright, Sworn January 22, 2013 at paras. 16-19, Ernst & Young Motion Record, Tab 12, pages 322.

13. Each opt out form filed by the Kim Orr Objectors contained the following statement:

This opt-out is submitted on condition that, and is intended to be effective only to the extent that, any defendant in this proceeding does not receive an order in this proceeding, which order becomes final, releasing any claim against such defendant, which includes a claim asserted on an opt-out basis by [name of Objector]. Otherwise, this opt-out right would be wholly illusory.

**Reference** Opt-out forms filed by Kim Orr Objectors, Ernst & Young Motion Record, Tabs 26 and 27, pages 907-908.

14. In his decision dated December 10, 2013, Justice Morawetz found that the applicable test under the *CCAA* had been met and sanctioned the Plan. It included a framework for the Ernst & Young Settlement and the Ernst & Young Release (the “Sanction Order”).

**Reference** Plan Sanction Order dated December 12, 2012, Ernst & Young Motion Record, Tab 5, pages 42-158.

15. In his Reasons for Decision, Justice Morawetz made it clear that he was not being asked to approve the Ernst & Young Settlement or the Ernst & Young Release. The appropriateness of the Ernst & Young Settlement or the Ernst & Young Release was to be considered at a separate hearing and it was.

**Reference** Reasons for Decision dated December 12, 2012, Ernst & Young Motion Record, Tab 6, pages 159-170.



16. The Objectors served their first notice of motion for leave to appeal to this Court in late December 2012, on the last day available to them under the appeal provisions *CCAA*. The did not conform with the *Rules* for time of service, but instead relied on the extended time provided for by the *CCAA*. That leave motion was submitted to the Court in writing on March 3, 2013. The Objectors confirmed that they were not seeking a stay nor to prevent Plan implementation. The Plan has now been implemented. Foreign recognition of the Sanction Order has already been obtained in the United States Bankruptcy Court, Southern District of New York, without opposition from the Objectors.

<b>Reference</b>	Amended Notice of Motion for Leave to Appeal, dated December 27, 2012, Motion Record of the Objectors for Motion for Directions (“Objectors Motion Record”), Tab K, pages 254-257.
	Letter from Bennett Jones LLP to Kim Orr LLP dated January 3, 2013, Ernst & Young Motion Record, Tab 23, page 904.
	Letter from Kim Orr LLP to Bennett Jones LLP dated January 3, 2013, Ernst & Young Motion Record, Tab 24, page 905.
	Letter from Lenczner Slaght LLP to Kim Orr LLP dated January 3, 2013, Ernst & Young Motion Record, Tab 25, page 906.

17. The approval hearing for the Ernst & Young Settlement proceeded before Justice Morawetz on February 4, 2013. Justice Morawetz sat as both *CCAA* judge and *CPA* judge. The Objectors participated fully in the settlement approval hearing. They did not argue their motion for a representation order or for the other relief they purportedly now seek. They did not argue that the settlement consideration was inadequate.

<b>Reference</b>	Notice of Motion for approval of Ernst & Young Settlement dated January 11, 2013, Ernst & Young Motion Record, Tab 28, pages 909-932.
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18. On March 20, 2013, Justice Morawetz released his Reasons for Decision approving the Ernst & Young Settlement and the Ernst & Young Release and dismissing the motions brought by the Objectors for representative status and other relief (the “Settlement Approval Order” and the “Representation Dismissal Order”).

**Reference** Settlement Approval Order dated March 20, 2013, Ernst & Young Motion Record, Tab 2, pages 7-21.

Representation Dismissal Order dated March 20, 2013, Ernst & Young Motion Record, Tab 3, pages 22-25.

Reasons for Decision dated March 20, 2013, Ernst & Young Motion Record, Tab 4, pages 26-41.

19. On April 9, 2013, the Objectors served a notice of motion for leave to appeal the Settlement Approval Order and the Representation Dismissal Order. Again, they relied upon the provisions of the *CCAA*. On April 15, 2013, the Objectors served an amended notice of motion for leave.

