

Court of Appeal File Number: M42399
Superior 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

Court of Appeal File Number: M42399
Superior Court File No. CV-11-431153-00CP

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN
CANADA and THE TRUSTEES OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS
LOCAL 793 PENSION PLAN FOR OPERATING ENGINEERS IN ONTARIO

Plaintiffs

-and-

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

Defendants

Proceeding under the *Class Proceedings Act, 1992*

**RESPONDING FACTUM OF
SINO-FOREST CORPORATION
(Motion for Leave to Appeal E&Y Settlement Approval Order
and Representation Dismissal Order)**

Dated: May 17, 2013

BENNETT JONES LLP
3400 One First Canadian Place
P.O. Box 130
Toronto ON M5X 1A4

Robert W. Staley (LSUC #27115J)
Derek J. Bell (LSUC #43420J)
Jonathan Bell (LSUC #55457P)

Tel: 416-863-1200
Fax: 416-863-1716

Lawyers for Sino-Forest Corporation

TO: THE APPEALS SERVICE LIST

Court of Appeal File Number: M42399
Superior 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

Court of Appeal File Number: M42399
Superior Court File No. CV-11-431153-00CP

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN
CANADA and THE TRUSTEES OF THE INTERNATIONAL UNION OF OPERATING
ENGINEERS LOCAL 793 PENSION PLAN FOR OPERATING ENGINEERS IN ONTARIO

Plaintiffs

-and-

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

Defendants

Proceeding under the *Class Proceedings Act, 1992*

**RESPONDING FACTUM OF
SINO-FOREST CORPORATION
(Motion for Leave to Appeal E&Y Settlement Offer
and Representation Dismissal Order)**

I. OVERVIEW

1. The Applicant, Sino-Forest Corporation ("SFC"), opposes the motion brought by Invesco Canada Ltd., Northwest & Ethical Investment L.P., and Comité Syndical National de Retraite Batirente Inc. (collectively, the "Moving Parties") for leave to appeal two orders of the Honourable Justice Morawetz dated March 20, 2013: the "Settlement Approval Order", approving the settlement of claims asserted against Ernst & Young LLP ("E&Y"), and the "Representation Dismissal Order", dismissing the Moving Parties' motion for appointment as representatives of investors who object to the E&Y Settlement.

2. The first three Moving Parties previously moved for leave to appeal the order (the "Sanction Order") of Justice Morawetz in the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.-36 ("CCAA") proceeding, dated December 10, 2012, sanctioning SFC's Plan of Compromise and Reorganization (the "Plan").

3. The motions for leave to appeal the Sanction Order and the E&Y Settlement Order and Representation Dismissal Order have been consolidated for consideration by this Court. SFC relies upon its factum (dated February 22, 2013), accompanying motion record and book of authorities, which were previously submitted in response to the Moving Parties' motion for leave

to appeal the Sanction Order. Rather than repeat all of the facts and submissions contained therein in this factum, SFC will only address additional facts and submissions that are of unique importance to this motion and which were accordingly not covered in its previous factum.

4. There is no reason to grant the Moving Parties' leave to appeal the Settlement Approval Order or the Representation Dismissal Order as both orders represent an appropriate exercise of discretion by an experienced CCAA Judge. There is nothing exceptional about Justice Morawetz's decision to approve the settlement of class action claims in a CCAA proceeding nor is there anything exceptional about his decision to approve CCAA releases for third parties that were integral to the resolution of SFC's CCAA proceeding.

5. What is exceptional is the fact that the Moving Parties have brought this motion for leave to appeal the Settlement Approval Order and Representation Dismissal Order, purportedly on the basis that they do not have the right to opt out of the E&Y Settlement, when it is in fact clear that their failure to file a proof of claim in SFC's CCAA proceeding forever bars them from bringing a claim against E&Y if they opt out of the E&Y Settlement. Accordingly, the Moving Parties claim to be bringing this motion (and if leave is granted, the appeal) to secure the right to opt out of a settlement agreement (that would provide them with a significant recovery from E&Y) when the opt out would in fact guarantee zero recovery, given that they would be barred from bringing any claim against E&Y.

