

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**

COURT OF APPEAL FOR ONTARIO

BETWEEN:

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

Plaintiffs

- and -

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

Defendants

Proceeding under the *Class Proceedings Act, 1992*

**FACTUM OF THE MOVING PARTIES (APPELLANTS),
INVESCO CANADA LTD.,
NORTHWEST & ETHICAL INVESTMENTS L.P.,
COMITÉ SYNDICAL NATIONAL DE RETRAITE BÂTIRENTE INC., MATRIX ASSET
MANAGEMENT INC., GESTION FÉRIQUE AND MONTRUSCO BOLTON
INVESTMENTS INC.**

(Motion for Directions)

April 22, 2013

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Comité Syndical National de Retraite Bâtirente Inc.,
Matrix Asset Management Inc., Gestion Férique and
Montrusco Bolton Investments Inc.

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PART I – OVERVIEW

1. The moving parties (the “Appellants”), Invesco Canada Ltd., Northwest & Ethical Investments L.P., Comité Syndical National de Retraite Bâtirente Inc., Matrix Asset Management Inc., Gestion Férique and Montrusco Bolton Investments Inc., move for various administrative relief and directions for the purpose of facilitating, consolidating and expediting their appeals and motions for leave to appeal (should leave be granted) from three orders of the Honourable Mr. Justice Morawetz, issued as part of the Sino-Forest Corporation (“Sino-Forest”) restructuring proceedings and proposed class action. Those orders are:

1. The Order sanctioning the Sino-Forest Plan of Compromise and Reorganization (“Plan”) – dated December 10, 2012 (“Sanction Order”) [Court of Appeal File No.: M42068]¹;
2. The Order approving the settlement between Sino-Forest’s former auditor, Ernst & Young LLP (“E&Y”), and the named plaintiffs in the Sino-Forest class action (the “Ontario Plaintiffs”), including a proposed third party no-opt-out release of all claims against E&Y – dated March 20, 2013 (“Settlement Approval Order”) [Court of Appeal File No.: M42399]²; and,
3. The Order dismissing the Appellants’ motion for a representation order and/or relief from the binding effect of the representation order sought by the Ontario Plaintiffs – dated March 20, 2013 (“Representation Dismissal Order”) [Court of Appeal File No.: M42399]³.

2. The Respondents on appeal (including Sino-Forest and the other parties to the *CCAA* proceedings) have consented or do not take a position on the following relief sought by the Appellants⁴:

1. an Order directing that the motion for leave to appeal the Settlement Approval Order and Representation Dismissal Order be heard orally;

¹ Order of Justice Morawetz, December 10, 2012 [*Sanction Order*], Exhibit “A” to the Affidavit of Tanya T. Jemec sworn April 22, 2013 [*Jemec Aff*], Appellants’ Motion Record, Tab 2A, pages 16-132.

² Settlement Approval Order, Exhibit “B” to Jemec Aff, Appellants’ Motion Record, Tab 2B, pages 133-147.

³ Representation Dismissal Order, Exhibit “C” to Jemec Aff, Appellants’ Motion Record, Tab 2C, pages 148-151.

⁴ Affidavit of Tanya T. Jemec sworn on April 22, 2013 [*Jemec Aff*] at para. 26, Appellants’ Motion Record, Tab 2, page 15.

2. an order expediting the hearings of the motions for leave to appeal and related appeals of the Sanction Order, Settlement Approval Order, and Representation Dismissal Order;
 3. an order permitting service of any materials related to these motions and related appeals to be done by email, with proof of receipt being unnecessary for purposes of filing; and,
 4. an order transferring the materials filed on the hearing before Justice Morawetz giving rise to the Settlement Approval Order and Representation Dismissal Order [Court of Appeal File No.: M42399] to the Court of Appeal, and allowing the parties to rely on these materials;
3. The Respondents oppose the following relief:
1. Consolidation of the motion for leave to appeal and related appeal of the Sanction Order [Court of Appeal File No.: M42068] with the present motions for leave to appeal the Settlement Approval Order and the Representation Dismissal Order;
 2. Hearing the motions for leave to appeal together with the appeals;
 3. Transfer of the motion materials before Justice Morawetz with respect to the Sanction Order to the Court of Appeal;
 4. abridging the times for service and validating late service; and,
 5. Granting leave to the Appellants to act as the representative party for the purposes of this appeal.
4. The three orders entered by Justice Morawetz arise out of the same factual and legal dispute: whether the settlement of the class claims against E&Y, which is a solvent non-debtor third-party, can be effectuated as part of Sino-Forest's restructuring proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"), and in particular whether E&Y can be granted an omnibus non-debtor third-party release as part of the settlement⁵, which release does recognize opt-outs -- instead of using the usual procedure for class settlements under the *Class Proceedings Act*, 1992, S.O. 1992, c. 6 ("CPA").

