Court File No. CV-12-9667-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

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

FACTUM OF THE AD HOC COMMITTEE OF PURCHASERS OF THE APPLICANT'S SECURITIES, INCLUDING THE REPRESENTATIVE PLAINTIFFS IN THE ONTARIO CLASS ACTION

(Motion Returnable May 8, 2012)

May 4, 2012

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TO: THE ATTACHED SERVICE LIST AT SCHEDULE "C"

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PART I – NATURE OF THE MOTIONS

1. The Ad Hoc Committee of Purchasers of the Applicant's Securities, including the representative plaintiffs in the Ontario Class Action (the "Ontario Plaintiffs") moves for:

(a) a direction or order that three motions that have been brought in the Ontario Class Action (court file no. CV-11-431153-00CP) may proceed: (a) a motion to approve a settlement; (b) a motion for certification; and (c) a motion for leave to proceed with statutory claims under the *Securities Act*.

(b) an order appointing the plaintiffs in the Ontario Class Action as representatives of the Class specified in the Ontario Class Action, for the purpose of these proceedings (but without any payment of professional fees out of the Applicant's estate);

(c) an order declaring that the Restructuring Support agreement between the Applicant and the Noteholders is not binding on this process and directing the Monitor to assist other stakeholders interested in formulating alternative proposals;

(d) an order directing a mediation of claims made in the Ontario Class Action and these proceedings, and directing the Monitor to establish a data room for the purposes of the mediation; and

(e) an order directing the regular disclosure of the professional costs being incurred by the Applicant's estate.

2. This factum also addresses the motion of the Applicant seeking a claims procedure order. The Ontario Plaintiffs object to the form of order put forth by the Applicant in its motion materials. The proposed order is unfairly and unnecessarily prejudicial to the interests of the tens of thousands of people in the Class in the Ontario Class Action.

PART II – OVERVIEW

3. This case involves the insolvency of a significant Canadian public company with business interests in the People's Republic of China and South America. There is a cloud of fraud hanging over this company and certain former officers and directors.

4. $6.5 billion of capital regulated through the Canadian capital markets is in issue. Remarkably, after months of investigation and the expenditure of $50 million of company funds, a committee struck by the board of this company cannot confirm that investors received fair value in return. A critical issue, in this case, is how the checks and balances in our markets failed to protect investors.

5. Courts in Canada, including this court, are left to determine how to apportion accountability among principals, gatekeepers (auditors and underwriters) and

victims; and, more particularly, to answer the questions raised by the relief detailed above.

6. In answering these questions, reference must be had to the purpose of the *CCAA*, which is to create a framework within which the negative impacts of liquidation can be mitigated for the benefit of society as a whole; a purpose that necessarily engages the broader public interest as a factor against which the decision of whether to allow a particular action will be weighed.[1]

7. In fulfilling its role and the purpose of the statute, the court is not to ignore or jettison other legislation and formulate new policy and/or procedure. To the contrary, the court must structure the *CCAA* process with a view to reconciling applicable legislation, so as to take into account the socio-economic policy choices reflected in all valid federal and provincial laws to the fullest extent possible.

8. In the circumstances of this case, a narrow objective is preserving and maximizing asset value, while balancing competing financial interests. The paramount objective, however, is to advance societal interests in an economy characterized by "a complex web of interdependent economic relationships."[2]

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[1] *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379 at para. 60, Book of Authorities of the Ad Hoc Committee of Purchasers of the Applicant's Securities, including the Representative Plaintiffs in the Ontario Class Action ["Ontario Plaintiffs' Book of Authorities"] at Tab 1.
[2] *Ibid.*, Ontario Plaintiffs' Book of Authorities at Tab 1.

9. At the core of the societal objectives brought into play in this case are those articulated by the Ontario *Securities Act* (the "*OSA*"), which is to provide protection to investors from unfair, improper or fraudulent practices, and to foster confidence in fair and efficient capital markets.[3] That statute, in turn, works in tandem with the *Class Proceedings Act* (the "*CPA*")[4], which promotes access to justice, judicial economy and behaviour modification.[5]

10. In fulfilling its role as referee, the court must advance the objectives of all of the relevant legislation in a controlled and coordinated way. In doing so, it should not view these proceedings as a contest between the legislative schemes. To the contrary, the court must look for ways to reconcile statutory objectives, to the extent that they may be in conflict.

11. In keeping with the principles articulated above, the Ontario Plaintiffs say as follows in respect of the issues presently before the court:

(a) Treatment of the pending Class Action motions:

(i) The Ontario Plaintiffs are not asking for a general lifting of the stay for all purposes imposed by the Initial Order. The Ontario Plaintiffs are merely seeking to proceed with three discrete motions in the Ontario Class Action and the Quebec Class Action:

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[3] *Securities Act*, R.S.O. 1990, c.S-5 at s. 1.1 ["*OSA*"].
[4] *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ["*CPA*"].
[5] *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 15, Ontario Plaintiffs' Book of Authorities at Tab 2.

1. the Pöyry Settlement Motion: a motion to approve a settlement, on behalf of the Class, between the plaintiffs and Class Action defendant, Pöyry (Beijing) Consulting Company Limited ("Pöyry");

2. Class Certification: a motion for certification of the Ontario Class Action, pursuant to section 5 of the Class Proceedings Act, 1992; and,

3. Leave under the *Securities Act*: a motion for leave to proceed with statutory claims pursuant to Part XXIII.1 of the Securities Act;

(ii) These motions will not hinder or prejudice the Applicant's restructuring. To the contrary, these motions will facilitate this insolvency proceeding and advance the common policy objectives of the *CCAA*, the *Securities Act* and the *Class Proceedings Act*:

1. The Pöyry Settlement, if approved, will resolve claims in this proceeding:

   a. It will narrow the quantum of potential claims against the Applicant that relate to the Ontario Class Action, and in particular claims relating to the Applicant's liability to

Pöyry and in respect of several claims attributable to Pöyry's alleged wrongdoing.

b. It provides for a dismissal and release of claims against all of the defendants in the Ontario Class Action (including the Applicant) in respect of Pöyry's alleged wrongdoing. In return, Pöyry would provide assistance and documentation for the prosecution of the Ontario Class Action. This will result in greater transparency and accountability, thereby helping to achieve greater market efficiency by discouraging sub-optimal behaviour.

c. It appears the defendants' real concern is Pöyry's sharing of information that may reveal their wrongdoing as alleged in the Ontario Class Action. That concern has no bearing on the Applicant's restructuring, or the objectives served by the *CCAA* or securities legislation.

2. The Certification and Leave Motions should also proceed.

a. The Certification Motion is a procedural motion and will not interfere with the Applicant's restructuring. Certification will advance the resolution of issues that inevitably will arise as a result of the claims procedure in

this case. For instance, a central purpose of the Certification Motion will be to assess and, where appropriate, limit the claims advanced on behalf of the Class to those that are suitable for class-wide treatment.

b. The Leave Motion will similarly advance the resolution of issues that inevitably will arise as a result of the claims procedure. The outcome of the Leave Motion might be also to narrow the statutory secondary market claims of the Class.

c. In any event, there would be incredible, and possibly complete, irreparable prejudice to the Class if the Leave Motion does not proceed in November 2012 (as scheduled). Statutory claims under Part XXIII.1 of the *Securities Act* are subject to a 3-year limitation period. This limitation period may continue to run until leave is granted and a pleading is filed in which the plaintiffs assert claims under Part XXIII.1. After February 2012, unexpired Class claims under Part XXIII may begin to expire, in which case, the claims of the Class would be decimated.

d. Finally, the Certification and Leave Motions were scheduled for November 2012 by order of Justice Perell dated March 26, 2012. This order was the result of a full-day contested motion before His Honour. Accordingly, to the extent it does not interfere significantly with the Applicant's restructuring, Justice Perell's order should be given its full effect and the Certification and Leave Motions should proceed as required by His Honour's order.

At a minimum, these motions should proceed as against the defendants in the Ontario Class Action other than the Applicant, the directors and officers.

(b) A representation order is needed to ensure that the interests of a vulnerable group are properly represented in these proceedings.

(i) A representation order facilitates the claims process and avoids the separate participation of potentially tens of thousands of claimants. It will ensure the orderly and fair process to resolve outstanding claims against the Applicant.

(ii) A representation order would also be consistent with the order of Justice Perell made January 6, 2012, granting carriage of the Ontario

Class Action to the Ontario Plaintiffs and the *sui generis* obligations already imposed on the Ontario Plaintiffs to act in the interests of the Class.

(iii) The Ontario Plaintiffs are not seeking funding of legal or other professional fees for their involvement in the *CCAA* proceeding, unlike other stakeholders in the process.

(c) <u>The Restructuring Support Agreement (the "RSA") should not be allowed to fetter the restructuring options in these proceedings:</u>

(i) An order declaring that this process is not governed by the terms of the Restructuring Support Agreement and directing the Monitor to assist all stakeholders in formulating alternative restructuring options is needed to ensure that stakeholders and the court have the benefit of a full range of restructuring options.

(ii) The RSA fetters the discretion of the Applicant and its board and unfairly tilts any potential restructuring in favour of the noteholders. The Applicant and monitor should not be limited in their ability to efficiently and fairly restructure the Applicant.

(d) An order should be made directing mediation and the creation of a data room:

(i) An order directing mediation to assist all of the parties in their efforts in developing a range of restructuring options. It would also go a long way towards resolving the major claims against the Applicant.

(ii) An order directing the Monitor to create a data room accessible to the participants in the mediation would significantly improve the efficiency of such mediation. The exchange of information is necessary to any compromise. Access to the data room would require execution of a non-disclosure agreement in form and substance acceptable to the monitor and the stakeholders, or as may be directed by the mediator. The participants would contribute such non-privileged information as the stakeholders may agree or as the mediator may direct.

(e) Disclosure of Professional Fees Charged to the Applicant:

(i) An order that the Monitor disclose all professional fees being charged to the Debtor estate in this process is warranted to ensure transparency and accountability in this process.

(ii) There is nothing objectionable or prejudicial in such disclosure. *CCAA* courts have ordered disclosure of professional fees in the past without issue.

(f) Applicant's Motion for Claims Procedure Order:

(i) The Ontario Plaintiffs do not oppose a claims procedure order per se. However, the Ontario Plaintiffs object to the form of order put forth by the Applicant in its motion materials. The proposed order as currently drafted may not permit the Ontario Plaintiffs to file a claim on behalf of the Class. Given the extremely limited notice contemplated, the claims procedure order would eviscerate the claims of the vast majority of the Class. This is inconsistent with principles of natural justice and the policies underlying Ontario's *Securities Act*.

(ii) As well, the proposed order as currently framed is unnecessarily prejudicial, devoid of due process for members of the Class in the Ontario Class Action, and inconsistent with the public policies underlying the Class Proceedings Act. There is no reason why a claims procedure order, if made, cannot be complementary to the class representation order made by Justice Perell and be flexible such that the Ontario Plaintiffs can file a claim on behalf of the Class. The alternative would require tens of thousands of purchasers of Sino's securities to file individual claims within a short time period. This would undoubtedly create havoc for the claims process and undermine a timely restructuring. This serves neither the Applicant nor the ends of justice.

PART III - THE FACTS

A. The Applicant

12. Sino-Forest Corporation is a company incorporated under the laws of Canada and purports to be a commercial forest plantation operator in the People's Republic of China ("PRC") and elsewhere ("SFC" or the "Applicant").

13. Allen Chan is a co-founder of SFC and was Chairman and Chief Executive Officer from 1994 until his resignation in August 2011. After this date, he remained at SFC as Founding Chairman Emeritus until his resignation on April 17, 2012.[6]

1. Capital Structure

14. SFC stock was traded on the TSX. Its authorized share capital consists of an unlimited number of common shares and an unlimited number of preference shares issuable in series. As at June 30, 2011, a total of 246,095,926 common shares were issued and outstanding. No preference shares have been issued.[7]

15. In terms of debt obligations, SFC has issued four series of notes which remain outstanding. The four series of notes mature at various times between 2013 and 2017:

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[6] Affidavit of Daniel Bach, sworn April 11, 2012 ("Initial Bach Affidavit"), Moving Party's Motion Record, Tab 2 at para. 38; Affidavit of Judson Martin, sworn March 30, 2012 ("First Martin Affidavit"), Application Record, Tab 2 at paras. 11 and 15.

[7] First Martin Affidavit, Application Record, Tab 2 at paras. 41-43.

(a) 2017 Senior Notes: On October 21, 2010, SFC issued guaranteed senior notes in the principal amount of $600 million. These notes mature on October 21, 2017, and interest is payable semi-annually, on April 21 and October 21, at a rate of 6.25% per annum. These notes are listed on the Singapore Stock Exchange and are supported by guarantees from 60 subsidiaries of SFC and share pledges from 10 of those same subsidiaries.

(b) 2016 Convertible Notes: On December 17, 2009, SFC issued convertible guaranteed notes in the principal amount of $460 million. These notes mature on December 15, 2016, and interest is payable semi-annually, on June 15 and December 15, at a rate of 4.25% per annum. These notes are supported by guarantees from 64 subsidiaries of SFC.

(c) 2014 Senior Notes: On July 27, 2009, SFC issued guaranteed senior notes in the principal amount of $399,187.000. These notes mature on July 28, 2014, and interest is payable semi-annually, on January 26 and July 26, at a rate of 10.25% per annum. These notes are listed on the Singapore Stock Exchange and are supported by guarantees from 60 subsidiaries of SFC and share pledges from 10 of those same subsidiaries.

(d) 2013 Convertible Notes: On July 23, 2008, SFC issued convertible guaranteed notes in the principal amount of $345 million. These notes mature on August 1, 2013, and interest is payable semi-annually, on February 1 and August 1, at a rate of 5% per annum. These notes are

supported by guarantees from 64 subsidiaries of SFC.[8]

B. The Muddy Waters Report

16. Since its establishment in 1994, SFC has claimed to have experienced breathtaking growth in revenues, assets, and net income. Prior to 2011, it had not declared a single losing quarter for well over 10 consecutives years. This apparent success came to a crashing halt on June 2, 2011.

