Court of Appeal File Nos. C56115, C56118, C56125
Court File No. CV-12-9667-00CL

COURT OF APPEAL FOR ONTARIO

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

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

FACTUM OF THE RESPONDENT, THE AD HOC COMMITTEE OF NOTEHOLDERS OF SINO-FOREST CORPORATION

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FACTUM OF THE RESPONDENTS, THE AD HOC COMMITTEE OF NOTEHOLDERS (THE "AD HOC COMMITTEE") OF SINO-FOREST CORPORATION

I. OVERVIEW

1. The appellants have all asserted claims against Sino-Forest Corporation ("Sino-Forest") in which they seek contribution and indemnity for any amounts that they may be ordered to pay as a result of claims in class actions, which name as defendants not only the appellants but also Sino-Forest (and others), and which allege that shareholders or former shareholders of Sino-Forest suffered losses as a result of their respective purchase or ownership of Sino-Forest shares.

2. The appellants argue that Morawetz J. (the "CCAA judge") erred in finding that their claims fall within the definition of "equity claims" under the *Companies' Creditors Arrangement Act* ("CCAA") and thus are subordinated, for voting and distribution, to claims of Sino-Forest's creditors who do not hold equity claims. The appellants' argument is incorrect; the CCAA judge reached the correct result.

3. As found by the CCAA judge, the language used in the statutory definition of "equity claims" is clear and unambiguous and covers the appellants' claims for contribution and indemnity against Sino-Forest. The ordinary and grammatical meaning of the statutory language, read harmoniously with the scheme of the CCAA, its object, and the intention of Parliament catches within its scope the claims asserted by the appellants herein. Just as claims against Sino-Forest brought directly by shareholders or former shareholders for losses on their shares are equity claims, regardless of the cause of action under which such claims are made, so too are the appellants' claims for contribution and indemnity in respect of those claims. Neither the cause of action under which contribution and indemnity is claimed, nor the fact that the appellants are not shareholders alters that conclusion. The appellants' arguments that the statutory definition (which was added to the CCAA by amendments enacted in 2009) should be read down to comport with what they say was the law prior to the amendments, and their attempt to read the word "claim" so narrowly as to divorce it from the language and purpose of the statutory scheme are incorrect.

II. THE FACTS

4. The Ad Hoc Committee adopts and relies upon the statement of facts set out in the factum of Sino-Forest. Certain facts of particular importance to the arguments advanced in this factum are highlighted in the paragraphs which follow.

5. There are four different class proceedings that assert claims on behalf of shareholders or former shareholders of Sino-Forest: one in Ontario, one in Quebec, one in Saskatchewan, and one in New York. In each proceeding, the claim on behalf of shareholders or former shareholders is for losses allegedly incurred as a result of the purchase of Sino-Forest

shares. Sino-Forest is a defendant in each action. The appellants are each named as a defendant in one or more of those proceedings (although none of the appellants is named as a defendant in the Saskatchewan action). In three of the four actions, the plaintiffs have not specified the quantum of damages sought. However, in the fourth action (the Ontario action), the damages claimed amount to approximately $9.2 billion.

> Fresh as Amended Statement of Claim (Ontario), Exhibit "A" to the affidavit of Elizabeth Fimio, sworn June 8, 2012, Compendium of the Ad Hoc Committee, Tab 3
>
> Originating Documents in the Quebec class action, Exhibit "B" to the affidavit of Elizabeth Fimio, sworn June 8, 2012, Compendium of the Ad Hoc Committee, Tab 4
>
> Originating Documents in the Saskatchewan class action, Exhibit "C" to the affidavit of Elizabeth Fimio, sworn June 8, 2012, Compendium of the Ad Hoc Committee, Tab 5
>
> Complaint in the New York class action, Exhibit "D" to the affidavit of Elizabeth Fimio, sworn June 8, 2012, Compendium of the Ad Hoc Committee, Tab 6

6. The facts that are alleged to give rise to the causes of action against the appellants in the various proceedings are (with very minor differences) also alleged to give rise to causes of action asserted against Sino-Forest.

7. The appellants all filed proofs of claim in these CCAA proceedings against Sino-Forest, seeking contribution and indemnity for, among other things, any amounts that they are ordered to pay as damages to the plaintiffs in the class actions. The proofs of claim advance several different legal bases for Sino-Forest's alleged obligation of contribution and indemnity, including contractual terms of indemnity, negligent misstatement in tort, and the provisions of the *Negligence Act*[1] establishing the right to contribution between joint tortfeasors. The proofs of claim make it clear that the contribution and indemnity claims are for the sums that the appellants may have to pay to the class action plaintiffs for claims asserted on behalf of

[1] R.S.O. 1990, c. N-1, s. 1 and 2

shareholders and former shareholders of Sino-Forest.

