Court of Appeal File No. C56115

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 PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

Credit Suisse Securities (Canada) Inc., TD Securities Inc., Dundee Securities Corporation (now known as DWM Securities Inc.), RBC Dominion Securities Inc., Scotia Capital Inc., CIBC World Markets Inc., Merrill Lynch Canada Inc., Canaccord Financial Ltd. (now known as Canaccord Genuity Corp.), Maison Placements Canada Inc., Credit Suisse Securities (USA) LLC and Merrill Lynch, Pierce, Fenner & Smith Incorporated, successor by merger to Banc of America Securities LLC

Appellants on Appeal

- and -

Sino-Forest Corporation

Respondent on Appeal

FACTUM OF THE APPELLANTS, THE UNDERWRITERS

TORYS LLP
79 Wellington Street West
Suite 3000, TD Centre
Toronto, Ontario
M5K 1N2 Canada

Fax: 416.865.7380

Sheila Block (LSUC#: 14089N)
Tel: 416.865.7319
Email: sblack@torys.com

David Bish (LSUC#: 41629A)
Tel: 416.865.7353
Email: dbish@torys.com

Lawyers for the Underwriters (Appellants)

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FACTUM OF THE APPELLANTS, THE UNDERWRITERS

PART I - THE APPELLANTS & THE APPEAL

1. The appeal is concerned with the correct interpretation of "equity claims" in the *Companies' Creditors Arrangement Act*.[1] The Underwriters[2] appeal from the order of the Honourable Mr. Justice Morawetz, in which he determined that certain of the independent, third-party contractual claims of the Underwriters (the "Underwriters' Contractual Claims"), bargained for as part of their contractual retainers to provide underwriting services to the

[1] R.S.C. 1985, c. C-36, as amended (the "CCAA").

[2] The Underwriters are Credit Suisse Securities (Canada) Inc., TD Securities Inc., Dundee Securities Corporation (now known as DWM Securities Inc.), RBC Dominion Securities Inc., Scotia Capital Inc., CIBC World Markets Inc., Merrill Lynch Canada Inc., Canaccord Financial Ltd. (now known as Canaccord Genuity Corp.), Maison Placements Canada Inc., Credit Suisse Securities (USA) LLC and Merrill Lynch, Pierce, Fenner & Smith Incorporated, successor by merger to Banc of America Securities LLC.

respondent, Sino-Forest Corporation, were "equity claims" for the purposes of the CCAA, except in so far as they consist of legal fees.[3] The motions judge erred in determining that the Underwriters' Contractual Claims are equity claims at all.

PART II - OVERVIEW

2. Determining whether a claim is an "equity claim" within the meaning of the CCAA or *Bankruptcy and Insolvency Act*[4] affects a creditor's important entitlement to vote on a CCAA plan or a BIA proposal, a creditor's distributions under a plan or proposal, relative priorities among creditors, and the statutory subordination of claims. The effect of characterizing the Underwriters' Contractual Claims as "equity claims" allows Sino-Forest to compromise and release those claims under a CCAA plan for no consideration and without any right of the Underwriters to vote.

3. The issue before this Court is the motions judge's error in determining that the Underwriters' Contractual Claims are "equity claims" within the meaning of the CCAA. He erred in his interpretation of "equity claims" in the CCAA, and in his characterization of the Underwriters Contractual Claims as equity claims based on that interpretation. On the plain language of the definition in the CCAA, "equity claims" must be claims in respect of an "equity interest", which, in turn, is defined as a share, warrant or option. The indemnity claims of the Underwriters are based on their status as contractual counterparties to Sino-Forest for the provision of underwriting services, and are, therefore, in respect of a contract.

4. The plain language interpretation of the CCAA is reinforced by the historical common law treatment as debt claims of contract claims of service providers like the Underwriters. This

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[3] The characterization of contractual claims relating to the offerings of notes was not an issue that was dealt with by the motions judge and is not an issue on the appeal.

[4] R.S.C. 1985, c, B-3, as amended (the "BIA")

interpretation is also consistent with the rationale for the amendments to section 2 of the CCAA that introduced the definition of "equity claims" (the "Equity Claims Definition"), namely precluding creative attempts by shareholders to disguise their equity claims as debt claims in order to elevate their priority. Applying the correct interpretation of "equity claims" leads to the conclusion that the Underwriters Contractual Claims are debt claims and not equity claims.

PART III - FACTS

A. Background: Sino-Forest and the Class Action Proceedings

5. *Sino-Forest*. Sino-Forest is a Canadian public holding company that holds the shares of numerous subsidiaries, which, in turn, hold, directly or indirectly, forestry assets located principally in the People's Republic of China.[5]

6. Sino-Forest has outstanding common shares listed on the Toronto Stock Exchange (since August 26, 2011, trading in Sino-Forest shares has ceased as a result of an order made by the Ontario Securities Commission). Sino-Forest also has outstanding approximately $1.8 billion in unsecured notes, issued in four series.[6]

7. *The offerings*. Certain of the Underwriters provided underwriting services in connection with three separate Sino-Forest equity offerings in June 2007, June 2009 and December 2009, and four separate Sino-Forest note offerings in July 2008, June 2009, December 2009 and October 2010 (collectively, the "Offerings").[7]

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[5] *Monitor's Pre-Filing Report*, Underwriters' Motion Record, Tab 6, pp. 1062-1063, paras. 12-13, Underwriters' Compendium of Evidence, Tab 1, paras. 12-13

[6] *Monitor's Pre-Filing Report*, Underwriters' Motion Record, Tab 6, p. 1067, para. 20(d)(i), Underwriters' Compendium of Evidence, Tab 1, paras. 12-13

[7] *Wise Affidavit*, Underwriters' Motion Record, Tab 5, p. 280, paras. 4 and 5, Underwriters' Compendium of Evidence, Tab 3, paras. 4 and 5

8. *The class actions*. Sino-Forest and certain of its current and former officers, directors and employees, along with Sino-Forest's current and former auditors, technical consultants and the Underwriters were named as defendants in one or more proposed class action lawsuits commenced in 2011 in Ontario, Quebec, Saskatchewan and New York (the "Class Actions").[8]

9. The Class Actions involve allegations that the public disclosure made by Sino-Forest contained misrepresentations, including in prospectus disclosure relating to the Offerings, and in the company's quarterly and annual continuous disclosure. The plaintiffs in the Class Actions seek to represent classes of owners of debt and equity securities of Sino-Forest. None of the Class Actions has been certified, and each was at a very preliminary stage before they were stayed as a result of the CCAA proceedings, as discussed below in section B.