⁵ See *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 ["ATB"], Appellants' Book of Authorities, Tab 2.

5. Justice Morawetz acted in his capacity as a Commercial List justice with respect to Sino-Forest's *CCAA* proceedings; and he was specially appointed also to act under the *CPA* with respect to the proposed E&Y Settlement.

6. Without consolidation, scarce judicial resources will be wasted on hearing the same facts and legal arguments twice. The Appellants would be required to replicate essentially the same record on both proceedings. Inconsistent decisions could emerge if the multiple motions for leave to appeal and the related appeals are kept separate. The rest of the requested administrative relief is intended to reduce the onerous and costly service and filing requirements in light of the numerous parties to this proposed appeal. Granting the requested relief will work in favour of expediting the proceedings, an objective shared by all parties.

7. The Appellants seek leave to act as the representative party under section 30(5) of the *CPA* and the reasons of this Court in *Dabbs v. Sun Life Assurance Co. of Canada*⁶ in order to pursue an appeal under section 30(3) of the *CPA*. The circumstances of this case – where no other party is opposing the settlement and releases on appeal -- justify granting the requested leave.

PART II – FACTS

8. The Appellants are institutional public and private investment funds that were putative class members (but not named representative plaintiffs) in the Ontario class proceeding commenced against Sino-Forest and other parties, following the disclosure of apparent fraud at Sino-Forest in June 2011. The market in Sino-Forest stock collapsed after the disclosure, and the company's notes were also significantly devalued. On January 6, 2012, the Honourable Mr. Justice Paul Perell of the Ontario Superior Court of Justice granted carriage of the Ontario class proceedings to the plaintiffs and counsel in *Trustees of the Labourers' Pension Fund of Central and Eastern Canada*,

⁶ *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 3622 (C.A.) at paras. 18-21 [*"Dabbs"*], **Appellants' Book of Authorities, Tab 5.**

et al. v. Sino-Forest Corp., et al., Court File No. CV-11-431153-00CP (the “Class Action”)⁷. The named plaintiffs in that case (the “Ontario Plaintiffs”) are represented by the law firms of Koskie Minsky LLP and Siskinds LLP (“Class Counsel”).

9. Sino-Forest entered reorganization proceedings under *CCAA* in March 2012. During the proceedings, Justice Morawetz lifted the *CCAA* stay of proceedings so as to allow Justice Perell to consider and ultimately approve a class action settlement between the Ontario Plaintiffs and one of the defendants, Pöyry (Beijing) Consulting Company Limited (“Pöyry”).⁸

10. The Appellants appeared in the *CCAA* proceedings after it was announced on December 3, 2012, that the Ontario Plaintiffs had reached a proposed class settlement with E&Y, which they planned to effectuate using a new “framework” drafted for inclusion in the *CCAA* Plan. The framework allowed defendants in the class proceeding – E&Y, and also underwriters, directors and officers, and the other auditor – to obtain releases under the *CCAA* on a non-opt-out basis upon court approval of settlements with the respective defendants. As part of the settlement, E&Y agreed to pay \$117 million into a Settlement Trust for distribution to anyone who might assert Sino-Forest securities-related claims against E&Y. The settlement had been reduced to writing a few days earlier, on November 29, 2013, in Minutes of Settlement. The E&Y settlement was conditional upon there being no opt outs:

¶10 It is the intention of the Parties that *this* settlement shall be approved and implemented in the Sino-Forest Corporation *CCAA* Proceedings. **The settlement shall be conditional upon full and final releases and claims bar orders in favour of EY and which satisfy and extinguish all claims against EY, and without opt-outs,** and as contemplated by the additional terms attached hereto as Schedule B hereto and incorporated as part of these Minutes of Settlement.⁹

⁷ *Smith v. Sino-Forest Corp.*, 2012 ONSC 24, [2012] O.J. No. 88 [“*Smith v. Sino-Forest*”], **Appellants’ Book of Authorities, Tab 14.**

⁸ *Trustees of the Labourers’ Pension Fund of Central and Eastern Canada v. Sino-Forest Corp.*, 2012 ONSC 5398, **Appellants’ Book of Authorities, Tab 16.**

⁹ Minutes of Settlement, at para. 10, **Exhibit “G” to Jemec Aff, Appellants’ Motion Record, Tab 2G, page 225.**

[Emphasis added]

11. The revised Plan incorporating the framework for third-party non-debtor releases was approved by creditors the same morning of December 3, 2012. Share purchaser class members such as the Appellants and other “equity claimants” were not entitled to vote on the Plan.