17. On that date, a research firm, Muddy Waters LLP ("Muddy Waters") released a damning report alleging that SFC had engaged in wide-scale deception of its investors, calling the Company a "near total fraud" and a "Ponzi scheme" (the "Muddy Waters Report").[9]

18. The main allegations in the Muddy Waters Report are that:

(a) SFC has been engaged in fraud since it went public on the TSX;

(b) SFC has improperly used so-called "authorized intermediaries" ("AIs") to conceal that the company's purported timber transactions lacked economic substance;

(c) SFC has grossly exaggerated its forestry assets;

(d) SFC uses a highly opaque corporate structure scores of British Virgin Islands

[8] First Martin Affidavit, Application Record, Tab 2 at paras. 44-48.
[9] Exhibit "M" to First Martin Affidavit, Application Record, Tab 2 at para. 7.

and other entities, which structure serves no legitimate business purpose; and

(e) SFC is essentially a Ponzi scheme.[10]

19. The report also makes allegations against SFC's auditor, Ernst & Young ("E&Y"). Muddy Waters suggests that SFC is a "retirement plan" for E&Y partners which impedes the auditors' ability to detect problems.[11]

20. Despite the claimed financial strength of this company, the fallout from the Muddy Waters Report was immediate and profound.

21. On June 2, 2011, after the Muddy Waters Report was released, SFC shares fell from $18.21 to $14.46 on the TSX (a decline of 20.6%), at which point trading was halted. When trading resumed the next day, SFC's shares fell to a close of $5.23 (a decline of 71.3% from June 1).[12]

22. The Muddy Waters Report also triggered a number of other events: SFC struck a purportedly independent committee of its board (the "IC" or "SC") to investigate the allegations in the Muddy Waters Report; class actions were commenced including the Ontario Class Action; the Ontario Securities Commission ("OSC") commenced an investigation into SFC, Allen Chan and other senior officers; and the Royal Canadian Mounted Police commenced a criminal investigation. By

[10] Exhibit "M" to the First Martin Affidavit, Application Record, Tab 2M.
[11] Exhibit "M" to the First Martin Affidavit, Application Record, Tab 2M.
[12] Amended Statement of Claim ("Amended Claim"), Exhibit "B" to Initial Bach Affidavit, Moving Party's Motion Record, Tab 2B.

December 2011, notwithstanding having sufficient cash reserves, SFC defaulted in its payment under its note indentures and in its financial reporting obligations. On March 30, 2012 SFC commenced these proceedings.

23. Each of these events is discussed in more detail below.

C. The Purportedly Independent Committee

24. SFC declared that the mandate of the IC was to "thoroughly examine and review the allegations contained in Muddy Waters' report".[13]

25. Allen Chan, in a press release dated June 3, 2011, stated:

> It is important that our independent committee thoroughly address Muddy Waters' allegations, and they will have my full support and those of the management team in doing so. However, let me say clearly that the allegations contained in this report are inaccurate and unfounded. **Muddy Waters' shock-jock approach is transparently self-interested and we look forward to providing our investors and other stakeholders with additional information to rebut these allegations.**[14]

Ultimately, however, the IC failed to produce sufficient information to rebut the vast majority of the Muddy Waters allegations.

26. The independence of the IC was questionable from the start.

27. The IC initially consisted of William Ardell, James Bowland, and James Hyde. Each of these individuals was a director of SFC during the time of the misconduct alleged in the Muddy Waters Report. Each of these individuals was named as a

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[13] Initial Bach Affidavit, Moving Party's Motion Record, Tab 2 at paras. 73-76.
[14] Exhibit "H" to Initial Bach Affidavit, Moving Party's Motion Record, Tab 2H [emphasis added].

defendant in the class actions described below and were defendants for most of the time they sat on the IC.

28. Counsel to the IC was Osler, Hoskin & Harcourt LLP ("Osler").[15] Osler is also counsel in the Ontario Class Action and to the individual defendants William Ardell, James Bowland, James Hyde, and Garry West.[16]

29. Similarly, Bennett Jones LLP acts as counsel to SFC in these *CCAA* proceedings, while at the same time acting as counsel in the Ontario Class Action not only to SFC, but also to individual defendants Edmund Mak, Simon Murray, Judson Martin, Kai Kit Poon and Peter Wang.[17]

30. The IC produced three reports (the "IC Reports"). The IC Reports are artfully worded. The executive summaries to the IC Reports generally cast the IC's findings in the most positive light. However, a deeper examination of the body of those reports and of their schedules (a number of which have been redacted to withhold what appears to be key information), demonstrates that the IC has been unable to refute many of the allegations levelled by Muddy Waters. The "shock-jock" report thus appears to have stymied the IC, notwithstanding months of investigation and the expenditure of $50 million.

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[15] Initial Bach Affidavit, Moving Party's Motion Record, Tab 2 at paras. 73-76.
[16] Initial Bach Affidavit, Moving Party's Motion Record, Tab 2 at para. 73.
[17] Initial Bach Affidavit, Moving Party's Motion Record, Tab 2 at para. 54.

31. In attempting to excuse its inability to refute many of the allegations made in the Muddy Waters Report, the IC outlined a number of challenges that it faced. These included:

- The Chinese legal regime for forestry, which appears to suffer from among other things, corruption in its dealings with SFC;
- Difficulty in obtaining information from non-compellable third parties;
- Corporate governance and operational weaknesses, including a lack of full cooperation from certain members of management, operational and administration systems that are generally not sophisticated having regard to the size and complexity of SFC's business and in relation to North American practices.[18]

32. The IC does not explain how SFC's board, senior officers, auditors and underwriters had managed to perform their duties (or not) in light of these challenges, which appear to have existed for many years prior to release of the Muddy Waters Report.

33. On January 10, 2012, SFC issued a press release wherein it cautioned that the company's historic financial statements and related audit reports should not be relied upon.[19]

34. On January 31, 2012, the IC released its Final Report to SFC's board of directors.[20] The IC revealed that, despite having conducted an investigation over

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[18] Second IC Report, Exhibit "R" to the First Martin Affidavit, Application Record, Tab 2M.
[19] Exhibit "E" to the First Martin Affidavit, Application Record, Tab 2E.
[20] All of the independent directors of the IC were named as defendants in the Ontario Class Action.

nearly eight months, it had failed to refute or even to provide plausible answers to key allegations made by Muddy Waters:

> The IC believes that, notwithstanding that there remain issues which have not been fully answered, the work of the IC is now at the point of diminishing returns because much of the information which it is seeking lies with non-compellable third parties, may not exist or is apparently not retrievable from the records of the Company.[21]

35. In an article dated February 13, 2012, William Ardell disclosed that SFC had spent approximately $50 million on this investigation.[22]

36. The results of the IC investigation were so sparse or unreliable that SFC's auditor, E&Y, resigned less than two months later on April 5, 2012.

37. In its resignation letter to SFC, E&Y noted that the company had not prepared December 31, 2011 consolidated financial statements for audit. It also noted that in SFC's March 30, 2012 filing under the *CCAA*, SFC said that it remained unable to satisfactorily address outstanding issues in relation to its 2011 annual financial statements (notwithstanding its $50 million investigation).[23]

D. The Class Action Litigation

38. Class actions have been commenced against SFC in Ontario, Quebec, Saskatchewan and the United States. Counsel to the Plaintiffs in the Ontario Class Action are unaware of any material steps that have been taken in the

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[21] Exhibit "I" to the Initial Bach Affidavit, Moving Party's Motion Record, Tab 2I.
[22] Exhibit "J" to the Initial Bach Affidavit, Moving Party's Motion Record, Tab 2J.
[23] Initial Bach Affidavit, Moving Party's Motion Record, Tab 2 at para. 83.

Saskatchewan or United States actions.[24] The Ontario Plaintiffs intend to coordinate with the progress of the Quebec Class Action in a complimentary and efficient manner.[25]

39. Each of these actions is described below.

1. The Ontario Class Action

40. On July 20, 2011, the Trustees of the Labourers' Pension Fund and the Trustees of the International Union of Operating Engineers (the "Ontario Plaintiffs") commenced a class action by way of a notice of action (the "Ontario Class Action").[26] In addition to SFC, the action names 25 defendants, including various officers and directors, SFC's former auditors, various underwriters and a forestry valuation company (the "Third Party Defendants").[27]

41. The Third Party Defendants include a number of very large and solvent financial institutions, with hundreds of millions to billions of dollars in annual revenues. The following is financial information for certain of the Third Party Defendants:

(a) E&Y reported US$22.9 billion in global revenue for the year ended June 30, 2011.[28]

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[24] Initial Bach Affidavit, Moving Party's Motion Record, Tab 2 at paras. 62 and 65.
[25] Initial Bach Affidavit, Moving Party's Motion Record, Tab 2 at para. 60.
[26] Court File No. 11-CV-431153CP (Toronto).
[27] Initial Bach Affidavit, Moving Party's Motion Record, Tab 2 at para. 4.
[28] Initial Bach Affidavit, Moving Party's Motion Record, Tab 2 at para 96 (a).

(b) Bank of America Corporation and Merrill Lynch Canada Inc. are wholly owned subsidiaries of Bank of America Corporation. In 2011, Bank of America reported revenue of $94.4 billion and net income (excluding goodwill impairment charges) of $4.6 billion.[29]

(c) Canaccord Financial Ltd. (now Canaccord Genuity) is a subsidiary of Canaccord Financial Inc. In 2011, Canaccord Financial Inc. reported revenue of $538 million and net income of $145 million.[30]

(d) CIBC World Markets Inc. is a subsidiary of CIBC. In 2011, CIBC reported revenue of $12.25 billion and net income of $3 billion.[31]

(e) Credit Suisse Securities (Canada) Inc. and Credit Suisse (USA) LLC are subsidiaries of Credit Suisse Group. In 2011, Credit Suisse Group reported revenue of CHF 26.2 billion and net income of CHF 2.79 billion. One CHF is equal to approximately CAD 1.088.[32]

(f) Dundee Securities Corp. (now DWM Securities Inc.) is a subsidiary of DundeeWealth Inc. On March 9, 2011, DundeeWealth Inc. became a wholly owned subsidiary of ScotiaBank. In 2010, DundeeWealth Inc. reported revenue of $1.04 billion and net income of $118.7 million.[33]

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[29] Initial Bach Affidavit, Moving Party's Motion Record, Tab 2 at para 96 (b).
[30] Initial Bach Affidavit, Moving Party's Motion Record, Tab 2 at para 96 (c).
[31] Initial Bach Affidavit, Moving Party's Motion Record, Tab 2 at para 96 (d).
[32] Initial Bach Affidavit, Moving Party's Motion Record, Tab 2 at para 96 (e).
[33] Initial Bach Affidavit, Moving Party's Motion Record, Tab 2 at para 96 (f).

(g) RBC Dominion Securities Inc. is a principal subsidiary of the Royal Bank of Canada. In 2011, the Royal Bank of Canada reported revenue of $27.4 billion and net income of $4.8 billion.[34]

(h) Scotia Capital Inc. is a principal subsidiary of Scotia Bank. In 2011, ScotiaBank reported revenue of $17.3 billion and net income of $5.26 billion.[35]

(i) TD Securities Inc. is a principal subsidiary of the Toronto-Dominion Bank. In 2011, Toronto-Dominion Bank reported revenue of $21.5 billion and net income of $5.9 billion.[36]

2. *Other Ontario Class Actions*

42. By way of a notice of action issued on November 14, 2011, David Grant and Robert Wong commenced an action (the "Grant-Wong Action"), arising out of the same facts, against SFC and certain of the other individual and corporate defendants.[37] On December 13, 2011, the plaintiffs in the Grant-Wong Action filed a statement of claim.[38]

43. Two other proposed class actions were also commenced: *Smith v. Sino-Forest Corp.* (11-CV-428238CP) with Rochon Genova as class counsel, and *Northwest*

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[34] Initial Bach Affidavit, Moving Party's Motion Record, Tab 2 at para 96 (g).
[35] Initial Bach Affidavit, Moving Party's Motion Record, Tab 2 at para 96 (h).
[36] Initial Bach Affidavit, Moving Party's Motion Record, Tab 2 at para 96 (i).
[37] Initial Bach Affidavit, Moving Party's Motion Record, Tab 2 at para. 5.
[38] Initial Bach Affidavit, Moving Party's Motion Record, Tab 2 at para. 6.

& Ethical Investments L.P. v. Sino-Forest Corp. (11-CV-435826CP) with Kim Orr as class counsel. Those actions are now stayed as a result of the Ontario Plaintiffs being granted carriage of the Ontario Class Action.

3. *The Ontario Plaintiffs are Granted Carriage*

44. On December 20 and 21, 2011, a motion was heard to determine which plaintiffs should have carriage over the class proceedings in Ontario against SFC and the other defendants. Justice Perell considered three potential plaintiff groups, each of whom had commenced actions in Ontario. Justice Perell, in deciding the motion, considered a number of factors, including the attributes of the representative plaintiffs, the class definition in each action, the theory of the case, the causes of action and prospects of certification. The court also considered the experience of class counsel in acting on behalf of securityholders, the retainer and the legal and forensic resources available to prosecute the claim.

45. In reasons dated January 6, 2012, spanning 332 paragraphs over 52 pages, the court granted carriage of the class action to the Ontario Plaintiffs (the "Ontario Class Action").[39]

46. The court ordered that no other class actions may be commenced in Ontario in respect of the subject matter of the Ontario Class Action without leave.

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[39] Initial Bach Affidavit, Moving Party's Motion Record, Tab 2 at para. 7.