> See, for example, the Proof of Claim of Ernst & Young, Exhibit "A-A2" to the affidavit of Christina Shiels, sworn June 21, 2012, Compendium of the Ad Hoc Committee, Tab 7, p. 275-278
>
> And see the Proof of Claim of BDO Limited, paras. 18-19, Exhibit "A" to the Affidavit of Iryna Dubinets, sworn June 22, 2012, Compendium of the Ad Hoc Committee, Tab 8, p. 313-314

8. Sino-Forest accordingly brought a motion, seeking, *inter alia*, an order that the contribution and indemnity claims against Sino-Forest for the amounts claimed on behalf of shareholders and former shareholders, including the appellants' claims for contribution and indemnity, be recognized as "equity claims" as that term is used in the CCAA. The Ad Hoc Committee, which consists of note-holders owning approximately half of Sino-Forest's total note-holder debt, who are creditors with claims that are not equity claims, supported Sino-Forest's motion.

9. The motion was heard by the CCAA judge, who has overseen these CCAA proceedings from their outset. On July 27, 2012, the CCAA judge granted the order sought by Sino-Forest and, in particular, ordered that "any indemnification claim against Sino-Forest related to or arising from the Shareholders Claims, including, without limitation, by or on behalf of any of the other defendants to the proceedings listed in Schedule "A" are "equity claims" under the CCAA, being claims for contribution or indemnity in respect of claims that are equity claims".

> Order of Justice Morawetz, para. 3, Compendium of the Ad Hoc Committee, Tab 1, p. 2

10. In reaching his decision, the CCAA judge first considered the language of the statutory definition of "equity claims" and noted that the definition "focuses on the nature of the

claim", rather than on the identity of the person asserting the claim. He also noted that the claims for contribution and indemnity at issue are the direct result of claims brought by shareholders for losses suffered as a result of their respective equity investments and that, accordingly, the claims for contribution and indemnity would ultimately be used to compensate the shareholders for those losses: He said:

> In this case, it seems clear that the Shareholder Claims led to the Related Indemnity Claims. Put another way, the inescapable conclusion is that the Related Indemnity Claims are being used to recover an equity investment.
>
> Endorsement of Justice Morawetz, dated July 27, 2012, at para. 79, Compendium of the Ad Hoc Committee, Tab 2, p. 18

11. He then held that to give priority to such claims would run counter to the scheme established by the Act:

> It would be totally inconsistent to arrive at a conclusion that would enable either the auditors or the Underwriters, through a claim for indemnification, to be treated as creditors when the underlying actions of the shareholders cannot achieve the same status. To hold otherwise would indeed provide an indirect remedy where a direct remedy is not available.
>
> Endorsement of Justice Morawetz, dated July 27, 2012, at para. 82, Compendium of the Ad Hoc Committee, Tab 2, p. 18

12. As is discussed below, the result reached by the CCAA judge is correct.

III. LAW AND ARGUMENT

A. The Rules of Statutory Interpretation Necessarily Lead to the Result Reached by the CCAA Judge

13. The appellants argue that the CCAA judge reached the wrong result, because he ought to have held that the provisions in issue, brought into the CCAA by amendments enacted

in 2009, ought to be given a narrow reading and were simply a codification of pre-existing law, which law (so the appellants say) did not subordinate claims such as those advanced by the appellants, but only subordinated claims made by shareholders. However, the appellants' approach is inapt. When interpreting a statute, the starting point is not case law interpreting a previous iteration of the legislation. Rather, as the CCAA Judge held, the starting point must be the statutory provision itself, as currently worded.

14. "Equity claim" is defined in the CCAA as follows:

> "**equity claim**" means a claim that is in respect of an equity interest, including a claim for, among others,
>
> (a) a dividend or similar payment,
>
> (b) a return of capital,
>
> (c) a redemption or retraction obligation,
>
> (d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or , in Quebec, the annulment, of a purchase or sale of an equity interest, or
>
> (e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d).
>
> CCAA, subsection 2(1), Ad Hoc Committee's Book of Authorities, Tab 1

15. "Equity interest" is, in turn, defined as follows:

> "**equity interest**" means
>
> (a) in the case of a company other than an income trust, a share in the company – or a warrant or option or another right to acquire a share in the company – other than one that is derived from a convertible debt . . .
>
> CCAA, subsection 2(1), Book of Authorities of the Ad Hoc Committee, Tab 1

16. The fundamental rule of statutory interpretation, as articulated by the Supreme Court of Canada, requires these words to be read in their entire context, in their grammatical and ordinary sense, in a manner that is harmonious with the overall statutory scheme, with the legislative purpose, and with Parliament's intention:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para. 26, Book of Authorities of the Ad Hoc Committee, Tab 4

17. As the Supreme Court has noted, this approach is consistent with section 12 of the *Interpretation Act* which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".

> *Interpretation Act*, R.S.C. 1985, c. I-21, s. 12, Book of Authorities of the Ad Hoc Committee, Tab 2
>
> *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para. 26, Book of Authorities of the Ad Hoc Committee, Tab 4

18. In the present case, Parliament, through its choice of words, has clearly shown that the definition of "equity claims" is to be given a broad and expansive reading, and not the type of narrow reading urged by the appellants. This is apparent from two aspects of the definition.