12. On December 7, 2012, the Applicant moved before Justice Morawetz to have the Plan sanctioned, including the new framework for third party release found in the new Article 11. The Appellants appeared at the Sanction hearing despite the short notice. The Appellants opposed the sanctioning of Article 11 on the basis that it was not integral to the restructuring of Sino-Forest. The Appellants also argued that Article 11 impermissibly renders illusory and extinguishes the Appellants’ statutory opt-out rights under the *CPA*.¹⁰

13. On December 10, 2012, Justice Morawetz issued his Plan Sanction Order. He dismissed the Appellants’ concerns as being premature, because the release of E&Y was separate from the Plan, in that it would not become effective unless and until the settlement was approved and other conditions were met:

¶48 As noted in the endorsement dated December 10, 2012, which denied the Funds’ adjournment request, the E&Y Settlement does not form part of the Sanction Order ...¹¹

...

¶20 Essentially, if certain conditions are met and further court approval and order are obtained, it is conceivable that E&Y will get a release. However, such a release is not being requested at this time. Further, it is not a condition of Plan Implementation that the E&Y matter be settled.¹²

[Emphasis added]

¹⁰ *Sanction Order, supra* note 1, Exhibit “A” to Jemec Aff, Appellants’ Motion Record, Tab 2A, pages 16-132.

¹¹ Reasons of Justice Morawetz, 2012 ONSC 7050, December 12, 2012 at para. 48, Exhibit “J” to Jemec Aff, Appellants’ Motion Record, Tab 2J, page 248.

¹² Endorsement of Justice Morawetz, 2012 ONSC 7041, December 10, 2012 at para. 20, Exhibit “H” to Jemec Aff, Appellants’ Motion Record, Tab 2H, page 236.

14. The Appellants have moved for leave to appeal the Sanction Order. In their Reply Factum, the Appellants requested that that motion should be joined with any future appellate proceedings resulting from the E&Y settlement.¹³

15. It was later announced that some of Sino-Forest former directors and officers who have been accused by the OSC of fraud or other illegal conduct have been added to the list of Named Third Party Defendants who would be entitled to a no-opt-out third-party release in the event they settled the class claims against them.

16. Following the sanctioning of the Plan, the Ontario Plaintiffs moved to have the E&Y Settlement approved by Justice Morawetz in the *CCAA* Court. Justice Morawetz was also granted powers under the *CPA*.

17. On January 15, 2013 – the deadline for class members to opt-out in connection with the Poyry settlement -- the Appellants opted out of the Class Action.

18. On January 30, 2013, Sino-Forest implemented its restructuring Plan. This occurred, obviously, without regard to whether the E&Y Settlement or any other Named Third Party Defendant settlements would ever actually be consummated, and without regard to whether releases would ever actually be granted.

19. The motion to approve the E&Y Settlement was heard on February 4, 2013. The proposed release of E&Y was defined so as to bind all Securities Claimants, meaning any person who purchased, sold, or held Sino-Forest securities, as defined by the *Securities Act*, R.S.O. 1990, c. 5 (“*Securities Act*”), at any time. The Ontario Plaintiffs proposed to establish a settlement trust

¹³ Reply Factum of the Objectors for Motion for Leave to Appeal from Sanction Order, dated March 1, 2013 [“Reply Factum”], Exhibit “M” to Jemec Aff, Appellants’ Motion Record, Tab 2M, pages 302-311; Jemec Aff, supra note 4, Appellants’ Motion Record, Tab 2, pages 8-15.

which would distribute the E&Y settlement funds. The Ontario Plaintiffs also moved for a representation order appointing them as representatives of all Securities Claimants.

20. The Appellants objected to the approval of the E&Y settlement on the same basis as before – that the proposed no-opt-out settlement and third party release in favour of E&Y are not integral or necessary for success of the Plan and the restructuring of Sino-Forest.¹⁴ The Appellants further argued that it was improper to impose Class Counsel as the legal representatives of the Appellants when their interests were opposed and the Appellants were adequately represented by their own counsel. The Appellants moved to be appointed as representatives of the 88 objecting Securities Claimants and/or for relief from the binding effect of the representation order requested by the Ontario Plaintiffs.

21. On March 20, 2013, Justice Morawetz approved the E&Y settlement, granted a representation order to the Ontario Plaintiffs, and dismissed the Appellants' representation motion.