10. *The Underwriters*. The Underwriters are among the defendants named in some of the Class Actions.[9]

11. In connection with the equity Offerings, certain Underwriters entered into underwriting agreements, and bargained for contractual terms from Sino-Forest and certain of its subsidiaries that Sino-Forest would indemnify and hold harmless the Underwriters in connection with an array of matters that could arise from those Offerings.[10] These indemnities were contract terms negotiated by the Underwriters in their contracts with Sino-Forest for the provision of underwriting services. The Underwriters' Contractual Claims are in respect of these contracts and contractual terms related to the equity Offerings.

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[8] *Fimio Affidavit*, Underwriters' Motion Record, Tab 4, p. 26, para. 2, Underwriters' Compendium of Evidence, Tab 2, para. 2

[9] *Fimio Affidavit*, Underwriters' Motion Record, Tab 4, p. 26, para. 2 and Exhibits "A", "B", "C" and "D", Underwriters' Compendium of Evidence, Tab 2, para. 2

[10] *Wise Affidavit*, Underwriters' Motion Record, Tab 5, p. 280, para. 8 and Exhibits "A", "C" and "F", Underwriters' Compendium of Evidence, Tab 3, para. 8. There are also agreements with contractual terms in respect of the note Offerings that were not dealt with in the motion below.

B. The CCAA Proceedings

12. *The commencement of proceedings and the scope of the CCAA stay.* On March 30, 2012, Sino-Forest commenced proceedings under the CCAA. Justice Morawetz granted the Initial Order and appointed FTI Consulting Canada Inc. as the Monitor.[11]

13. As part of the Initial Order made by the motions judge, the Class Actions were stayed. An order made by Justice Morawetz on May 8, 2012 confirmed that the Class Actions were also stayed as against the Underwriters and other Class Action defendants (except one Class Action defendant that has entered into a settlement with the Class Action plaintiffs).[12]

14. The creditors of Sino-Forest consist of the holders of the company's shares and notes, as well as persons with indemnity claims, including the Underwriters.

15. *The nature and status of the CCAA proceedings.* Sino-Forest, with the support of the noteholders, sought to pursue two tracks: a sale of the company to a third party, and in the alternative a plan of arrangement and compromise that would involve the noteholders and other creditors ultimately owning Sino-Forest. Those two tracks are reflected in the Restructuring and Support Agreement between Sino-Forest and a group of noteholders.[13] Extensions of the stay of proceedings were sought by Sino-Forest to permit the two tracks to proceed.[14]

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[11] *Initial Order*, Underwriters' Motion Record, Tab 10, p. 1545-1574, Underwriters' Compendium of Evidence, Tab 4

[12] *Scope of the Stay Order*, Underwriters' Motion Record, Tab 12, Underwriters' Compendium of Evidence, Tab 5

[13] *Monitor's Pre-Filing Report*, Underwriters' Motion Record, Tab 6, pp. 1075-1076, paras. 41-42, Underwriters' Compendium of Evidence, Tab 1, paras. 41-42

[14] *Monitor's First Report*, Underwriters' Motion Record, Tab 7, p. 1101, para. 42, Underwriters' Compendium of Evidence, Tab 6, para. 42

16. The CCAA motions judge made an order approving a sales process at the same time that he made the Initial Order on March 30, 2012, but he has not otherwise considered or approved the Support Agreement.[15]

17. The Monitor has advised that the expressions of interest received by Sino-Forest in phase one of the sales process were not sufficient to provide for payment in full to the noteholders so as to proceed to phase two of the sales process. The sale process was terminated pursuant to the terms of the Restructuring and Support Agreement.[16]

18. Therefore, Sino-Forest pursued the second track and has proposed a plan of compromise and reorganization (the "Plan"). The Plan, if approved, will result in Sino-Forest transferring substantially all of its assets to a newly formed entity to be owned by the noteholders and other creditors. To the extent that the Underwriters' Contractual Claims are equity claims, the Underwriters will be excluded from voting those claims and receiving distributions under the Plan in respect of them.

19. A meeting of creditors and a vote on the Plan has not occurred, but is scheduled for November 29, 2012.

20. *Claims Procedure Order*. Contemporaneously with the sales process, Sino-Forest and the Monitor have commenced a claims process pursuant to a Claims Procedure Order.[17] The Claims Procedure Order required claims against Sino-Forest and its directors and officers to be filed by June 21, 2012 (the claims form requested that creditors indicate their claims against subsidiaries of Sino-Forest, although no bar order has been made setting a deadline for the filing

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[15] *Sales Process Order*, Underwriters' Motion Record, Tab 11, pp. 1575-1596, Underwriters' Compendium of Evidence, Tab 7

[16] *Monitor's Fourth Report*, Underwriters' Motion Record, Tab 8, pp. 1181-1182, paras. 23-24, Underwriters' Compendium of Evidence, Tab 8, paras. 23-24

[17] *Claims Procedure Order*, Underwriters' Motion Record, Tab 13, pp. 1601-1649, Underwriters' Compendium of Evidence, Tab 9

of these claims, as the Sino-Forest subsidiaries are not Applicants in the CCAA proceedings). The Underwriters filed proofs of claim in respect of the Underwriters' Contractual Claims and their other claims. No response has been received in respect of those proofs of claim, and Sino-Forest has yet to take a position as to their validity or quantum.[18]

C. The Equity Claims Order

21. *The motion.* On June 26, 2012, Morawetz J. heard the motion by Sino-Forest seeking declarations that the claims of shareholders and the Underwriters' Contractual Claims were "equity claims" within the meaning of the CCAA.