19. First, and contrary to the interpretation urged by the appellants, Parliament did <u>not</u> define "equity claims" by referring to the identity of the person making the claim; it did not restrict "equity claims" to those made by a shareholder or former shareholder; it did not restrict

"equity claims" to those made for losses suffered as a result of the claimant's own shareholding. Rather, it defined an "equity claim" to be a claim "in respect of" an equity interest. The Supreme Court has repeatedly held that the words "in respect of" are "of the widest possible scope" conveying some link or connection between two related subjects:

> The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters.
>
> *CanadianOxy Chemicals Ltd. v. Canada (Attorney General),* [1998] S.C.J. No. 87 at para. 16, quoting from *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29 at 39, Book of Authorities of the Ad Hoc Committee, Tab 5

20. Similarly, in *Markevich v. Canada*, the Supreme Court said:

> The words "in respect of" have been held by this Court to be words of the broadest scope that convey some link between two subject matters.
>
> *Markevich v. Canada*, 2003 SCC 9 at para. 26 [emphasis added], Book of Authorities of the Ad Hoc Committee, Tab 6

21. Thus, by defining an "equity claim" to be a claim that is "in respect of" an equity interest, Parliament has indicated that, as long as a claim has "some connection" to, or "some link" to an equity interest, then it will fall within the definition of "equity claim".

22. Second, in a further clear indication of its desire for a broad reading, Parliament provided a series of non-exhaustive examples of the types of claims that it intended to include in the general category of "claims in respect of an equity interest". The various examples are preceded by the words, "including a claim for, among others". The Supreme Court has explained that words such as "including" or "include" are words of expansion (particularly when

rendered in French, as they are here, by the word "notamment"), and indicate that the preceding phrase should be given a generous interpretation so that it encompasses matters that might otherwise not be thought to fall within the phrase. As LaForest J. stated in *National Bank of Greece (Canada) v. Katsikonouris*:

> [T]hese words are terms of extension, designed to enlarge the meaning of preceding words, and not to limit them.
>
> . . . [T]he natural inference is that the drafter will provide a specific illustration of a subset of a given category of things in order to make it clear that that category extends to things that might otherwise be expected to fall outside it.
>
> *National Bank of Greece (Canada) v. Katsikonouris*, [1990] S.C.J. No. 95 at paras. 13-14, Book of Authorities of the Ad Hoc Committee, Tab 6

23. This interpretive approach must apply with even greater force where the list of examples is preceded not only by the word "including", but also by the words "among others". Thus, in the present case, Parliament has indicated that, when determining which claims have a link to, or connection with an equity interest, one must give the definition a broad and generous reading, expanding it by reference to the examples used, but not limiting it to those examples (because the examples are said to be "among others"). The breadth of the definition of "equity claims" was recognized by Pepall J. in *Re: Nelson Financial Group Ltd.*, where she stated:

> The language of section 2 is clear and broad.
>
> *Re: Nelson Financial Group Ltd.*, 2010 ONSC 6229 at para. 27, Book of Authorities of the Ad Hoc Committee, Tab 8

24. Paragraph 2(1)(e) of the Act clearly illustrates that the expansive reading extends beyond claims by shareholders to reach claims for contribution and indemnity which would necessarily be made by persons who are the subjects of claims by shareholders, but who are not

themselves shareholders. And paragraph 2(1)(e) repeats the same expansive "in respect of" phrasing that is found in the opening words of the definition. It defines equity claims as including (among others) a claim for "contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d)", thereby including claims for contribution or indemnity that are connected, or linked to claims enumerated in subparagraphs (a) through (d) of the definition of "equity claims".

CCAA, subsection 2(1), Book of Authorities of the Ad Hoc Committee, Tab 1

25. The words that Parliament used are thus inconsistent with the appellants' argument for a narrow interpretive approach that would have the 2009 amendments effect no change to the CCAA.

26. In addition, the words of the definition must be read "harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament". In the present case, the "scheme" and "object" of the Act and the intention of Parliament are to facilitate the restructuring of insolvent companies and, in furtherance of that object, to subordinate the claims of persons asserting "equity claims" both in terms of voting and in terms of distribution, as against the claims of creditors with non-equity claims.

With respect to the purpose of the CCAA, see *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at paras. 15 and 59, Book of Authorities of the Ad Hoc Committee, Tab 9

And see *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 at para. 50, Book of Authorities of the Ad Hoc Committee, Tab 10

27. As part of this scheme, the Act provides (in subsection 6(1)) that holders of equity claims cannot vote on a plan unless the court so orders, and provides that no amounts shall be paid out of the debtor company's assets on account of equity claims unless and until all non-

equity claims have been paid in full. Thus, subsection 6(8) of the CCAA states:

> No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.
>
> Companies' Creditors Arrangement Act, R.S.C. 1985, c C-36, subsections 6(1) and 6(8), Book of Authorities of the Ad Hoc Committee, Tab 1

28. The CCAA clearly expresses Parliament's intention that certain claimants – i.e. those with equity claims – be treated differently: they are to be subordinated. Such different treatment is consistent with the overall purpose of the CCAA, in that it encourages the restructuring of insolvent companies. The subordination of securities-related or equity claims made against the insolvent company facilitates and furthers such restructuring, by limiting the number of persons who are entitled to vote on or share in any restructuring plan to creditors who possess non-equity claims against the company.