**Reference** Amended Notice of Motion for Leave to Appeal, dated April 9, 2013, Objectors Motion Record, Tab T, pages 349-355.

Amended Notice of Motion for Leave to Appeal, dated April 9, 2013, Objectors Motion Record, Tab T, pages 349-355 and Notice of Motion for Directions dated April 18, 2013, Objectors Motion Record, Tab A, page 1.

20. On April 19, 2013, the Objectors served a notice of appeal dated April 18, 2013, purporting to appeal as of right from the Settlement Approval Order and the Representation Dismissal Order, in respect of which they had already sought leave to appeal.

**Reference** Notice of Appeal dated April 18, 2013, Ernst & Young Motion Record, Tab 29, page 933.

### PART III - LAW AND ARGUMENT

21. The Objectors have no standing to bring an appeal from the Settlement Approval Order and the Representation Dismissal Order. They require leave of this Honourable Court under sections 13 and 14 of the *CCAA*, in accordance with the *Rules*. The Objectors have sought leave to appeal consistent with the *CCAA*.

22. Pursuant to subsection 134(3) of the *Courts of Justice Act*, R.S.O. 1990, c. C-43, a court to which an appeal is taken may, in a proper case, quash the appeal.

23. An appeal may be quashed where the party bringing the appeal does not have standing or the appeal is manifestly devoid of merit.

<b>Reference</b>	<i>Lesyork Holdings Ltd. v. Munden Acres Ltd.</i> , [1976] O.J No. 2225 (C.A) at para. 16 [ <i>Lesyork</i> ], Ernst & Young Brief of Authorities, Tab 1.
	<i>Bérubé v. Rational Entertainment Ltd.</i> , [2009] O.J. No. 5619 (Div. Ct.) at para. 23 [ <i>Berube</i> ], Ernst & Young Brief of Authorities, Tab 2.
	<i>Oatway v. Canada (Wheat Board)</i> , [1945] S.C.R. 204 at pp. 9-10 [ <i>Oatway</i> ], Ernst & Young Brief of Authorities, Tab 3.

24. Both apply here.

#### A. The Objectors Do Not Have Standing to Bring an Appeal

25. No appeal court has inherent jurisdiction. A right of appeal is solely a creation of statute. It is only available to the extent specifically provided for in the applicable legislation.

<b>Reference</b>	<i>Kourtessis v. Canada (Minister of National Revenue-M.N.R.)</i> , [1993] 2 S.C.R. 53 at para. 39, Ernst & Young Brief of Authorities, Tab 4.
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*Knox Contracting Ltd. v. Canada*, [1990] 2 S.C.R. 338 at para. 25, Ernst & Young Brief of Authorities, Tab 5.

26. The Objectors seek leave to act as a representative party for the purposes of appealing the Settlement Approval Order under subsection 30(5) of the *CPA* and, if such relief is obtained, to appeal pursuant to subsection 30(3) of the *CPA*.

27. This Court held in *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 3622 [*Dabbs*] that an individual class member does not have an independent right of appeal under subsection 6(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c.C-4. Subsection 30(3) of the *CPA* takes precedence over and excludes that provision of general application. Under subsection 30(5) of the *CPA*, a class member requires leave to be appointed as the representative party of the class in circumstances where the representative plaintiff does not appeal from a judgment on common issues. The class member must demonstrate that s/he would adequately represent the interests of the class, in the face of the representative plaintiff's inaction.

**Reference**      *Dabbs, supra* at para. 13, Ernst & Young Brief of Authorities, Tab 6.

28. Subsections 30(3) and (5) of the *CPA* provide:

**30.(3)** A party may appeal to the Court of Appeal from a judgment on common issues and from an order under section 24, other than an order that determines individual claims made by class members.

**30.(5)** If a representative party does not appeal as permitted by subsection (3), or if a representative party abandons an appeal under subsection (3), any class member may make a motion to the Court of Appeal for leave to act as the representative party for the purposes of subsection (3).