22. The Equity Claims Order made by Morawetz J. does not address the validity or quantum of the Underwriters' Contractual Claims; it instead addresses their priority.

23. As discussed above, the Equity Claims Order subordinates the Underwriters' claims as equity claims in the CCAA proceedings. The Equity Claims Order allows Sino-Forest to compromise and release the Underwriters' Contractual Claims under a CCAA plan for no consideration and without any right of the Underwriters to vote on the Plan in respect of their claims.

24. The Underwriters and Sino-Forest's auditors, Ernst & Young LLP and BDO Limited opposed the motion seeking the Equity Claims Order. The Underwriters' position was that the Underwriters' Contractual Claims were not "equity claims" within the meaning of the CCAA Equity Claims Definition.

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[18] *Monitor's Sixth Report*, Underwriters' Motion Record, Tab 9, pp. 1216-1217, paras. 22-25, Underwriters' Compendium of Evidence, Tab 10, paras. 22-25

25. *The motions judge's decision.* On July 27, 2012, Morawetz J. made the Equity Claims Order. He declared that the Underwriters' Contractual Claims were "equity claims", other than in respect of defence costs.

PART IV - THE ISSUE & THE LAW

26. The issue before this Court is motions judge's error in determining that the Underwriters' Contractual Claims are equity claims within the meaning of the CCAA, and in this Part III, we address the error in four sections:

A. *Plain meaning of "equity claim".* The Equity Claims Definition does not include the claims of contractual, arm's length indemnity claimants such as the Underwriters who are not shareholders, and whose claims are not in respect of equity interests. The words "contribution or indemnity in respect of a claim" used in subsection (e) of the Equity Claims Definition are meant to apply to claims in respect of an indemnity granted in favour of shareholders of a company, *qua* shareholders, in respect of their equity securities and not to claims arising from a contractual indemnity granted in favour of an independent third party. Given the language of the Equity Claims Definition, the U.S. law relied on by the motions judge is irrelevant.

B. *Pre-2009 Amendments caselaw.* The motions judge erred in holding that the 2009 amendments to the CCAA (the "2009 Amendments") substantively altered the law so as to subordinate and treat as "equity claims" the claims of contractual, arm's length indemnity claimants. The pre-2009 Amendments case law demonstrates that "equity claims" does not include the Underwriters' Contractual Claims.

C. *Rationale of the 2009 Amendments.* The 2009 Amendments that introduced the Equity Claims Definition were intended to address claims to recover equity investments that shareholders were attempting to disguise as debt. The 2009 Amendments were not intended to affect the characterization of debt claims such as the Underwriters' Contractual Claims.

D. *Correct characterization of the Underwriters' Contractual Claims.* The characterization of the Underwriters' Contractual Claims depends on the nature and origin of the indemnity claim as a contractual term provided as part of a contract for services. The motions judge erred in finding that the Underwriters' Contractual Claims are being used to recover an equity investment. These claims are correctly characterized as debt claims.

27. The motion judge's decision below concerns a question of law, specifically the proper interpretation of the Equity Claims Definition. Deference is not appropriate, and this Court may substitute the opinion of the motions judge with its own.

> *Algoma Steel Inc. v. Union Gas Ltd.*, [2003] O.J. No. 71 (C.A.), paras. 16 and 19, Brief of Authorities of the Underwriters, Tab 1
>
> *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, paras. 8 and 10, 27-28, Brief of Authorities of the Underwriters, Tab 2

A. Plain Meaning of "Equity Claim"

28. A determination of whether the Underwriters' Contractual Claims are unsecured debt claims or equity claims requires an analysis of the statutory provisions relating to claims provable and the plain meaning of the CCAA definition of "equity claims". The CCAA is to be construed in accordance with these statutory interpretation principles:

(a) 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.

(b) Every Act "shall be deemed to be remedial" and ... every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning, and spirit."

Re Rizzo & Rizzo Shoes Ltd., [1998] 1 S.C.R. 27 at paras. 6 and 21, Brief of Authorities of the Underwriters, Tab 3

29. The general rule under Canadian bankruptcy and insolvency legislation is that all unsecured debt claims against a bankrupt or insolvent entity rank *pari passu*. The 2009 Amendments added new provisions to both the BIA and the CCAA concerning the treatment of equity claims against a bankrupt or insolvent entity to clarify what, in fact, constitutes an equity as opposed to a debt claim.

30. The new section 2 of the CCAA incorporates the BIA framework for the determination of what is a claim provable in CCAA proceedings, as follows:

> 2.(1) In this Act, "claim" means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 the *Bankruptcy and Insolvency Act*.
>
> CCAA, section 2(1), Schedule "B"

31. Section 121(1) of the BIA provides as follows:

> 121(1) Claims provable – All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt

> shall be deemed to be claims provable in proceedings under this Act.
>
> BIA, section 121(1), Schedule "B"

32. The 2009 Amendments introduced two new definitions: that of "equity claims" and "equity interests". Equity claims are defined in Section 2(1) of the CCAA as follows:

> 2.(1) - "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, section 2(1), Schedule "B"

33. By definition, an equity claim must be a claim "in respect of an equity interest". Equity interest is, in turn, defined in Section 2(1) of the CCAA as follows:

> 2.(1) - "equity interest" means
>
> (a) in the case of a corporation other than an income trust, a share in the corporation — or a warrant or option or another right to acquire a share in the corporation — other than one that is derived from a convertible debt …
>
> CCAA, section 2(1), Schedule "B"

34. On a plain reading of the Equity Claims Definition, "equity claims" must be claims in respect of an "equity interest". Equity interest is defined as a share, warrant or option. Accordingly, subsection (e) of the Equity Claims Definition requires a claim that is for contribution or indemnity in respect of a share, warrant or option. The Underwriters'

Contractual Claims are not in respect of a share, warrant or option. Instead, they are in respect of a contract, namely the contracts negotiated among the Underwriters and Sino-Forest for the provision of underwriting services.