6. The fact that it would be commercially absurd for the Moving Parties to opt out of the E&Y Settlement demonstrates that this motion, and if leave were granted, the appeal, are a waste of this Court's precious time and resources. The Moving Parties have failed to satisfy any of the

requirements to be granted leave to appeal and accordingly, this motion should be dismissed with costs.

II. FACTS

7. As set out in its factum dated February 22, 2013, SFC disagrees with the characterization of the facts as presented by the Moving Parties. SFC relies upon the facts as set out in its February 22, 2013 factum and the below is merely intended to highlight specific facts that are particularly pertinent to this motion.

A. Claims Process

8. On May 14, 2012, as part of SFC's CCAA proceeding, Justice Morawetz granted an order (the "Claims Procedure Order") approving a claims process that was developed by SFC in consultation with the Monitor.¹

9. In order to identify the nature and extent of claims asserted against SFC's subsidiaries, the Claims Procedure Order required any claimant that had or intended to assert a right or claim against one or more of the subsidiaries, relating to a purported claim made against SFC, to so indicate on their Proof of Claim.²

10. Paragraph 17 of the Claims Procedure Order provides:

¹ Affidavit of W. Judson Martin, Sworn November 29, 2012 (the "Martin November 29 Affidavit"), para. 39, Motion Record of the Moving Parties, Invesco Canada Ltd., Northwest & Ethical Investments LP, Comite Syndical National De Retraite Batirente Inc., Matrix Asset Management Inc., Gestion Ferique, and Monrusco Bolton Investments Inc. for Leave to Appeal the Sanction Order ("Motion Record of Invesco(Leave to Appeal Sanction Order)"), Tab 3(N), p. 248.

² Martin November 29 Affidavit, para. 41, Motion Record of Invesco (Leave to Appeal Sanction Order), Tab 3(N), pp. 298-299.

THIS COURT ORDERS that any Person that does not file a Proof of Claim as provided for herein such that the Proof of Claim is received by the Monitor on or before the Claims Bar Date or the Restructuring Claims Bar Date, as applicable, (a) shall be and is hereby forever barred from making or enforcing such Claim against the Applicant and all such Claims shall be forever extinguished; (b) shall be and is hereby forever barred from making or enforcing such Claim as against any other Person who could claim contribution or indemnity from the Applicant; (c) shall not be entitled to vote such Claim at the Creditors' Meeting in respect of the Plan or to receive any distribution thereunder in respect of such Claim; and (d) shall not be entitled to any further notice in, and shall not be entitled to participate as a Claimant or creditor, in the CCAA Proceedings in respect of such Claim [Emphasis Added]

11. As described more fully in SFC's February 22, 2013 factum, the plaintiffs in the Ontario, Quebec and New York class actions all filed Proofs of Claim in the CCAA proceeding pursuant to the Claims Procedure Order, but no proof of claim was filed by the Moving Parties.

12. Pursuant to paragraph 27 of the Claims Procedure Order, the plaintiffs in the Ontario class action filed a proof of claim on behalf of the members of the Ontario class action.³

13. SFC's auditors, including E&Y, asserted claims against SFC for contribution and indemnity for any amounts paid or payable in respect of the shareholder class actions, with each of the auditors having asserted claims in excess of \$6.5 billion. In addition, the auditors asserted claims for payment of professional fees associated with SFC after the release of the Muddy Waters report, and generalized claims for damage to reputation.⁴ The auditors also asserted

³ Claims Procedure Order of Morawetz J., dated May 14, 2012, Responding Motion Record of Sino-Forest Corporation (Leave to Appeal E&Y Settlement Approval Order and Representation Dismissal Order), Tab 1(A), p. 3.

⁴ Martin November 29 Affidavit, para. 62, Motion Record of Invesco (Motion for Leave to Appeal Sanction Order), Tab 3(N), p. 305.

indemnification claims against SFC in respect of the class action claims against them by the former noteholders.⁵

14. The auditors, including E&Y, asserted claims against SFC's subsidiaries for, among other things, indemnification in connection with the shareholder class actions. Those claims tended to treat SFC and its subsidiaries interchangeably or as one collective entity.⁶

15. Based on the clear wording of paragraph 17 of the Claims Procedure Order, which was not appealed, if the Moving Parties opt out of the Ontario class action, the fact that they have not filed a proof of claim pursuant to the Claims Procedure Order "forever bars" them from making any claim against E&Y "who could claim contribution or indemnity from the Applicant [SFC]".