Justice Morawetz approved the E&Y settlement as a distribution to creditors under the Plan:

¶60 Firstly, although the Plan has been sanctioned and implemented, a significant aspect of the Plan is a distribution to SFC's creditors. The significant and, in fact, only monetary contribution that can be directly identified, at this time, is the \$117 million from the Ernst & Young Settlement. Simply put, until such time as the Ernst & Young Settlement has been concluded and the settlement proceeds paid, there can be no distribution of the settlement proceeds to parties entitled to receive them. It seems to me that in order to effect any distribution, the Ernst & Young Release has to be approved as part of the Ernst & Young Settlement.¹⁵

22. On April 9 and 10, 2013, the Appellants served their Notice of Motion for Leave to Appeal the Settlement Approval Order and the Representation Dismissal Order within the prescribed timelines. The Appellants seek leave to appeal the approval of the E&Y settlement on the same grounds as raised on the Sanction Order – that the E&Y settlement and third-party release are not

¹⁴ Factum of the Objectors for Motion for Settlement Approval, dated January 30, 2013, Exhibit "E" to Jemec Aff, Appellants' Motion Record, Tab 2E, page 172-219.

¹⁵ *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation*, 2013 ONSC 1078, at para. 60, Appellants' Book of Authorities, Tab 12.

integral to the Plan or the Sino-Forest restructuring. The Appellants also contest that the E&Y Settlement is fair, reasonable, and in the best interest of the class.

23. On April 17, 2013, the Appellants were requested by the Registrar to serve and file an Amended Notice of Motion of for Leave to Appeal and bring this motion for directions. The motion for directions was brought in accordance with the *Rules of Civil Procedure* on seven days' notice.

24. On April 19, 2013, the Appellants served a Notice of Appeal asserting a right of appeal under section 30(3) of the *CPA*.

PART III – ISSUES AND THE LAW

25. Three issues remain to be decided:

1. Should the hearing of the motion for leave to appeal the Settlement Approval Order and Representation Order be consolidated with the hearing of the motion for leave to appeal the Sanction Order?
2. Should the Court combine the leave and appeal hearings into one hearing?
3. Should the Court grant the Appellants' other requested administrative relief?

Issue No. 1: The motion for leave to appeal the Sanction Order and the motion for leave to appeal the Settlement Approval Order and Representation Dismissal Order involve the same factual and legal issues and should be consolidated

26. The outstanding motions for leave to appeal should be consolidated to prevent further delay, expense, and risk of inconsistent results. Overall, consolidation will promote the parties' shared objective of expediting the proceedings.

27. Rule 6.01(1) of the *Rules of Civil Procedure* provides that the Court may consolidate proceedings in the following circumstances:

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...

28. The purpose of consolidation is to save expense, avoid delay and avoid multiplicity of pleadings and proceedings.¹⁶ Consolidation is a discretionary decision, decided after an assessment of all relevant issues, including the status of the proceedings and the extent of duplication. The Court should similarly avoid the risk of inconsistent results.¹⁷ This can be achieved by ordering consolidation at an early stage.¹⁸ Consolidation should be ordered when the circumstances of one proceeding are essentially a subset of the circumstances of the other proceeding.¹⁹ Consolidation can be ordered when the parties are not the same and the factual materials filed are different as long as the proceedings raise similar issues and the parties seek similar remedies.²⁰

29. The three orders of Justice Morawetz at issue share common questions of law or fact, such as: 1) under what circumstances are non-debtor third-party releases available in *CCAA* restructuring plans; and 2) 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. Both motions for leave require consideration of the same transaction, the Sino-Forest restructuring Plan. One deals with the “framework” for settlements and releases as embodied in Plan Article 11; the other involves an

¹⁶ *Dyna Corp. Jamaica Ltd. v. 967413 Ontario Ltd.*, 2000 CarswellOnt 227 (S.C.), Appellants’ Book of Authorities, Tab 7; *Consbec Inc. v. Walker*, 2006 CarswellOnt 8154 (S.C.J.) at para. 26-27 [“*Consbec*”], Appellants’ Book of Authorities, Tab 4.

¹⁷ *Consbec*, *supra* note 16 at para. 27, Appellants’ Book of Authorities, Tab 4.

¹⁸ *Flitney v. Howard*, [1985] O.R. 701 (C.A.), Appellants’ Book of Authorities, Tab 8; *Stelco Inc., Re*, 2005 CarswellOnt 829, 195 O.A.C. 74 (C.A.) [“*Stelco*”], Appellants’ Book of Authorities, Tab 15.

¹⁹ *DIRECTV Inc. v. Gillott*, 2007 CarswellOnt 883 (S.C.J.) at para. 43, Appellants’ Book of Authorities, Tab 6.