35. The indemnity claims in subparagraph (e) of the Equity Claims Definition are indemnities in favour of shareholders whose claims are with respect to their equity interests. Indemnities granted by a contract to independent third-parties dealing at arm's length are not covered by the language in subparagraph (e). There is no question that subparagraphs (a) to (d) of the Equity Claims Definition are focused squarely on claims of shareholders against the CCAA debtor company (and not against third parties) in respect of shares, warrants or options of the CCAA debtor company. It follows that a proper construction of the Equity Claims Definition requires that subsection (e) deals with the indemnity or contribution claims of shareholders in respect of their shares, warrants or options.

36. Morawetz J. erred in his interpretation of the Equity Claims Definition, and, in particular, subparagraph (e), in concluding that the Equity Claims Definition includes as equity claims the claims of contractual, arm's length claimants such as underwriters who are not shareholders, and whose claims are not in respect of equity interests held by these equity investors. On a plain reading of the definition, "equity claims" must be claims in respect of an equity interest, which, in turn, is defined as a share, warrant or option. Therefore, subparagraph (e) of the Equity Claims Definition means a claim that is for contribution or indemnity in respect of a share, warrant or option. The Underwriters' Contractual Claims are not in respect of subparagraphs (a) to (d) of the definition, which are all related to claims of shareholders. Their claims are based on their status as contractual counterparties to Sino-Forest and its subsidiaries that supplied services to the companies, and are, therefore, in respect of a contract for services and are not properly construed as equity claims.

37. In interpreting the Equity Claims Definition, Morawetz J. wrongly relied on U.S. Courts' interpretation of sections 510 and 502 of the U.S. Bankruptcy Code (i.e., the U.S. version of the CCAA Equity Claims Definition).[19] Those sections expressly provide for different treatment of claim holders under U.S. law and are not comparable to the definition in the CCAA. For example, in setting out the scope of claims that are subordinated under the U.S. Bankruptcy Code, section 502 refers to "an entity that is liable with the debtor". Under U.S. securities laws, underwriters are liable for misstatements in offering documents and are, therefore, expressly covered by the language in section 502, as entities "liable with the debtor".[20] Parliament did not choose to adopt that language or that principle. Reliance on the U.S. interpretation of the U.S. Bankruptcy Code is irrelevant to the interpretation of the plain reading of the CCAA. The Canadian provisions are simply different.

B. Pre-2009 Amendments Caselaw

38. It has been held that the 2009 Amendments merely codify prior case law on point and do not represent a departure from that law.

> *Re Nelson Financial Group Ltd.* (2010), 71 C.B.R. (5th) 153 (Ont. S.C.J.) at para. 27, Brief of Authorities of the Underwriters, Tab 4

39. Case law prior to the 2009 Amendments held that on the insolvency of a company, the claims of creditors rank ahead of the claims of shareholders for the return of their capital and are only entitled to share in the assets of an insolvent corporation until after all the ordinary creditors have been paid in full. This is premised on the notion that shareholders are higher risk takers, having willingly chosen to tie their investment to the fortunes of the corporation, as opposed to creditors who choose a lower level of exposure to risk. The Underwriters' indemnity claims are

[19] Bankruptcy Code, 11 U.S.C. § 502 and 510 (2012); Schedule B

[20] Securities Act of 1933 § 11, 15 U.S.C. 77k (2012); Schedule B

based on their status as contractual counterparties to Sino-Forest and its subsidiaries to whom the Underwriters supplied services. The relationship between the Underwriters and Sino-Forest bears no hallmarks of an equity relationship. Claims arising from their commercial and contractual dealings are, in no sense of the word, equity claims. The claims of the Underwriters and shareholders are legally distinct.

> See e.g., *Re Central Capital Corp.* (1995), 29 C.B.R. (3d) 33 (Ont. C.J. (Gen. Div. – Commercial List)) at para. 36, aff'd 38 C.B.R. (3d) 1 (Ont. C.A.), Brief of Authorities of the Underwriters, Tab 5
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> *Re Blue Range Resources Corp.* (2000), 15 C.B.R. (4th) 169 (Alta. Q.B.) at paras. 35-45, Brief of Authorities of the Underwriters, Tab 6

40. The pre-2009 Amendments case law includes *National Bank of Canada v. Merit Energy Ltd.* In that case, the Alberta Court of Queen's Bench considered the contractual indemnity claims of underwriters, and distinguished the claims of the underwriters from shareholder indemnification claims finding that the underwriter's contractual claims were debt claims, while rejecting the shareholders attempts to dress up their equity claims as debt claims. On the nature of the Underwriters' indemnity claims, the Court held:

> 62. The fundamental premise of the Trustee's argument is that the Underwriters' indemnity simply "flows through" or "passes on" the Flow-Through Shareholders' claim to Merit. This ignores the nature of the causes of action being advanced by the Underwriters and *the existence of a contractual indemnity freely given by Merit for good and valuable consideration.* The Trustee did not suggest that the indemnity was invalid or unenforceable, rather, it argued that this valid and enforceable right should be treated as a "shareholders' claim" and subordinated. With respect, I cannot agree with the Trustee's position.
>
> ...
>
> 64. *The Underwriters' indemnity claims against Merit are not made as a shareholder or for any return of investment made by the Underwriters.* Rather, *they are based on contractual, legal and equitable duties owed directly by Merit to the Underwriters.*

> Similarly, the other causes of action advanced by the Underwriters against Merit in the Third Party Notice do not arise from any equity position in the company, but are based on agency, fiduciary and contractual relationships between the Underwriters and Merit, to which the Flow-Through Shareholders are strangers and are unavailable for them to assert.
>
> 65. For example, the Underwriters are entitled to an indemnity for defence costs even if the Flow-Through Shareholders' claims fail completely. The ultimate success or failure of the Flow-Through Shareholders' claims makes no difference to the existence and enforceability of this right against Merit. [Emphasis added.]
>
> *National Bank of Canada v. Merit Energy Ltd.* (2001), 28 C.B.R. (4th) 228 (Alta. Q.B.) at paras. 62-65, aff'd 2002 ABCA 5, Brief of Authorities of the Underwriters, Tab 7

41. The Court in *Merit* accepted that an underwriter's contractual indemnification claims are distinct from the claims of shareholders for a return of their investment, and the Court acknowledged that the policy rationale behind subordinating shareholder claims does not apply in the case of an underwriter's contractual indemnification claims. The 2009 Amendments ought to be interpreted in a manner consistent with the holding in *Merit*, namely characterizing indemnification claims of underwriters as debt claims based on policy considerations.