29. Section 24 of the *CPA* provides for the determination of liability and the award of damages in certain circumstances, as well as the division of damages awarded:



24.(1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,

(a) monetary relief is claimed on behalf of some or all class members;

(b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and

(c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

30. Like the class member in *Dabbs*, the Objectors provide no evidence to even suggest that they could adequately represent the interests of the class by bringing an appeal which seeks to set aside a settlement agreement. The settlement agreement was: (a) negotiated with the representative plaintiffs who won a carriage fight; and (b) properly approved by the Court.

**Reference**            *Dabbs, supra* at para. 19, Ernst & Young Brief of Authorities, Tab 6.

31. Sections 30 and 24 of the *CPA* do not address settlements in a class proceeding. As this Court found in *Dabbs*, if an individual class member is dissatisfied with a settlement agreement entered into between the parties and approved by the Court, s/he may opt-out. S/he does not have a right of appeal under any applicable legislation.

32. Due to the intersection of the *CPA* and the *CCAA*, the alternative available to the dissenting class member in *Dabbs* is not available to the Objectors – the Objectors may not opt out of the settlement. However, their procedural rights are not foreclosed. As they have demonstrated by bringing not one but two motions for leave to appeal, the *CCAA* affords them the right to appeal, if this Honourable Court finds that they have met the requisite test for leave.



**Reference**      *Dabbs, supra* at para. 20, Ernst & Young Brief of Authorities, Tab 6.

**B.      The Appeal Lacks Merit**

33.      The Objectors seek to appeal the Settlement Approval Order on the grounds that it does not conform with a settlement approval hearing conducted solely under the *CPA* and that Justice Morawetz did not consider the sufficiency of the settlement amount or give effect to the Objectors' opt-out rights under the *CPA*.

34.      The Objectors also raise the issue of representation, which they failed to argue at the motion before Justice Morawetz, and which they assert now without any basis in evidence.

35.      Where an appeal is manifestly devoid of merit, a court may quash it.

**Reference**      *Court of Justice Act*, subsection 134(3).

*Oatway, supra*, at pp. 9-10, Ernst & Young Brief of Authorities, Tab 3.

*Lesyork, supra*, at para. 16, Ernst & Young Brief of Authorities, Tab 1.

*Berube, supra* at para. 27, Ernst & Young Brief of Authorities, Tab 2.

36.      As set out at paragraph 1(a) of the Objectors' Notice of Appeal, Justice Morawetz was appointed by Regional Senior Justice Then to hear the settlement approval motion under both the *CCAA* and the *CPA*. In recent years, a number of courts managing *CCAA* proceedings have approved class action settlements within the context of *CCAA* plans.

**Reference**      *Re Nortel Networks Corp.* (2010), [2010] O.J. No. 1232 (S.C.J.), at paras. 70-71, Ernst & Young Brief of Authorities, Tab 7.

*Robertson v. ProQuest Information and Learning Co.*, [2011] O.J. No. 1160 (S.C.J.), at paras. 27, 34 ("*Robertson*"), Ernst & Young Brief of Authorities, Tab 8.

37. Justice Morawetz considered the court's jurisdiction to hear the Ernst & Young Settlement. Justice Morawetz adopted a similar approach to the combined proceedings as did Justice Pepall (as she then was) in *Robertson*. Justice Morawetz held that the settlement approval should not proceed solely under the *CPA* and that the Objectors' claim against Ernst & Young could not be considered in isolation from the reality of the *CCAA* proceedings affecting all parties.

**Reference**        Reasons for Decision of Morawetz J. dated March 20, 2013 at paras.36-40, 72, 75 and 78, Ernst & Young Motion Record, Tab 4, pages 32-33 and 39-40.

38. Prior to the settlement approval hearing, Justice Morawetz required that notice be provided to putative class members of the settlement. In addition to notice, the parties provided a mechanism for those opposing the settlement to voice their concerns through notices of objection, which were filed with the Court.

**Reference**        Fourteenth Report of the Monitor, Ernst & Young Motion Record, Tab 15, pages 356-685.

Supplemental Fourteenth Report of the Monitor, Ernst & Young Motion Record, Tab 16, pages 686-789.