²⁰ *Forestall v. Toronto Police Services Board*, 2007 CarswellOnt 254 (Div. Ct.) Appellants’ Book of Authorities, Tab 9.

actual settlement and release. The Appellants see no possible reason to divorce these two motions, since they are factually and legally so closely connected.

30. Judicial economy and consistency of verdicts will be advanced if this Court is presented with all issues, in context, in both motions at the same time, as opposed to litigating the same issues in fragmented instalments. Such an approach has been discouraged and should be avoided.²¹ Furthermore, the issues raised in these proceedings are of general importance to Canada's capital markets, confirming that consolidation is appropriate.

31. The Appellants' motion for leave to appeal the Sanction Order is pending. Rule 61.03(14) of the *Rules of Civil Procedure* states that a motion for leave to appeal will be submitted for determination 36 days after filing of the moving parties' reply factum, which occurred on March 4, 2013. The Court is of course free to order an oral hearing to address that motion and order that that it be consolidated with the proposed oral hearing of the motion for leave to appeal the Settlement Approval Order and Representation Dismissal Order.

32. The Respondents were aware of the Appellants' intention to request that this Court join its review of the Settlement Approval Order and Representation Dismissal Order with its review of the Sanction Order.²² There is no prejudice to the Respondents from the requested consolidation.

Issue No. 2: The motions for leave to appeal should be heard at the same time as the appeals in order to avoid prejudice and to expedite the proceedings

33. The motions for leave to appeal and the related appeals should be heard together to properly expedite the proceedings and prevent prejudice to the parties.

34. Certainty and stability in the *CCAA* proceedings warrant having both the leave motions and the appeals themselves heard promptly.²³ This Court has approved combining motions for

²¹ *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 SCR 629, at para. 90 [*"Garland"*], **Appellants' Book of Authorities, Tab 10.**

²² *Reply Factum*, *supra* note 13, **Exhibit "M" to Jemec Aff, Appellants' Motion Record, Tab 2M, pages 302-311.**

leave and appeals into a single oral hearing.²⁴ In general, a decision on this subject is made by weighing the possible prejudice to the moving party if the order is not made, as against the possible prejudice to the responding party if the order is made.²⁵

35. Here, the parties agree on the importance of expediting the appellate proceedings. Guidance with respect to the core issues regarding the availability of third-party releases in this restructuring will be useful before any more Class Action settlements are negotiated.

36. Combining the leave and appeal hearings into one would expedite the proceedings and reduce the expense and prejudice associated with delay to all parties. On the other hand, there is no apparent prejudice to the Respondents from such a course of action.

Issue No. 3: Granting the other requested administrative relief would promote efficiency and access to justice

37. The Respondents oppose the following proposed orders: 1) transfer of the motion materials before Justice Morawetz with respect to the Sanction Order to the Court of Appeal; 2) granting leave to the Appellants to act as the representative party for the purposes of this appeal; and 3) waiving or abridging the notice, service and filing obligations for this motion and validating timely service of the Amended Notice of Motion for Leave to Appeal of the orders dated March 20, 2013 of Justice Morawetz.

38. The materials before Justice Morawetz concerning the Sanction Order contain affidavit material and submissions by Sino-Forest and the other Respondents which go to the heart of the contested issues: is the third-party release framework in Article 11 of the Plan, as utilized by E&Y, integral to the success of the Plan and restructuring of Sino-Forest?

²³ *Air Canada (Re)*, [2003] O.J. No. 2207 (C.A.) at para. 14 [*"Air Canada"*], Appellants' Book of Authorities, Tab 1,

²⁴ *ATB*, *supra* note 5 at para. 4, Appellants' Book of Authorities, Tab 2.

²⁵ *Air Canada*, *supra* note 23 at para. 15, Appellants' Book of Authorities, Tab 1.

39. Transfer of the materials is appropriate for the same reason that consolidation of the motions for leave and the appeal is justified: the issues are closely related and the parties' submissions should be considered together. Transferring the Superior Court of Justice file relating to the Sanction Order promotes efficiency and reduces costs.

40. As noted above, Justice Morawetz was appointed to hear matters relating to the E&Y settlement under the *CPA* as well as the *CCAA*. One of the grounds for the Appellants' appeal is section 30(3) of the *CPA*, which provides that "a party" may appeal from a judgment on common issues or from an order under section 24 (aggregate assessment of monetary relief); under section 30(5), if the representative party does not bring such an appeal, "any class member may make a motion to the Court of Appeal for leave to act as the representative party." In *Dabbs*, this Court refused to grant such leave because the class members there could opt out of the proposed settlement. The situation here is exactly to the contrary -- the Appellants have been denied the right to opt out of a Class Action settlement. Moreover, the settlement, if finalized, would finally release the Appellants' claims against E&Y but may not entitle them any benefit.²⁶ In order to promote access to justice for all equity claimant class members, the Appellants seek leave to act as the representative party on the appeal as equity claimants, assuming an appeal is available under section 30(3). The question of whether a right of appeal is, under the circumstance, open to the Appellants under section 30(3) should be properly left to the three judge appeal panel to decide together with the merits.