42. The pre-2009 Amendments cases include those in which shareholders' direct claims were rejected as being claims in equity rather than debt. The shareholder cases provide relevant examples of the creative attempts by shareholders to disguise their equity claims as debt claims in order to elevate the priority of their claims – the very types of attempts that the 2009 Amendments preclude.

> *National Bank of Canada v. Merit Energy Ltd.*, *supra*, at para. 55, Brief of Authorities of the Underwriters, Tab 7

43. The pre-2009 Amendments case law also includes *Re EarthFirst Canada Inc.* in which the court found that indemnification claims of shareholders in respect of their flow-through

securities – that is, the very claims now expressly captured by subparagraph (e) of the Equity Claims Definition – were equity claims. The Court found that:

> ... it is clear that the indemnity claim derives from the original status of the subscribers as subscribers of shares, that the claim was acquired as part of an investment in shares, and that any recovery on the indemnity would serve to recoup a portion of what the subscriber originally invested, primarily qua shareholder.
>
> *Re EarthFirst Canada Inc.* (2009), 56 C.B.R. (5th) 102 (Alta. Q.B.) [*EarthFirst*] at paras. 4 and 5, Brief of Authorities of the Underwriters, Tab 8

44. The position of the subscribers in *Re EarthFirst Canada Inc.* is fundamentally different from the position of the Underwriters.

45. Morawetz J. erred in holding that the 2009 Amendments substantively altered the law so as to subordinate and treat as equity claims the claims of contractual, arm's length indemnity claimants such as underwriters who are not shareholders and whose claims are not in respect of equity interests (i.e., shares, warrants or options) held by such claimants. The 2009 Amendments, including the amendments to section 2 of the CCAA, codify and articulate existing law rather than change the law. There was no extrinsic evidence before the motions judge to support a finding that Parliament intended to change or did, in fact, change the common law as it existed at the time of the 2009 Amendments, and the pre-2009 Amendments common law, therefore, remains relevant.

46. The pre-2009 Amendments decision of the Ontario Superior Court of Justice in *Return on Innovation Capital Ltd. v. Gandi Innovations Ltd.* ("*Gandi*") considered the case of an indemnity in favour of director and officer insiders. It did not consider the CCAA Equity Claims Definition. In *Gandi*, the Gandi companies were insolvent and in CCAA proceedings. An investor sued the directors and officers for recovery of its equity investment in the debtor

corporation. The investor's claims were framed as claims against the company insiders for breach of contract, fraud, rescission, negligent misrepresentation, and breach of fiduciary duty, and it was argued that they were not equity claims. The Court concluded that the claims in fact were equity claims, and that claims for indemnity or contribution by the insiders were also equity claims.

> *Return on Innovation Capital Ltd. v. Gandi Innovations Ltd.* (2011), 83 C.B.R. (5th) 123 (Ont. S.C.J.), at para. 61, leave to appeal to Ont. C.A. refused, 2012 ONCA 10, Brief of Authorities of the Underwriters, Tab 9

47. *Gandi*, however, can be distinguished from Merit and the present case. Importantly, the focus of the *Gandi* decision was on the nature of the claims of the shareholder. The decision does not contain any analysis of the pre-2009 Amendments law on the priority of third-party indemnities, including those of underwriters, and the Court of Appeal refused leave, in part, because it was a pre-2009 Amendments case.

C. Rationale for the 2009 Amendments

48. The Supreme Court has held that the use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise which may be employed by the Court.

> *Re Rizzo & Rizzo Shoes Ltd.*, *supra*, at para. 31, Brief of Authorities of the Underwriters, Tab 3

49. Parliament's intent with respect to the 2009 Amendments is reflected in the Standing Senate Committee on Banking Trade and Commerce's *Debtors and Creditors Sharing the Burden* (the "Senate Report"). The Senate Report noted that equity claims are generally understood to be those claims that are not based on the supply of goods, services or credit to a corporation, but rather are based on some wrongful act committed by an issuer of an instrument reflecting equity in the capital of a corporation.

> Standing Senate Committee on Banking Trade and Commerce, *Debtors and Creditors Sharing the Burden*, 2003 [*Standing Senate Committee Report*] at pp. 158-159, Brief of Authorities of the Underwriters, Tab 10

50. In addition to confirming the long-standing principle of bankruptcy and insolvency law that shareholders cannot recover on their equity claims until all creditors of a corporate entity have been paid in full, consideration of the 2009 Amendments also addressed the application of this rule to certain categories of claims over which confusion had arisen as a result of difficulties in determining debt claims from equity claims. This determination is conducted against the backdrop of the public policy considerations discussed in the Senate Report and in the case law above. The Senate Report observed that:

> [i]n view of recent corporate scandals in North America, the Committee believes that the issue of equity claims must be addressed in insolvency legislation. In our view, the law must recognize the facts in insolvency proceedings: since holders of equity have necessarily accepted - through their acceptance of equity rather than debt - that their claims will have a lower priority than claims for debt, they must step aside in a bankruptcy proceeding. Consequently, their claims should be afforded lower ranking than secured and unsecured creditors, and the law, in the interests of fairness and predictability - should reflect both this lower priority for holders of equity and the notion that they will not participate in a restructuring or recover anything until all other creditors have been paid in full.
>
> *Standing Senate Committee Report* at pp. 158-159, Brief of Authorities of the Underwriters, Tab 10

51. Viewed through legislative history, the 2009 Amendments properly construed are a codification of the established common law prohibitions against these creative attempts by shareholders upon the bankruptcy or insolvency of a company to characterize as debts, claims that were, in substance, claims for the recovery of an equity investment. The rationale for the 2009 Amendments was to prevent shareholder indemnity claims from being categorized as debt claims. Examples of "disguised" shareholder claims include indemnities provided by companies

to shareholders that in effect guarantee the performance of their shares or payment of dividends; shareholders framing their actual tort claims as indemnities; shares with indemnity components or other hybrid securities; and other similar indemnity claims. The 2009 Amendments, especially subparagraph (e), make clear such dressed-up equity claims will not be treated as debt claims.

