

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

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

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

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COURT OF APPEAL OF 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**

Applicant

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

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PART I - THE FACTS

Overview

1. The Ad Hoc Committee of Purchasers of the Applicant's Securities (the "Class Action Plaintiffs") oppose the various administrative relief sought by the moving parties (the "Kim Orr Objectors").

2. The Kim Orr Objectors seek a variety of relief pertaining to their motions for leave to appeal the order sanctioning the plan of compromise and arrangement (the "Plan" and the "Sanction Order") under the *Companies Creditors' Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") of Sino-Forest Corporation ("Sino-Forest"), and for leave to appeal the orders approving the Ernst & Young Settlement and dismissing the objections of the Kim Orr Objectors (the "Settlement Approval and Dismissal Orders").

The Class Action Plaintiffs oppose the following relief:

- (a) leave to act as the representative party for the purposes of the appeal of the Ernst & Young Settlement;
- (b) consolidation of the motion for leave to appeal the Settlement Approval and Dismissal Orders with leave to appeal the Sanction Order, and consolidation of all related appeals;
- (c) hearing the motions for leave to appeal together with the appeals;
- (d) transfer of the motion materials before Justice Morawetz with respect to the Sanction Order to the Court of Appeal for the appeal of the Settlement Approval and Dismissal Orders; and
- (e) validation of late service.

3. The proposed relief of the Kim Orr Objectors will achieve no useful purpose and should not be granted for the following reasons:

(a) The Kim Orr Objectors should not be granted leave to act as the representative party for the purposes of the appeal of the Settlement Approval and Dismissal Orders. To the contrary, they have consistently demonstrated their unsuitability to represent the class:

- (i) Kim Orr LLP (“Kim Orr”), who represent the Kim Orr Objectors, was denied carriage of the Sino-Forest class action and was ranked last of the 3 groups competing for carriage;
- (ii) The Kim Orr Objectors have acquiesced to have their interests represented by Koskie Minsky LLP and Siskinds LLP (“Class Counsel”) throughout Sino-Forest’s insolvency proceeding;
- (iii) No proof of claim was filed by the Kim Orr Objectors in Sino-Forest’s insolvency;
- (iv) The Kim Orr Objectors did not seek to participate in the court-ordered mediation in September, 2012;
- (v) Neither Kim Orr nor the Kim Orr Objectors ever sought any information from Class Counsel as to the Ontario Action or Sino-Forest’s insolvency proceeding, or took any steps in the insolvency proceeding to protect their interests or the interests of the other class members; and
- (vi) The Kim Orr Objectors are a small fraction of the class. They are the only class members who seek to set the settlement agreement aside. To the contrary, over 99% of the class expressly supported or did not oppose the settlement.

(b) The motion for leave to appeal the Settlement Approval and Dismissal Orders and the motion to appeal the Sanction Order and all related appeals should not be consolidated. The motion for leave to appeal the Sanction Order has already proceeded in the ordinary course. These motions raise distinct issues, and consolidation would cause needless delay.

(c) The motion for leave to appeal should not be heard together with the appeal, since this would defeat the purpose of the statute and ordinary practice requiring leave to be heard first, thereby saving expense and judicial resources if leave is denied. The Kim Orr Objectors have not identified any reason to depart from the standard practice. The Kim Orr Objectors have not identified any prejudice if the motions for leave to appeal are heard before the appeals, consistent with standard practice.

(d) The motion records before Justice Morawetz on sanctioning the Plan do not need to be transferred to the Court of Appeal for the motion for leave to appeal the Settlement Approval and Dismissal Orders and related appeals since this motion record is unnecessary for these motions.

(e) Late service should not be validated. The Kim Orr Objectors have served their Notice of Motion late, have not perfected their motion for leave to

appeal on time, and their appeal of the Settlement and Dismissal Orders is statute-barred. This demonstrates a consistent pattern of late service. The Kim Orr Objectors have not demonstrated any reason why their late service should be validated.