4. Status of the Ontario Class Action

47. The Ontario Plaintiffs have filed a Fresh as Amended Statement of Claim in the Ontario Class Action (the "Amended Claim"). The Amended Claim incorporates information revealed to the public for the first time by the IC and incorporates information obtained through class counsel's own ongoing investigation and analysis, which was aided by various experts and by investigators based in Hong Kong.[40]

48. The Amended Claim alleges that SFC, certain of its officers and directors, its auditors and its underwriters made material misrepresentations regarding the operations and assets of SFC. The Amended Claim seeks $6.5 billion in damages and is brought on behalf of the following Class:

> [A]ll persons and entities, wherever they may reside who acquired Sino-Forest's Securities during the Class Period by distribution in Canada or on the Toronto Stock Exchange or other secondary market in Canada, which includes securities acquired over-the-counter, and all persons and entities who acquired Sino-Forest's Securities during the Class Period who are resident of Canada or were resident of Canada at the time of acquisition and who acquired Sino's Securities outside of Canada, except the Excluded Persons (the "Class" or "Class Members").[41]

49. The Class Period is "the period from and including March 19, 2007 to and including June 2, 2011."[42] "Excluded Persons" are the defendants, their past and present subsidiaries, affiliates, officers, directors, senior employees, partners,

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[40] Initial Bach Affidavit, Moving Party's Motion Record, Tab 2 at para. 15; Amended Claim, Exhibit "B" to Initial Bach Affidavit, Moving Party's Motion Record, Tab 2B.
[41] Initial Bach Affidavit, Moving Party's Motion Record, Tab 2 at para. 16; Amended Claim, Exhibit "B" to Bach Affidavit, Moving Party's Motion Record, Tab 2B.
[42] Initial Bach Affidavit, Moving Party's Motion Record, Tab 2 at para. 17 and 18; Amended Claim, Exhibit "B" to Initial Bach Affidavit, Moving Party's Motion Record, Tab 2B.

legal representatives, heirs, predecessors, successors and assigns, and any individual who is a member of the immediate family of an individual defendant.

50. There are four motions scheduled to be heard in the Ontario Class Action:

(a) The Plaintiffs' motion for approval of a litigation funding agreement reached between the Ontario Plaintiffs and Claims Funding International, PLC ("CFI"). On April 20, 2012, on consent of the parties, this Court ordered this motion to proceed on May 17, 2012.

(b) The Ontario Plaintiffs' motion for certification for the purpose of settlement only as against the defendant, Pöyry. Prior to the commencement of the *CCAA* proceedings, the Plaintiffs reached a settlement with Pöyry effective March 22, 2012.[43] The elements of the Pöyry settlement include:

(i) Pöyry will consent to certification;

(ii) Pöyry will provide material cooperation in the plaintiffs' prosecution of this action against the remaining defendants, including providing relevant documents and if necessary, acting as a witness for the plaintiffs;

(iii) the action is being dismissed as against Pöyry without costs;

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[43] Affidavit of Daniel Bach, sworn April 26, 2012 ["Second Bach Affidavit"], Motion Record, Tab 2 at paras. 10-12.

(iv) the approval order would include bar orders to prevent future and other claims against Pöyry in respect of the matters raised in this action; and

(v) the settlement is subject to approval by the Ontario and Quebec courts (the "Pöyry Settlement Motion").

(c) The Leave Motion and the Certification Motion, which were served on the defendants on April 6, 2012. These motions are scheduled to be heard from November 21 to 30, 2012.

5. *Leave and Certification Motions*

51. Following the filing of the Claim on January 26, 2012, the Ontario Plaintiffs undertook to Justice Perell to serve and file by no later than April 2, 2012 their motions for certification (the "Certification Motion") under the *CPA* and for leave to advance the statutory cause of action for secondary market misrepresentation (the "Leave Motion") under Part XXIII.1 of the *OSA*.

52. The Plaintiffs brought a motion returnable March 22, 2012 to require the defendants to deliver a statement of defence and to set a timetable for the hearing of the Certification Motion and Leave Motion.[44] All of the defendants

[44] Initial Bach Affidavit, Moving Party's Motion Record, Tab 2 at para. 9.

made submissions opposing the scheduling of the Leave and Certification Motions.[45] These submissions were rejected.

53. In reasons dated March 26, 2012, Justice Perell set a timetable for the hearing of the Leave and Certification Motions and set the motions to be heard in November 2012. His Honour also directed that a defendant that delivered an affidavit for the Leave Motion would be required to deliver a statement of defence.

54. In his reasons, Justice Perrell noted that although "a motion for an order requiring a defendant to deliver a statement of defence or for an order setting a timetable for a motion should not be a momentous matter ... the defendants [to the Ontario Class Action] strenuously resist[ed] delivering a statement of defence before the certification motion". They submitted that "it would be both contrary to law and a denial of due process to require them to plead in the normal course of an action." They also submitted that a series of motions be scheduled, beginning with the Leave Motion, followed by Rule 21 motions, followed by the Certification Motion. Some defendants would have begun with the Rule 21 motions before the Leave Motion, but all wished for a sequence of separate motions, each of which would spawn its own appeal route.

55. In rejecting these arguments, His Honour recognized their tactical nature:

> The truth of the matter is that the Defendants and their lawyers are not concerned about wasted time and effort but rather they do not wish to plead because they believe it is

[45] Initial Bach Affidavit, Moving Party's Motion Record, Tab 2 at para. 69.

> tactically better to avoid the disclosure of their case that the *Rules of Civil Procedure* would normally mandate.
>
> I see no unfairness of denying defendants a tactical manoeuvre that may be inconsistent with the general principle of rule 1.04 that the rules "shall be liberally construed to secure, the just, most expeditious and least expensive determination of every civil proceeding on its merits.[46]

56. The allegations in the Amended Claim are not boilerplate or speculative. While SFC was conducting its internal investigations, counsel for the Ontario Class Action was conducting its own independent research. The Amended Claim contains specific allegations, supported by the evidence of professionals in Canada, the PRC and the Republic of Suriname (where a significant SFC subsidiary claims to have forestry assets). Some of the support for these allegations is summarized below.

i) The Evidence of Alan Mak

57. Alan Mak is an expert in forensic accounting from the Toronto-based firm of Rosen & Associates. Mr. Mak opines, *inter alia*, that:

(a) From an accounting and financial reporting perspective, and based on publicly available information (including the IC Reports), sufficient appropriate evidence does not exist to justify SFC's reporting of timber assets and revenues for the vast majority of SFC's standing timber activities in 2006 to 2010;

(b) The annual audited financial statements of SFC for much or all of the period 2005-2010 should not have been issued to the public;

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[46] Exhibit "G" to Initial Bach Affidavit, Moving Party's Motion Record, Tab 2G at para. 52.

(c) The legal ownership and occurrence of *bona fide* economic transactions have not been established by SFC or by the investigation of the SC;

(d) Given the 'closed circuit' nature of SFC's standing timber business model, a serious possibility (if not high probability) is that SFC's entire standing timber business is an accounting fiction;

(e) SFC's timber assets, revenues and profits from at least 2006 to 2010 were grossly overstated;

(f) In direct contravention of Canadian GAAP, SFC grossly overstated its "cash flows from operating activities," a figure that is extensively relied upon by financial analysts to compute valuations of the company; and

(g) E&Y and BDO failed to conduct their audits in accordance with Generally Accepted Auditing Standards, and failed to detect material misstatements in SFC's financial statements.[47]

ii) The Evidence of Steven Chandler

58. Steven Chandler is a former senior law enforcement official from Hong Kong. Among other things, Mr. Chandler examined various business records that had been filed with the Administration of Industry and Commerce of the PRC, as well as certain filings with the Courts of Hong Kong. Based in part upon that examination, Mr. Chandler found, *inter alia*, that:

(a) A company from which SFC had claimed to have generated substantial sales was in fact a shell and never did any business from the time of its establishment;

[47] Initial Bach Affidavit, Moving Party's Motion Record, Tab 2 at para. 2; Affidavit of Alan T. Mak, sworn in support of the Leave Motion, Moving Party's Motion Record, Tab 2A.

(b) Neither SFC nor any of its subsidiaries appeared to have an interest in a Shanghai-based company of which SFC claimed to be part-owner;

(c) SFC failed to disclose that one of its officers was a major shareholder of a subsidiary of Homix Limited (a company discussed in the Martin Affidavit) at the time that Homix was acquired by SFC; and

(d) Contrary to statements made in the Final Report of the SC, maps are in fact allowed and have been widely used in the PRC for at least the last three years.[48]

iii) The Evidence of Carol-Ann Tjon-Pian-Gi

59. Carol-Ann Tjon-Pian-Gi is a lawyer qualified to practice law in the Republic of Suriname. Ms. Tjon-Pian-Gi opines that although The Greenheart Group (a partially owned subsidiary of SFC) claims to have been granted well in excess of 150,000 hectares of forestry concessions in the Republic of Suriname, the *Forest Management Act* of the Republic of Suriname prohibits a person or legal entity, or various legal entities in which a person or legal entity has a majority interest, from being granted more than 150,000 hectares of forestry concessions.[49]

iv) The Evidence of Dennis Deng

60. Dennis Deng is a partner in one of Beijing's leading law firms. Mr. Deng opines, *inter alia*, that:

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[48] Initial Bach Affidavit, Moving Party's Motion Record, Tab 2 at para. 23; Affidavit of Steven Gowan Chandler, sworn in support of the Leave Motion, Moving Party's Motion Record, Tab 2A.
[49] Initial Bach Affidavit, Moving Party's Motion Record, Tab 2 at para. 24;Moving Party's Motion Record, Tab 2; Affidavit of Carol-Ann Tjon-Pian-Gi, sworn in support of the Leave Motion, Moving Party's Motion Record, Tab 2A.

(a) It is unlawful in the PRC, and potentially punishable with severe criminal penalties, for forestry companies or their representatives to give gifts to employees of forestry bureaus (it having been disclosed by the SC that "there are indications in emails and in interviews with [SFC] Suppliers that gifts and cash payments are made to forestry bureaus and forestry bureau officials");

(b) SFC's BVI subsidiaries are likely engaging in "business activities" in the PRC in violation of PRC law, and the unauthorized conduct of "business activities" in the PRC is potentially punishable with severe penalties;

(c) It is likely that certain of SFC's authorized intermediaries and suppliers refused to produce requested documentation to the SC because that documentation may demonstrate that they were engaging in illegal tax evasion; and

(d) In the PRC, standing timber may not be purchased without purchasing land use rights, and because foreign forestry companies are not allowed to purchase land use rights, the standing timber purchase contracts entered into by SFC's BVI subsidiaries are void and unenforceable under PRC law.[50]

6. *Other Class Actions*

i) Quebec Class Action

61. On June 9, 2011, Siskinds Desmeules (affiliated with Siskinds LLP) filed a petition for an order authorizing the bringing of a class action and granting the status of representative in the Quebec Superior Court (the "Quebec

[50] Initial Bach Affidavit, Moving Party's Motion Record, Tab 2 at para. 25; Moving Party's Motion Record, Tab 2; Affidavit of Dennis Deng, sworn in support of the Leave Motion, Moving Party's Motion Record, Tab 2A.

Proceeding"). The Quebec Class Action is proceeding in coordination with the Ontario Class Action.[51]

62. Prior to the hearing of the Quebec Proceeding, the class definition will likely be revised so that it is limited to Quebec residents eligible to participate in a class proceeding under the Quebec *Code of Civil Procedure*, which expressly excludes entities employing more than 50 persons from participating in a class proceeding.[52]

ii) United States Class Action

63. On January 27, 2012, the Washington, D.C.-based law firm of Cohen Milstein Sellers & Toll PLLC commenced a proposed class action against SFC and certain other defendants in the New York Supreme Court (the "U.S. Action"). The U.S. Action defines the proposed class as:

> (i) all persons or entities who, from March 19, 2007 through August 26, 2011 (the "Class Period") purchased the common stock of Sino-Forest on the Over-the-Counter ("OTC") market and who were damaged thereby; and (ii) all persons or entities who, during the Class Period, purchased debt securities issued by Sino-Forest other than in Canada and who were damaged thereby.[53]

64. It does not appear to the Ontario Plaintiffs that any material steps have been taken in the U.S. Action.[54]

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[51] Initial Bach Affidavit, Moving Party's Motion Record, Tab 2 at para. 60.
[52] *Code of Civil Procedure*, R.S.Q., c. C-25, art. 999.
[53] Initial Bach Affidavit, Moving Party's Motion Record, Tab 2 at para. 61.
[54] Initial Bach Affidavit, Moving Party's Motion Record, Tab 2 at para. 62.

iii) Saskatchewan Action

65. On December 1, 2011, the Merchant Law Group LLP commenced a proposed class action against SFC and certain other defendants in the Saskatchewan Court of Queen's Bench styled as *Haigh v. Sino-Forest Corporation* (the "Saskatchewan Action"). The proposed class in the Saskatchewan Action is defined as:

> All persons and entities wherever they may reside who acquired securities of Sino during the Class Period either by primary distribution in Canada or an acquisition on the TSX or other secondary market in Canada, other than the Defendants, their past and present subsidiaries, affiliates, officers, directors, senior employees, partners, legal representatives, heirs, predecessors, successors and assigns, and any individual who is an immediate family member of an Individual Defendant.[55]

66. It does not appear to the Ontario Plaintiffs that any material steps have been taken in the Saskatchewan Action.[56]

E. The Ontario Securities Commission Investigation

67. On June 8, 2011 SFC announced that the OSC had commenced an investigation into the company.

68. On August 26, 2011, the OSC issued a temporary order against SFC and certain members of SFC's management, including the defendant Allen Chan, directing:

(d) that "all trading in the securities of Sino-Forest shall cease"; and

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[55] Initial Bach Affidavit, Moving Party's Motion Record, Tab 2 at para. 64.
[56] Initial Bach Affidavit, Moving Party's Motion Record, Tab 2 at para. 65.