29. The scheme and object of the CCAA are harmonious with, and entirely consistent with the interpretation arrived at by the CCAA judge. In the present case, the assets of Sino-Forest will not be sufficient to pay in full the claims of the company's creditors who hold claims other than equity claims. If the appellants' contribution and indemnity claims were not subordinated but were instead ranked *pari passu* with the non-equity claims, then the assets of Sino-Forest would have to be used, in part, to satisfy those appellants' claims, which are advanced to obtain contribution and indemnity for payments to shareholders who suffered monetary losses. Thus, claims that shareholders suffered monetary losses (which are clearly equity claims) would, through the appellants' contribution and indemnity claims, have the effect of reducing the amounts otherwise available to ordinary creditors. This would run directly counter to the priority scheme established by the CCAA and its broader legislative purpose of

encouraging and facilitating the restructuring of insolvent companies.

30. Thus, when one considers the words used by Parliament in light of the broader statutory scheme, there can be no serious question but that the contribution and indemnity claims at issue fall within the scope of "equity claims" as defined by subsection 2(1):

(a) The claims at issue are claims against Sino-Forest for contribution or indemnity (as contemplated by paragraph 2(1)(e) of the CCAA).

(b) The claims at issue are linked to, or have a connection to, claims that fall within paragraph (d). That is, they are linked to, or have some connection to claims brought by shareholders for a monetary loss resulting from the ownership or purchase of an equity interest in Sino-Forest.

(c) The indemnity claims at issue are linked to, or have a connection to claims brought by shareholders against the insolvent company. In their claims for contribution and indemnity, the appellants seek recompense from Sino-Forest for any amounts that the appellants are ordered to pay to shareholders in the various class action proceedings in which the appellants and Sino-Forest are defendants, and in which the facts that are alleged to give rise to the claims asserted against the appellants and Sino-Forest overlap. Accordingly, it is clear that the claims for contribution and indemnity are "in respect of" – i.e. are linked to, or have some connection with – claims brought against Sino-Forest for a monetary loss resulting from the ownership or purchase of shares.

B. It Is Immaterial that the Appellants Were Not Equity Holders or that They Claim in Contract, Tort, or Statute

31. Contrary to the arguments advanced by the appellants,[2] the fact that the appellants were not equity-holders of Sino-Forest does not mean that their claims for contribution and indemnity are not equity claims. The appellants' arguments simply fail to take into account the words of the legislative definition, which does not define an "equity claim" as a claim "brought by an equity holder". As noted by the CCAA judge, the legislation does not concern itself with the identity of the claimant, but rather focuses exclusively on what the claim is for:

> The plain language in the definition of "equity claim" does not focus on the identity of the claimant. Rather, it focuses on the nature of the claim.
>
> Endorsement of Morawetz J., para. 79, Compendium of the Ad Hoc Committee, Tab 2, p. 18

32. A similar flaw plagues the appellants' arguments that, because they assert claims for contribution and indemnity acquired pursuant to contract, tort or statute, the claims are not "in respect of an equity interest".[3] Again, the appellants' arguments ignore the fact that the legislative definition of equity claim does not depend upon the legal basis on which an equity claim is asserted.

33. Even prior to the amendments to the CCAA, when trying to determine whether a given claim should be subordinated, the courts looked to what the claim was for, rather than to the legal category into which the cause of action fell. Thus, in *Re EarthFirst Canada Inc.*, the

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[2] See, e.g., the factum of Ernst & Young at para. 4; and see the factum of BDO Limited at paras. 70 and 74; and see the factum of the Underwriters at para. 57

[3] See, in this respect, the Factum of the Underwriters at paras. 55-56; and see the factum of BDO Limited at para. 93; and see the Factum of Ernst & Young at para. 48.

court held that the claim at issue should be subordinated as it sought to recover losses on shares, despite the fact that the claims were asserted pursuant to a contractual indemnity granted in a share subscription agreement.

> *Re EarthFirst Canada Inc.*, 2009 CarswellAlta 1069 at para. 4 (Q.B.), Book of Authorities of the Ad Hoc Committee, Tab 11

34. The 2009 amendments to the CCAA make it clear that, whatever the cause of action, if a claim relates to, or has some connection or link to an equity interest, it is an equity claim. Shareholders or former shareholders may sue for losses on the shares under contract (as in *EarthFirst*), in tort (for misrepresentation), or for a statutory cause of action (under the *Securities Act* or for an oppression remedy). Yet, if the claim is for losses on shares, it is an equity claim. Similarly, the fact that that appellants' claims for contribution and indemnity do not assert an equity interest in Sino-Forest does not answer the question of whether the claims fall within the definition of "equity claims". That question is answered by determining whether the appellants' claims for contribution and indemnity have a link, or a connection to, equity claims enumerated in paragraphs (a) through (d), which, as discussed above, they clearly do. Moreover, by expressly referring to claims for contribution and indemnity in the definition of "equity claims", Parliament clearly intended to cover claimants who did not themselves have or assert an equity interest.