4. For these reasons, the various administrative relief sought by the moving parties should be refused.

Sino-Forest's Decline

5. Sino-Forest was an integrated forest plantation operator and forest products company, with most of its assets and the majority of its business operations in the People's Republic of China.¹

6. On June 2, 2011, allegations of fraud arose against Sino-Forest. On July 20, 2011, the Class Action Plaintiffs commenced the above-captioned class proceeding (the "Ontario Action") against Sino-Forest and various other defendants.²

7. Two other class proceedings relating to Sino-Forest were subsequently commenced in Ontario: *Smith et al. v. Sino-Forest Corporation et al.* and *Northwest and Ethical Investments L.P. et al. v. Sino-Forest Corporation et al.* (the "Northwest Action"). Kim Orr LLP ("Kim Orr") acted for the plaintiffs in the *Northwest Action*.³

8. In December 2011, there was a carriage motion to determine which of the three Ontario actions should be permitted to proceed and which should be stayed. On January

¹ Reasons of Morawetz J. dated December 12, 2012 at paras 13 and 14, Motion Record of the Kim Orr Objectors, Tab 2(J), pp 242 – 243.

² Reasons of Morawetz J. dated March 20, 2013 at para 9, Motion Record of the Kim Orr Objectors, Tab 2(S), p 335.

³ Reasons of Morawetz J. dated March 20, 2013 at para 10, Motion Record of the Kim Orr Objectors, Tab 2(S), p 336.

6, 2012, Perell J. appointed Siskinds LLP and Koskie Minsky LLP to prosecute the Ontario class action, and stayed the other class proceedings. Justice Perell ranked Kim Orr's case as being last of the 3 groups competing for carriage.⁴

The Pöyry (Beijing) Settlement

9. Prior to Sino-Forest's insolvency, the Class Action Plaintiffs reached a settlement with Pöyry (Beijing) Consulting Company Limited ("Pöyry") (the "Pöyry Settlement"), a forestry valuator that provided services to Sino-Forest.⁵

10. Perell J. (in Ontario) and Émond J. (in Québec) approved the Pöyry Settlement. As part of this motion, the Courts set an opt-out deadline in respect of the whole action. January 15, 2013 was fixed as the date by which members of the Pöyry Settlement Class who wished to opt out of the action would have to file an opt-out form for the claims administrator.⁶

Sino-Forest's Insolvency

11. On March 30, 2012, Sino-Forest was granted protection from its creditors under the *CCAA* (the "Insolvency Proceeding"), and thereby secured an interim stay of proceedings against the company.⁷

⁴ Reasons of Morawetz J. dated March 20, 2013 at para 11, Motion Record of the Kim Orr Objectors, Tab 2(S), p 336.

⁵ Reasons of Morawetz J. dated March 20, 2013 at para 17, Motion Record of the Kim Orr Objectors, Tab 2(S), p 337.

⁶ Reasons of Morawetz J. dated March 20, 2013 at para 19, Motion Record of the Kim Orr Objectors, Tab 2(S), p 337.

⁷ Reasons of Morawetz J. dated March 20, 2013 at para 12, Motion Record of the Kim Orr Objectors, Tab 2(S), p 336.

12. On May 14, 2012, the court granted a claims procedure order. This order provided that all persons with claims against Sino-Forest, directors and officers or subsidiaries were to file proofs of claim with the court-appointed monitor on or before June 20, 2012, failing which their claims would be barred permanently.⁸

13. None of the Kim Orr Objectors filed a proof of claim. To the contrary, the Class Action Plaintiffs did file a proof of claim in the representative capacity in respect of the whole class, which included the Kim Orr Objectors' claims.⁹

14. In September 2012, the Class Action Plaintiffs participated in a court-ordered mediation with the defendants to the Ontario Action and their insurers. The Kim Orr Objectors did not seek to appear at the mediation. Moreover, in advance of the mediation, a confidential data room was established by court order. The Kim Orr Objectors did not seek access to the documents in the data room. Class Counsel relied on the contents of the data room for the mediation.

15. On November 29, 2012, the Class Action Plaintiffs and Ernst & Young entered into a settlement for \$117 million, subject to several conditions, including court approval in the CCAA proceeding.¹⁰ In addition, compromises of class action claims and a

⁸ Reasons of Morawetz J. dated March 20, 2013 at para 15, Motion Record of the Kim Orr Objectors, Tab 2(S), p 336.

⁹ Reasons of Morawetz J. dated March 20, 2013 at para 35, Motion Record of the Kim Orr Objectors, Tab 2(S), p 339.