B. Motion to Approve the Ernst & Young Settlement

16. On February 4, 2013, Justice Morawetz heard a motion seeking approval of the Ernst & Young Settlement. The Moving Parties opposed the motion, arguing that the Ernst & Young Settlement was not fair and reasonable. The Moving Parties also sought a Representation Order.

17. On March 20, 2013, Justice Morawetz approved the Settlement Approval Order and dismissed the Moving Parties' motion for the Representation Dismissal Order.⁷

⁵ Martin November 29 Affidavit, para. 66, Motion Record of Invesco (Motion for Leave to Appeal Sanction Order), Tab 3(N), p. 306.

⁶ Martin November 29 Affidavit, para. 67, Motion Record of Invesco (Motion for Leave to Appeal Sanction Order), Tab 3(N), p. 307.

⁷ Settlement Approval Order of Justice Morawetz dated March 20, 2013, Motion Record of the Moving Parties, Invesco Canada Ltd., Northwest & Ethical Investments LP, Comite Syndical National De Retraite Batirente Inc., Matrix Asset Management Inc., Gestion Ferique, and Montrusco Bolton Investments Inc. for Leave to Appeal the E&Y Settlement Approval Order and Representation Dismissal Order ("Motion Record of Invesco (Motion for Leave to Appeal E&Y Settlement Approval Order and Representation Dismissal Order)"), Tab 2, p. 15; Representation Dismissal Order of Justice Morawetz dated March 20, 2013, Motion Record of Invesco (Motion for Leave to Appeal E&Y Settlement Order and Representation Dismissal Order), Tab 3, p. 30.

18. In issuing the Settlement Approval Order, Justice Morawetz correctly found:

[66] ...the Ernst & Young Settlement is fair and reasonable, provides substantial benefits to relevant stakeholders and is consistent with the purpose and spirit of the CCAA. In addition, in my view, the factors associated with the *ATB Financial* nexus test favour approving the Ernst & Young Release.

[67] ...In this case, there is a connection between the release of claims against Ernst & Young and a distribution to creditors. The plaintiffs in this litigation are shareholders and Noteholders of SFC. These plaintiffs have claims to assert against SFC that are being directly satisfied, in part, with the payment of \$117 million by Ernst & Young.

[68] In my view it is clear that the claims Ernst & Young asserted against SFC, and SFC's subsidiaries had to be addressed as part of the restructuring....

[71] Implicit in my findings is rejection of the Objector's arguments questioning the validity of the Ernst & Young Settlement and Ernst & Young Release. The relevant consideration is whether a proposed settlement and third-party release sufficiently benefits all stakeholders to justify court approval. I reject the proposition that the \$117 million settlement payment is not essential or even related to the restructuring; it represents, at this point in time, the only real monetary consideration available to stakeholders. The potential to vary the Ernst & Young Settlement and Ernst & Young Release to accommodate opt-outs is futile, as the court is being asked to approve the Ernst & Young Settlement and Ernst & Young Release as proposed. [emphasis added]

[72] I do not accept that the class action settlement should be approved solely under the CPA. The reality facing the parties is that SFC is insolvent; it is under CCAA protection and stakeholder claims are to be considered in the context of the CCAA regime. The Objectors' claim against Ernst & Young cannot be considered in isolation from the CCAA proceedings...