C. The Meaning of the Term "Claim" Does Not Exclude the Contribution and Indemnity Claims from the Definition of "Equity Claims

35. Ernst & Young argues that the claims for which it seeks contribution and indemnity do not fall within the definition of "claim" used in the CCAA, because "claim" means a claim provable within the meaning of the *Bankruptcy and Insolvency Act* and, in order to be a

"claim provable", a claim must, *inter alia*, be asserted against the insolvent company. Ernst & Young argues that, because the claims for which it seeks contribution and indemnity are claims brought against it, its claim for contribution and indemnity cannot be "in respect of a claim" as that term is used in the CCAA.[4]

36. Ernst & Young's argument suffers from a number of flaws. First, it does not take into account the fact that the words of the CCAA must be construed in such a manner as to avoid an absurd result and to avoid rendering a statutory provision meaningless. If Ernst & Young's interpretation were correct, section 2(1)(e) would be devoid of any meaning. A claim for contribution and indemnity is, by its very nature, a claim that is brought because the contribution and indemnity claimant is itself the subject of a claim. There could never be a situation where a person seeks contribution and indemnity, when it is not itself being sued. Holding that a contribution and indemnity claim falls outside of the scope of paragraph 2(1)(e) on the basis asserted by Ernst & Young would render that paragraph meaningless. Such a result is to be avoided, as directed by Lamer C.J. in *R. v. Proulx*:

> It is a well accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage.
>
> *R. v. Proulx*, 2000 SCC 5 at para. 28, Book of Authorities of the Ad Hoc Committee, Tab 12
>
> *Winters v. Legal Services Society*, [1999] S.C.J. No. 49 at para. 48, Book of Authorities of the Ad Hoc Committee, Tab 13

37. Second, Ernst & Young's argument ignores the fact that paragraph 2(1)(e) refers to a "claim for contribution or indemnity in respect of a claim referred to in any of paragraphs (a)

[4] See in this regard the factum of Ernst & Young at paras. 33-34

to (d)". As discussed above, the Supreme Court has repeatedly held that the words "in respect of" are "of the widest possible scope", encompassing "in relation to", or "in connection with". Here, the claims for contribution and indemnity have the requisite link to the enumerated claims. That is, they have a connection or link to claims, brought for monetary losses incurred by shareholders, against Sino-Forest and the appellants, such as are referred to in paragraph 2(1)(d). As discussed above, the legal proceedings brought against the appellants which have given rise to their claims for contribution and indemnity are proceedings brought against both the appellants and Sino-Forest (among others), with the causes of action asserted against both groups depending largely upon common facts. Indeed, the appellants' claims at issue include claims for contribution and indemnity among joint tortfeasors, pursuant to sections 1 and 2 of the *Negligence Act* Those claims (as well as the indemnity claims) can only be made because the appellants allege that Sino-Forest (as opposed to the appellants) is the cause of the shareholders' loss.

> *Negligence Act*, R.S.O. 1990, c. N.1, s. 1 and 2, Book of Authorities of the Ad Hoc Committee, Tab 3
>
> Proof of Claim of Ernst & Young, Exhibit "A-A1" and "A-A2" to the affidavit of Christina Shiels, sworn June 21, 2012, Compendium of the Ad Hoc Committee, Tab 7, p. 275-278
>
> And see the Proof of Claim of BDO Limited, Portion of Exhibit "A" to the Affidavit of Iryna Dubinets, sworn June 22, 2012, Compendium of the Ad Hoc Committee, Tab 8, p. 313-314

38. Finally, the list of examples provided in subsection 2(1) of the CCAA is not exhaustive; the examples are said to be "among others". Even if the narrow reading advanced by Ernst & Young were correct as to the meaning of paragraph 2(1)(e), it would not assist the appellants, because the section clearly indicates an intention to cover the type of claims that the appellants assert, whether by the specific example provided in paragraph 2(1)(e) or in the

residual category of "among others".

D. The 2009 Amendments Should Not Be Read Down Due to Pre-Existing Case Law

39. The appellants argue that the 2009 amendments to the CCAA, including the new definition of "equity claims", "codify prior case law on point".[5] The appellants go on to argue that the definition of "equity claims" cannot encompass claims for contribution and indemnity such as are advanced by the appellants, because the jurisprudence that pre-dated the amendments held that such claims were not to be subordinated.[6] This approach suffers from several inter-related errors.

40. Prior to the amendments, a consistent body of case law had developed dealing with the subordination of claims brought by shareholders relating to their respective shareholdings.[7] However, only two decisions have considered the priority of claims for contribution and indemnity brought by persons other than shareholders under the pre-amendment Act. A 2001 decision of LoVecchio J. of the Alberta Court of Queen's Bench in *National Bank of Canada v. Merit Energy Ltd.* (affirmed by the Alberta Court of Appeal) considered claims brought by the debtor's underwriters, auditors, directors and officers, in which those parties sought contribution and indemnity in respect of claims brought by shareholders for misrepresentations made in a prospectus. The court held that such claims for contribution and indemnity were "not made as a shareholder or for any return of investment made" and were "not

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[5] See for example the Underwriters' factum at para. 38.

[6] See, e.g., the factum of Ernst & Young at para. 54ff.