52. Importantly, the examples of equity claims provided in the Senate Report do not include indemnity claims of independent third-parties dealing at arm's length, such as underwriters. The Senate Report, citing the Joint Task Force on Business Insolvency Law Reform, states that "all [equity] claims against a debtor in an insolvency proceeding ... including claims for payment of dividends, redemption or retraction or repurchase or shares, and damages (including securities fraud claims) are to be treated as equity claims subordinate to all other secured and unsecured claims against the debtor ... ."

> *Standing Senate Committee Report* at pp. 158-159, Brief of Authorities of the Underwriters, Tab 10

53. Also notably absent from the Senate Report's recommendation, is any reference to the indemnity claims of independent third-parties dealing at arm's length. The Senate Report recommended that:

> [t]he *Bankruptcy and Insolvency Act* be amended to provide that *the claim of a seller or purchaser of equity securities*, seeking damages or rescission in connection with the transaction, *be subordinated to the claims of ordinary creditors*. Moreover, these claims should not participate in the proceeds of a restructuring or bankruptcy until other creditors of the debtor have been paid in full. [Emphasis added.]
>
> *Standing Senate Committee Report* at pp. 158-159, Brief of Authorities of the Underwriters, Tab 10

54. This legislative history showing the rationale of the 2009 Amendments further supports the interpretation of the words "contribution or indemnity in respect of a claim" used in

subsection (e) of the Equity Claims Definition are meant to apply to claims arising from an indemnity granted in favour of shareholders of a company, and not to claims arising from a contractual right granted in favour of an independent third party.

D. Correct Characterization of the Contractual Indemnities Claims

55. The Underwriters' Contractual Claims are not in respect of an equity interest (and therefore are not equity claims), but are in respect of contractual rights provided to the Underwriters by Sino-Forest. Accordingly, the Underwriters' Contractual Claims must be distinguished from the claims of shareholders themselves.

56. Justice Morawetz erred in finding that the characterization of the Underwriters' Contractual Claims as equity claims turns on the nature of the underlying claim, as opposed to the nature and origin of the indemnity claim as a contractual right provided as part of a contract for services.

57. Fundamentally, the postponement of equity claims (both at common law prior to the 2009 Amendments and now pursuant to the 2009 Amendments) is a policy-driven outcome. Independent third-parties dealing at arm's length, such as underwriters, cannot reasonably be said to have accepted the risks that a shareholder has with respect to its claims. Returning to first principles, the policy reason for treating equity claims as subordinate to the claims of creditors is that equity owners always take the risk of not being paid together with the possible reward of the upside of ownership. That is their bargain. When an owner seeks to recover its equity investment as a debt, it is trying to resile from the bargain it struck. Underwriters do not take on the same risk-reward bargain when they supply services to a company. They do not receive the benefits of equity. Underwriters strike their own bargain with a company, and a part of their contractual compensation is the indemnity they receive from a company.

58. Creditors (including the noteholders) of Sino-Forest had notice of the contractual indemnities provided by Sino-Forest to the Underwriters, as the relevant underwriting and related agreements were disclosed by Sino-Forest and publicly filed with securities regulators pursuant to applicable securities legislation. The services supplied to Sino-Forest by the Underwriters had the effect of providing Sino-Forest with additional capital to, among other things, fund its operations and ongoing obligations to creditors and others.

59. In the Endorsement, Morawetz J. does not address the nature of the claims made by the Underwriters. Underwriters' Contractual Claims are claims of Underwriters against Sino-Forest under their contracts, occasioned in this instance by claims brought by shareholders against the Underwriters, as opposed to direct shareholder claims against Sino-Forest.

60. The Underwriters bargained for certain protections in the relevant agreements with Sino-Forest, including the indemnity provisions contained therein. The Underwriters' Contractual Claims of the Underwriters are based on the Underwriters' status as contractual counterparties to Sino-Forest. They are not derivative of claims of shareholders. The risk-reward profile of the shareholder and underwriter is fundamentally different and a policy-driven analysis of equity claims should account for this dissimilarity in position.

61. Applying the correct interpretation of "equity claims", based on the plain meaning of the words in the CCAA, the pre-2009 Amendments case law codified in the Equity Claims Definition, and the rationale for the 2009 Amendments, the Underwriters' Contractual Claims are properly characterized as debt claims and the motions judge erred in reaching a different result.

PART V - ORDER REQUESTED

62. The Underwriters request that the appeal be allowed, the Equity Claims Order be set aside, and judgment be granted discissing the Equity Claims Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Sheila Block

Sheila Block

David Bish /SKB

David Bish

Lawyers for the Underwriters named in Class Actions

Court of Appeal File No. C56115

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 PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

Credit Suisse Securities (Canada) Inc., TD Securities Inc., Dundee Securities Corporation (now known as DWM Securities Inc.), RBC Dominion Securities Inc., Scotia Capital Inc., CIBC World Markets Inc., Merrill Lynch Canada Inc., Canaccord Financial Ltd. (now known as Canaccord Genuity Corp.), Maison Placements Canada Inc., Credit Suisse Securities (USA) LLC and Merrill Lynch, Pierce, Fenner & Smith Incorporated, successor by merger to Banc of America Securities LLC

Appellants on Appeal

- and -

Sino-Forest Corporation

Respondent on Appeal

LAWYER'S CERTIFICATE

Counsel for the Underwriters (Appellants) hereby certify:

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

(b) we estimate that 2.5 hour will be required for the Appellants (including Ernst & Young LLP and BDO Limited).

