

**COURT OF APPEAL FOR ONTARIO**

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

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

Applicant

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

**NOTICE OF APPEAL OF ERNST & YOUNG LLP**

**THE APPELLANT, ERNST & YOUNG LLP (“E&Y”), APPEALS** to the Court of Appeal from the Order of the Honourable Justice Morawetz dated July 27, 2012 made at Toronto, Ontario.

**THE APPELLANT ASKS** that the Order appealed from be set aside and an order be granted as follows:

1. An Order abridging the time for service and filing of this Notice of Appeal, Factum, Appeal Book and Compendium and other materials required to perfect this appeal, validating service by email (in accordance with the practice of the Ontario Superior Court of Justice (Commercial List) and the Order of Justice Morawetz dated March 30, 2012) and dispensing with any further service, such that the appeal is properly returnable on a date to be fixed by the Registrar;

2. An Order:
  - (a) dismissing the Equity Claims Motion (as defined below) brought by Sino-Forest Corporation (“SFC”);
  - (b) finding that the claims of E&Y against SFC are not “equity claims” within the definition of section 2 of the *Companies Creditors’ Arrangement Act*, R.S.C. 1985, c. C-36, as amended (“CCAA”);
  - (c) finding that the claims of E&Y against SFC are “unsecured creditor” claims within the definition of section 2 of the CCAA; and
  - (d) directing that the claims of E&Y against SFC must be dealt with and valued in accordance with the claims process set out in the Claims Procedure Order (as defined below);
3. An Order that this appeal be heard with the appeals in Court File Nos. M41655 and M41656;
4. An Order granting E&Y its costs of the appeal and the motion appealed from; and
5. Such further and other relief as the lawyers for the Appellant may request and this Honourable Court may permit.

**THE GROUNDS OF APPEAL** are as follows:

1. On March 30, 2012, SFC sought and was granted by order of the Ontario Superior Court of Justice protection from its creditors pursuant to the CCAA;
2. SFC and a number of other parties including E&Y (the appellant) are defendants in three proposed uncertified class actions brought and currently pending in Ontario, Quebec and the Southern District of New York respectively (the “Class Actions”). The various proposed representative plaintiffs seek damages on behalf of proposed classes made up of past and present shareholders (equity holders) and noteholders (debtholders) of SFC;
3. E&Y was the auditor of SFC, *inter alia*, from 2003 to 2004 and from 2007 until it resigned on April 4, 2012. The Class Actions seek damages in connection with certain alleged misrepresentations in the public disclosure of SFC;
4. On May 14, 2012, the Applicant SFC sought and was granted relief in the CCAA proceedings in the form of a “Claims Procedure Order”, which established a procedure for the identification and determination of all claims against the Applicant SFC, its directors and officers and the subsidiaries of SFC. The Claims Procedure Order purported to establish a procedure, *inter alia*, to identify (and address any dispute in respect of) whether a claim is or is not an “equity claim” as defined in the CCAA (the “Claims Process”);
5. E&Y, among other creditors, filed proofs of claim in the CCAA proceedings pursuant to the Claims Procedure Order on June 20, 2012, the claims bar date (the “Proofs of Claim”). E&Y’s Proofs of Claim included claims for damages for breach of contract, negligent

misrepresentation, fraudulent misrepresentation, inducing breach of contract, injury to reputation, vicarious liability and for contribution and indemnity (contractual, statutory and common law) from SFC and its directors and officers, in respect of the Class Actions and other pending or threatened proceedings. As required under the Claims Procedure Order, E&Y's Proofs of Claim also provided detailed descriptions and support for its claims against the subsidiaries of SFC, who are not Applicants in the CCAA proceeding;

6. Prior to the filing of the Proofs of Claim and in any event prior to any determination of those Proofs of Claim in accordance with the Claims Procedure Order, SFC, supported by the Monitor, brought a motion (by way of Notice of Motion dated June 8, 2012 and seeking a hearing date of June 15, 2012) for the pre-determination of whether or not the anticipated claims of shareholders and certain anticipated claims for contribution and indemnity in respect of claims by shareholders, including the anticipated claim of E&Y, were "equity claims" within the meaning of the CCAA (the "Equity Claims Motion"). The Equity Claims Motion addressed only claims against SFC itself, and not claims against the subsidiaries of SFC, as specifically confirmed by counsel to the Applicant in oral argument;