41. With respect to the timing of the notice of this motion and of service and filing of the notice of motion for leave, the Appellants have complied with the applicable deadlines and moved promptly to comply with the Registrar's directions to bring the present motion for directions.

²⁶ The E&Y Settlement has been approved as a distribution to creditors under the Plan. Section 6(8) of the *CCAA* prohibits distribution to equity claimants before all non-equity claimants have been paid in full. The Appellants, along with other share purchaser class members, are deemed to be equity claimants. Since creditors and other non-equity claimants in the Sino-Forest restructuring have not been paid in full, equity claimants may be at risk of being prevented from obtaining any allocation of the E&Y settlement funds.

Seven days' notice of this motion was provided to the Respondents pursuant to Rule 37.07(6).

The motion for leave to appeal was served and filed on time. The timing of the service and filing of the Amended Notice of Motion for Leave to Appeal was as requested by the Registrar. The Respondents have been aware of the Appellants' intention to move for leave to appeal at least since April 9, 2013.

42. In any event, Rule 3.02 of the Rules of Civil Procedure states that a court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just. The main consideration in extending time is whether the extension of time for service will advance the just resolution of the dispute, without prejudice or unfairness to the parties.²⁷ With respect to extending the time to file a notice of appeal in this case, if necessary, it is clear that the Appellants have formed an intention to appeal within the relevant period – in fact, they served a notice of appeal; there has been no delay; no prejudice has been accrued to the respondents; the appeal is meritorious; and significant injustice would result if the Appellants were denied a right to appeal on the basis of a missed deadline.²⁸

43. Granting the requested relief will expedite the appellate proceedings, consistent with the parties' consensus. No prejudice will befall any Respondent if the Court grants the requested administrative relief.

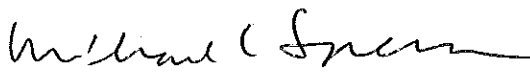
²⁷ *Chiarelli v. Weins*, [2000] O.J. No. 296 (C.A.), at paras. 12 & 17, Appellants' Book of Authorities, Tab 3.

²⁸ *Monteith v. Monteith*, 2010 ONCA 78 at para. 11 Appellants' Book of Authorities, Tab 13; *Issasi v. Rosenzweig*, 2011 ONCA 112 at para. 4, Appellants' Book of Authorities, Tab 11.

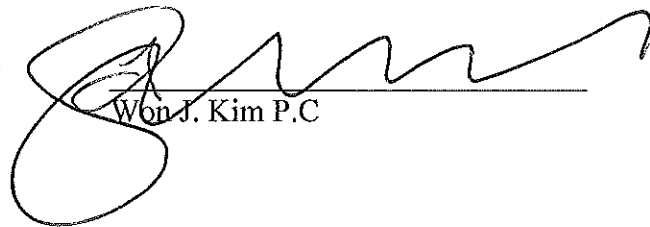
PART IV – ORDER REQUESTED

44. The Appellants respectfully request an order in substantially similar form as set out in Schedule “C”.

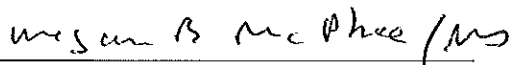
ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 22nd DAY OF April, 2013



Michael C. Spencer



Won J. Kim P.C



Megan B. McPhee

Lawyers for the Moving Parties (Appellants),
Invesco Canada Ltd., Northwest & Ethical
Investments L.P., Comité Syndical National de
Retraite Bâtirente Inc., Matrix Asset
Management Inc., Gestion Férique and
Montrusco Bolton Investments Inc.