C. Appeals from the Settlement Approval Order and the Representation Dismissal Order

19. On April 9, 2013, the Moving Parties served and filed a notice of motion for leave to appeal the Settlement Approval Order and the Representation Dismissal Order and sought an

order to consolidate that motion, should leave be granted, with the motion for leave to appeal the Sanction Order.⁸

20. On April 17, 2013, the Moving Parties served and filed an amended notice of motion for leave to appeal the Settlement Approval Order and the Representation Dismissal Order. The amended notice of motion removed the portion of the notice seeking an order to consolidate the motion, should leave be granted, with the motion for leave to appeal the Sanction Order.⁹

21. On April 17, 2013, the Moving Parties served and filed a motion for directions that sought, among other things, the consolidation (and oral hearing) of this motion with the motion for leave to appeal the Sanction Order and the appeals, if leave were granted.¹⁰

22. On April 19, 2013, the Moving Parties served and filed a notice of appeal to the Settlement Approval Order and the Representation Dismissal Order dated April 18, 2013, now claiming that this was a final order despite having served and filed a notice of motion for leave to appeal those same orders on April 9, 2013.¹¹

23. On May 1, 2013, Justice Simmons of this Court granted an endorsement consolidating the Moving Parties' motion seeking leave to appeal the Settlement Approval Order and the Representation Dismissal Order with the motion seeking leave to appeal the Sanction Order.

⁸ Notice of Motion for Leave to Appeal dated April 9, 2013, Motion Record of Invesco (Motion for Leave to Appeal E&Y Settlement Approval Order and Representation Dismissal Order), Tab 1, p. 1.

⁹ Amended Notice of Motion for Leave to Appeal dated April 9, 2013, Motion Record of Invesco (Motion for Leave to Appeal E&Y Settlement Approval Order and Representation Dismissal Order), Tab 1, p. 8

¹⁰ Notice of Motion (Motion for Directions), dated April 17, 2013, Responding Motion Record of Sino-Forest Corporation (Motion for Leave to Appeal the Ernst & Young LLP Settlement Order and Representation Dismissal Order), Tab 1(B), p. 54.

¹¹ Notice of Appeal dated April 18, 2013, Responding Motion Record of Sino-Forest Corporation (Motion for Leave to Appeal the Ernst & Young LLP Settlement Order and Representation Dismissal Order), Tab 1(C), p. 62.

Although Justice Simmons consolidated the motions for leave to appeal, he dismissed the Moving Parties' motion to consolidate the leave motions with the hearing of the appeals. Justice Simmons also reserved the issue of representation for the purpose of any appeal to the leave panel or the appeal panel, as necessary.¹²

III. LAW AND ARGUMENT

A. Leave to Appeal

24. Leave to appeal an order made in a CCAA proceeding can only be granted where:

- (a) the point on appeal is of significance to the practice;
- (b) the point on appeal is of significance to the underlying parties;
- (c) the appeal is *prima facie* meritorious and not frivolous; and
- (d) the appeal will not hinder the progress of the action.¹³

25. The four part test for granting leave to appeal requires that all four elements be satisfied; the failure to establish *any* one of the requirements will result in a dismissal of the application.¹⁴ In this case, the moving parties have failed to satisfy at least three of the four requirements.

26. The Moving Parties carry a heavy burden in order to obtain leave in a CCAA proceeding. Courts have emphasized that such an application will only be granted sparingly because of, among other things, the "real time" dynamic of CCAA proceedings and the discretionary nature

¹² Endorsement of Justice Simmons dated May 1, 2013, Motion Record of Invesco (Motion for Leave to Appeal E&Y Settlement Approval Order and Representation Dismissal Order), Tab 23, p. 377.

¹³ *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.) at para. 24, Brief of Authorities of Sino-Forest Corporation (Motion for Leave to Appeal Sanction Order), Tab 2; *Timmerco Ltd. (Re)*, 2012 ONCA 552 at para. 2, Brief of Authorities of Sino-Forest Corporation (Motion for Leave to Appeal Sanction Order), Tab 3.

¹⁴ *Statoil Canada Ltd. (Arrangement relatif a)*, 2012 QCCA 665 at paras. 4 & 7, Brief of Authorities of Sino-Forest Corporation (Motion for Leave to Appeal Sanction Order), Tab 4.

of orders made by supervising CCAA judges. In one of the oft-cited cases on this issue, Justice MacFarlane stated:

...I am of the view that this Court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the CCAA. The process of management which the Act has assigned to the trial Court is an ongoing one...A colleague has suggested that a judge exercising a supervisory function under the CCAA is more like a judge hearing a trial, who makes orders in the course of that trial...In supervising a proceeding under the CCAA, orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and of problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the CCAA. I do not say that leave will never be granted in a CCAA proceeding. But the effect upon all parties concerned will be an important consideration in deciding whether leave ought to be granted.¹⁵
[emphasis added]

27. As described below, the Moving Parties have failed to satisfy the four part test for granting leave to appeal. In any event, such appeal would be moot given that the Plan has already been substantially implemented and cannot be undone. As such, the Moving Parties' motion for leave to appeal the Settlement Approval Order and Representation Dismissal Order should be denied.