¹⁰ Minutes of Settlement dated November 29, 2012, Motion Record of the Kim Orr Objectors, Tab 2(G), p 223.

framework for settlements were incorporated into the Plan in exchange for the support of the Plan by third party defendants and in particular, Ernst & Young, BDO Limited and a group of eleven former underwriters for Sino-Forest.¹¹

The CCAA Plan

16. A final version of the Plan was circulated on December 3, 2012.¹² The final amendments to the Plan included a framework for the Ernst & Young Settlement and a framework for potential future settlements with other defendants.

17. The December 3 version of the Plan was approved by an overwhelming majority of affected creditors. In total, 98.81% of creditors by the number of creditors, and 99.97% of creditors by the value of their claims voted in favour of the Plan.¹³

18. The Kim Orr Objectors were the sole objectors to the Plan.¹⁴

Sanction of the Plan

19. Justice Morawetz issued the Plan Sanction Order on December 10, 2012, with reasons following on December 12, 2012. The Sanction Order provided that the Plan and all of its terms and conditions were fair and reasonable.¹⁵

¹¹ Reasons of Morawetz J. dated December 10, 2012 at para 24, Motion Record of the Kim Orr Objectors, Tab 2(H), p 237.

¹² Reasons of Morawetz J. dated December 12, 2012 at para 38, Motion Record of the Kim Orr Objectors, Tab 2(J), p 246.

¹³ Reasons of Morawetz J. dated December 12, 2012 at paras 10 and 46, Motion Record of the Kim Orr Objectors, Tab 2(J), p 242.

¹⁴ Reasons of Morawetz J. dated December 12, 2012 at paras 3 and 4, Motion Record of the Kim Orr Objectors, Tab 2(J), p 241.

¹⁵ Order of Morawetz J. dated December 10, 2012, Motion Record of the Kim Orr Objectors, Tab 2(A), p 18.

20. Justice Morawetz commented on the Ernst & Young Settlement and noted that it did not form part of the Sanction Order. His Honour distinguished between (a) approval of a framework for the Ernst & Young Settlement; and (b) approval of the settlement itself. Justice Morawetz noted that the Plan contained provisions that “provide a framework pursuant to which a release of the Ernst & Young claims under the Plan will be effective if several conditions are met.” One of those conditions was further court approval of the settlement. Accordingly, Justice Morawetz noted that any issues relating to the Ernst & Young Settlement, “including fairness, continuing discovery rights ..., or opt out rights” would be dealt with at a further court-approval hearing.¹⁶

Appeal of the Plan Sanction Order

21. The Sanction Order was issued on December 10, 2012. On December 27, 2012, the Kim Orr Objectors served a notice of motion for leave to appeal the Sanction Order. This was served late – the Kim Orr Objectors were required to serve this notice of motion within 15 days of the Sanction Order.

22. The Kim Orr Objectors served a revised notice of appeal on December 31, 2012.

23. On January 15, 2013, the last day of the opt-out period established by the orders of Perell J. and Émond J., the Kim Orr Objectors filed conditional opt-out forms.¹⁷

¹⁶ Reasons of Morawetz J. dated December 12, 2012 at paras 47-49, Motion Record of the Kim Orr Objectors, Tab 2(J), p 248.

¹⁷ Reasons of Morawetz J. dated March 20, 2013 at para 32, Motion Record of the Kim Orr Objectors, Tab 2(S), p 339.

24. According to their opt-out forms, on the day the Muddy Waters report was released, the Kim Orr Objectors held approximately 1.6% of the Sino-Forest shares outstanding on June 30, 2011.¹⁸

25. On January 29, 2013, more than 7 weeks after the Sanctions Order was issued, the Kim Orr Objectors perfected their motion for leave to appeal the Sanction Order.¹⁹ This too was perfected late.

26. The motion for leave to appeal the Sanction Order proceeded in the ordinary course in writing. Extensive responding facta have since been filed by many of the parties to the motion for leave to appeal the Sanction Order. As of the date of this factum, no decision has been rendered by the Court of Appeal on this motion.

Approval of the Ernst & Young Settlement Agreement

27. On February 4, 2013, Justice Morawetz heard the motion to approve the Ernst & Young Settlement. The Kim Orr Objectors made extensive oral and written submissions at the approval hearing.