DATE: October 26, 2012

Sheila Block

Sheila Block

TORYS LLP

Counsel for the Underwriters (Appellants)

SCHEDULE A

LIST OF AUTHORITIES

1. *Algoma Steel Inc. v. Union Gas Ltd.*, [2003] O.J. No. 71 (C.A.)
2. *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235
3. *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27
4. *Re Nelson Financial Group Ltd.* (2010), 71 C.B.R. (5th) 153 (Ont. S.C.J.) aff'd 38 C.B.R. (3d) 1 (Ont. C.A.)
5. *Re Central Capital Corp.* (1995), 29 C.B.R. (3d) 33 (Ont. C.J. (Gen. Div. - Commercial List))
6. *Re Blue Range Resources Corp.* (2000), 15 C.B.R. (4th) 169 (Alta. Q.B.)
7. *National Bank of Canada v. Merit Energy Ltd.* (2001), 28 C.B.R. (4th) 228 (Alta. Q.B.) aff'd 2002 ABCA 5
8. *Re EarthFirst Canada Inc.* (2009), 56 C.B.R. (5th) 102 (Alta. Q.B.)
9. *Return on Innovation Capital Ltd. v. Gandi Innovations Ltd.* (2011), 83 C.B.R. (5th) 123 (Ont. S.C.J.) leave to appeal to Ont. C.A. refused, 2012 ONCA 10
10. Standing Senate Committee on Banking Trade and Commerce, *Debtors and Creditors Sharing the Burden*, 2003

SCHEDULE B

LEGISLATION

COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C. C-36

Definitions

2. (1) In this Act,

...

"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;

...

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.

Court may order amendment

(2) If a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

Restriction — certain Crown claims

(3) Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under

(a) subsection 224(1.2) of the *Income Tax Act*;

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial

legislation establishes a "provincial pension plan" as defined in that subsection.

Restriction — default of remittance to Crown

(4) If an order contains a provision authorized by section 11.09, no compromise or arrangement is to be sanctioned by the court if, at the time the court hears the application for sanction, Her Majesty in right of Canada or a province satisfies the court that the company is in default on any remittance of an amount referred to in subsection (3) that became due after the time of the application for an order under section 11.02.

Restriction — employees, etc.

(5) The court may sanction a compromise or an arrangement only if

(a) the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court's sanction, of

(i) amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(d) of the *Bankruptcy and Insolvency Act* if the company had become bankrupt on the day on which proceedings commenced under this Act, and

(ii) wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company's business during the same period; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Restriction — pension plan

(6) If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

(a) the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that was required to be paid by the employer to the fund, and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, if the prescribed plan were regulated by an Act of Parliament; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Non-application of subsection (6)

(7) Despite subsection (6), the court may sanction a compromise or arrangement that does not allow for the payment of the amounts referred to in that subsection if it is satisfied that the relevant parties have entered into an agreement, approved by the relevant pension regulator, respecting the payment of those amounts.

Payment — equity claims

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.

***BANKRUPTCY AND INSOLVENCY ACT*, R.S.C., 1985, C. B-3**

Claims provable

121. (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

Contingent and unliquidated claims

(2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.

Debts payable at a future time

(3) A creditor may prove a debt not payable at the date of the bankruptcy and may receive dividends equally with the other creditors, deducting only thereout a rebate of interest at the rate of five per cent per annum computed from the declaration of a dividend to the time when the debt would have become payable according to the terms on which it was contracted.

Family support claims

(4) A claim in respect of a debt or liability referred to in paragraph 178(1)(b) or (c) payable under an order or agreement made before the date of the initial bankruptcy event in respect of the bankrupt and at a time when the spouse, former spouse, former common-law partner or child was living apart from the bankrupt, whether the order or agreement provides for periodic amounts or lump sum amounts, is a claim provable under this Act.

BANKRUPTCY CODE, 11 U.S.C. § 502 AND 510 (2012)

§ 502. Allowance of claims or interests

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

(b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—

(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;

(2) such claim is for unmatured interest;

(3) if such claim is for a tax assessed against property of the estate, such claim exceeds the value of the interest of the estate in such property;

(4) if such claim is for services of an insider or attorney of the debtor, such claim exceeds the reasonable value of such services;

(5) such claim is for a debt that is unmatured on the date of the filing of the petition and that is excepted from discharge under section 523(a)(5) of this title;

(6) if such claim is the claim of a lessor for damages resulting from the termination of a lease of real property, such claim exceeds—

(A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of--
(i) the date of the filing of the petition; and
(ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property; plus

(B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates;

(7) if such claim is the claim of an employee for damages resulting from the termination of an employment contract, such claim exceeds—

(A) the compensation provided by such contract, without acceleration, for one year following the earlier of--
(i) the date of the filing of the petition; or
(ii) the date on which the employer directed the employee to terminate, or such employee terminated, performance under such contract; plus

(B) any unpaid compensation due under such contract, without acceleration, on the earlier of such dates;

(8) such claim results from a reduction, due to late payment, in the amount of an otherwise applicable credit available to the debtor in connection with an employment tax on wages, salaries, or commissions earned from the debtor; or

(9) proof of such claim is not timely filed, except to the extent tardily filed as permitted under paragraph (1), (2), or (3) of section 726(a) of this title or under the Federal Rules of Bankruptcy Procedure, except that a claim of a governmental unit shall be timely filed if it is filed before 180 days after the date of the order for relief or such later time as the Federal Rules of Bankruptcy Procedure may provide, and except that in a case under chapter 13, a claim of a governmental unit for a tax with respect to a return filed under section 1308 shall be timely if the claim is filed on or before the date that is 60 days after the date on which such return was filed as required.

(c) There shall be estimated for purpose of allowance under this section—

(1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case; or

(2) any right to payment arising from a right to an equitable remedy for breach of performance.

(d) Notwithstanding subsections (a) and (b) of this section, the court shall disallow any claim of any entity from which property is recoverable under section 542, 543, 550, or 553 of this title or that is a transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section 522(i), 542, 543, 550, or 553 of this title.

(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—

(A) such creditor's claim against the estate is disallowed;

(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

(C) such entity asserts a right of subrogation to the rights of such creditor under section 509 of this title.

(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.

(f) In an involuntary case, a claim arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee and the order for relief shall be determined as of the date such claim arises, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(g)(1) A claim arising from the rejection, under section 365 of this title or under a plan under chapter 9, 11, 12, or 13 of this title, of an executory contract or unexpired lease of the debtor that has not been assumed shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.
(2) A claim for damages calculated in accordance with section 562 shall be allowed under subsection (a), (b), or (c), or disallowed under subsection (d) or (e), as if such claim had arisen before the date of the filing of the petition.