¹⁵ *Statoil Canada Ltd. (Arrangement relatif a)*, *supra* at para. 4, Brief of Authorities of Sino-Forest Corporation (Motion for Leave to Appeal Sanction Order), Tab 4; *Timminco Ltd. (Re)*, *supra* at para. 2, Brief of Authorities of Sino-Forest Corporation (Motion for Leave to Appeal Sanction Order), Tab 3; *Stelco Inc.*, [2005] O.J. No. 4883 (C.A.) at paras 15 & 18, Brief of Authorities of Sino-Forest Corporation, Tab 5; *Pacific National Lease Holding Corp. (Re)* (1992), 19 B.C.A.C. 134 at paras. 28-30, Brief of Authorities of Sino-Forest Corporation (Motion for Leave to Appeal Sanction Order), Tab 6.

1. Points on appeal are not of significance to the practice

28. The point on appeal is not of significance to the practice. There is no controversy that class action settlements can be approved in CCAA proceedings¹⁶

29. Moreover, there is no controversy that those settlements can provide for CCAA releases as this has also occurred on several occasions and is a practice that has been endorsed and approved by this Court.¹⁷

30. There is nothing remarkable about the Settlement Approval Order or the Representation Dismissal Order rendering it of significance to the practice.

2. Points on appeal are not of significance to the underlying parties

31. Likewise, the points on which the Moving Parties seek leave to appeal cannot reasonably be viewed as having significance to the Moving Parties. In light of the clear wording of the Claims Procedure Order (which was not appealed), the Moving Parties' arguments with respect to the extinguishment of opt-out rights are academic and moot, at best. There is no commercially reasonable basis on which to assume the Moving Parties will exercise the rights that flow from success on the appeal for which they seek leave, given that the only practical result of success on appeal would be the preservation of opt-out rights that would never be exercised.

¹⁶ *Re Nortel Networks Corp.* (2010), 63 C.B.R. (5th) 44 (Sup. Ct. J.), Brief of Authorities of Sino-Forest Corporation (Motion for Leave to Appeal E&Y Settlement Approval Order and Representation Order), Tab 1; *Robertson v. ProQuest Information and Learning Co.*, [2011] O.J. No. 1160 (Sup. Ct. J.), Brief of Authorities of Sino-Forest Corporation (Motion for Leave to Appeal E&Y Settlement Approval Order and Representation Order), Tab 2.

¹⁷ *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 92 O.R. (3d) 513 (C.A.) at paras. 31, 71-72, Brief of Authorities of Sino-Forest Corporation (Motion for Leave to Appeal Sanction Order), Tab 11; *Nortel Networks Corp., Re*, 2010 ONSC 1708 at paras. 79, Brief of Authorities of Sino-Forest Corporation (Motion for Leave to Appeal E&Y Settlement Approval Order and Representation Dismissal Order), Tab 1.

32. Section 17(b) of the Claims Procedure Order (which the Moving Parties never sought to appeal or otherwise set aside, notwithstanding they had notice of the Claims Procedure Order) specifically bars any person who fails to file a timely proof of claim in the CCAA proceeding from making or enforcing a claim against any person who could claim contribution or indemnity from SFC, which includes E&Y. The Moving Parties deliberately declined to file a proof of claim in the CCAA proceedings, notwithstanding that the Moving Parties were aware of the CCAA proceedings and the Claims Procedure Order. As such, even if the Moving Parties are granted and exercise an opt-out right, they cannot bring a claim against E&Y.