28. The Ernst & Young Settlement was approved by Justice Morawetz on March 20, 2013. His Honour rejected the objections of the Kim Orr Objectors. Furthermore, he dismissed the Kim Orr Objectors' motion for representative status.

¹⁸ Reasons of Morawetz J. dated March 20, 2013 at para 33, Motion Record of the Kim Orr Objectors, Tab 2(S), p 339.

¹⁹ Factum of the Appellants, Invesco Canada Ltd., Norwest & Ethical Investments L.P. and Comité Syndical National de Retraite Bâtirent Inc., January 29, 2013, Motion Record of the Kim Orr Objectors, Tab 2(L), p 258.

29. The Kim Orr Objectors' motion opposing the Ernst & Young Settlement was dismissed.²⁰

30. Justice Morawetz held that the Ernst & Young Settlement was fair and reasonable in all the circumstances. The Ernst & Young Settlement provided a substantial benefit to relevant stakeholders, was consistent with the purpose of the CCAA, and that the claims released against Ernst & Young were rationally related to the purpose of the plan and necessary for it.²¹

31. Justice Morawetz rejected the argument that approval of the Ernst & Young settlement would "render [the Kim Orr Objectors'] opt-out rights illusory". His Honour held that the claims arising out of the class proceeding were claims in the CCAA process, which were, by definition, subject to compromise. Since the claims against Ernst & Young fell within the ambit of the Claims Procedure Order, they could also be the subject of settlement.²²

Appeal of the Ernst & Young Settlement

32. The Kim Orr Objectors served their Notice of Motion for the appeals of the Settlement Approval and Dismissal Orders on April 9, 2013. This was late service. The CCAA and the *Rules of Civil Procedure* require a Notice of Motion for leave to appeal to

²⁰ Order of Justice Morawetz dated March 20, 2013, Motion Record of the Kim Orr Objectors, Tab 2(C), p 150.

²¹ Reasons of Morawetz J. dated March 20, 2013 at para 61, Motion Record of the Kim Orr Objectors, Tab 2(S), p 345.

²² Reasons of Morawetz J. dated March 20, 2013 at paras 40 – 41, Motion Record of the Kim Orr Objectors, Tab 2(S), p 340.

be served within 15 days.²³ The Kim Orr Objectors served their notice of motion for leave 20 days after the settlement was approved. On April 17, 2013, the Kim Orr Objectors served their Amended Notice of Motion for Leave to Appeal the Settlement Approval and Dismissal Orders.²⁴

33. On April 17, 2013, the Kim Orr Objectors served their Notice of Motion for Directions, seeking an array of relief concerning their pending motions.²⁵

34. On April 22, 2013, the Kim Orr Objectors served their motion record, factum, and book of authorities for their Motion for Directions.

PART II - ISSUES AND THE LAW

35. The Class Action Plaintiffs submit that the following relief sought by the Kim Orr Objectors should be refused:

- (a) Leave to act as the representative party for the purposes of this appeal;
- (b) Consolidation of the motion for leave to appeal and related appeals of the Sanction Order with the motions for leave to appeal the Settlement Approval and the Dismissal Orders and all related appeals;
- (c) Leave to hear the motions for leave to appeal the Sanction Order, the Settlement Approval and Dismissal Orders together with the appeals of these orders;

²³ *Rules of Civil Procedure*, Rule 61.03.1(1).

²⁴ Amended Notice of Motion for Leave to Appeal dated April 9, 2013, Motion Record of the Kim Orr Objectors. Tab 2(T), p 349.

²⁵ Notice of Motion (Motion for Directions), dated April 17, 2013, Motion Record of the Kim Orr Objectors. Tab 1, p 1.

(d) Transfer of the motion materials before Justice Morawetz with respect to the Sanction Order to the Court of Appeal for the leave to appeal and appeal of the Settlement Approval and Dismissal Orders; and

(e) Validation of late service.

A. THE KIM ORR OBJECTORS CANNOT ACT AS REPRESENTATIVE PARTY

36. The Kim Orr Objectors' motion for leave to act as the representative party for the purposes of this appeal should be dismissed.

37. The Kim Orr Objectors do not have a right to appeal the Ernst & Young Settlement, since they are individual class members, and not parties to the Ontario Action.

