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

**COURT OF APPEAL FOR ONTARIO**

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

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

Applicant

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

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# REPLY FACTUM OF THE APPELLANTS, INVESCO CANADA LTD., NORTHWEST & ETHICAL INVESTMENTS L.P., AND COMITÉ SYNDICAL NATIONAL DE RETRAITE BÂTIRENTE INC.

(Motion for Leave to Appeal from Sanction Order)

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March 1, 2013

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**TO: THE SERVICE LIST**

## LAW AND ARGUMENT

### Overview

1. This Reply Factum addresses two new arguments raised by the Respondents, the Underwriters, Ernst & Young LLP ("E&Y") and Sino-Forest Corporation ("Sino-Forest"): (a) that the remedy sought by the Appellants "is no longer possible" now that the applicant's Plan of Compromise and Reorganization ("Plan") has been implemented, rendering this proposed appeal moot; and (b) that the Appellants did not obtain leave to submit fresh evidence on appeal concerning the public importance of the issue underlying this proposed appeal.

2. It is plain and obvious that the framework for third party releases, stated in Article 11 of the Plan, is severable and separate from the rest of the Plan. As a matter of historical fact, the Plan was submitted to parties and on the verge of approval without any Article 11. Moreover, the Article 11 framework still may never have any operative effect on the Plan or any of the parties, if no settlements and releases under it are ever approved, so as a matter of logic no party can say its approval of the Plan depended on the presence of the framework for such releases. In addition, it is self-contradictory for the Respondents to argue both that the Appellants are seeking to appeal prematurely and that the Appellants should have pressed their point before the Plan was implemented. In fact, the Plan's prior implementation militates in favour of granting leave to appeal since the typical time pressures associated with an active restructuring are no longer present.[1]

3. This Court can and should consider the important issue of third party releases presented by this case. In addition to this proposed appeal, it is apparent that the third party release issue will also be the subject of a proposed appeal by whichever parties are dissatisfied by Justice Morawetz' forthcoming decision on the approval of the proposed E&Y settlement. It would advance judicial economy to allow the proposed appeal to be heard and ultimately join it with any appeal which

[1] *Edgewater Casino Inc. (Re)*, 2009 BCCA 40 at para. 25.

would result from Justice Morawetz' decision on the fairness of E&Y's settlement, so that both appeals may be considered in their full procedural context. Denying leave to appeal at this stage would unnecessarily encourage litigation by installment.[2]

4. The fresh affidavit evidence filed by the Appellants in their motion record illustrates the public importance of not allowing Article 11 to stand and under applicable case law it should be admitted on that basis.

**The Proposed Appeal Is Not Moot**

5. The Respondents do not dispute that the third party releases for which Article 11 provides a framework will not come into existence unless and until the Court below approves a settlement containing such releases. As a result, the parties all know that the framework is inoperative and hypothetical in the absence of such approval; and indeed that such releases may never come into existence at all. This demonstrates that the Article 11 framework for releases stands separate from the rest of the Plan, and may never become operative at all. Indeed, that is the basis for the Respondents' argument that this proposed appeal is premature.

6. It is also the Respondents, not the Appellants, who decided to segment the insertion of the third party release feature of the Plan into separate "framework" and "settlement approval" stages. The Respondents cannot fairly use that "installment" method to seek to insulate the third party release issue from appeal.

7. The Appellants' position in the proposed appeal is that *no* framework for third party releases is lawful or appropriate in the present situation, and accordingly the Plan is not fair and reasonable in respect of Article 11, regardless of which of the possible third party defendants may seek releases within the framework. It follows that *not* granting leave to appeal at this stage would prevent an efficient unitary adjudication of the issue of whether third party releases are permissible

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[2] *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 SCR 629, at para. 90 ["*Garland*"].

here, and would waste the resources of the Court and parties since the releases then would have to be considered piecemeal at each settlement approval hearing and in possible motions for leave to appeal therefrom.

8. Moreover, the history of the implementation of the Plan confirms that an appellate remedy disallowing Article 11 would not require a reversal of the reorganization Plan. The Plan was proposed to the creditors without the Article 11 framework, which was tacked on at the last moment. All parties know that approval of the releases contemplated by the Article 11 framework has not yet occurred and is not assured -- nevertheless, the Plan has been implemented. If this Court allows the appeal and determines that third party releases are inappropriate, the result will be the same as though each proposed settlement and release was separately disapproved, which is an outcome all parties must know could occur. Such a remedy accordingly would not contradict the reasonable expectations of any party, and therefore cannot be the basis of a mootness argument.