7. The Equity Claims Motion was ultimately heard on June 26, 2012;

8. By way of Order dated July 27, 2012, the Honourable Justice Morawetz made the Order appealed from, *inter alia*, declaring that any indemnification claims of E&Y, including claims of E&Y related to or arising from claims against E&Y by shareholders of SFC, other than possible defence costs, are "equity claims" (the "Equity Claims Order");

9. The Equity Claims Order fundamentally affects the Appellant's rights in the CCAA proceedings, including E&Y's entitlement to vote on any CCAA plan of compromise or arrangement, distributions under such a plan, relative priorities between creditors and the statutory subordination of claims. The Equity Claims Order fundamentally changes the relationship between auditors and their clients, in this proceeding and generally;

10. The Honourable Justice Morawetz erred in determining that any claims for indemnification by E&Y are equity claims. In particular, the motions judge erred as follows:

- (a) The motions judge erred in not finding that the Equity Claims Motion was premature. There has been no determination of the nature, quality or quantity of any claims pursuant to the Claims Procedure Order or otherwise. As a result, there was a lack of any evidentiary basis for the Order appealed from;
- (b) The motions judge erred in concluding that E&Y's claim for indemnification was "in respect of an equity interest" as defined in section 2 of the CCAA. E&Y was not and is not a shareholder or other equity holder in SFC. It does not assert a claim to assets of SFC as an equity holder nor does it assert any rights accorded to an equity holder. E&Y's claims against SFC and its officers and directors are grounded in contractual, statutory and common claims for contribution and indemnity and in breach of contract, negligent misrepresentation, fraudulent misrepresentation, inducing breach of contract, injury to reputation and vicarious liability;

- (c) The motions judge erred in failing to conclude that the actual and contingent losses in respect of which E&Y asserts a claim against SFC do not arise from a "claim" by equity holders being made against the Applicant, SFC. They arise from claims made directly against E&Y. Such claims are not captured by the definition of "equity claim";
- (d) The motions judge erred in concluding that a finding that E&Y's claims against SFC do not constitute "equity claims" would be inconsistent with the principles of the CCAA. The definition of "equity claim" in section 2 of the CCAA and the policy and principles behind it are to preclude shareholders of an insolvent company from participating, on a *pari passu* basis, with general creditors of the debtor company. E&Y is not a shareholder of SFC and is not in the same position as SFC's shareholders. E&Y, as auditor of SFC, did not accept the same risks (and rewards) as SFC's shareholders. The policy reasons for subordinating shareholder claims to creditor claims simply do not apply to auditors;
- (e) The motions judge erred in concluding that to consider E&Y's claim as a general unsecured claim (and not an "equity claim") would put the shareholders in a position to achieve creditor status through their separate claims against E&Y. Any recovery by SFC's shareholders against E&Y is wholly independent of any recovery by E&Y against SFC for contribution and indemnity. It is E&Y that will not recover its losses if its claim for indemnity is denied, not the shareholders;

- (f) The motions judge erred in finding that the enactment of the definition of “equity claim” in section 2 of the CCAA is not consistent with preceding case law. Such case law refused to subordinate the claims of auditors to other unsecured claims while subordinating claims of shareholders;
  - (g) The motions judge erred in failing to consider the legislative history of the amendments to the CCAA;
  - (h) The motions judge erred in failing to conclude that the words "contribution or indemnity in respect of a claim" used in section 2 of the CCAA are meant to apply to claims arising from an indemnity granted in favour of shareholders of a company and not to claims arising from an indemnity granted in favour of an independent third party, such as E&Y as auditor;
  - (i) The motions judge erred in failing to appreciate that a significant portion of E&Y’s claim is not an indemnity claim but rather a claim for breach of contract, inducing breach of contract, reputational loss and/or fraudulent or negligent misrepresentation; and
  - (j) The motions judge erred in failing to conclude that the claims of E&Y against SFC are general unsecured claims, as defined in the CCAA;
11. The CCAA and in particular section 2; and

12. Such further and other grounds as counsel may advise and this Honourable Court may permit.

**THE BASIS FOR THE APPELLATE COURT'S JURISDICTION IS:**

1. Sections 13 and 14 of the CCAA;
2. Rule 61 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194;
3. Sections 6 and 134 of the *Courts of Justice Act*, R.S.O. 1990, c C-43; and
4. This Honourable Court granted the Appellant leave to appeal by way of endorsement dated October 10, 2012, together with the related appeals in Court File Nos. M41655 and M41656, on an expedited basis on a schedule to be set by the Registrar.

October 16, 2012

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

Court of Appeal File No.

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

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PROCEEDING COMMENCED AT TORONTO

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