38. The participation of individual class members in a class proceeding is governed by section 14 of the *Class Proceedings Act, 1992*. However, this section "is not intended as an invitation for malcontents within the class to undermine the authority of the representative plaintiff..."²⁶

39. Section 30(3) of the *Class Proceedings Act, 1992* sets out the rights of appeal to the Court of Appeal in a class proceeding. These rights of appeal are only conferred to parties and not class members.²⁷ These rights also relate to a judgment on the common issues or under s 24, which have not been rendered in this case. The Kim Orr Objectors participated in the settlement approval proceedings as class members, not as parties.

²⁶ Michael G. Cochrane, *Class Actions A Guide to the Class Proceedings Act, 1992*, (Toronto: Canada Law Book Inc., 1993) at p. 76, Book of Authorities of the Class Action Plaintiffs ("Plaintiffs' Authorities"), Tab 1.

²⁷ *Class Proceedings Act, 1992* s. 30(3)

40. Section 30(5) permits class members in limited circumstances to move for leave to act as representative parties for the purposes of bringing an appeal under section 30(3).²⁸ The Kim Orr Objectors do not satisfy the test to act as a representative party for the purpose of appealing the Ernst & Young Settlement. In fact, the Kim Orr Objectors have consistently demonstrated that they cannot adequately represent the class.

41. The Court of Appeal in *Dabbs v. Sun Life Assurance Co.* set out the relevant test for granting leave under section 30(5). The court's discretion to grant leave "is guided by the best interests of the class and in particular by a consideration whether the class member applying would fairly and adequately represent the interests of the class."²⁹

42. In *Dabbs*, the class member's motion for leave to permit him to act as a representative party for the purposes of bringing his appeal was denied:

There is nothing in the record which indicates that Maclean would adequately represent the interests of this class by bringing an appeal which seeks to set aside the settlement agreement. Courts in three jurisdictions have approved the agreement. Maclean is the only class member of an estimated 400,000 who now seeks to set it aside. The wishes of one class member ought not to govern the interests of the entire class.³⁰

43. Likewise, there is nothing in the record that indicates that the Kim Orr Objectors would adequately represent the interests of this class by bringing an appeal seeking to set aside the Ernst & Young Settlement. To the contrary, the Kim Orr Objectors have consistently demonstrated that they are unfit to represent the class:

²⁸ *Class Proceedings Act, 1992* s. 30(5)

²⁹ *Dabbs v Sun Life Assurance Co.*, [1998] OJ No 3622 at para 19 (CA) [*Dabbs*], Plaintiffs' Authorities, Tab 2.

³⁰ *Dabbs* at para 19, Plaintiffs' Authorities, Tab 2.

- (a) Justice Perell denied carriage of the class action to Kim Orr and even ranked Kim Orr last of the 3 groups competing for carriage of the Sino-Forest class action;
- (b) The Kim Orr Objectors have elected to have their interests represented by Class Counsel throughout the Insolvency Proceeding;
- (c) No proof of claim was filed by Kim Orr, who represent the Kim Orr Objectors. The Class Action Plaintiffs filed a proof of claim on behalf of the whole class, including the Kim Orr Objectors;
- (d) The Kim Orr Objectors did not seek to participate in the court-ordered mediation in September, 2012;
- (e) Neither Kim Orr nor the Kim Orr Objectors ever sought any information from Class Counsel as to the Ontario Action or the Insolvency Proceeding, or took any steps in the Insolvency Proceeding to protect their own interests;
- (f) The Kim Orr Objectors, who represent only a small fraction of class members, are the only class members who seek to set the settlement agreement aside. According to their opt-out forms, the members of the Kim Orr Group collectively held 3,921,618 Sino shares on June 2, 2011, the day on which the initial Muddy Waters report on Sino-Forest was released. This constitutes approximately 1.6% of the approximately 246 million shares which Sino had outstanding on June 30, 2011 and Sino-Forest's financial statements for the three and six months ended June 30, 2011.