[7] See e.g. *Re Blue Range Resource Corp.*, 2000 ABQB 4 at para. 22, Book of Authorities of the Ad Hoc Committee, Tab 15; *Re Earthfirst Canada Inc.*, 2009 ABQB 316 at para. 4, Book of Authorities of the Ad Hoc Committee, Tab 11.

claims for a return of equity". Accordingly, LoVecchio J. held that the claims for contribution and indemnity were not subordinate to the claims of ordinary creditors, under the CCAA as it then stood.

> *National Bank of Canada v. Merit Energy Ltd.*, 2001 ABQB 583 at paras. 64 and 66; aff'd 2002 ABCA 5, Book of Authorities of the Ad Hoc Committee, Tab 14

41. By contrast, the opposite conclusion was reached by the Ontario courts in *ROI Fund Inc. v. Gandi Innovations Ltd.* In that case, Newbould J. held that claims brought by directors and officers for contribution and indemnity because of shareholder claims against them were to be subordinated. Although that case was decided after the 2009 amendments had come into force, the CCAA filing pre-dated the amendments and, accordingly, Newbould J. had to determine the issues before him based on the CCAA as it stood prior to the enactment of the amendments. Leave to appeal to this Honourable Court was denied.

> *ROI Fund Inc. v. Gandi Innovations Ltd.*, 2011 ONSC 5018 at para. 61; leave to appeal denied 2012 ONCA 10, Book of Authorities of the Ad Hoc Committee, Tab 16

42. Thus, the two decisions that consider whether the CCAA, as it stood prior to the 2009 amendments, subordinated claims for contribution and indemnity by third parties sued by shareholders for losses incurred as a result of their shareholdings reached two different conclusions. Both decisions relate to the "pre-existing" law. While the appellants argue that the *ROI* case was wrongly decided, that is not only incorrect, it does not assist them in any event. Pre-existing law cannot be "codified" if it is inconsistent.

43. Moreover, the trial judge in *Merit Energy* based his decision on the fact that the claims for contribution and indemnity were "not made as a shareholder or for any return of investment made" and were "not claims for a return of equity". If the amendments had been

intended to codify that approach, those words (or words to that effect) would undoubtedly have been used in the definition of "equity claims". They were not. The statutory definition of "equity claims" does not include a requirement that the claims be brought by shareholders, nor does it include a requirement that the claim be for a return of an investment or equity. Rather, as discussed above, Parliament chose to use much broader and more expansive language, sweeping in a much broader spectrum of claims.

> For the relevant portion of the decision in *National Bank of Canada v. Merit Energy Ltd.*, see 2001 ABQB 583 at paras. 64 and 66, Book of Authorities of the Ad Hoc Committee, Tab 14

44. Accordingly, it is submitted that the Canadian jurisprudence that pre-dates the 2009 amendments is of little assistance in interpreting the statutory definition of "equity claims" that was added to the CCAA by those amendments.

45. For similar reasons, it is submitted that this Court should reject the argument advanced by Ernst & Young that the presumption against the legislature changing the common law should lead to the conclusion that Parliament intended the definition of "equity claims" to exclude claims for contribution or indemnity advanced by third parties.[8] The principle of law upon which the appellants rely, i.e. that the legislature is presumed not to intend to change the common law unless the intention to do so is clear, is limited to "established principles, policies or practices" of the common law.

> *Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324*, 2003 SCC 42 at para. 39, Book of Authorities of the Ad Hoc Committee, Tab 17

46. The principle upon which Ernst & Young relies simply does not have any

[8] See in this respect the factum of Ernst & Young at para. 50ff.

application to a situation such as the present. The prior case law was not "common law", but simply judicial decisions interpreting the CCAA in its previous form. When there is a body of law interpreting a statute, and then Parliament acts so as to amend the relevant provisions of that statute, it would be illogical to presume that, through its amendments, Parliament did not intend to make any changes to the statute in question. Indeed, if any presumption applies, it would be the opposite to what is advocated by the appellants.

> *Sullivan and Driedger on the Construction of Statutes,* 5th ed., p. 579-580, Book of Authorities of the Ad Hoc Committee, Tab 18

47. Moreover, the prior case law could not constitute "established principle, policy or practice", due to its very limited nature and its inconsistency, as is discussed above. And, in any event, the 2009 amendments and the words chosen by Parliament to effect them are so clear as to admit of no doubt that Parliament intended to subordinate claims for contribution and indemnity by third persons as equity claims, and thus to change pre-existing law, if such law had been to a different effect.

E. The Appellants' Policy Arguments Should Be Rejected

48. The appellants make various "policy" arguments with respect to why it would be desirable for their respective claims for contribution and indemnity not to be subordinated. For example, Ernst & Young argues that the policy reasons related to shareholders assuming greater risk in return for greater reward "would not be furthered by the characterization of Ernst & Young's claim as an equity claim".[9] Similar arguments are advanced by BDO[10] and by the

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[9] See Ernst & Young's factum at para. 42.

[10] See BDO Limited's factum at para. 71.

underwriters.[11]

49. Such policy decisions are properly the domain of Parliament, not the courts, and certainly cannot displace the clear words chosen by Parliament to express its legislative intention.