(e) "Chan and the other named individuals resign any and all positions that they hold as a director or officer of Sino-Forest and cease trading in securities."[57]

69. In recitals to the temporary order, the OSC stated that:

a. "Sino-Forest, through its subsidiaries, appears to have engaged in significant non-arm's length transactions which may have been contrary to Ontario securities law and the public interest",

b. "Sino-Forest and certain of its officers and directors appear to have misrepresented some of its revenue and/or exaggerated some of its timber holdings by providing information to the public in documents required to be filed or furnished under Ontario securities laws and which may have been false or misleading in a material respect contrary to section 122 or 126.2 of the [Ontario Securities] Act and contrary to the public interest," and

c. "Sino-Forest and certain of its officers and directors including Chan appear to be engaging or participating in acts, practices, or a course of conduct related to its securities which it and/or they know or reasonably ought to know perpetuate a fraud on any person or company contrary to section 126.1 of the Act and contrary to the public interest."[58]

70. The temporary cease trade order made on August 26, 2011 was later extended and continues in force.

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[57] Exhibit "M" to Initial Bach Affidavit, Moving Party's Motion Record, Tab 2M.
[58] Exhibit "M" to Initial Bach Affidavit, Moving Party's Motion Record, Tab 2M.

71. On April 5, 2012, Sino received an Enforcement Notice from OSC staff. Enforcement Notices were also received that day by Allen Chan, David Horsley (who remarkably then remained the CFO of SFC), Alfred Hung, and George Ho, among others. The Enforcement Notice against SFC alleges conduct contrary to ss. 122 and 126.1 (fraud and market manipulation) of the *OSA*.[59]

72. Enforcement Notices are notices issued by OSC staff that usually identify issues revealed in an investigation, and advise that staff intend to commence a formal proceeding relating to those issues. Recipients of the notices are given the opportunity to make submissions before OSC staff decide to commence formal proceedings.[60]

73. Section 126.1 of the *OSA* prohibits activities resulting in an artificial price of a security, or which perpetuate a fraud on any person or company. Section 122 provides for a quasi-criminal offence and penalties on conviction of up to $5 million and imprisonment for a term of up to five years less a day. The website of the OSC states that the OSC pursues cases in court under s.122 "in order to seek sanctions and penalties that send a strong message of deterrence to those who try to exploit investors."[61]

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[59] Initial Bach Affidavit, Moving Party's Motion Record, Tab 2 at para. 87.
[60] Initial Bach Affidavit, Moving Party's Motion Record, Tab 2 at para. 88.
[61] Initial Bach Affidavit, Moving Party's Motion Record, Tab 2 at para. 87-89.

F. Allen Chan

74. Throughout the IC investigation, the Ontario Class Action and the OSC investigation, SFC's former CEO Allen Chan has figured prominently in the media as both a spokesperson for the company and as the subject of much scrutiny.

75. In the Ontario Class Action, the Ontario Plaintiffs allege that Chan received lavish compensation from SFC since its establishment. They allege that for 2006 to 2010, Chan's total compensation (other than share-based compensation) was, respectively, US$3 million, $US3.8 million, $US5.0 million, $US7.6 million and US$9.3 million. The Ontario Plaintiffs further allege that Chan (and several other individual defendants) sold SFC shares at lofty prices, and thereby reaped millions of dollars of gains. Chan received SFC stock options that were allegedly backdated or otherwise mispriced, in violation of the TSX Rules, GAAP and relevant securities legislation.[62]

76. On August 26, 2011, Chan resigned as Chairman, CEO and as director of SFC pending the completion of the review by the IC of the allegations in the Muddy Waters Report.[63]

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[62] Amended Claim, Exhibit "B" to Bach Affidavit, Moving Party's Motion Record, Tab 2B.
[63] First Martin Affidavit, Application Record, Tab 2 at para. 135.

77. The IC review did not reveal any information which would exonerate Chan from Muddy Waters' core allegations. Chan nonetheless remained in his position as Chairman Emeritus and appears to have maintained an active role with SFC.

78. Although Chan is being investigated by securities regulators in North America, and is a defendant in numerous class action lawsuits, it appears to be business as usual in PRC. Indeed, Chan has continued to be honoured within the PRC. In November 2011, at the 2nd China Forestry Expo, the China National Forestry Industry Federation (the "CNFIF") presented Chan with an "Outstanding Achievement" award from. In recognition of his contribution to the forestry industry in the PRC, Chan was the first keynote speaker following the Minister of the State Forestry Administration at the China Forestry Expo.[64]

79. In February 2012, the CNFIF presented Chan with the "2011 China Forestry Persons of the Year" award.[65]

80. Just weeks later, on April 5, 2012, Chan was one of the several former SFC directors to receive an enforcement notice from the OSC.

81. Despite SFC's earlier steadfast protestation that Chan was of critical importance to SFC's success as a company, purportedly as a result of his business

[64] First Martin Affidavit, Application Record, Tab 2 at para. 107.
[65] First Martin Affidavit, Application Record, Tab 2 at para. 110.

(stunningly opaque) business "relationships,"[66] Chan resigned his position as Chairman Emeritus.

G. SFC obtains *CCAA* creditor protection

82. After spending $50 million on its largely futile internal investigation, and just days after Justice Perell took SFC and the other defendants to task for the self-serving and tactical arguments advanced by them in the Ontario Class Action, SFC obtained protection from its creditors under the *CCAA* pursuant to an order of this Court dated March 30, 2012 (the "Initial Order").

83. The Initial Order, as amended by the Order of Justice Morawetz dated April 13, 2012, provided a stay of proceedings in favour of SFC until June 1, 2012.

84. Section 17 of the Initial Order includes the following language:

> until and including April 29, 2012 (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (a "Proceeding") shall be commenced or continued against or in respect of the Applicant or the Monitor, or affecting the Business or the Property, except with written consent from SFC and the Monitor or with leave of this Court. Any Proceedings currently under way against or in respect of the Applicant or affecting the Business or the Property were hereby stayed and suspended pending further Order of this Court.[67]

85. The defendants to the Ontario Class Action, including the Third Party Defendants, seek to glom on to the stay of proceedings created by the Initial Order to avoid having to finally deliver a statement of defence, avoid the

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[66] First Martin Affidavit, Application Record, Tab 2 at para. 106.
[67] Initial Order at para. 17.

disclosure that would be provided by the Pöyry Settlement Motion, and prevent the hearing of the Leave and Certification Motions.

86. On the same day, without court permission, the Applicant entered into the RSA with certain of its noteholders. The effect of the RSA is to tie the Applicant's hands in the *CCAA* Proceedings in exchange for little or no consideration, to the potential prejudice of the Applicant's other stakeholders.

87. The RSA requires the Applicant to liquidate its assets through a plan of arrangement, providing for:

(a) the transfer of the Applicant's business assets to either:

(i) an arm's length third party buyer for a cash payment equal to 85% of the outstanding value of the outstanding notes; or,

(ii) a new entity owned primarily by the noteholders;

(b) the creation of a Litigation Trust in the amount of $20 million with the purpose of funding speculative litigation against Muddy Waters LLC, for the benefit of:

(iii) "Junior Constituents" for the first $25 million and a minimum of 70% of any recovery above $25 million; and,

(iv) possibly, the noteholders for 30% of any recovery over $25,000,000;

(c) An incentive payment to noteholders and other creditors having claims below an unspecified amount; and

(d) The release of claims against the Applicant's current and former directors and officers.

88. Pursuant to the RSA, the Applicant has fettered its discretion in these proceedings and its ability to deal with all stakeholders in a fair and even handed manner. Among other things, the RSA provides that the Applicant:

(a) is precluded from taking "any action, directly or indirectly, that is materially inconsistent with, or is intended or is likely to interfere with the consummation of, the Transaction, except as required by applicable Law or by any stock exchange rules, or by any other Governmental Entity having jurisdiction over the Company or any of its Subsidiaries"[68];

(b) "shall not, directly or indirectly...: (i) solicit, initiate, knowingly facilitate or knowingly encourage (including any way of furnishing information or entering into any agreement) any inquiries or proposals regarding any transaction that is an alternative to the Transaction (an 'Other Transaction'); (ii) participate in an substantive discussions or negotiations with any person (other than the Initial Consenting Noteholders and the Advisors) regarding any Other Transaction; or (iv) enter into, or publicly propose to enter into, any agreement in respect of any Other Transaction; or (iv) provided, however, that notwithstanding anything in the Section 5(n), the Company may, after consulting with the Advisors, consider an Other Transaction if:... (b) such Other Transaction provides for either (I) the repayment in full in cash of the

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[68] Restructuring Support Agreement ("RSA"), Exhibit "B" to the First Martin Affidavit, Application Record, Tab 2B at s. 5(e).

principal amount of the Notes, all Accrued Interest and the Expense Reimbursement on closing of the Other Transaction; or (II) is determined by the Company and its advisors to be financially superior for the Noteholders and can be implemented through a plan of arrangement with the support of the Initial Consenting Noteholders...[69]

89. It is not clear why the Applicant could not have filed for protection from its creditors without entering into the RSA.

90. Moreover, any concessions obtained from the noteholders in respect of the Plan are more illusory than real. Pursuant to s. 6(b)(iii) of the RSA, it is a condition precedent to the noteholders' support for the Plan that "the Initial Consenting noteholders shall be satisfied with the results of due diligence concerning the Company, its Subsidiaries and their businesses."[70]

PART IV - ISSUES AND THE LAW

A. Issues

91. The Ontario Plaintiffs submit that the following issues need to be addressed on this motion:

(a) Should the following motions be stayed:

(i) the Pöyry Settlement Motion;

(ii) the certification motion; and

[69] RSA, Application Record, Tab 2B at s. 5(n).
[70] RSA, Application Record, Tab 2B at s. 6(b)(iii).

(iii) the leave motion under the *Securities Act*.

(b) Should the following orders be made in order to ensure the *CCAA* proceeding is fair and balances the needs of all stakeholders:

(i) An order appointing the Ontario Plaintiffs, for the purposes of these proceedings, as representatives of the class defined in the Ontario Class Action;

(ii) A declaration that the RSA is not binding on this process and an order directing the Monitor to assist parties having an interest in developing alternative restructuring proposals;

(iii) An order directing a mediation of the claims in the Ontario Class Action and in these proceedings;

(iv) An order directing the Monitor to create a confidential data room accessible to all parties in these proceedings; and

(v) An order that the Monitor will disclose all professional fees being charged to the Debtor estate in this process?

(c) Should the Applicant's claims procedure order be granted and if so, what revisions are appropriate?

B. Overarching principles of the court's discretion

92. It is important for this court, in considering the motion before it, to examine the policy objectives underlying the three legislative schemes engaged by this case

(i.e. the *OSA*, the *CPA* and the *CCAA*). These objectives are mutually reinforcing, which militates in favour of permitting the three motions in the Ontario Class Action during the *CCAA* proceeding to the extent possible.

93. The principal objectives of the *OSA* are to protect investors and to promote fair and efficient capital markets. As s. 1.1 of the *OSA* provides:

> The purposes of this *Act* are,
> (a) to provide protection to investors from unfair, improper or fraudulent practices; and
> (b) to foster fair and efficient capital markets and confidence in capital markets.[71]

94. Although these objects are taken from the Ontario statute, the goals of securities regulation across Canada are the same.

95. The goal of protecting our economy is obviously a goal of great importance. In *Pezim*, the Supreme Court of Canada emphasized the importance of securities regulation in our economic system:

> This protective role, common to all securities commissions, gives a special character to such bodies which must be recognized when assessing the way in which their functions are carried out under their *Acts*.
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> ...
>
> The breadth of the [British Columbia Securities] Commission's expertise and specialisation is reflected in the provisions of the [*Securities Act*]. Section 4 of the Act identifies the Commission as being responsible for the administration of the Act. The Commission also has broad powers with respect to investigations, audits, hearings and orders.
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> ...
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> In reading these powerful provisions, it is clear that it was the legislature's intention to give the Commission a very broad discretion to determine what is in the public's interest ....[72]

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[71] *OSA*, *supra*, s. 1.1.
[72] *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 at 593, 595, Ontario

96. The following year, in *British Columbia Securities Commission v. Branch*, Justices Sopinka and Iacobucci's majority reasons put the objects of securities regulation this way:

> The *Act* aims to protect the public from unscrupulous trading practices which may result in investors being defrauded. It is designed to ensure that the public may rely on honest traders of good repute able to carry out their business in a manner that does not harm the market or society generally.[73]

97. The *CPA* also raises policy objectives that must be respected to the extent possible in this proceeding. There are three purposes underlying the *CPA*: access to justice, judicial economy and behaviour modification. As the Supreme Court of Canada held in *Hollick v. Toronto (City)*:

> The [*CPA*] reflects an increasing recognition of the important advantages that the class action offers as a procedural tool. As I discussed at some length in *Western Canadian Shopping Centres* (at paras. 27-29), class actions provide three important advantages over a multiplicity of individual suits. **First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public.** In proposing that Ontario adopt class action legislation, the Ontario Law Reform Commission identified each of these advantages: see Ontario Law Reform Commission, Report on Class Actions (1982), vol. I, at pp. 117-45; see also Ministry of the Attorney General, Report of the Attorney General's Advisory Committee on Class Action Reform (February 1990), at pp. 16-18. In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters.[74]

Plaintiffs' Book of Authorities at Tab 3.

[73] *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3 at para. 35 ["*Branch*"], Ontario Plaintiffs' Book of Authorities at Tab 4.

[74] *Hollick*, *supra* at para. 15 (emphasis added), Ontario Plaintiffs' Book of Authorities at Tab 2.

98. Furthermore, the statutory scheme under the *CPA* makes the Ontario courts responsible for ensuring that the interests of the absent class members are not harmed. It is well settled that class proceedings are *sui generis* litigation and that, from the commencement of a class proceeding, the courts have responsibilities to the class.[75]

99. Respecting securities class actions, numerous courts have held that class actions are the preferable procedure through which to bring claims pursuant to the statutory causes of action contained in the *OSA*.[76] Indeed, claims under the *OSA* are tailored-made for class action treatment. The reason for this is clear: a class action has the greatest potential to supplement securities regulation so as to enhance investor protection. In the absence of a class proceeding, these statutory causes of action would not have the bite necessary to supplement the regulatory regime and to "ensure that the public may rely on honest traders of good repute able to carry out their business in a manner that does not harm the market or society generally".[77] The reality is that many investors who are harmed by misrepresentations do not sustain losses that could be economically pursued on an individual basis.