33. In addition, if they were afforded and exercised opt-out rights under the *Class Proceedings Act* (the "CPA"), the Moving Parties would be prohibited from relying on or sheltering under the proof of claim filed by the Ontario class action plaintiffs in the CCAA, given that its application is expressly limited to class members in the Ontario class action. Thus, the Moving Parties failure to file a proof of claim in SFC's CCAA proceeding forever bars them from bringing an action against E&Y, even if they are granted the opt-out rights they purport to seek on appeal.

34. Likewise, the Moving Parties' assertion that Justice Morawetz erred in granting the Representative Dismissal Order in the face of their opposition cannot reasonably be viewed as having any significance to the Moving Parties given that by failing to file a proof of claim in the CCAA proceedings, they deliberately chose to have their interests represented by the Ontario class action plaintiffs prior to the E&Y Settlement motion.

35. Courts have repeatedly stated that as a general principle, they will decline to decide a case which raises merely a hypothetical or abstract question, particularly where the decision will

have no practical effect on a party's rights.¹⁸ The points on appeal will have no practical effect on the Moving Parties rights, given the Claims Procedure Order and there are no exceptional circumstances warranting a departure from the general principle that such an appeal will not be heard.

3. Appeal is not *prima facie* meritorious

36. The Alberta Court of Appeal has held that in order for this requirement to be satisfied, "on first impression, there must appear to be an error in principle of law or a palpable and overriding error of fact. Exercise of discretion by a supervising judge, so long as it is exercised judicially, is not a matter for interference by an appellate court, even if the appellate court were inclined to decide the matter another way."¹⁹

37. Courts have recognized and reiterated that a large amount of deference must be afforded to decisions made by the supervising judge in a CCAA proceeding.²⁰ Justice Morawetz has been overseeing SFC's CCAA process since its inception and is uniquely situated with respect to the facts of this case; his decision was based upon an intimate understanding of the issues facing SFC and its stakeholders. Therefore, this requirement is only satisfied if the Moving Parties can

¹⁸ *Borowski v. Canada*, [1989] 1 S.C.R. 342 at para. 15, Brief of Authorities of Sino-Forest Corporation (Motion for Leave to Appeal E&Y Settlement Approval Order and Representation Dismissal Order), Tab 3; see also *Tamil Co-operative Homes Inc. v. Arulappah*, [2000] O.J. No. 3372 (C.A.) at para. 13, Brief of Authorities of Sino-Forest Corporation (Motion for Leave to Appeal E&Y Settlement Approval Order and Representation Dismissal Order), Tab 4.

¹⁹ *Resurgence Asset Management LLC v. Canadian Airlines Corp.*, 2000 ABCA 149 at para. 35, Brief of Authorities of Sino-Forest Corporation (Motion for Leave to Appeal Sanction Order), Tab 9.

²⁰ *Ravelston Corp. (Re)*, 2007 ONCA 268 at para. 14, Brief of Authorities of Sino-Forest Corporation (Motion for Leave to Appeal Sanction Order), Tab 10; *Resurgence Asset Management*, *supra* at para. 28, Brief of Authorities of Sino-Forest Corporation (Motion for Leave to Appeal Sanction Order), Tab 9.

demonstrate that, *prima facie*, there was a palpable and overriding error. As described below, it is clear that the Moving Parties have not met this burden.

(a) Justice Morawetz Correctly Applied the Test to Approve the E&Y Settlement

38. Prior to granting the Settlement Approval Order, Justice Morawetz's reasons, at paragraphs 34 through 42, correctly considered whether the court had jurisdiction in the CCAA proceedings to approve the E&Y Settlement and E&Y Release. Only after having found, in an exercise of the discretion afforded to him pursuant to the CCAA, that he had the requisite jurisdiction to approve the E&Y Settlement did Justice Morawetz apply the three part test required to assess CCAA settlements:

- (a) whether the settlement is fair and reasonable;
- (b) whether it provides substantial benefits to other stakeholders; and
- (c) whether it is consistent with the purpose and spirit of the CCAA.²¹

39. Upon application of this test, Justice Morawetz concluded that the E&Y Settlement was fair and reasonable and provided substantial benefit to SFC's stakeholders, consistent with the purpose and spirit of the CCAA. In so finding, Justice Morawetz expressly denied any assertion that the E&Y Settlement should be approved solely under the CPA or that it was inappropriate to consider the E&Y Settlement within the framework of the CCAA. In finding the \$117 million to be a "significant contribution" to the CCAA Plan (and one from which the Moving Parties would