(h) A claim arising from the recovery of property under section 522, 550, or 553 of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(i) A claim that does not arise until after the commencement of the case for a tax entitled to priority under section 507(a)(8) of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(j) A claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case. Reconsideration of a claim under this subsection does not affect the validity of any payment or transfer from the estate made to a holder of an allowed claim on account of such allowed claim that is not reconsidered, but if a reconsidered claim is allowed and is of the same class as such holder's claim, such holder may not receive any additional payment or transfer from the estate on account of such holder's allowed claim until the holder of such reconsidered and allowed claim receives payment on account of such claim proportionate in value to that already received by such other holder. This subsection does not alter or modify the trustee's right to recover from a creditor any excess payment or transfer made to such creditor.

(k)(1) The court, on the motion of the debtor and after a hearing, may reduce a claim filed under this section based in whole on an unsecured consumer debt by not more than 20 percent of the claim, if—

(A) the claim was filed by a creditor who unreasonably refused to negotiate a reasonable alternative repayment schedule proposed on behalf of the debtor by an approved nonprofit budget and credit counseling agency described in section 111;

(B) the offer of the debtor under subparagraph (A)--
(i) was made at least 60 days before the date of the filing of the petition; and
(ii) provided for payment of at least 60 percent of the amount of the debt over a period not to exceed the repayment period of the loan, or a reasonable extension thereof; and

(C) no part of the debt under the alternative repayment schedule is nondischargeable.

(2) The debtor shall have the burden of proving, by clear and convincing evidence, that—

(A) the creditor unreasonably refused to consider the debtor's proposal; and

(B) the proposed alternative repayment schedule was made prior to expiration of the 60-day period specified in paragraph (1)(B)(i).

§ 510. Subordination

(a) A subordination agreement is enforceable in a case under this title to the same extent that such agreement is enforceable under applicable nonbankruptcy law.

(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.

(c) Notwithstanding subsections (a) and (b) of this section, after notice and a hearing, the court may—

(1) under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest; or

(2) order that any lien securing such a subordinated claim be transferred to the estate.

SECURITIES ACT OF 1933 § 11, 15 U.S.C. 77K (2012)

§ 77k. Civil liabilities on account of false registration statement

(a) Persons possessing cause of action; persons liable

In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition
he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue—

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

(b) Persons exempt from liability upon proof of issues

Notwithstanding the provisions of subsection (a) of this section no person, other than the issuer, shall be liable as provided therein who shall sustain the burden of proof—

(1) that before the effective date of the part of the registration statement with respect to which his liability is asserted (A) he had resigned from or had taken such steps as are permitted by law to resign from, or ceased or refused to act in, every office, capacity, or relationship in which he was described in the registration statement as acting or agreeing to act, and (B) he had advised the Commission and the issuer in writing that he had taken such action and that he would not be responsible for such part of the registration statement; or

(2) that if such part of the registration statement became effective without his knowledge, upon becoming aware of such fact he forthwith acted and advised the Commission, in accordance with

paragraph (1) of this subsection, and, in addition, gave reasonable public notice that such part of the registration statement had become effective without his knowledge; or

(3) that (A) as regards any part of the registration statement not purporting to be made on the authority of an expert, and not purporting to be a copy of or extract from a report or valuation of an expert, and not purporting to be made on the authority of a public official document or statement, he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading; and (B) as regards any part of the registration statement purporting to be made upon his authority as an expert or purporting to be a copy of or extract from a report or valuation of himself as an expert, (i) he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or (ii) such part of the registration statement did not fairly represent his statement as an expert or was not a fair copy of or extract from his report or valuation as an expert; and (C) as regards any part of the registration statement purporting to be made on the authority of an expert (other than himself) or purporting to be a copy of or extract from a report or valuation of an expert (other than himself), he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement of the expert or was not a fair copy of or extract from the report or valuation of the expert; and (D) as regards any part of the registration statement purporting to be a statement made by an official person or purporting to be a copy of or extract from a public official document, he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue, or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement made by the official person or was not a fair copy of or extract from the public official document.

(c) Standard of reasonableness

In determining, for the purpose of paragraph (3) of subsection (b) of this section, what constitutes reasonable investigation and reasonable ground for belief, the standard of reasonableness shall be that required of a prudent man in the management of his own property.

(d) Effective date of registration statement with regard to underwriters

If any person becomes an underwriter with respect to the security after the part of the registration statement with respect to which his liability is asserted has become effective, then for the purposes of paragraph (3) of subsection (b) of this section such part of the registration statement shall be considered as having become effective with respect to such person as of the time when he became an underwriter.

(e) Measure of damages; undertaking for payment of costs

The suit authorized under subsection (a) of this section may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: *Provided,* That if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. In no event shall any underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all other underwriters similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any suit or as a consequence of suits authorized under subsection (a) of this section for damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public. In any suit under this or any other section of this subchapter the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.

(f) Joint and several liability; liability of outside director

(1) Except as provided in paragraph (2), all or any one or more of the persons specified in subsection (a) of this section shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

(2)(A) The liability of an outside director under subsection (e) of this section shall be determined in accordance with section 78u-4(f) of this title.

(B) For purposes of this paragraph, the term "outside director" shall have the meaning given such term by rule or regulation of the Commission.

(g) Offering price to public as maximum amount recoverable

In no case shall the amount recoverable under this section exceed the price at which the security was offered to the public.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

Court of Appeal File No. C56115

COURT OF APPEAL FOR ONTARIO

FACTUM OF THE APPELLANTS, THE UNDERWRITERS

TORYS LLP
79 Wellington Street West
Suite 300, TD Centre
Toronto, Ontario M5K 1N2

Fax: 416.865.7380

Sheila Block (LSUC#: 14089N)
Tel: 416.865.7319
Email: sblock@torys.com

David Bish (LSUC#: 41629A)
Tel: 416.865.7353
Email: dbish@torys.com

Lawyers for the Underwriters (Appellants)