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[75] *Fantl v. Transamerica Life Canada*, 2009 ONCA 377 at para. 38, Ontario Plaintiffs' Book of Authorities at Tab 5.
[76] See for e.g. *Dobbie v. Arctic Glacier Income Fund*, 2011 ONSC 25, Ontario Plaintiffs' Book of Authorities at Tab 6; *Silver v. Imax Corp.*, [2009] O.J. No. 5573 (S.C.J.) ["*Imax*"], Ontario Plaintiffs' Book of Authorities at Tab 7; *McKenna v. Gammon Gold Inc.*, [2010] O.J. No. 1057 (S.C.J.), Ontario Plaintiffs' Book of Authorities at Tab 8.
[77] *Branch*, *supra* at at para. 35, Ontario Plaintiffs' Book of Authorities at Tab 4.

100. For instance, in *Marcantonio v. TVI Pacific Inc.*, Justice Lax, in certifying a class action for the purpose of settlement which, like the present case, included claims under s. 138 of the *OSA*,[78] noted the advantages of class proceedings in cases involving secondary market misrepresentation. She held that:

> Individual litigation of securities cases can be difficult, time-consuming and expensive. Many claims would never be advanced because they are uneconomic for an individual investor to pursue. A class action is the optimal method of procuring a remedy for a group of investors who allege they have been harmed in similar ways as a single determination of the defendants' liability eliminates duplication of fact-finding and legal analysis. Further, **a class action has the potential to act as an essential and useful supplement to the deterrent effects of regulatory oversight. It enhances the incentive for directors and officers to ensure that their disclosures to the investing public are materially accurate, thereby enhancing investor protection.** Consequently, a class proceeding is the preferable procedure because it provides a fair, efficient and manageable method of determining the common issue, and advances the proceeding in accordance with the goals of access to justice, judicial economy and behaviour modification.[79]

101. Finally, the purposes underlying the *CCAA* also reflect society's interest in efficient economic markets. In *Century Services Inc. v. Canada*, Justice Deschamps (for a majority of the Supreme Court of Canada) held that the purpose of the *CCAA* "is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets."[80]

102. Justice Deschamps was clear that the social purpose served by the *CCAA* extends beyond the creditors and employees of a company undergoing restructuring. As she held, after reviewing the history of the *CCAA*:

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[78] *OSA*, *supra*, s. 138.
[79] *Marcantonio v. TVI Pacific Inc.*, [2009] O.J. No. 3409 (S.C.J.) at para. 9 (emphasis added) ["*Marcantonio*"], Ontario Plaintiffs' Book of Authorities at Tab 9.
[80] *Century Services*, *supra* at para. 15 (emphasis added), Ontario Plaintiffs' Book of Authorities at Tab 1.

> Reorganization serves the **public interest** by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (ibid., at p. 593). **Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.**[81]

103. In other words, *CCAA* proceedings are not simply about maximizing value for creditors through the liquidation of assets or ensuring that employees remain employed. Rather, *CCAA* proceedings are intended to advance societal interests (not limited to the interests of employees and creditors) in an economy characterized by "a complex web of interdependent economic relationships".

104. In summary, all three legislative schemes are directed at protecting the efficiency of the economy as a whole. In this sense, they complement each other and it only makes sense that the court orders should serve to advance the objectives of all the statutes in tandem.

C. The Motions should not be stayed

1. Overview of the law respecting stays

105. Irrespective of whether the various motions related to the Ontario Class Action are or are not currently stayed as a result of this proceeding, the fundamental point is that they should not be stayed.

106. The Ontario Plaintiffs accept that this court has the jurisdiction to stay the various motions. Accordingly, although the Ontario Plaintiffs take the position that the

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[81] *Ibid.* at paras. 16-18.

Pöyry Settlement Motion is not stayed, and that the Certification and Leave Motions are not stayed as against the Third Party Defendants other than the current and former directors and officers of the Applicant, the real issue to be decided is: "Should they be stayed?"

107. The Ontario Plaintiffs say that:

(a) The parties seeking to stay these motions have the high burden of persuading the court that circumstances exist warranting a comprehensive stay and depriving the Ontario Plaintiffs from access to the courts; and

(b) The burden is not satisfied in this case.

108. The source of this Court's jurisdiction to stay the relevant motions is found in s. 11.02 of the *CCAA* and s. 106 of the *Courts of Justice Act* ("*CJA*"). In either case, the onus of demonstrating that a stay is warranted is on the party seeking the stay.[82]

i) The CCAA test

109. In general, courts should use their remedial powers under the *CCAA* to achieve the broad public objective of the legislation; that is, to mitigate the damaging social and economic effects caused by the liquidation of a company's assets. As noted above, the Supreme Court of Canada has confirmed that the *CCAA* is

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[82] *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, s. 11.02(3) ["*CCAA*"]; *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.) at para. 21 ["*Campeau*"], Ontario Plaintiffs' Book of Authorities at Tab 10.

designed to mitigate the negative impacts of liquidation for all stakeholders, not simply creditors and employees. Orders made within the *CCAA* framework (including stays) should be focused and serve this ultimate policy objective.

110. In addition, while a judge exercises broad discretion under the *CCAA*, the discretion must be exercised in the public interest and tailored according to the particular public concern at play.[83]

111. A stay is only warranted where a proceeding may negatively affect the debtor company. When deciding whether to grant a stay, the court is not concerned with any individual or specific class of stakeholders. Rather, as Justice Blair (as he then was) held in *Campeau v. Olympia & York Developments Ltd.* ("*Campeau*"), a stay is only appropriate where a proceeding could "seriously impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement".[84]

112. This interpretation is supported by the text of the *CCAA*. Section 11.02 provides:

> 11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,
>
> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken **in respect of the company** under *the Bankruptcy and Insolvency Act* or the Winding-up and Restructuring Act;
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding **against the company**; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any

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[83] *Century Services*, *supra* at para. 60, Ontario Plaintiffs' Book of Authorities at Tab 1.
[84] *Campeau*, *supra* at para. 19, Ontario Plaintiffs' Book of Authorities at Tab 10.

> action, suit or proceeding **against the company**.[85]

113. Moreover, several recent cases underscore how the more extreme powers of a *CCAA* judge, are reserved for restructuring arrangements that serve a significant and broad public concern.[86]

114. In summary, a stay in a *CCAA* proceeding will only be warranted where the proceeding stayed would have a negative impact on the debtor company and where it serves the broader public interest advanced by the *CCAA*; specifically, the mitigation of negative impacts on society generally caused by liquidation.

ii) The CJA test

115. Pursuant to s. 106 of the *CJA*, "a court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just."[87]

116. Justice Strathy recently articulated the test for obtaining a stay of proceedings under s. 106 as follows:

> There is no dispute that I have jurisdiction to grant a stay where it would be just and convenient to do so. **That jurisdiction should be exercised sparingly.** The moving party must show that (a) continuation of the action would be unjust because it would be oppressive or vexatious to the moving party or would otherwise be an abuse of the process; and (b) the stay would not cause an injustice to the plaintiff.[88]

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[85] *CCAA*, s. 11.02(1) (emphasis added).
[86] See e.g. *Century Services*, *supra*; *Canadian Red Cross Society*, 2002 CarswellOnt 2136 (S.C.J.), Ontario Plaintiffs' Book of Authorities at Tabs 1 and 11.
[87] *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 106.
[88] *Trillium Motor World Ltd. v. General Motors of Canada Ltd.*, 2011 ONSC 1300, [2011] O.J. No. 889 at para. 170 (emphasis added) ["*Trillium Motors*"], Ontario Plaintiffs' Book of Authorities at Tab 12.

117. In *Campeau*, Justice Blair stressed that "the balance of convenience must weigh significantly in favour of granting the stay, as a party's right to have access to the courts must not be lightly interfered with."[89] To warrant a stay, it must actually be unjust to proceed. Justice Blair continued:

> The court must be satisfied that a continuance of the proceeding would serve as an injustice to the party seeking the stay, in the sense that it would be oppressive or vexatious or an abuse of the process of the court in some other way. The stay must not cause an injustice to the plaintiff.[90]

2. *The Motions should proceed*

i) Proceeding with these motions is consistent with meeting policy objectives

118. As set out above, the three processes at issue on this motion (the *CCAA*, the *OSA* and Ontario Class Action brought pursuant to the *CPA*) all serve the similar purpose of protecting the integrity of the Canadian economy as a whole. These proceedings should therefore be allowed to continue so that they may work in tandem to bolster this public objective. This approach is consistent with a bedrock principle in our justice system: namely, that courts are to avoid finding a conflict between the operation of legislative schemes to the extent possible.[91]

119. There is a "dominant tide" in Canadian federalism towards cooperation.[92] The presumption when approaching federal and provincial statutes (such as the

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[89] *Campeau*, *supra* at para. 21, Ontario Plaintiffs' Book of Authorities at Tab 10.
[90] *Ibid.*
[91] Ruth Sullivan, *Construction of Statutes*, 5th ed., Markham: LexisNexis Canada, 2008 at p. 326.
[92] *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2 at 18, Ontario Plaintiffs' Book of Authorities at Tab 14. See also: *P.E.I. Potato Marketing Board v. H. B. Willis Inc.*, [1952] 2 S.C.R. 392, Ontario Plaintiffs' Book of Authorities at Tab 15; *Lord's Day Alliance of Canada v. Attorney General of British*

CCAA, on the one hand, and the *CPA* and the *OSA*, on the other) is that each should operate as normal.[93]

120. Of course, there are some cases where courts have stayed proceedings or rights arising under provincial legislation. One example is in *Re Nortel Networks Corp.* In that case, this court overrode provincial *Employment Standards Act* provisions that required payment of termination and severance obligations on the basis that the payment of those obligations to individual creditors would frustrate the broader social stakeholder objectives of the *CCAA*.[94] Similarly, in *Re Timminco Limited,* this court stayed class proceedings litigation focussed on recovering available insurance proceeds.[95] The court did this so that Timminco's executive team could focus on the debtor's sale process, noting that "to the extent that the claim... is intended to access certain insurance proceeds, it seems to me that the prosecution of such claim can be puton hold, for a period time".

121. The present case is unlike *Nortel* or *Timminco* in which the operation of a provincial statute or proceeding frustrated the purpose of the *CCAA*. As discussed above, far from frustrating the objectives of the *CCAA*, the processes under the *OSA* and the *CPA* advance very similar objectives. The Ontario Class Action touches upon a broad public interest.

Columbia, [1959] S.C.R. 497, Ontario Plaintiffs' Book of Authorities at Tab 16; and *Coughlin v. Ontario Highway Transport Board*, [1968] S.C.R. 569, Ontario Plaintiffs' Book of Authorities at Tab 17.

[93] *Canadian Western Bank v. Alberta*, 2007 SCC 22 at para. 37, Ontario Plaintiffs' Book of Authorities at Tab 18.

[94] *Re Nortel Networks Corp.*, 2009 CarswellOnt 7383 (C.A.), Ontario Plaintiffs' Book of Authorities at Tab 26.

[95] *Re Timminco Ltd.*, 2012 ONSC 2515 (unreported), Ontario Plaintiffs' Book of Authorities at Tab 36.

122. The significance of the Ontario Class Action to the public interest is highlighted by the concerns articulated by the OSC in its March 2012 Report entitled, "Emerging Markets Issuer Review".[96] One month after the Muddy Waters Report was released, the OSC announced it was commencing a regulatory review of emerging market issuers. The purpose of the review was to assess the quality and adequacy of selected emerging market issuers' disclosure and corporate governance practices, as well as the adequacy of the gatekeeper roles played by auditors, underwriters and the exchanges, and to identify any broad policy issues and entity-specific concerns.[97]

123. In its final report, the OSC identifies five principal concerns with the emerging market companies they reviewed:

(a) The level of EM issuer governance and disclosure;

(b) The adequacy of the audit function for an EM issuer's annual financial statements;

(c) The adequacy of the due diligence process conducted by underwriters in offerings of securities by EM issuers; and

(d) The nature of the exchange listing approval process.[98]

124. The language used by the OSC is damning:

> One of our central concerns was the apparent "form over substance" approach to compliance with applicable standards for disclosure, issuer governance, board oversight, audit practices and due diligence practices. In our view, the level of rigor and independent-mindedness applied by boards, auditors and underwriters in doing their important jobs – management oversight, audit, due diligence on offerings – should have been more thorough.[99]

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[96] Ontario Securities Commission Staff Notice 51-719, "Emerging Markets Issuer Review" dated March 20, 2012, Ontario Plaintiffs' Book of Authorities at Tab 28.
[97] *Ibid.* at 2.
[98] *Ibid.* at 8.
[99] *Ibid.*

125. The OSC Report makes it clear that the Ontario Class Action is not merely about recovery of claims. The action addresses a systemic concern and the relevant motions and the *CCAA* proceeding can, and should, proceed harmoniously. To do so squarely advances the public interest underlying each of the applicable statutory schemes and does no actual harm to the Applicant or the restructuring process.

ii) The Pöyry Settlement Motion will narrow the issues

126. The Pöyry Settlement, if approved, will resolve claims in this proceeding. It will narrow the quantum of potential claims against the Applicant that relate to the Ontario Class Action, and in particular claims relating to the Applicant's liability to Pöyry and in respect of several claims attributable to Pöyry's alleged wrongdoing.

127. The Pöyry Settlement Motion does not have any material impact on SFC, its business or its property; staying this motion would not serve the objectives of the *CCAA*. The continuation of this limited aspect of the Ontario Class Action will not prejudice stakeholders in these proceedings, nor will it prejudice the defendants in the Ontario Class Action.