44. In contrast, Class Counsel has vigorously protected the interests of the Ontario Plaintiffs and the class. Class Counsel has:

- (a) Entered into tolling agreements with the defendants;
- (b) Brought a motion for certification of the Ontario action under the *Class Proceedings Act, 1992*;
- (c) Brought a motion for leave to proceed with statutory claims under Part XXIII.1 of the Ontario *Securities Act*;
- (d) Brought a motion requiring the defendants to deliver a statement of defence and to set a timetable for the hearing of the leave and certification motions;
- (e) Appeared numerous times in the Insolvency Proceeding, including motions: (1) to lift the CCAA stay partially or fully; (2) regarding the claims procedure; (3) to permit a motion to approve a litigation funding arrangement for this action; (4) for a representation order; (5) to effect the Pöyry settlement; (6) to secure access to non-public documents that were relevant to the claims advanced in Canadian actions; and (7) to schedule the mediation.

45. For these reasons, the Kim Orr Objectors' motion for leave to act as the representative party for the purposes of this appeal should be dismissed.

B. THE APPEALS SHOULD NOT BE CONSOLIDATED

46. Leave to consolidate the appeals of the Sanction, Settlement Approval, and the Representation Orders, and all related appeals should be refused.

47. The Kim Orr Objectors perfected their motion for leave to appeal the Sanction Order on January 29, 2013.³¹ This motion proceeded in the ordinary course in writing. Extensive facta have since been filed by many of the parties to this motion. It is not appropriate to consolidate that leave to appeal motion to which the parties have already responded with a new leave motion, and this court should not utilize its discretion to so order.

48. This Court should not use its discretion to consolidate the leave to appeal motions and related appeals. Rule 6.01(1) of the *Rules of Civil Procedure* confers a discretion on the court to order that proceedings be consolidated where (a) they have a question of law or fact in common; (b) the relief claimed in them arises out of the same transaction or occurrence or series of transactions or occurrences; or (c) for any other reason an order ought to be made under this rule.³²

49. The Kim Orr Objectors assert that the three orders of Justice Morawetz at issue share the following common issues:

³¹ Factum of the Appellants, January 29, 2013, Motion Record of the Kim Orr Objectors, Tab 2(L), p 258.

³² *Rules of Civil Procedure*, Rule 6.01(1).

- (a) under what circumstances are non-debtor third-party releases available in *CCAA* restructuring plans; and
- (b) is the E&Y settlement and release under Article 11 of the Plan integral to the success of the Plan and restructuring of Sino-Forest.³³

50. This is not accurate. The appeal of the Plan Sanction Order and the appeal of the Settlement Approval and Dismissal Orders raise distinct legal and factual issues.

51. Justice Morawetz correctly held that the Plan Sanction Order approved only a framework with respect to a proposed settlement of claims against third party defendants. The approval of the Ernst & Young Settlement was not before the court, no release was being provided Ernst & Young pursuant to the approval of the Plan, and the issue of the availability of releases was not decided.³⁴

52. Such issues were properly addressed in Justice Morawetz's decision to approve the Ernst & Young Settlement. The Kim Orr Objectors' appeal of the Ernst & Young Settlement properly concerns the fairness of the settlement and the scope of the releases, which is distinct from those issues raised in the appeal of the Sanction Order.

53. Conversely, the Kim Orr Objectors' appeal of the Plan Sanction Order directly concerns issues that do not fall within the scope of the appeal of the appeal of the Settlement Approval and Dismissal Orders:

- (a) whether it the Plan appropriately contains a framework for third party releases in the context of settlements;

³³ Factum of the Kim Orr Objectors, para 29.

³⁴ Reasons of Morawetz J. dated December 12, 2012 at paras 47- 49, Motion Record of the Kim Orr Objectors, Tab 2(J), p 248.

- (b) whether the Plan can be amended after it has already been implemented; and
- (c) whether only part of the Plan can be appealed and can be severed.

54. Although there is obvious commonality in the narrative involving the two appeals, that does not result in the necessary factual and legal considerations being of common application. To the extent that there are overlapping issues of fact or law between the three orders of Justice Morawetz at issue, these do not bear sufficient importance in relation to the other facts or issues in the proceedings to render the consolidation desirable.³⁵

55. Finally, granting the consolidation of the motion for leave to appeal and related appeal of the Sanction Order with the motions for leave to appeal the Settlement Approval and the Dismissal Orders would result in further delay to these already protracted proceedings.