39. In assessing the Ernst & Young Settlement and the Ernst & Young Release, Justice Morawetz considered (following *Robertson*):

- (a) whether the settlement was fair and reasonable;
- (b) whether it provided substantial benefit to the other stakeholders; and
- (c) whether it was consistent with the purposes and spirit of the *CCAA*.

**Reference** Reasons for Decision of Morawetz J. dated March 20, 2013 at paras. 49 and 58-80, Ernst & Young Motion Record, Tab 4, pages 35 and 38-41.

*Robertson, supra*, Ernst & Young Brief of Authorities, Tab 8.

40. In considering the Ernst & Young Release (and implicitly no opt-out rights), Justice Morawetz applied the “nexus test” (following *ATB Financial*):

- (a) Are the claims to be released rationally related to the purposes of the Plan?
- (b) Are the claims to be released necessary for the Plan?
- (c) Are the parties who have the claims released against them contributing in a tangible and realistic way? and
- (d) Will the Plan benefit the debtor and creditors generally?

**Reference** Reasons for Decision of Morawetz J. dated March 20, 2013 at paras. 50 and 58-80 Ernst & Young Motion Record, Tab 4, pages 35 and 38-41.

*Re Metcalfe & Mansfield Alternative Investments II Corp.*, [2008] O.J. No. 3164 at para. 71 (C.A.) (“*ATB Financial*”), Ernst & Young Brief of Authorities, Tab 9

41. In making his decision, Justice Morawetz held that:

- (a) the \$117 million to be paid by Ernst & Young was substantial (and tangible) and the only monetary contribution to the Plan;

**Reference** Reasons for Decision of Morawetz J. dated March 20, 2013 at paras. 60, 63 and 64 Ernst & Young Motion Record, Tab 4, pages 38-39.

- (b) the claims to be released were rationally connected to the Plan;

**Reference** Reasons for Decision of Morawetz J. dated March 20, 2013 at para. 61 Ernst & Young Motion Record, Tab 4, page 38.

- (c) in the particular context and reality of Sino-Forest's insolvency, the settlement was necessary to the Plan;

**Reference** Reasons for Decision of Morawetz J. dated March 20, 2013 at para. 62, Ernst & Young Motion Record, Tab 4, page 38.

- (d) the voting creditors approved the Plan with knowledge of the nature and effect of the Ernst & Young Release;

**Reference** Reasons for Decision of Morawetz J. dated March 20, 2013 at para. 64, Ernst & Young Motion Record, Tab 4, pages 38-39.

- (e) the Ernst & Young Release was fair and reasonable and not overly broad; and

**Reference** Reasons for Decision of Morawetz J. dated March 20, 2013 at para. 65, Ernst & Young Motion Record, Tab 4, page 39.

- (f) the Ernst & Young Settlement was fair and reasonable, provided substantial benefit to the stakeholders and was consistent with the purpose and spirit of the *CCAA*.

**Reference** Reasons for Decision of Morawetz J. dated March 20, 2013 at para. 66, Ernst & Young Motion Record, Tab 4, page 39.

42. Justice Morawetz rejected the Objectors' submissions in their entirety. For Justice Morawetz, the relevant consideration was whether a proposed settlement and third-party release sufficiently benefitted all stakeholders to justify court approval. He found that it did.

**Reference** Reasons for Decision of Morawetz J. dated March 20, 2013 at para. 71, Ernst & Young Motion Record, Tab 4, pages 39-40.

43. Justice Morawetz held that the Objectors should not be permitted to opt out in the context of the combined *CPA* and *CCAA* proceedings, especially when they elected not to participate in the *CCAA* proceedings and did not, among other things, file any claim in that process.



**Reference**        Reasons for Decision of Morawetz J. dated March 20, 2013  
at para. 75-78, Ernst & Young Motion Record, Tab 4, pages  
39-40.