128. The Pöyry Settlement Agreement is an agreement reached with a defendant in the Ontario Class Action prior to the commencement of these proceedings. In exchange for information and cooperation from Pöyry, the Class will release its

claims against Pöyry and seek a standard bar order preventing claims for contribution, indemnity and other claims over in respect of the released claims. If it is later determined that the non-settling defendants have such rights of contribution, indemnity, or claim over against Pöyry, then the Class would not be entitled to claim or recover from the non-settling defendants the proportion of any judgment that the Ontario court would have apportioned to Pöyry.[100]

129. Given the carefully crafted "no claims over" provision, the Pöyry Settlement Agreement benefits the defendants to the Ontario Class Action, including SFC, by simplifying the Ontario Class Action and limiting the liability of all defendants.

130. The Ontario Plaintiffs anticipate that the only action required from SFC in connection with the Pöyry Settlement is production of SFC's shareholder listing as of June 2, 2011, so that notice of the settlement can be given to the Class.

131. This information is readily available and frequently provided in securities class actions.[101]

132. Moreover, identifying the members of the Class and running the opt-out period for the Class is an important exercise even for these *CCAA* proceedings. It is obviously beneficial to understand who the affected stakeholders are for the purposes of these proceedings. The certification and opt-out process pertaining

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[100] Initial Bach Affidavit at paras. 98-99, Moving Party's Motion Record, Tab 2; Sino Forest Class Action National Settlement Agreement dated March 20, 2012 ["Pöyry Settlement Agreement"], Exhibit "F" to Initial Bach Affidavit in support of the Pöyry Settlement Motion, Moving Party's Motion Record, Tab 2E.
[101] Affidavit of David Weir, sworn April 19, 2012.

to the Pöyry Settlement will determine who will be bound by subsequent court orders approving settlements in the Class Action.

133. This Court should take note that the primary resistance to the Pöyry Settlement Motion proceeding comes from SFC's auditors, in particular, E&Y. It is deeply troubling that auditors, whose primary function is to maintain transparency and openness, seek to prevent the release of documents that will shed light on SFC's (mis)management (and potentially the auditors' role) in failing to detect it. It appears the defendants' real concern is Pöyry's sharing of information that may reveal their wrongdoing as alleged in the Ontario Class Action. That concern has no bearing on the Applicant's restructuring, or the objectives served by the *CCAA* or securities legislation.

iii) The complaints about allowing the Leave and Certification Motions to proceed are exaggerated

134. The Leave and Certification Motions are essentially procedural motions and will not unduly interfere with the Applicant's restructuring. To the contrary, they are necessary and appropriate steps to be taken in furtherance of the common objectives of the applicable legislative schemes. Certification will advance the resolution of issues that inevitably will arise as a result of the claims procedure in this case. For instance, one of the central purposes of the certification motion will be to assess and, where appropriate, limit the claims advanced on behalf of the Class.

135. The *CPA* is remedial legislation that was designed, in part, "to facilitate access to justice for individuals whose claims would be uneconomic or inefficient if pursued on an individual basis."[102] It allows litigants with similar claims against a common party to have those claims decided on a group basis. As noted above, courts have held that securities class actions serve an important public purpose in the regulation of efficient capital markets and the economy of Canada as a whole.

136. The issue at the certification stage is whether the lawsuit is appropriately prosecuted as a class action. Justice Strathy held in *Ramdath v. George Brown College of Applied Arts & Technology*:

> Certification is decidedly *not* a test of the merits of the action. The question for a judge on a certification motion is not "will it succeed as a class action?, but rather, "can it *work* as a class action?"[103]

137. The *CPA* simply provides a statutory framework for the prosecution of class proceedings. The legislation is procedural: it does not concern the merits of the underlying claim. If the five-part test set out in s. 5(1) of the *CPA* is met, then the action must be certified as a class proceeding. Section 5(1) provides:

> 5(1) The court shall certify a class proceeding on a motion under section 2, 3, or 4 if,
>
> (a) the pleadings or notice of application discloses a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
>
> (c) the claims or defences of the class members raise common issues;
>
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
>
> (e) there is a representative plaintiff or defendant who

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[102] *Trillium Motor*, *supra* at para. 42, Ontario Plaintiffs' Book of Authorities at Tab 12.
[104] *CPA*, *supra*, at s. 5(1).

(i) would fairly and adequately represent the interest of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding; and

(iii) does not have, on the common issues for the class, an interest in conflict with the interest of the other class members.[104]

138. These requirements are linked such that "[t]here must be a cause of action, shared by an identifiable class, from which common issues arise that can be resolved in a fair, efficient and manageable way that will advance the proceedings and achieve access to justice, judicial economy and the modification of behaviour of wrongdoers."[105]

139. The test under s. 5(1)(a) of the *CPA* is the same as the test under Rule 21.01(1)(b) of the *Rules of Civil Procedure*[106]: whether "it is plain and obvious that the allegations pleaded are incapable of supporting a cause of action and that the claim cannot succeed."[107] In other words, this requirement turns on the bare statement of claim and does not require any additional facts or evidence from the defendants.

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[105] *Sauer v. Canada (Minister of Agriculture)* (2008), 169 A.C.W.S. (3d) 27 (Ont. S.C.J.) at para. 14, Ontario Plaintiffs' Book of Authorities at Tab 20.
[106] *Rules of Civil Procedure*, R.R.O., Reg. 194, r. 21.01(1)(b).
[107] *McCracken v. Canadian National Railway*, 2010 ONSC 4520 at para. 94, Ontario Plaintiffs' Book of Authorities at Tab 21. The "plain and obvious" test is most often cited to *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at para. 36, Ontario Plaintiffs' Book of Authorities at Tab 22.

140. Respecting the other requirements of s. 5 of the *CPA*, courts have held that the plaintiffs must simply lead "some basis in fact" to establish they have met the test.[108]

141. The plaintiffs meet this standard by filing one or more affidavits in support of the class proceeding. Although not necessary, defendants who challenge certification will usually file responding affidavits. Often there are cross-examinations.

142. Until recently, the practice had developed that defendants to putative class actions would often not file statements of defence until after certification. However, in two recent decisions, Justice Perell has raised serious concerns regarding this practice, including in the Ontario Class Action. In both *Pennyfeather v. Timminco*[109] and in the Ontario Class Action,[110] Justice Perell held that defendants in class actions are not a special class of litigant exempted from the normal *Rules of Civil Procedure*, even if defendants to date have assumed this mantle. As he held recently in the Ontario Class Action:

> The *Rules* are the norm for a fair procedure, and the norm of civil procedure is that both sides must disclose the case that their opponent must meet. Defendants are not like an accused in a criminal proceeding with a right to remain silent. It is not regarded as unfair

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[108] *Glover v. Toronto (City)* (2009), 70 C.P.C. (6th) 303 (Ont. S.C.J.) at para. 15, Ontario Plaintiffs' Book of Authorities at Tab 23.
[109] See generally *Pennyfeather v. Timminco* , 2011 ONSC 4257 (S.C.J.) at paras. 37-38, 84-92, Ontario Plaintiffs' Book of Authorities at Tab 24.
[110] See generally Exhibit "G" to the Initial Bach Affidavit, Moving Party's Motion Record, Tab 2G at para. 45-56.

> or abnormal to compel a defendant to plead a statement of defence in response to a statement of claim.[111]

143. Moreover, it is fair for courts to deny defendants relief that depends upon a statement of defence in cases in which a defendant has elected not to plead, presumably for tactical reasons. As Justice Perell said of the defendants in the Ontario Class Action:

> I find it hard to believe that the accomplished lawyers in the case at bar are waiting for the outcome of the leave motion and the certification motion before investigating the material facts and researching the applicable law and advising the Defendants about what defences are available to them. The truth of the matter is that the Defendants and their lawyers are not concerned about wasted time and effort but rather they do not wish to plead because they believe it is tactically better to avoid the disclosure of their case that the *Rules of Civil Procedure* would normally mandate.
>
> I see no unfairness of denying defendants a tactical maneuver that may be inconsistent with general principle of rule 1.04 that the rules "shall be liberally construed to secure, the just, most expeditious and least expensive determination of every civil proceeding on its merits."
>
> I also see no unfairness in denying defendants the tactical maneuver of not delivering a statement of defence before certification when the exchange of pleadings may be tactically and substantively beneficial to defendants. The defendants arguments that class membership is over-inclusive or under-inclusive, that the proposed common issues want for commonality, that the action is not manageable as a class action, that a class proceeding is not the preferable procedure, and that the litigation plan is deficient are best made when the defendants shows the colour of his or her eyes by pleading a defence and these arguments will be stronger than the "is! – is not! – is too!" sandbox arguments of many a certification motion. For whatever it is worth, my own observation from recent certification motions where defendants have pleaded before certification is that both sides and the administration of justice are better for it.[112]

144. Similarly, s. 138.3 of the *OSA*, which creates a cause of action permitting investors to sue if there are misrepresentations in an issuer's continuing disclosure requires proposed class action plaintiffs to obtain a court's permission to commence an action.[113] This is to protect reporting issues and capital markets

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[111] *Ibid.* at para. 49.
[112] *Ibid.* at paras. 52-54.
[113] *OSA*, *supra*, s. 138.3.

generally from the costs associated with unmeritorious securities class action claims. The plaintiffs need only satisfy the court that the claim is made in good faith and has a reasonable possibility of success at trial.[114] This court has described the leave requirement as "a relatively low threshold."[115]

145. The defendants in the Ontario Class Action have raised numerous complaints about why these motions cannot proceed. None of these complaints survives scrutiny.

146. Their primary complaint is that, absent the participation of SFC and its officers and directors, the defendants will be unable to build their case.

147. However, as noted above, none of the defendants has filed a statement of defence in the Ontario Class Action. In his reasons of March 26, 2012, Justice Perell ordered that any defendant that delivers an affidavit pursuant to s. 138.8(2) of the *OSA* opposing leave shall also file a statement of defence, and that any other defendant may, if so advised, deliver a statement of defence.[116] The defendants cannot simultaneously complain that they are unable to make out their defences, yet refuse to advise the Ontario Plaintiffs and this court of those purported defences. As Justice Perell noted, defendants do not have "the right to remain silent".[117] In any event, the defendants can still establish their defences if

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[114] *Imax*, *supra* at para. 25; *OSA*, *supra*, 138.8(1).
[115] *Ibid.*
[116] Exhibit "G" to Initial Bach Affidavit, Moving Party's Motion Record, Tab 2G at para. 49.
[117] Exhibit "G" to Initial Bach Affidavit, Moving Party's Motion Record, Tab 2G at para. 79.

they performed their own necessary due diligence in the impugned transactions. SFC's participation is not required.

148. Even if SFC's participation is required, the vast majority of the work will be conducted by professionals (i.e. lawyers and accountants), not SFC directors. If one or two SFC directors need to attend to matters in the Ontario Class Action from time to time, this is a *de minimis* interference and one entirely appropriate in the circumstances, in light of the societal objectives underlying both this proceeding and the Ontario Class Action.

149. The defendants further argue that they will be prevented from any opportunity to claim contribution and indemnity against SFC if there is finding of liability against them. The evidence put forward suggests that the scope of the coverage is spotty. However, the existence of an indemnity should hardly affect the Ontario Plaintiffs' right to pursue the action against each defendant without delay. To the contrary, the Ontario Plaintiffs' claims against the Third Party Defendants are what ground the Third Party Defendants' standing in these proceedings as against SFC and its subsidiaries.

150. If the Third Party Defendants are found liable and seek to claim over, they can do so as a part of these proceedings or in a separate proceeding based on their private agreement with SFC after any stays are lifted.

151. In any event, as explained above, the Leave and Certification Motions are confined solely to the questions of whether the criteria of s. 5 of the *CPA* and s. 138.8 are satisfied. The fact that the Third Party Defendants may have claims for contribution and indemnity against SFC is irrelevant to the issues raised by the Leave and Certification Motions.

152. Moreover, the *OSA* provides that an action cannot be commenced after three years after the alleged misrepresentation was made.[118] In the recent decision *Sharma v. Timminco.*, the Ontario Court of Appeal held that the limitation period governing the cause of action created by the *OSA* for misrepresentation in an issuer's continuous disclosure is not tolled by s. 28 of the *CPA*.[119] As a result of this decision, the defendants are expected to argue that the limitation period under Part XXIII.1 continues to run until leave to proceed is granted and the claim is filed.

153. In the absence of a tolling agreement between the parties, the Ontario Plaintiffs must proceed with their November 2012 Leave Motion. If the Ontario Plaintiffs are unable to obtain leave by February 2013 (the expiration date of the current tolling agreement), their claims will be out of time and they will be seriously and irreparably harmed.

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[118] *OSA*, *supra*, s. 138.14.
[119] *Sharma v. Timminco*, 2012 ONCA 107 at para. 28.

154. The *OSA* provides for secondary market claims as part of its broader enforcement mechanism designed to protect investors. As cited above, Justice Lax held in *Marcantonio v. TVI Pacific Inc.* that a class action based on secondary market claims has the potential to act as an essential and useful supplement to the deterrent effects of regulatory oversight. It enhances the incentive for directors and officers to ensure that their disclosures to the investing public are materially accurate, thereby enhancing investor protection.[120] The Leave Motion ought to proceed.

D. Policy demands that the *CCAA* process be conducted fairly

155. This proceeding is an unusual application of the *CCAA*. Generally, recourse to the *CCAA* is used where a company's insolvency has been triggered by legitimate economic constraints. In this case, the primary causes for SFC's insolvency are the numerous allegations of fraud and gross mismanagement levelled against SFC. The Applicant has spent several months and approximately $50 million attempting to refute the allegations against it. It has been unable to verify its forestry assets adequately. This and other failures of the IC's investigation make it highly unlikely that a purchaser of the company's "as is, where is, if is" assets will materialize. It also appears that the Applicant has no future as a going concern business. Nothing that happens in this court will change the etherealness of SFC's assets.

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[120] *Marcantonio*, *supra* at para. 9.