²¹ *Robertson v. ProQuest Information and Learning Co.*, [2011] O.J. No. 1160 (Sup. Ct. J.), Brief of Authorities of Sino-Forest Corporation (Motion for Leave to Appeal E&Y Settlement Approval Hearing and Representation Dismissal Order), Tab 2.

benefit), Justice Morawetz expressly acknowledged that the quantum of settlement was reasonable, contrary to the assertions made by the Moving Parties.²²

40. After determining the E&Y Settlement was fair and reasonable, Justice Morawetz applied the "nexus test" articulated in *ATB Financial* to find that there was a sufficient nexus between the E&Y Release and the overall plan of arrangement. In doing so, Justice Morawetz considered whether:

- (a) the claims to be released are rationally related to the purpose of the plan;
- (b) the claims to be released are necessary for the success of the plan;
- (c) the parties who have claims released against them are contributing in a tangible and realistic way to the plan; and
- (d) the plan will benefit the debtor and creditors generally.²³

41. Justice Morawetz correctly found:

- (a) the claims to be released were rationally connected to and necessary for the Plan (Justice Morawetz found the claims of E&Y against SFC were "intertwined to the extent they cannot be separated", as were the claims of the Moving Parties against E&Y);

²² Reasons for decision of Morawetz J. dated March 20, 2013 at para. 63, Motion Record of Invesco (Motion for Leave to Appeal E&Y Settlement Approval Order and Representation Dismissal Order), Tab 4, pp. 46-47.

²³ Reasons for Decision of Morawetz J. dated March 20, 2013 at paras. 50 and 58-80, Motion Record of Invesco (Motion for Leave to Appeal E&Y Settlement Approval Order and Representation Dismissal Order), Tab 4, pp. 44, 46-49; *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 92 O.R. (3d) 513 (C.A.) at paras. 71-72, Brief of Authorities of Sino-Forest Corporation (Motion for Leave to Appeal Sanction Order), Tab 11.

- (b) the E&Y Settlement and E&Y Release was necessary to the Plan given that without its approval, the objectives of the Plan would remain unfulfilled;
- (c) the E&Y Settlement was contributing in a tangible way to the Plan by its "significant contribution" of \$117 million;
- (d) the voting creditors approved the Plan with knowledge of the nature and effect of the E&Y Settlement, which benefited the claimants in the form of a tangible distribution; and
- (e) the E&Y Release was not overly broad or offensive to public policy and is fair and reasonable.

42. Having overseen the CCAA process from the beginning, Justice Morawetz's application of the correct legal tests outlined above was made with the benefit of his intimate knowledge of the issues facing SFC and its stakeholders. Absent a palpable and overriding error, of which there is none, Justice Morawetz's decision to issue the Settlement Approval Order and deny the Representation Dismissal Order should be afforded considerable deference, in accordance with the guiding principles articulated in *Statoil Canada Ltd., supra*.

(b) The E&Y Settlement Does Not Violate Subsection 6(8) of the CCAA

43. The Moving Parties argue that approval of the E&Y Settlement and the E&Y Release violates s. 6(8) of the CCAA. The argument advanced by the Moving Parties in this respect is misguided and reflects a misunderstanding of the purpose of the provision.

44. Section 6(8) states:

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

45. The purpose of s. 6(8) was explained by this Honourable Court in dismissing an appeal from the Equity Claims Order issued in SFC's CCAA process. Specifically, this Court stated that s. 6(8) was intended to ensure "that a monetary loss suffered by a shareholder (or other holder of an equity interest) in respect of his or her equity interest did *not* diminish the assets of the debtor available to general creditors in a restructuring" (underlining added).²⁴

46. The \$117 million settlement payment by E&Y is not an asset of the debtor. It is a fund contributed by E&Y to resolve claims by certain of SFC's shareholders and creditors against E&Y. Because the E&Y Settlement does not involve the allocation of the debtor's assets, section 6(8) has no application.²⁵