9. The Supreme Court of Canada outlined a two-part test to determine whether the Court should decline to hear an issue because it is moot in *Borowski v. Canada (Attorney General)*:

> First, it is necessary to determine **whether the required tangible and concrete dispute has disappeared and the issues have become academic**. Second, if the response to the first question is affirmative, it is **necessary to decide if the court should exercise its discretion to hear the case**.[3]

10. There is a tangible and concrete dispute between the parties as to the appropriateness of using the *CCAA* process to provide extraordinary no-opt-out third party releases which may be invoked at any future date, indeed after the restructuring Plan is implemented.

11. The propriety of Article 11 of the Plan cannot reasonably be deemed a moot or academic issue. An appeal from a *CCAA* proceeding is not moot if the outcome may be determinative of ongoing litigation.[4] A decision on this proposed appeal that the third party release framework is

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[3] *Borowski v. Canada (Attorney General)* [1989] 1 S.C.R. 342 at para. 16 ["*Borowski*"].
[4] *843504 Alberta Ltd. (Re)*, 2011 ABQB 448 at para. 26.

inappropriate certainly would determine the availability of such releases in settlement of the ongoing class action claims against the various defendants who may seek to avail themselves of the framework.[5]

12. E&Y and other third party defendants have not gained any rights that cannot be undone.[6] While the implementation of the Plan means that Sino-Forest's restructuring cannot be undone, the same cannot be said of the framework under Article 11. According to the terms of the Plan, the various actions or forbearances undertaken by the third party defendants in connection with the Plan are not tied to effectiveness of third party releases. Article 11 therefore stands separate and apart from the rest of the Plan. The parties' dispute over the propriety of Article 11 is very much alive and an effective remedy can be given if the answer is that Article 11 is inappropriate.

13. In the second stage of the *Borowski* test, the Court has discretion to hear an appeal even if it is moot. If the Court were to reach this stage, it would find that the relevant factors -- adversarial interests of the parties, judicial economy, and proper judicial role and function -- are satisfied.[7]

14. It is clear that the necessary adversarial relationship continues to exist in this action. The Appellants have opted out of the class action against the defendants for the purpose of commencing individual proceedings, and have vigorously contested the third party release framework at all times.

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[5] To invoke the release of Named Third Party Defendants the prerequisites in Article 11.2(b) of the Plan require (i) the granting of the Sanction Order, (ii) the granting of the applicable Named Third Party Defendant Settlement Order; and (iii) the satisfaction/waiver of all conditions precedent in the settlement. Once it is confirmed that the conditions precedent in the settlement are fulfilled the release in Article 11.2(c) applies.

To invoke the release of E&Y the pre-requisites in Article 11.1(a) of the Plan require (i) the granting of the Sanction Order; (ii) the issuance of the Settlement Trust Order; (iii) the granting of an Order under Chapter 15 of the United States Bankruptcy Code recognizing and enforcing the Sanction Order and Settlement Trust Order in the United States; (iv) any other order necessary to give effect to the E&Y settlement; (v) the fulfillment of all conditions precedent in the E&Y settlement and the fulfillment by the Ontario class action plaintiffs of all of their obligations thereunder, and (vi) the Sanction Order, the Settlement Trust Order and all E&Y Orders being final orders. The release in Article 11.1(b) then applies once the settlement monies are paid and confirmed paid.

[6] *TELUS Corporation (Re)*, 2012 BCSC 1919 at para. 141.

[7] *Borowski, supra* note 3 at paras. 31, 34, and 40.

15. Allowing this appeal will advance judicial economy by determining whether any third party releases are appropriate, rather than approaching the issue piecemeal in connection with potentially all 15 Named Party Defendants.

16. Releases proposed for incorporation in Court-approved settlements of class litigation involving a *CCAA* applicant are clearly suited for consideration by the judiciary. The issue is of great public importance with ramifications for Canada's capital markets.[8] It is in the public interest that this Court engage in judicial resolution of this issue in the circumstances of this case.[9]

**The Court Should Discourage Litigation by Installments**

17. As stated by the Respondents in their factums, Justice Morawetz has reserved his decision regarding the fairness of the settlement between the Class Action plaintiffs and E&Y. Regardless of the outcome, it is expected that leave to appeal that decision will be pursued by some of the parties to this appeal. Judicial economy will be advanced if this Court is presented with all issues, in context, in both appeals at the same time, as opposed to litigating the same issues in fragmented instalments.[10]