44.     In any event, Justice Morawetz properly found that the Objectors could not opt out under either the *CPA* or the *CCAA* in the conditional manner they unilaterally attempted.

**Reference**        Reasons for Decision of Morawetz J. dated March 20, 2013  
at para. 80, Ernst & Young Motion Record, Tab 4, page 41.

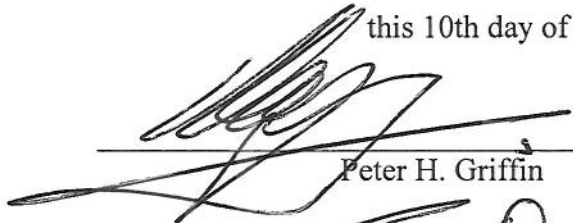
45.     The Objectors now seek to challenge Justice Morawetz's decisions in three proceedings: two leave motions and a purported appeal. On its face, the Objectors' appeal lacks merit. It should be quashed.

**PART IV - ORDER REQUESTED**

46. For the reasons set out above, Ernst & Young requests that the appeal brought by the Objectors by way of notice of appeal dated April 18, 2013 be quashed and that Ernst & Young be awarded its costs on this motion.

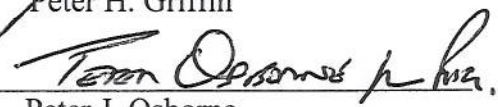
**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

this 10th day of May, 2013.



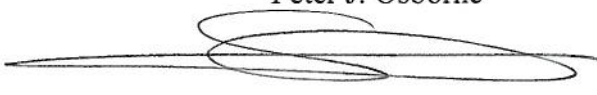
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**SCHEDULE “A”**

**List of Authorities**

1. *Lesyork Holdings ltd. v. Munden Acres Ltd.*, [1976] O.J No. 2225 (C.A.)
2. *Bérubé v. Rational Entertainment Ltd.*, [2009] O.J. No. 5619 (Div. Ct.)
3. *Oatway v. Canada (Wheat Board)*, [1945] S.C.R. 204
4. *Kourtessis v. Canada (Minister of National Revenue-M.N.R.)*, [1993] 2 S.C.R. 53
5. *Knox Contracting Ltd. v. Canada*, [1990] 2 S.C.R. 338
6. *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 3622 (C.A.)
7. *Re Nortel Networks Corp.*, [2010] O.J. No. 1232 (S.C.J.)
8. *Robertson v. ProQuest Information and Learning Co.*, [2011] O.J. No. 1160 (S.C.J.)
9. *Re Metcalfe & Mansfield Alternative Investments II Corp.*, [2008] O.J. No. 3164 (C.A.)

## SCHEDULE "B"

### Legislation

#### Class Proceedings Act, S.O. 1992, Chapter 6

##### **Aggregate assessment of monetary relief**

24. (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,

(a) monetary relief is claimed on behalf of some or all class members;

(b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and

(c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

##### **Average or proportional application**

(2) The court may order that all or a part of an award under subsection (1) be applied so that some or all individual class members share in the award on an average or proportional basis.

##### **Idem**

(3) In deciding whether to make an order under subsection (2), the court shall consider whether it would be impractical or inefficient to identify the class members entitled to share in the award or to determine the exact shares that should be allocated to individual class members.

##### **Court to determine whether individual claims need to be made**

(4) When the court orders that all or a part of an award under subsection (1) be divided among individual class members, the court shall determine whether individual claims need to be made to give effect to the order.

##### **Procedures for determining claims**

(5) Where the court determines under subsection (4) that individual claims need to be made, the court shall specify procedures for determining the claims.

##### **Idem**

(6) In specifying procedures under subsection (5), the court shall minimize the burden on class members and, for the purpose, the court may authorize,

(a) the use of standardized proof of claim forms;

(b) the receipt of affidavit or other documentary evidence; and

(c) the auditing of claims on a sampling or other basis.

##### **Time limits for making claims**



(7) When specifying procedures under subsection (5), the court shall set a reasonable time within which individual class members may make claims under this section.