50. Further, the appellants' policy argument is wrongly focussed. The appellants are each sued because of their involvement or alleged involvement in transactions whereby shareholders purchased shares leading to their alleged losses – the underwriters by underwriting prospectus share offerings and the auditors for having their audit opinions attached (with their consent) to financial statements included in prospectus share offerings. Thus, the appellants' arguments miss the policy considerations that are discussed, among other places, in the American jurisprudence relating to the subordination of third party indemnity claims. For example, in *Re: Mid-American Waste Systems, Inc.*, the Delaware court considered indemnification claims that were asserted by underwriters who had been involved in the securities transactions that gave rise to the shareholders' proceedings. The court noted that American legislation (which is worded in a similar manner to the CCAA) reflected a policy decision in favour of subordinating all claims arising out of securities transactions. The court referred to the legislation and stated:

> [I]t simply added to the subordination treatment new classes of persons and entities involved with the securities transactions giving rise to the rescission and damage claims. . . . Congress intended the holders of securities law claims to be subordinated, why not also subordinate claims of other parties (e.g., officers and directors and underwriters) who play a role in the purchase and sale transactions which give rise to the securities law claims?

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[11] See the Underwriters' factum at para. 57.

Re: Mid-American Waste Systems, Inc. (1999), 228 B.R. 816 at 826 (U.S. Bankruptcy Court for the District of Delaware), Book of Authorities of the Ad Hoc Committee, Tab 19

51. And similarly:

> As I view it, in 1984 Congress made a legislative judgment that claims emanating from tainted securities law transactions should not have the same priority as the claims of general creditors of the estate.

Re: Mid-American Waste Systems, Inc. (1999), 228 B.R. 816 at 826 (U.S. Bankruptcy Court for the District of Delaware), Book of Authorities of the Ad Hoc Committee, Tab 19

52. The same point was made in *Re: Jacom Computer Services Inc. and Unicapital Corporation*:

> The inclusion of reimbursement and contribution claims to those subordinated . . . is simply the addition of "new classes of persons and entities involved with the securities transactions giving rise to the rescission and damage claims."

Re Jacom Computer Services Inc. and Unicapital Corporation (2002), 280 B.R. 570 at 572 (U.S. Bankruptcy Court for the Southern District of New York), Book of Authorities of the Ad Hoc Committee, Tab 20

53. This policy consideration is entirely consistent with the words actually used by Parliament in the definition of "equity claims". Thus, contrary to the appellants' arguments, the CCAA amendments reflect a policy choice made by Parliament that is similar to that made in the United States, namely, that all claims related to allegedly "tainted securities transaction" should be subordinated, regardless of the identity of the claimant or the precise legal characterization of the claim.

54. Ernst & Young and BDO argue that the American cases have only dealt with claims for contribution and indemnity brought by underwriters and have not dealt with such

claims brought by auditors, and suggest a policy or principled distinction. However, this is not correct. There is no principled basis to distinguish such claims brought by auditors from those brought by underwriters, particularly where, as here, the auditors are expressly alleged to have consented to the use of their audited financial statements in prospectuses used to sell Sino-Forest shares, and where the shareholders thus allege that the auditors' opinions played a role in the securities transactions alleged to be tainted.

See e.g. the factum of BDO Limited, paras. 20-21

F. The Appellants' Arguments Relating to Legislative History Should Be Rejected

55. Finally, the appellants argue that an examination of certain legislative history reveals that Parliament did not intend to subordinate claims for contribution and indemnity brought by third parties. The appellants' argument does not withstand scrutiny.

56. The appellants refer to a Report of the Standing Senate Committee on Banking, Trade and Commerce, from November 2003. However, that report says nothing one way or the other expressly about the priority of third party claims for contribution and indemnity. Accordingly, it does not suggest that Parliament's intention was to do what the appellants suggest, when it specifically legislated about claims for contribution and indemnity.

57. The report does, however, indicate two things: first, that the Committee was of the view that Canadian law needed to be changed (not that existing law needed to be codified); and second, that it was of the view that Canadian law of subordination of equity claims should be harmonized with that of the United States. The report states:

> Insolvency legislation in the United States has created the concept of "subordination of equity claims". . . . In American legislation, such claims are

> subordinated to the claims of traditional suppliers. Canadian insolvency does not subordinate shareholder or equity damage claims. It is thought that this treatment has led some Canadian companies to reorganize in the United States rather than in Canada.
>
> Debtors and Creditors Sharing the Burden, A Review of the *Bankruptcy and Insolvency* Act and the *Companies' Creditors Arrangement Act*, Report of the Standing Senate Committee on Banking, Trade and Commerce, November 2003, Section S, Ad Hoc Committee's Book of Authorities, Tab 21
>
> And, on this point, see Janis Sarra, "From Subordination to Parity: An International Comparison of Equity Securities Law Claims in Insolvency Proceedings", Int. Insolv. Rev., Vol. 16:181-246 (2007) at p. 209, Ad Hoc Committee's Book of Authorities, Tab 22

58. As discussed above, at that time, settled U.S. law was that third party claims for contribution and indemnity for damages payable in connection with shareholder losses were subordinated to the claims of other creditors. Thus, to the extent that the report is of assistance in interpreting the definition of "equity claims", it points towards the same broad, expansive definition as is indicated by the words of the definition itself and the Parliamentary intention evident therefrom.