156. The Ontario Class Action offers the best means of uncovering the truth about the allegations against the Applicant and its directors and officers. If, however, the Ontario Class Action, in whole or in part, is stayed pending the *CCAA* process, or if the claims forming the subject matter of that action are at risk of being compromised, the Ontario Plaintiffs must have a meaningful role in the formulation of a suitable plan of arrangement.

157. In short, the *CCAA* process must be conducted fairly with a view to balancing the interests of all stakeholders, not merely the Applicant's creditors and its employees. Recently, the Supreme Court of Canada in *Century Services* expressed the *CCAA* court's mandate this way:

> The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. **Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* – avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.**[121]

158. The following orders are appropriate because they ensure that the means used to advance the policy objectives underlying the *CCAA* are consistent with the overarching principle of fairness to all stakeholders.

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[121] *Century Services*, *supra* at para. 70 (emphasis added), Ontario Plaintiffs' Book of Authorities at Tab 1.

1. A representation order is required

159. This court should grant an order appointing the Ontario Plaintiffs as representatives in these proceedings. The Ontario Plaintiffs do not seek any funding from the Applicant's estate for their professional fees.

160. A representation order in this case will facilitate the claims process and avoids the separate participation of potentially tens of thousands of claimants. It will ensure the orderly and fair process to resolve outstanding claims against the Applicant.

161. A representation order would also be consistent with the order of Justice Perell made January 6, 2012, granting carriage of the Ontario Class Action to the Ontario Plaintiffs and the *sui generis* obligations already imposed on the Ontario Plaintiffs to act in the interests of the Class.[122]

162. Ontario courts have repeatedly recognized their authority to appoint representatives in *CCAA* proceedings on the basis of s. 11 of the *CCAA* and rule 10.01 of the *Rules of Civil Procedure*.[123] Courts will grant a representation order where it is fair and convenient to do so, particularly where it will serve the

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[122] *Fantl v. Transamerica Life Canada*, *supra* at para. 29 and 38.
[123] *CCAA*, *supra*, s. 11; *Rules of Civil Procedure*, *supra*, r. 10.01; *Nortel Networks Corp., Re* (2009), 53 C.B.R. (5th) 196 (Ont. S.C.J.) at paras. 10, 12 ["*Nortel Networks (S.C.J.)*"], Ontario Plaintiffs' Book of Authorities at Tab 27; *Fraser Papers Inc., Re*, 2009 CarswellOnt 6169 (S.C.J.) at para. 7, Ontario Plaintiffs' Book of Authorities at Tab 29; *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 1328 at para. 20 ["*Canwest Publishing*"], Ontario Plaintiffs' Book of Authorities at Tab 30.

objectives of the *CCAA*, which include ensuring an orderly and fair process to resolve outstanding claims against the debtor company.[124]

163. In *Canwest Publishing*, Justice Pepall (as she then was) set out a list of relevant factors considered by courts in granting representation orders in *CCAA* proceedings. These factors include:

- the vulnerability and resources of the group sought to be represented;
- any benefit to the companies under *CCAA* protection;
- any social benefit to be derived from representation of the group;
- the facilitation of the administration of the proceedings and efficiency;
- the avoidance of a multiplicity of legal retainers;
- the balance of convenience and whether it is fair and just including to the creditors of the Estate;
- whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared to act for the group seeking the order; and
- the position of other stakeholders and the Monitor.[125]

164. The Ontario Plaintiffs are precisely the type of group for which a representation order is appropriate:

i) Vulnerability

165. The class definition in the Ontario Class Action encompasses a large number of individual investors from around the world currently represented by the Ontario

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[124] *Canwest Publishing*, *supra* at para. 24; *Nortel Networks (S.C.J.)*, *supra* at para. 13; *Canwest Global Communications Corp., Re*, 2009 Carswell Ont 9398 (S.C.J.) at paras 14-15, Ontario Plaintiffs' Book of Authorities at Tab 31.

[125] *Canwest Publishing*, *supra* at para. 21.

Plaintiffs pending the Certification Motion and an opt out period. Many class members have limited abilities to pursue individual claims in complex *CCAA* proceedings. Moreover, given the dispatch of the *CCAA* proceeding, many investors (some of whom are located around the world) are at risk of having their rights affected by a process before they are able to mount an intervention.

166. The public policy as reflected in the *CPA* directs that the Ontario Plaintiffs be given the fullest possible voice in any proceeding that threatens potential recovery for their losses.

ii) Benefit to the Applicant

167. The Applicant receives at least two benefits if this Court makes a representation order. First, SFC can have greater confidence when reaching a compromise that affected interests have been adequately represented. The representation order will assist SFC by having representative counsel interact with class members and represent their interests before SFC. Second, the Ontario Plaintiffs are not seeking funding for their involvement in the *CCAA* proceeding, unlike other stakeholders in the process.

iii) Social Benefit

168. The representation order will provide a social benefit by assisting class members, by fielding their concerns, by providing them with information about the process and by representing their interests to other stakeholders in the process.

169. The objectives of the *CPA* include access to justice, judicial economy and behaviour modification. All three of these important societal objectives would be furthered by a representation order.

170. The objectives of the *CCAA* include promoting efficient markets and balancing the interests of various stakeholders, not just creditors and employees. The *OSA* also seeks to protect individual investors and to promote efficient markets. These are important societal objectives that would be upheld through a representation order in this proceeding. A representation order would benefit society at large by giving voice to thousands of investors who had faith in Canada's efficient market and were, with the *CCAA* filing, suddenly at risk of having no recourse.

iv) Facilitation of the administration of justice and efficiency in these proceedings

171. The representation order will streamline and introduce efficiency to the process by having a common voice represent the group of class members. It will avoid a multiplicity of legal retainers, which will be a benefit to SFC, its creditors and all participants in the process.

172. Further, the suitability of Siskinds LLP and Koskie Minsky LLP as representative counsel has been scrutinized in detail by Justice Perell. His Honour found the firms to be well-established and noted that the lead lawyers had considerable

experience and proficiency in class actions and securities litigation.[126] Justice Perell's decision can provide comfort to this court that these firms are also suitable representatives for this group in the *CCAA* proceedings.

v) Conclusion

173. In summary, the appointment of representatives and representative counsel for the putative class members will ensure that their interests are protected, while at the same time ensuring an efficient and orderly process.

2. *The Restructuring Support Agreement should not govern this proceeding*

174. This court should declare that the RSA does not govern this proceeding or any potential sales transaction and is not binding on the parties. Further, this court should order that the Monitor work with all parties interested in developing restructuring options.

175. The RSA was formulated on the eve of the *CCAA* filing between SFC and certain Noteholders (referred to in the RSA as "initial consenting noteholders"). No other stakeholders were advised of the RSA, nor did any other stakeholder have an opportunity to provide input. The adage, "he who holds the pen writes himself the best deal" reflects the self-serving nature of the RSA, as it favours a small number of stakeholders in this process, to the exclusion of all others.

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[126] Exhibit "D" to the Initial Bach Affidavit, Moving Party's Motion Record, Tab 2D at para. 328.

176. The RSA offers releases to directors and officers. Quite apart from the fact that the directors do not appear to provide any consideration to creditors in exchange for these releases, the negotiation and presence of these releases appears to be contrary to the directors' duties under s. 122(1) of the *CBCA*, which requires them to act in good faith and in the best interests of the company.[127] This release of liability provision, at best, improperly fetters the discretion of the Board and prevents it from acting in an even-handed manner. At worst, it is entirely self-serving and included by the board solely as a means of dodging any accountability for its prior acts. In either instance, this feature of the RSA is entirely improper and this court should not uphold it.

177. Furthermore, the RSA forecloses restructuring options that might otherwise be available to the Applicant and its stakeholders. It prevents the Applicant from exploring alternative restructuring options, or even from assisting other stakeholders in exploring other such options.

178. It does all of this for little or no consideration from the bondholders, who are entitled to walk away from the agreement at their discretion where they are not "satisfied with the results of the due diligence concerning the Company." To be clear, that is due diligence in respect of a company that just conducted a $50 million investigation, and was unable to meaningfully respond to the allegations in the Muddy Waters Report.

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[127] *Canada Business Corporations Act*, R.S.C., 1985, c. C-44, s. 122(1).

179. The RSA fetters the discretion of SFC and its board and unfairly tilts the playing field in favour of the bondholders. It should not frame this process.

180. Instead, the court should order the Monitor to work with all stakeholders to develop alternative restructuring options.

181. At the end of the restructuring process, the stakeholders and this court should not be left with a "take it or leave it" sale plan without having had a meaningful opportunity to develop other options. The Monitor is ideally situated to act as intermediary for the parties in developing one or more alternative sales transactions.

3. Mediation is appropriate

182. If the purpose of these proceedings is to find a compromise that is acceptable to the requisite majorities of stakeholders, it makes eminent sense to proceed with an early-stage mediation that will assist the stakeholders in finding common ground.

183. In this complex, multi-party proceeding, the "three Cs of the Commercial List - communication, cooperation and common sense" should figure prominently.[128] It makes sense to provide the parties in this proceeding with a forum to communicate and cooperate to see if a mutually agreeable solution can be reached, as this Court has done in many other cases, most recently in *Nortel*.

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[128] *Re Grace Canada Inc.* (2005), 17 C.B.R. (5th) 275 (Ont. S.C.J.) at para. 5, Ontario Plaintiffs' Book of Authorities at Tab 32.

184. An efficient resolution of the numerous issues facing the parties has the potential to minimize costs for the SFC estate, and ultimately its stakeholders.

185. Even if mediation is unsuccessful, there is value in providing all parties an opportunity to articulate their positions in a confidential, without prejudice environment.

4. There should be a data room to facilitate disclosure

186. In order to formulate alternative restructuring options and as a first step to resolving outstanding claims, the parties should make full and plain disclosure to each other.

187. A "data room" or bank of shared, confidential information will assist the parties in understanding the full landscape of this complex, multi-party proceeding. The parties cannot reach a meaningful settlement or compromise without having reviewed relevant information. Moreover, disclosure will serve to enhance the fairness and reasonableness of any settlement.

188. Indeed, in approving a future settlement, this court will want assurances that stakeholders were fully informed when they agreed to the plan. A class proceedings judge will want similar assurances when approving any future settlement of the Ontario Class Action.

189. The data room can be organized and maintained by the Monitor.

5. There must be complete disclosure of professional fees

190. This court should order that the Monitor disclose the various professional fees and expenses being charged to the debtor estate, at regular intervals.

191. The *CCAA* process should be open and transparent to the greatest extent possible.[129] Stakeholders and the court should have the benefit of knowing the costs of these proceedings, so that they can weigh those costs against the benefits received and alternative options.

192. There is nothing objectionable or prejudicial in such disclosure. *CCAA* courts have ordered disclosure of professional fees in the past without issue. The *Air Canada* and *Stelco* proceedings are examples.

E. Claims Procedure Order

193. The current draft Order creates significant prejudice for the Class in the Ontario Class Action.

194. Although the order does not appear to foreclose the filing of a representative claim, it is important that the order expressly acknowledge the Ontario Plaintiffs' entitlement to file such a claim, in keeping with the policies underlying class proceedings and securities legislation across Canada and the carriage order of Justice Perell.

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[129] *Re Arclin Canada Ltd.*, 2009 O.J. No. 4260 (S.C.J.) at para. 17, Ontario Plaintiffs' Book of Authorities at Tab 33.

195. This is particularly significant as the order provides extremely limited notice[130] and provides that a failure to file a claim by the claims bar date will bar claims against the Applicant and any person that could seek to claim contribution or indemnity against the Applicant. In other words, if the Ontario Plaintiffs are not permitted to claim on behalf of the Class, the claims procedure order would have the practical effect of eviscerating the Class' claims by creating an opt in procedure for class members. This would negatively affect tens of thousands of people and has been rejected by Ontario courts as a "draconian penalty".[131]

196. There is no reason for this approach and could potentially undermine the claims process and restructuring.

197. In addition to the foregoing, the proposed Claims Procedure Order creates the following other concerns:

(a) The focus of the Claims Process Order seems to be on the Applicant and its directors and officers. However, based upon the parties' discussions to date, there seems to be an intent to capture the Ontario Plaintiffs' claims against the solvent Third Party Defendants (such as the Applicant's auditors and underwriters), as part of the *CCAA* Proceedings. The intent of the Claims Procedure Order should be clarified so that stakeholders may know precisely which claims are at risk of being barred and/or compromised. However, to

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[130] *Currie v. McDonald's Restaurants of Canada Ltd.* (2005), 74 O.R. (3d) 321 (C.A.) at paras. 31, 37-40 and 43 ["*Currie*"], Ontario Plaintiffs' Book of Authorities at Tab 34.
[131] *Durling v. Sunrise Propane Energy Group Inc.*, 2011 ONSC 7506 at paras. 41, 42 and 54, Ontario Plaintiffs' Book of Authorities at Tab 27; *Currie*, *supra* at para. 29.

be clear, the Ontario Plaintiffs' position, notwithstanding the *Metcalfe* case, is that their claims against solvent third parties are not and/or should not be subject to compromise as part of *CCAA* proceedings, and our comments herein are made without prejudice to that position. The Ontario Plaintiffs reserve all of their rights to challenge any plan of compromise or arrangement incorporating such release provisions in the event that one is proposed.

(b) The draft Claims Procedure Order currently contemplates that noteholders' claims will be filed by the applicable indenture trustee, and individual noteholders are barred from filing claims on their own behalf. Without commenting on the correctness or appropriateness of that provision as it pertains to the contractual claims of noteholders against SFC as issuer of the notes, it should not apply to claims against Third Party Defendants by present or former noteholders for the damages sustained by them as a result of the Third Party Defendants' negligence or other misconduct. In accordance with Justice Perell's carriage order, the Ontario Plaintiffs presently have the exclusive right to bring the latter claims.

(c) The draft Claims Order leaves open the possibility that a dispute with respect to the Ontario Plaintiffs' claims may be referred to a court-appointed referee for adjudication. These claims are not of the kind that can be adjusted by reference to a claims officer. Justice Perell is already seized of that litigation

and is familiar with the parties and the issues raised in the litigation. As such, the Order should be clear that in the event of dispute, the Ontario Plaintiffs' claims will be determined through the existing court process.