(c) The Points on Appeal are Frivolous and Rendered Moot

47. As explained in greater detail above, the arguments advanced by the Moving Parties with respect to their purported denial of opt-out rights and representative status render any appeal theoretical, moot and therefore frivolous and without merit. The Moving Parties declined to file a proof of claim in SFC's CCAA proceedings to preserve their opt-out rights or to otherwise participate in key steps in the CCAA process. They are accordingly forever barred by the Claims

²⁴ *Sino-Forest Corporation (Re)*, 2012 ONCA 816 at para. 56, Brief of Authorities of Sino-Forest Corporation (Motion for Leave to Appeal E&Y Settlement Approval Order and Representation Dismissal Order), Tab 5.

²⁵ See *Canwest Global Communications (Re)*, 2010 ONSC 3537 at para. 29, Brief of Authorities of Sino-Forest Corporation (Motion for Leave to Appeal E&Y Settlement Approval Order and Representation Dismissal Order), Tab 6, in which a third party payment to shareholders was held not violate s. 6(8).

Procedure Order from pursuing any claim against Ernst & Young. Thus, even if the Moving Parties were entitled to opt-out rights under the CPA, those opt-out rights will be rendered commercially absurd and therefore meaningless by the practical implication of their exercise.

48. In light of the Moving Parties' failure to satisfy three of the four elements of the test required to grant leave to appeal CCAA orders, the Moving Parties' motion for leave to appeal the Settlement Approval Order and Representation Dismissal Order should be denied.

IV. RELIEF SOUGHT

49. SFC respectfully requests that the Moving Parties' motion for leave to appeal the Settlement Approval Order and the Representation Dismissal Order be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

May 17, 2013

A handwritten signature in cursive script, reading "Bennett Jones LLP", is written over a horizontal line.

BENNETT JONES LLP
Lawyers for Sino-Forest Corporation

SCHEDULE "A" – AUTHORITIES CITED

Jurisprudence

1. *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.)
2. *Timminco Ltd. (Re)*, 2012 ONCA 552
3. *Statoil Canada Ltd. (Arrangement relative a)*, 2012 QCCA 665
4. *Stelco Inc.* (2005), 78 O.R. (3d) 241 (C.A.)
5. *Pacific National Lease Holding Corp. (Re)* (1992), 19 B.C.A.C. 134
6. *Re Nortel Networks Corp.* (2010), 63 C.B.R. (5th) 44 (Sup. Ct. J.)
7. *Robertson v. ProQuest Information and Learning Co.*, [2011] O.J. No. 1160 (Supt. Ct. J.)
8. *Metcalfe & Mansfield Alternative Investment II Corp. (Re)* (2008), 92 O.R. (3d) 513 (C.A.)
9. *Borowski v. Canada*, [1989] 1 S.C.R. 342
10. *Tamil Co-operative Homes Inc. v. Arulappah*, [2000] O.J. No. 3372 (C.A.)
11. *Resurgence Asset Management LLC v. Canadian Airlines Corp.*, 2000 ABCA 149
12. *Ravelston Corp. (Re)*, 2007 ONCA 268
13. *Sino-Forest Corporation, (Re)*, 2012 ONCA 816
14. *Canwest Global Communications (Re)*, 2010 ONSC 3537

SCHEDULE "B" – STATUTORY REFERENCES

Companies' Creditors Arrangement Act, RSC 1985, c C-36

Payment — equity claims

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

**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 OR COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION**

Court of Appeal File Number: M42399
Court File No. CV-12-9667-00CL

COURT OF APPEAL FOR ONTARIO

**RESPONDING FACTUM OF SINO-
FOREST CORPORATION
(Motion For Leave to Appeal E&Y
Settlement Approval and Representation
Dismissal Order)**

BENNETT JONES LLP
One First Canadian Place
Suite 3400, P.O. Box 130
Toronto, Ontario
M5X 1A4

Robert W. Staley (LSUC #27115J)
Derek J. Bell (LSUC #43420J)
Jonathan Bell (LSUC #55457P)

Tel: 416-777-4857
Fax: 416-863-1716

Lawyers for Sino-Forest Corporation