G. The Equity Claims Order Was Not Premature

59. The submissions of the appellants reveal that the determination of whether their claims are equity claims turns on the application of the statutory provision to the claims that they have asserted. The appellants have pointed to nothing which suggests the need for any additional information that they did not have an opportunity to put before the CCAA judge. Accordingly, the CCAA judge's discretion to determine the issue on Sino-Forest's motion should not be interfered with. The Ad Hoc Committee relies on the submissions made by Sino-Forest on this issue.

IV. ORDER REQUESTED

60. For all of the foregoing reasons, it is respectfully requested that the within appeals be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of November, 2012.

Benjamin Zarnett

Robert Chadwick

Julie Rosenthal

Brendan O'Neill

Lawyers for the Ad Hoc Committee of Noteholders

CERTIFICATE

Counsel for the Respondents, the Ad Hoc Committee of Noteholders, hereby certifies that:

(a) an order under subrule 61.09(2) of the *Rules of Civil Procedure* is not required, and

(b) 2 hours will be required for the oral argument of the respondents (including Sino-Forest, the Ad Hoc Committee of Noteholders and the Monitor).

Dated: November 6, 2012

Benjamin Zarnett

Goodmans LLP

Counsel for the Ad Hoc Committee of Noteholders

SCHEDULE "A" - LIST OF AUTHORITIES

1. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, s. 2(1), s. 6, as amended
2. *Interpretation Act*, R.S.C. 1985, c. I-21, s. 12
3. *Negligence Act*, R.S.O. 1990, c. N.1, s. 1 and 2
4. *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42
5. *CanadianOxy Chemicals Ltd. v. Canada (Attorney General),* [1998] S.C.J. No. 87
6. *Markevich v. Canada*, 2003 SCC 9
7. *National Bank of Greece (Canada) v. Katsikonouris*, [1990] S.C.J. No. 95
8. *Re: Nelson Financial Group Ltd.*, 2010 ONSC 6229
9. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60
10. *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587
11. *Re EarthFirst Canada Inc.*, 2009 CarswellAlta 1069 (Q.B.)
12. *R. v. Proulx*, 2000 SCC 5
13. *Winters v. Legal Services Society*, [1999] S.C.J. No. 49
14. *National Bank of Canada v. Merit Energy Ltd.*, 2001 ABQB 583; aff'd 2002 ABCA 5
15. *Re Blue Range Resource Corp.*, 2000 ABQB 4
16. *ROI Fund Inc. v. Gandi Innovations Ltd.*, 2011 ONSC 5018; leave to appeal denied 2012 ONCA 10
17. *Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324*, 2003 SCC 42
18. *Sullivan and Driedger on the Construction of Statutes*, 5th ed., p. 579-580
19. *Re: Mid-American Waste Systems, Inc.* (1999), 228 B.R. 816 (U.S. Bankruptcy Court for the District of Delaware)

20. *Re: Jacom Computer Services Inc. and Unicapital Corporation* (2002), 280 B.R. 570 (U.S. Bankruptcy Court for the Southern District of New York)

21. Debtors and Creditors Sharing the Burden, A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act, Report of the Standing Senate Committee on Banking, Trade and Commerce, November 2003, Section S

22. Janis Sarra, "From Subordination to Parity: An International Comparison of Equity Securities Law Claims in Insolvency Proceedings", Int. Insolv. Rev., Vol. 16:181-246 (2007) at p. 209

SCHEDULE "B" - LEGISLATION

1. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, Sections 2(1), 6(1) and 6(8)

Section 2. (1) Definitions

...

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

...

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

(a) a dividend or similar payment,

(b) a return of capital,

(c) a redemption or retraction obligation,

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

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

"equity interest" means

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

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

...

Section 6 – Compromises to be sanctioned by court

6. (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

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

...

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

2. *Interpretation Act*, R.S.C. 1985, c. I-21, s. 12

12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

3. *Negligence Act*, R.S.O. 1990, c. N.1, s. 1 and 2

1. Where damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent, and, where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each is liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.

2. A tortfeasor may recover contribution or indemnity from any other tortfeasor who is, or would if sued have been, liable in respect of the damage to any person suffering damage as a result of a tort by settling with the person suffering such damage, and thereafter commencing or continuing action against such other tortfeasor, in which event the tortfeasor settling the damage shall satisfy the court that the amount of the settlement was reasonable, and in the event that the court finds the amount of the settlement was excessive it may fix the amount at which the claim should have been settled.

4. *U.S. Bankruptcy Code*, 11 USCS § 510(b) and § 502(e)(1)(B) and § 502(e)(2)

§ 510. Subordination

...

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

§ 502. Allowance of claims or interests

...

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

...

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

...

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

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

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 Nos. C56115, C56118, C56125
Court File No. CV-12-9667-00CL

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

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