C. LEAVE TO APPEAL SHOULD NOT BE HEARD AT SAME TIME AS THE APPEAL

56. The relief sought by the Kim Orr Objectors to hear the leave motions and the appeals at the same time should be dismissed. The Kim Orr Objectors cannot demonstrate any prejudice by following the ordinary course of hearing the leave motion before the appeal. Conversely, hearing the leave motion and the appeal together would unfairly prejudice the other parties to the Insolvency Proceeding.

³⁵ *Abegweit Potatoes Ltd v JB Read Marketing Inc*, [2003] PEIJ No 80 at para 23 (CA), Plaintiffs' Authorities, Tab 3.

57. In the ordinary course, appeals to the Court of Appeal that require leave are heard in writing, in advance of the appeal itself.³⁶ The purpose of holding the leave motion separately from the appeal is to avoid needless expense, delay, and overburdening limited court resources. In practice, virtually every leave motion is dealt with in writing.³⁷

58. The Kim Orr Objectors seek an exception to the usual practice and to the requirements under the *Rules of Civil Procedure*. An exception of this nature will only be made where the moving party has demonstrated that it will be substantially prejudiced if the order is not made, and that the other parties will not be unfairly prejudiced if the order is made.³⁸

59. The Kim Orr Objectors do not argue that they would be prejudiced if this relief was denied. They state that “the parties agree on the importance of expediting the appellate proceedings”, and addressing the issues of this appeal “would be useful before any Class Action settlements are negotiated.”³⁹ This does meet the standard of “substantial prejudice” set out by this court in *Air Canada (Re)*. Moreover, the Class Action Plaintiffs have consented to expediting the hearing of the leave motion and related appeals.

60. In contrast, ordering that the leave motion and the appeal be heard together would needlessly prejudice the Ontario Plaintiffs. By divorcing the leave to appeal

³⁶ *Rules of Civil Procedure*, Rule 61.03.1.

³⁷ *Air Canada (Re)*, [2003] OJ No 2207 at para 11 (CA), Plaintiffs’ Authorities, Tab 4.

³⁸ *Air Canada (Re)*, [2003] OJ No 2207 at para 15 (CA), Plaintiffs’ Authorities, Tab 4.

³⁹ Factum of the Kim Orr Objectors, para 35.

motion from the appeal itself, the decision to expend resources arguing the appeal can be made with full knowledge of whether the appeal will actually be heard. Preparing for an appeal of this nature would take considerable time and expense, and the parties should not be put to this preparation needlessly, especially given the history of Kim Orr's approach in this matter.

D. MOTION MATERIAL SHOULD NOT BE TRANSFERRED

61. The relief sought by the Kim Orr Objectors to transfer the motion record before Justice Morawetz with respect to the Sanction Order to the Court of Appeal for the purposes of the leave to appeal the Settlement Approval and Dismissal Orders should be dismissed.

62. Given that the appeals from the Settlement Approval and Dismissal Orders do not arise or relate to the Sanction Order, the motion record on which Justice Morawetz relied to sanction the Plan is not necessary for the current leave motion.

E. LATE SERVICE SHOULD NOT BE VALIDATED

63. The Kim Orr Objectors' motion to validate the untimely service of the Notice of Motion for leave to appeal the Settlement Approval and Dismissal Orders and the untimely perfection of the appeal should be dismissed.

64. The Kim Orr Objectors failed to serve their Notice of Appeal in time, and they failed to perfect the appeal in time. Their motion for leave to appeal is statute-barred, and the Kim Orr Objectors have not demonstrated any compelling reason why service of their Notice of Motion or failure to perfect in time should be validated.

65. The appeals of the Settlement Approval Order and the Representation Order are regulated as far as possible according to the practice of the Court of Appeal for Ontario.⁴⁰ Appeals to this court requiring leave require that the notice of motion for leave to appeal must be served within 15 days after the making of the order or decision from which leave to appeal is sought.⁴¹

66. Accordingly, the Kim Orr Objectors were required to serve their notice of motion seeking leave to appeal the Settlement and Dismissal Orders 15 days after the Ernst & Young Settlement was approved.⁴² The Kim Orr Objectors did not do so. The Ernst & Young Settlement was approved on March 20, 2013. The Notice of Motion seeking leave to appeal the Settlement and Dismissal Orders was not served until April 9, 2013, 20 days after the Ernst & Young Settlement decision was rendered.