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Schedule A—Authorities

Tab	Case
1.	<i>Air Canada (Re)</i> , [2003] O.J. No. 2207 (C.A.)
2.	<i>ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.</i> , 2008 ONCA 587
3.	<i>Chiarelli v. Weins</i> , [2000] O.J. No. 296 (C.A.),
4.	<i>Consbec Inc. v. Walker</i> , 2006 CarswellOnt 8154 (S.C.J.)
5.	<i>Dabbs v. Sun Life Assurance Co. of Canada</i> , [1998] O.J. No. 3622 (C.A.)
6.	<i>DIRECTV Inc. v. Gillott</i> , 2007 CarswellOnt 883 (S.C.J.)
7.	<i>Dyna Corp. Jamaica Ltd. v. 967413 Ontario Ltd.</i> , 2000 CarswellOnt 227 (S.C.)
8.	<i>Flitney v. Howard</i> , [1985] O.R. 701 (C.A.)
9.	<i>Forestall v. Toronto Police Services Board</i> , 2007 CarswellOnt 254 (Div. Ct.)
10.	<i>Garland v. Consumers' Gas Co.</i> , 2004 SCC 25, [2004] 1 SCR 629
11.	<i>Issasi v. Rosenzweig</i> , 2011 ONCA 112
12.	<i>Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation</i> , 2013 ONSC 1078
13.	<i>Monteith v. Monteith</i> , 2010 ONCA 78
14.	<i>Smith v. Sino-Forest Corp.</i> , 2012 ONSC 24, [2012] O.J. No. 88
15.	<i>Stelco Inc., Re</i> , 2005 CarswellOnt 829, 195 O.A.C. 74 (C.A.)
16.	<i>Trustees of the Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp.</i> , 2012 ONSC 5398

Schedule B—Legislation

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 6(8)

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

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 24

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

- (a) monetary relief is claimed on behalf of some or all class members;
- (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and
- (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 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.

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 30(5)

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

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 3.02

- (1) Subject to subrule (3), the court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just.
- (2) A motion for an order extending time may be made before or after the expiration of the time prescribed.

- (3) An order under subrule (1) extending or abridging a time prescribed by these rules and relating to an appeal to an appellate court may be made only by a judge of the appellate court.
- (4) A time prescribing by these rules for serving, filing or delivering a document may be extended or abridged by filing a consent.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 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...

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 61.03(14)

Thirty-six days after service of the moving party's motion record and factum, and transcripts, if any, or on the filing of the moving party's reply factum, if any, whichever is earlier, the motion shall be submitted to the court for consideration, and,

- (a) if it appears from the written material that no oral hearing is warranted, the court shall determine the motion;
- (b) otherwise, the court shall order an oral hearing to determine the motion.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 37.07(6)

Where a motion is made on notice, the notice of motion shall be served at least seven days before the date on which the motion is to be heard

Securities Act, R.S.O. 1990, c. S.5, s.1(1)

"security" includes,

- (a) any document, instrument or writing commonly known as a security,
- (b) any document constituting evidence of title to or interest in the capital, assets, property, profits, earnings or royalties of any person or company,
- (c) any document constituting evidence of an interest in an association of legatees or heirs,

- (d) any document constituting evidence of an option, subscription or other interest in or to a security,
- (e) a bond, debenture, note or other evidence of indebtedness or a share, stock, unit, unit certificate, participation certificate, certificate of share or interest, preorganization certificate or subscription other than,
- (i) a contract of insurance issued by an insurance company licensed under the *Insurance Act*, and
- (ii) evidence of a deposit issued by a bank listed in Schedule I, II or III to the *Bank Act* (Canada), by a credit union or league to which the *Credit Unions and Caisses Populaires Act, 1994* applies, by a loan corporation or trust corporation registered under the *Loan and Trust Corporations Act* or by an association to which the *Cooperative Credit Associations Act* (Canada) applies,
- (f) any agreement under which the interest of the purchaser is valued for purposes of conversion or surrender by reference to the value of a proportionate interest in a specified portfolio of assets, except a contract issued by an insurance company licensed under the *Insurance Act* which provides for payment at maturity of an amount not less than three quarters of the premiums paid by the purchaser for a benefit payable at maturity,
- (g) any agreement providing that money received will be repaid or treated as a subscription to shares, stock, units or interests at the option of the recipient or of any person or company,
- (h) any certificate of share or interest in a trust, estate or association,
- (i) any profit-sharing agreement or certificate,
- (j) any certificate of interest in an oil, natural gas or mining lease, claim or royalty voting trust certificate,
- (k) any oil or natural gas royalties or leases or fractional or other interest therein,
- (l) any collateral trust certificate,
- (m) any income or annuity contract not issued by an insurance company,
- (n) any investment contract,
- (o) any document constituting evidence of an interest in a scholarship or educational plan or trust, and
- (p) any commodity futures contract or any commodity futures option that is not traded on a commodity futures exchange registered with or recognized by the Commission under the *Commodity Futures Act* or the form of which is not accepted by the Director under that Act,

whether any of the foregoing relate to an issuer or proposed issuer; (“valeur mobilière”)

Schedule C—Draft Order

Court of Appeal File No.: M42068
Court of Appeal File No.: M42399
Court of Appeal File No.: M42404
S.C.J. Court File No.: CV-12-9667-00CL