**Idem**

(8) A class member who fails to make a claim within the time set under subsection (7) may not later make a claim under this section except with leave of the court.

**Extension of time**

(9) The court may give leave under subsection (8) if it is satisfied that,

(a) there are apparent grounds for relief;

(b) the delay was not caused by any fault of the person seeking the relief; and

(c) the defendant would not suffer substantial prejudice if leave were given.

**Court may amend subs. (1) judgment**

(10) The court may amend a judgment given under subsection (1) to give effect to a claim made with leave under subsection (8) if the court considers it appropriate to do so.

## **Appeals**

### **Appeals: refusals to certify and decertification orders**

**30.** (1) A party may appeal to the Divisional Court from an order refusing to certify a proceeding as a class proceeding and from an order decertifying a proceeding.

### **Appeals: certification orders**

(2) A party may appeal to the Divisional Court from an order certifying a proceeding as a class proceeding, with leave of the Superior Court of Justice as provided in the rules of court.

### **Appeals: judgments on common issues and aggregate awards**

(3) A party may appeal to the Court of Appeal from a judgment on common issues and from an order under section 24, other than an order that determines individual claims made by class members.

### **Appeals by class members on behalf of the class**

(4) If a representative party does not appeal or seek leave to appeal as permitted by subsection (1) or (2), or if a representative party abandons an appeal under subsection (1) or (2), any class member may make a motion to the court for leave to act as the representative party for the purposes of the relevant subsection.

**Idem**

(5) If a representative party does not appeal as permitted by subsection (3), or if a representative party abandons an appeal under subsection (3), any class member may make a motion to the Court of Appeal for leave to act as the representative party for the purposes of subsection (3).

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

**Court of Appeal jurisdiction**

6.(1) An appeal lies to the Court of Appeal from,

- (a) an order of the Divisional Court, on a question that is not a question of fact alone, with leave of the Court of Appeal as provided in the rules of court;
- (b) a final order of a judge of the Superior Court of Justice, except an order referred to in clause 19 (1) (a) or an order from which an appeal lies to the Divisional Court under another Act;
- (c) a certificate of assessment of costs issued in a proceeding in the Court of Appeal, on an issue in respect of which an objection was served under the rules of court.

**Powers on appeal**

134.(1) Unless otherwise provided, a court to which an appeal is taken may,

- (a) make any order or decision that ought to or could have been made by the court or tribunal appealed from;
- (b) order a new trial;
- (c) make any other order or decision that is considered just.

**Interim orders**

(2) On motion, a court to which a motion for leave to appeal is made or to which an appeal is taken may make any interim order that is considered just to prevent prejudice to a party pending the appeal.

**Power to quash**

(3) On motion, a court to which an appeal is taken may, in a proper case, quash the appeal.

**Determination of fact**

(4) Unless otherwise provided, a court to which an appeal is taken may, in a proper case,

- (a) draw inferences of fact from the evidence, except that no inference shall be drawn that is inconsistent with a finding that has not been set aside;
- (b) receive further evidence by affidavit, transcript of oral examination, oral examination before the court or in such other manner as the court directs; and
- (c) direct a reference or the trial of an issue, to enable the court to determine the appeal.

**Scope of decisions**

(5) The powers conferred by this section may be exercised even if the appeal is as to part only of an order or decision, and may be exercised in favour of a party even though the party did not appeal.

**New trial**

(6) A court to which an appeal is taken shall not direct a new trial unless some substantial wrong or miscarriage of justice has occurred.

**Idem**

(7) Where some substantial wrong or miscarriage of justice has occurred but it affects only part of an order or decision or some of the parties, a new trial may be ordered in respect of only that part or those parties.

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

**Leave to appeal**

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.

**Court of Appeal**

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.



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.: C56961  
Court File No. CV-12-9667-00-CL

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**COURT OF APPEAL FOR ONTARIO**

PROCEEDING COMMENCED AT TORONTO

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**FACTUM OF ERNST & YOUNG LLP**  
(Motion to Quash Appeal Returnable June 28, 2013)

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