67. Likewise, the Kim Orr Objectors were required to perfect their motion for leave to appeal within 21 days after the rendering of the decision approving the Ernst & Young Settlement.⁴³ The Kim Orr Objectors have not yet perfected their motion for leave to appeal.

68. The relevant factors to whether the time to serve the Notice of Motion and to perfect the motion for leave to appeal should be extended in this motion are:

- (a) whether the appellant formed an intention to appeal within the relevant period;

⁴⁰ *CCAA*, s. 14(2).

⁴¹ *Rules of Civil Procedure*, Rule 61.03.1(3)(a).

⁴² *CCAA*, s. 14; *Rules of Civil Procedure Rule*, 61.03.1(3)(a).

⁴³ *CCAA*, s. 14(2).

- (b) the explanation for the delay;
- (c) any prejudice to the respondent;
- (d) the merits of the appeal; and
- (e) whether the "justice of the case" requires it.⁴⁴

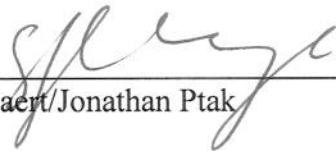
69. In this case, there is no evidence that the Kim Orr Objectors formed an intent to appeal the Settlement Approval and Dismissal Orders during the required time period. They have also not offered any explanation for their delay in serving the Notice of Motion or in perfecting the appeal. This is especially troublesome given the history of this matter.

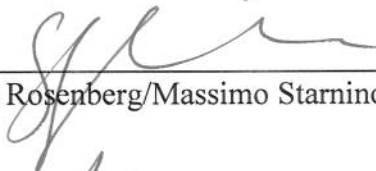
70. The 'justice of the case' requires that the time to serve the Notice of Motion and to perfect the appeal should not be extended. Kim Orr is experienced counsel who should be well aware of filing requirements under the *Rules of Civil Procedure*. Late filing and late perfection in these circumstances merely demonstrates a disregard for the rules of this Court and a lack of diligence that should not be rewarded.


71. For all of the above reasons, the requested relief should be refused.

⁴⁴ *Monteith v Monteith*, [2010] OJ No 346 (CA), Plaintiffs' Authorities, Tab 5.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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for: 
Ken Rosenberg/Massimo Starnino

for: 
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SCHEDULE “A” - LIST OF AUTHORITIES

1. Michael G. Cochrane, *Class Actions A Guide to the Class Proceedings Act, 1992*, (Toronto: Canada Law Book Inc., 1993)
2. *Dabbs v Sun Life Assurance Co*, [1998] OJ No 3622 (CA)
3. *Abegweit Potatoes Ltd v JB Read Marketing Inc*, [2003] PEIJ No 80 (CA)
4. *Air Canada (Re)*, [2003] OJ No 2207 (CA)
5. *Monteith v Monteith*, [2010] OJ No 346 (CA)

SCHEDULE "B" - RELEVANT STATUTES

Courts of Justice Act, RRO 1990, Reg. 194

6.01 (1) Where two or more proceedings are pending in the court and it appears to the court that,

- (a) they have a question of law or fact in common;
- (b) the relief claimed in them arises out of the same transaction or occurrence or series of transactions or occurrences; or
- (c) for any other reason an order ought to be made under this rule,
the court may order that,
 - (d) the proceedings be consolidated, or heard at the same time or one immediately after the other; or
 - (e) any of the proceedings be,
 - (i) stayed until after the determination of any other of them, or
 - (ii) asserted by way of counterclaim in any other of them.

61.03.1 (1) Where an appeal to the Court of Appeal requires the leave of that court, the motion for leave shall be heard in writing, without the attendance of parties or lawyers.

...

(3) The notice of motion,

- (a) shall be served within 15 days after the making of the order or decision from which leave to appeal is sought, unless a statute provides otherwise;

Class Proceedings Act, 1992, SO 1992, c. 6

14. (1) In order to ensure the fair and adequate representation of the interests of the class or any subclass or for any other appropriate reason, the court may, at any time in a class proceeding, permit one or more class members to participate in the proceeding.

...

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.

(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).

Companies' Creditors Arrangement Act, RSC, 1985, c C-36

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, RSC 1985,
c C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF SINO-FOREST CORPORATION**

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

**FACTUM OF THE CLASS ACTION PLAINTIFFS
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