COURT OF APPEAL FOR ONTARIO

) WEDNESDAY, THE
)
) 1ST DAY OF MAY, 2013

**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.: M42068
Court of Appeal File No.: M42399
Court of Appeal File No.: M42404
S.C.J. Court File No.: CV-11-431153-00CP

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

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

Plaintiffs

- and -

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

FENNER & SMITH INCORPORATED (successor by merger to Banc of America Securities LLC)

Defendants

Proceeding under the *Class Proceedings Act, 1992*

ORDER

THIS MOTION, made by the Moving Parties (Appellants) Invesco Canada Ltd., Northwest & Ethical Investments L.P., Comité Syndical National de Retraite Bâtirente Inc., Matrix Asset Management Inc., Gestion Férique and Montrusco Bolton Investments Inc. for directions on administrative matters including consolidating, expediting and seeking representative status on motions for leave to appeal and in the appeals thereof, was heard this day, at Osgoode Hall, 130 Queen St. West, Toronto, Ontario.

ON READING the motion record and factum of the Appellants and the motion record and factum of the responding parties, and on hearing the submissions of the lawyers for the Appellants and the responding parties,

1. **THIS COURT ORDERS** that the time for the service and filing of the Notice of Motion, the Motion Record and the Factum is hereby abridged so that this motion is properly returnable today and hereby dispenses with further service thereof.
2. **THIS COURT ORDERS** that service and filing of the Notice of Motion for Leave to Appeal from the orders dated March 20, 2013 of Justice Morawetz (“Settlement Approval Order” and “Representation Dismissal Order”) is validated.
3. **THIS COURT ORDERS** that all materials related to this motion, the motions for leave to appeal, Court of Appeal File No.: M42068, and M42399,

and all related appeals from the Settlement Approval Order, the Representation Dismissal Order and the order dated December 10, 2012 of the Honourable Mr. Justice Morawetz (“Sanction Order”), may be served by electronic mail, and that proof of receipt of that electronic mail is not necessary to validate service for the purpose of filing the materials with the Court.

4. **THIS COURT ORDERS** that the motions for leave to appeal from the Sanction Order, Court of Appeal File No.: M42068, the motions for leave to appeal from the Settlement Approval Order and Representation Dismissal Order, Court of Appeal File No.: M42399, and, for all related appeals shall be consolidated.
5. **THIS COURT ORDERS** that the hearing of the motions for leave to appeal and the appeals of the Sanction Order, the Settlement Approval Order and the Representation Dismissal Order shall be consolidated and heard together before a panel of three judges, orally.
6. **THIS COURT ORDERS** that the hearings of all such motions for leave to appeal and all such appeals of the Sanction Order, Settlement Approval Order and Representation Dismissal Order shall be expedited.
7. **THIS COURT ORDERS** that all materials filed on the hearing before Justice Morawetz giving rise to the Settlement Approval Order and Representation Dismissal Order (motion heard February 4, 2013) and on the hearing before Justice Morawetz giving rise to the Sanction Order (motion heard December 7, 2012), shall be transferred to the Court of Appeal and orders that the parties

may rely on those materials for the motions for leave to appeal the Sanction Order, Settlement Approval Order, and Representation Dismissal Order, and, all related appeals.

8. **THIS COURT FURTHER ORDERS** that the Appellants are granted leave to act as the representative party for the purposes of this proposed appeal in accordance with section 30(5) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6:
-

Court of Appeal File No.: M42068
Court of Appeal File No.: M42399
Court of Appeal File No.: M42404
Commercial Court File No.: CV-12-9667-00CL

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

Court of Appeal File No.: M42068
Court of Appeal File No.: M42399
Court of Appeal File No.: M42404
Superior Court File No.: CV-10-414302CP

**THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL
AND EASTERN CANADA, et al.** -and- **SINO-FOREST CORPORATION, et al.**

Plaintiffs

Defendants

COURT OF APPEAL FOR ONTARIO

(Proceeding Commenced at Toronto)

ORDER

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Retraite Bâtirente Inc., Matrix Asset Management Inc., Gestion
Férique and Montrusco Bolton Investments Inc.

Court of Appeal File No.: M42404
Commercial Court File No.: CV-12-9667-00CL

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

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

Court of Appeal File No.: M42404
Superior Court File No.: CV-10-414302CP

THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND
EASTERN CANADA, et al.
Plaintiffs

-and- SINO-FOREST CORPORATION, et al.

Defendants

COURT OF APPEAL FOR ONTARIO

(Proceeding Commenced at Toronto)

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