**Leave to Admit Fresh Evidence Should Be Granted**

18. In applications for leave to appeal a sanction order granted under the *CCAA*, the test for admitting fresh evidence at the leave stage[11] is set out by the Supreme Court of Canada in *R. v. Palmer*[12]: (1) by due diligence, the evidence could not have been adduced in the proceeding below; (2) it is relevant to a decisive or potentially decisive issue; (3) it is reasonably capable of belief; and, (4) if believed, it may reasonably have affected the result. In non-*CCAA* applications for leave

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[8] Affidavit of Eric J. Adelson sworn December 6, 2012, **Motion Record of the Appellants, Tab 2, p. 10, at para. 17**.
[9] *Borowski, supra* note 3 at para. 40.
[10] *Garland, supra* note 2 at para. 90.
[11] *Country Style Food Services Inc. (Re)*, [2002] O.J. No. 1377 (C.A.) at para. 4.
[12] *R. v. Palmer*, [1980] 1 S.C.R. 759 at 775.

to appeal, the admission of fresh evidence is allowed if it relates to the issue of public importance.[13] The appellants meet both tests.

19. The fresh affidavit evidence filed by the Appellants[14] is limited to relevant factual information, concerning the issue of public importance of Justice Morawetz's Sanction Order, and accordingly leave to admit should be granted. The evidence shows that defendants like Allen T.Y. Chan, the alleged architect of the fraud that caused Sino-Forest to collapse, and David J. Horsley, who allegedly authorized, permitted or acquiesced in what the Ontario Securities Commission termed Sino-Forest's "Standing Timber Fraud",[15] are seeking to utilize the Article 11 framework to obtain releases.[16] The use of Article 11 to insulate from civil liability former officers and directors accused of serious wrongdoing by the OSC was not discussed or contemplated at the Plan sanction hearing and would have reasonably affected the result. This evidence was not in the record below because it occurred only after the Sanction Order was issued.

20. The fresh evidence submitted meets those requirements. The third party release issue is of public importance for the reasons previously described, and particularly because in practice it would defeat a class member's important right to effectively prosecute his claims individually upon opting out of a class action or settlement.[17] The fresh evidence demonstrates how the public interest may be compromised by open-ended frameworks for releases such as Article 11.[18] The fresh evidence is factual and informational, as described above.

21. Accordingly, the Appellants submit that leave to admit the fresh affidavit evidence should be granted.

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[13] *Markevich v. Canada,* [2001] S.C.C.A. No. 371 (S.C.C.); *Canada Mortgage and Housing Corp. v. Iness* (2002), 62 O.R. (3d) 255 (C.A.) at paras. 5, 11, 12.
[14] Affidavit of Yonatan Rozenszajn sworn January 28, 2013, **Motion Record of the Appellants, Tab 3.**
[15] *Ibid.*, **at paras. 11, 13, and 14, Exhibits "P", "R", "S", "T" and "U".**
[16] *Ibid.*
[17] Factum of the Appellants, at paras. 3, 44-47.
[18] Affidavit of Yonatan Rozenszajn sworn January 28, 2013, **Motion Record of the Appellants, Tab 3, at paras. 7, 13 and 14, Exhibits "F", "K", "R", "S", "T" and "U"**.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 1st DAY of MARCH, 2013**

per James C. Orr

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Megan B. McPhee

per Michael C. Spencer.

Lawyers for the Appellants, Invesco Canada Ltd., Northwest & Ethical Investments L.P. and Comité Syndical National de Retraite Bâtirente Inc.

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## Schedule A—Authorities

**Jurisprudence**

| | |
|---|---|
| **1.** | *843504 Alberta Ltd. (Re),* 2011 ABQB 448 |
| **2.** | *Borowski v. Canada (Attorney General)* [1989] 1 S.C.R. 342 |
| **3.** | *Canada Mortgage and Housing Corp. v. Iness* (2002), 62 O.R. (3d) 255 (C.A.) |
| **4.** | *Country Style Food Services Inc. (Re)*, [2002] O.J. No. 1377 (C.A.) |
| **5.** | *Edgewater Casino Inc. (Re*), 2009 BCCA 40 |
| **6.** | *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 SCR |
| **7.** | *Markevich v. Canada,* [2001] S.C.C.A. No. 371 |
| **8.** | *R. v. Palmer*, [1980] 1 S.C.R. 759 |
| **9.** | *TELUS Corporation (Re)*, 2012 BCSC 1919 |

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