(d) There are a number of provisions which require consultation with the *ad hoc* committee of bondholders. Although the Ontario Plaintiffs recognize that it is appropriate for creditors to be consulted with respect to certain parts of this process, the Ontario Plaintiffs do not think that it is appropriate for a court order to appear to elevate the interests of some creditors over those of others. The order should treat all affected persons equally.

(e) The Claims Procedure Order, as presently drafted, contemplates that the bondholders will be consulted with respect to the treatment of claims above a threshold amount. The bondholders should not have input into the resolution of other parties' claims. The Monitor's independence is central to the efficiency of the claims resolution process, and the Monitor should not be hamstrung by a self-interested cohort of creditors. If the bondholders are not prepared to trust the Monitor's judgment in respect of the treatment of claims over a certain value, then the proper remedy is to require recourse to the court.

(f) The order is expressly without prejudice to the rights of any director and officer under any insurance policy. While the Ontario Plaintiffs appreciate that the directors and officers may be in a slightly different position from the

other defendants to the Ontario Class Action, the Ontario Plaintiffs submit that it is appropriate that the order be without prejudice to the right of those parties under their insurance as well.

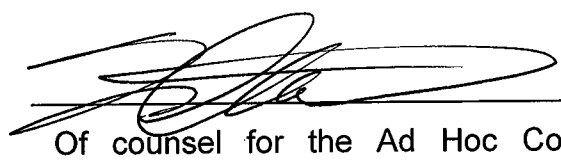
(g) As presently drafted, the Claims Procedure Order permits only the Applicant and the Monitor to apply to the court for direction in respect of the Claims Procedure Order. It should be open to all participants in the process to seek direction of the court regarding the Claims Process.

PART V - ORDER REQUESTED

198. The Ontario Plaintiffs request an Order consistent with the relief sought in its First Amended Notice of Motion, served on the parties on May 4, 2012.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

May 4, 2012



Of counsel for the Ad Hoc Committee of Purchasers of the Applicant's Securities, including the Representative Plaintiffs in the Ontario Class Action

SCHEDULE "A" - AUTHORITIES

1. *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379
2. *Hollick v. Toronto (City)*, 2001 SCC 68
3. *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557
4. *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3
5. *Fantl v. Transamerica Life Canada*, 2009 ONCA 377
6. *Dobbie v. Arctic Glacier Income Fund*, 2011 ONSC 25
7. *Silver v. Imax Corp.*, [2009] O.J. No. 5573 (S.C.J.)
8. *McKenna v. Gammon Gold Inc.*, [2010] O.J. No. 1057 (S.C.J.)
9. *Marcantonio v. TVI Pacific Inc.*, [2009] O.J. No. 3409 (S.C.J.)
10. *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.)
11. *Canadian Red Cross Society,* 2002 CarswellOnt 2136 (S.C.J.)
12. *Trillium Motor World Ltd. v. General Motors of Canada Ltd.*, 2011 ONSC 1300, [2011] O.J. No. 889
13. Ruth Sullivan, *Construction of Statutes*, 5th ed., Markham: LexisNexis Canada, 2008
14. *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2 at 18
15. *P.E.I. Potato Marketing Board v. H. B. Willis Inc.*, [1952] 2 S.C.R. 392
16. *Lord's Day Alliance of Canada v. Attorney General of British Columbia*, [1959] S.C.R. 497
17. *Coughlin v. Ontario Highway Transport Board*, [1968] S.C.R. 569
18. *Canadian Western Bank v. Alberta*, 2007 SCC 22
19. *Ramdath v. George Brown College of Applied Arts & Technology*, 2010 ONSC 2019

20. *Sauer v. Canada (Minister of Agriculture)* (2008), 169 A.C.W.S. (3d) 27 (Ont. S.C.J.)

21. *McCracken v. Canadian National Railway*, 2010 ONSC 4520

22. *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959

23. *Glover v. Toronto (City)* (2009), 70 C.P.C. (6th) 303 (Ont. S.C.J.)

24. *Pennyfeather v. Timminco* , 2011 ONSC 4257

25. *Sharma v. Timminco*, 2012 ONCA 107

26. *Re Nortel Networks Corp.*, 2009 CarswellOnt 7383 (C.A.).

27. *Nortel Networks Corp., Re* (2009), 53 C.B.R. (5th) 196 (Ont. S.C.J.)

28. Ontario Securities Commission Staff Notice 51-719, "Emerging Markets Issuer Review" dated March 20, 2012

29. *Fraser Papers Inc., Re*, 2009 CarswellOnt 6169 (S.C.J.)

30. *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 1328

31. *Canwest Global Communications Corp., Re*, 2009 Carswell Ont 9398 (S.C.J.)

32. *Re Grace Canada Inc.* (2005), 17 C.B.R. (5th) 275 (Ont. S.C.J.)

33. *Re Arclin Canada Ltd.*, 2009 O.J. No. 4260 (S.C.J.)

34. *Currie v. McDonald's Restaurants of Canada Ltd.* (2005), 74 O.R. (3d) 321 (C.A.)

35. *Durling v. Sunrise Propane Energy Group Inc.*, 2011 ONSC 7506

36. *Re Timminco Ltd.*, 2012 ONSC 2515 (unreported)

SCHEDULE "B" – STATUTES and REGULATIONS

1. *Securities Act*, R.S.O. 1990, c.S-5, ss. 1.1, 138.3, 138.8(1), 138.14

Purposes of Act

1.1 The purposes of this Act are,

(a) to provide protection to investors from unfair, improper or fraudulent practices; and

(b) to foster fair and efficient capital markets and confidence in capital markets.

[...]

Liability for secondary market disclosure
Documents released by responsible issuer

138.3 (1) Where a responsible issuer or a person or company with actual, implied or apparent authority to act on behalf of a responsible issuer releases a document that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the document was released and the time when the misrepresentation contained in the document was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages against,

(a) the responsible issuer;

(b) each director of the responsible issuer at the time the document was released;

(c) each officer of the responsible issuer who authorized, permitted or acquiesced in the release of the document;

(d) each influential person, and each director and officer of an influential person, who knowingly influenced,

(i) the responsible issuer or any person or company acting on behalf of the responsible issuer to release the document, or

(ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the release of the document; and

(e) each expert where,

(i) the misrepresentation is also contained in a report, statement or opinion made by the expert,

(ii) the document includes, summarizes or quotes from the report, statement or opinion of the expert, and

(iii) if the document was released by a person or company other than the expert, the expert consented in writing to the use of the report, statement or opinion in the document.

Public oral statements by responsible issuer

(2) Where a person with actual, implied or apparent authority to speak on behalf of a responsible issuer makes a public oral statement that relates to the business or affairs of the responsible issuer and that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the public oral statement was made and the time when the misrepresentation contained in the public oral statement was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages against,

(a) the responsible issuer;

(b) the person who made the public oral statement;

(c) each director and officer of the responsible issuer who authorized, permitted or acquiesced in the making of the public oral statement;

(d) each influential person, and each director and officer of the influential person, who knowingly influenced,

(i) the person who made the public oral statement to make the public oral statement, or

(ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the making of the public oral statement; and

(e) each expert where,

(i) the misrepresentation is also contained in a report, statement or opinion made by the expert,

(ii) the person making the public oral statement includes, summarizes or quotes from the report, statement or opinion of the expert, and

(iii) if the public oral statement was made by a person other than the expert, the expert consented in writing to the use of the report, statement or opinion in the public oral statement.

Influential persons

(3) Where an influential person or a person or company with actual, implied or apparent authority to act or speak on behalf of the influential person releases a document or makes a public oral statement that relates to a responsible issuer and that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the document was released or the public oral statement was made and the time when the misrepresentation contained in the document or public oral statement was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages against,

(a) the responsible issuer, if a director or officer of the responsible issuer, or where the responsible issuer is an investment fund, the investment fund manager, authorized, permitted or acquiesced in the release of the document or the making of the public oral statement;

(b) the person who made the public oral statement;

(c) each director and officer of the responsible issuer who authorized, permitted or acquiesced in the release of the document or the making of the public oral statement;

(d) the influential person;

(e) each director and officer of the influential person who authorized, permitted or acquiesced in the release of the document or the making of the public oral statement; and

(f) each expert where,

(i) the misrepresentation is also contained in a report, statement or opinion made by the expert,

(ii) the document or public oral statement includes, summarizes or quotes from the report, statement or opinion of the expert, and

(iii) if the document was released or the public oral statement was made by a person other than the expert, the expert consented in writing to the use of the report, statement or opinion in the document or public oral statement.

Failure to make timely disclosure

(4) Where a responsible issuer fails to make a timely disclosure, a person or company who acquires or disposes of the issuer's security between the time when the material change was required to be disclosed in the manner required under this Act or the regulations and the subsequent disclosure of the material change has, without regard to whether the person or company relied on the responsible issuer having complied with its disclosure requirements, a right of action for damages against,

(a) the responsible issuer;

(b) each director and officer of the responsible issuer who authorized, permitted or acquiesced in the failure to make timely disclosure; and

(c) each influential person, and each director and officer of an influential person, who knowingly influenced,

(i) the responsible issuer or any person or company acting on behalf of the responsible issuer in the failure to make timely disclosure, or

(ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the failure to make timely disclosure.

Multiple roles

(5) In an action under this section, a person who is a director or officer of an influential person is not liable in that capacity if the person is liable as a director or officer of the responsible issuer.

Multiple misrepresentations

(6) In an action under this section,

(a) multiple misrepresentations having common subject matter or content may, in the discretion of the court, be treated as a single misrepresentation; and

(b) multiple instances of failure to make timely disclosure of a material change or material changes concerning common subject matter may, in the discretion of the court, be treated as a single failure to make timely disclosure.

No implied or actual authority

(7) In an action under subsection (2) or (3), if the person who made the public oral statement had apparent authority, but not implied or actual authority, to speak on behalf of the issuer, no other person is liable with respect to any of the responsible issuer's securities that were acquired or disposed of before that other person became, or should reasonably have become, aware of the misrepresentation.

[...]

Leave to proceed

138.8 (1) No action may be commenced under section 138.3 without leave of the court granted upon motion with notice to each defendant. The court shall grant leave only where it is satisfied that,

(a) the action is being brought in good faith; and

(b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.

[...]

Limitation period

138.14 No action shall be commenced under section 138.3,

(a) in the case of misrepresentation in a document, later than the earlier of,

(i) three years after the date on which the document containing the misrepresentation was first released, and

(ii) six months after the issuance of a news release disclosing that leave has been granted to commence an action under section 138.3 or under comparable legislation in the other provinces or territories in Canada in respect of the same misrepresentation;

(b) in the case of a misrepresentation in a public oral statement, later than the earlier of,

(i) three years after the date on which the public oral statement containing the misrepresentation was made, and

(ii) six months after the issuance of a news release disclosing that leave has been granted to commence an action under section 138.3 or under comparable legislation in another province or territory of Canada in respect of the same misrepresentation; and

(c) in the case of a failure to make timely disclosure, later than the earlier of,

(i) three years after the date on which the requisite disclosure was required to be made, and

(ii) six months after the issuance of a news release disclosing that leave has been granted to commence an action under section 138.3 or under

comparable legislation in another province or territory of Canada in respect of the same failure to make timely disclosure. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 23.

2. *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 5(1)

Certification

5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

(a) the pleadings or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

3. *Code of Civil Procedure*, R.S.Q., c. C-25, art. 999.

999. In this Book, unless the context indicates a different meaning,

(a) "judgment" means a judgment of the court;

(b) "final judgment" means the judgment which decides the questions of law or fact dealt with collectively;

(c) "member" means a natural person, a legal person established for a private interest, a partnership or an association that is part of a group on behalf of which such a person, a partnership or an association brings or intends to bring a class action;

(d) "class action" means the procedure which enables one member to sue without a mandate on behalf of all the members.

A legal person established for a private interest, partnership or association may only be a member of a group if at all times during the 12-month period preceding the motion for authorization, not more than 50 persons bound to it by contract of

employment were under its direction or control and if it is dealing at arm's length with the representative of the group.

4. *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, ss. 11, 11.02(1), 11.02(3)

General power of court

11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

[...]

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

[...]

Burden of proof on application

(3) The court shall not make the order unless

(*a*) the applicant satisfies the court that circumstances exist that make the order appropriate; and

b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

5. *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 106

Stay of proceedings

106. A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

6. *Rules of Civil Procedure*, R.R.O., Reg. 194, rr. 10.01, 21.01(1)(b)

Proceedings in which Order may be Made

10.01 (1) In a proceeding concerning,

(a) the interpretation of a deed, will, contract or other instrument, or the interpretation of a statute, order in council, regulation or municipal by-law or resolution;

(b) the determination of a question arising in the administration of an estate or trust;

(c) the approval of a sale, purchase, settlement or other transaction;

(d) the approval of an arrangement under the *Variation of Trusts Act*;

(e) the administration of the estate of a deceased person; or

(f) any other matter where it appears necessary or desirable to make an order under this subrule,

a judge may by order appoint one or more persons to represent any person or class of persons who are unborn or unascertained or who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served.

7. *Canada Business Corporations Act*, R.S.C., 1985, c. C-44, s. 122(1)

Duty of care of directors and officers

122 (1) Every director and officer of a corporation in exercising their powers and discharging their duties shall

(*a*) act honestly and in good faith with a view to the best interests of the corporation; and

(*b*) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

SCHEDULE "C" – SERVICE LIST

April 27, 2012

Court File No. CV-12-9667-00-CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

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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

ONTARIO
SUPERIOR COURT OF JUSTICE
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PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE AD HOC COMMITTEE OF PURCHASERS OF THE APPLICANT'S SECURITIES, INCLUDING THE REPRESENTATIVE PLAINTIFFS IN THE ONTARIO CLASS ACTION
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