

*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

Applicant

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

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**FACTUM OF THE RESPONDENT,  
FTI CONSULTING CANADA INC.,  
in its capacity as Monitor**

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November 6, 2012

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**COURT OF APPEAL OF ONTARIO**

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R.S.C. 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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**FACTUM OF THE RESPONDENT,  
FTI CONSULTING CANADA INC.**

**PART I - OVERVIEW**

1. This responding factum is submitted by FTI Consulting Canada Inc. in its capacity as monitor (the “**Monitor**”) appointed in connection with the *Companies’ Creditors Arrangement Act* (“**CCAA**”) proceedings involving Sino Forest Corporation (“**SFC**” or the “**Company**”), in response to the appeals of the Underwriters, BDO Limited and Ernst & Young from the Order of Morawetz, J. dated July 27, 2012 (the “**Equity Claims Order**”).

2. In accordance with its role under the various orders issued in SFC’s CCAA proceedings, including the order of Morawetz, J. dated May 4, 2012 (the “**Claims Order**”), the Monitor participated in the motion giving rise to the Equity Claims Order and is participating in this appeal in order to clarify an important threshold question arising in relation to the Claims Order: namely, do the indemnity claims of the Appellants constitute “equity claims” as defined pursuant to s. 2 of the CCAA, with the attendant consequences under that statute?

3. The CCAA proceedings have been continuing for over seven (7) months. The Monitor is of the view that it is essential for SFC to move forward with its restructuring expeditiously and that the determination of this legal issue will provide SFC, the Monitor and other stakeholders with important guidance as to the classification of these claims. The Monitor does not believe that the determination of this issue by this Honourable Court interferes or conflicts with the Claims Order and the role of the Monitor, a claims officer or a Court under the Claims Order or otherwise.

4. The Monitor is a court-appointed officer and is entitled to come to a view with respect to legal issues related to a debtor's proceedings. It is the Monitor's view that Morawetz, J. did not err in making the Equity Claims Order and the Monitor respectfully submits that the appeals herein should be dismissed.

## **PART II – THE FACTS**

5. The Monitor adopts the facts summarized in paragraphs 1 through 22 of the endorsement of Morawetz, J. released on July 27, 2012 (the "**Equity Claims Reasons**"). To the extent of any conflict between the facts as summarized in the Equity Claims Reasons and the facts stated on behalf of the Appellants, the Monitor disagrees with the facts set out in the Appellants' facts.

## **PART III – MONITOR'S POSITION RE: APPELLANTS' ISSUES**

6. Contrary to the submissions of the Appellants in their facts, it is the Monitor's view that Morawetz, J. did not err when he concluded that:

(a) the claims by or on behalf of current or former shareholders asserted in the class proceedings against SFC and others (the "**Shareholder Claims**") are "equity claims"; and,

(b) the indemnity claims of the Appellants related to or arising from these Shareholder Claims are also "equity claims", except to the limited extent that the claims are for defence costs.



7. In particular, it is the Monitor's view that the plain and ordinary meaning of the definition of equity claim found in s. 2 of the CCAA, and in particular sub paragraph (e) of the definition, encompasses the indemnity claims asserted by the Appellants. The "equity claims" definition is focused on the nature of the underlying claims not the party asserting the claim. The position put forward by the Appellants would amount to "reading in" the requirement that the contribution or indemnity claims referenced in the definition must be made by the owner or holder of an equity interest.

8. The Monitor is also of the view that the reasoning of the Court in *Return on Innovation Capital Ltd. v. Gandi Innovations Ltd.* is to be preferred to that set out in *National Bank of Canada v. Merit Energy Ltd.*, as being more consistent with the principle of subordinating claims arising on behalf of persons having dealings with equity interests, including parties like the Appellants. Further, the inclusion of the Appellants' indemnity claims within the definition of equity claims ensures that shareholder claims will not be indirectly prioritized through such indemnity claims.

9. Overall, the Monitor is of the view that the specific wording of sub-paragraph (e) of the "equity claim" definition, which refers to indemnity or contribution claims **in respect** of other equity claims, suggests a broad category of claims, going beyond claims that can be asserted by the holders of equity interests themselves.

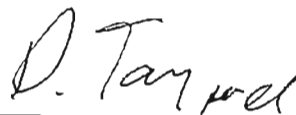
**PART IV - ISSUES**

10. The Monitor has no additional issues to raise in relation to these appeals.

**PART V – ORDER REQUESTED**

11. It is the Monitor's view that these appeals should be dismissed.

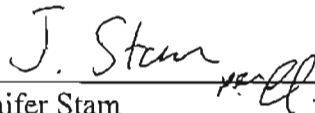
ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of November, 2012.



\_\_\_\_\_  
Derrick Tay



\_\_\_\_\_  
Clifton Prophet



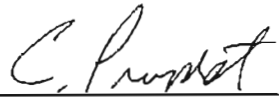
\_\_\_\_\_  
Jennifer Stam

Of Counsel to the Monitor

**CERTIFICATE**

I, CLIFTON PROPHET, solicitor for the Respondent, FTI Consulting Canada Inc, in its capacity as Monitor, certify that:

- (i) an Order under subrule 61.09(2) (original record and exhibits) is not required, and
- (ii) it will require 5 minutes for the Respondent's oral argument.

  
\_\_\_\_\_  
Clifton Prophet

**SCHEDULE A**

N/A

**SCHEDULE B**

N/A

Court of Appeal File C56115 / Court File No.: CV-12-9667-00CL

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**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
(Commercial List)

(PROCEEDING COMMENCED AT TORONTO)

**FACTUM OF THE RESPONDENT, FTI CONSULTING  
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