

Court of Appeal File No.: C56961/M42404/M42453
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

Court of Appeal File No.: C56961/M42404/M42453
S.C.J. Court File No.: CV-11-431153-00CP

COURT OF APPEAL FOR ONTARIO

BETWEEN:

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

Plaintiffs

- and -

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

Defendants

Proceeding under the *Class Proceedings Act, 1992*

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

(Motions to Quash Returnable June 28, 2013)

May 17, 2013

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TO: THE SERVICE LIST

| CONTENTS | Page |
|---|-------------|
| Part I – Overview | 1 |
| Part II – Facts | 3 |
| Part III – Issues and the Law | 11 |
| Issue No. 1: Justice Morawetz’s order approving the E&Y settlement was made under both the <i>CCAA</i> and the <i>CPA</i> . | |
| Issue No. 2: The E&Y settlement approval order qualifies as an appealable order under CPA s. 30(3) | |
| Issue No. 3: The Appellants should be granted leave to act as the representative party for purposes of this appeal | |
| Issue No. 4: The proposed appeal is not “manifestly devoid of merit”; it should be heard on its merits | |
| Part IV – Order Requested | 22 |

PART I – OVERVIEW

1. The Respondents (the “Appellants”), Invesco Canada Ltd., Northwest & Ethical Investments L.P., Comité Syndical National de Retraite Bâtirente Inc., Matrix Asset Management Inc., Gestion Férique and Montrusco Bolton Investments Inc., oppose the motions to quash the appeal in Court of Appeal File No.: C56961 brought by Ernst & Young LLP (“E&Y”) and the Ad Hoc Committee of Purchasers of the Applicant’s Securities, including the Representative Plaintiffs in the Ontario Class Action (“Class Action Plaintiffs”).

2. The present appeal was made pursuant to section 30(3) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (“CPA”)¹ from the orders of Justice Morawetz dated March 20, 2013, approving the E&Y class action settlement (“Settlement Approval Order” and “Representation Dismissal Order”) in the proceedings involving Sino-Forest Corporation.² The Appellants have concurrently moved for leave to act in a representative capacity pursuant to section 30(5) of the CPA for the purpose of the appeal;³ the Honourable Madam Justice Simmons has deferred that motion to this panel to consider concurrently with the motions to quash.⁴

3. The Appellants’ direct appeal under the CPA, coupled with their motion for leave under s. 30(5), is meritorious and appropriate under the present circumstances. As indicated by the dual captions on the Settlement Approval Order and the Representation Dismissal Order, Justice Morawetz was designated by the Regional Senior Justice, the Honourable Mr. Justice Then, to hear the motion to approve the E&Y settlement under both the CPA (in the class proceeding involving

¹ *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 30(3) [“CPA”].

² Settlement Approval Order of Justice Morawetz dated March 20, 2013 [“Settlement Approval Order”], Motion Record of Ernst & Young LLP, Tab 2, pp. 7-21; Representation Dismissal Order of Justice Morawetz dated March 20, 2013, Motion Record of Ernst & Young LLP, Tab 3, pp. 22-25.

³ Notice of Appeal of the Objectors dated April 18, 2013 at p. 4, Motion Record of Ernst & Young LLP, Tab 29, p. 936.

⁴ Endorsement of the Justice Simmons dated May 1, 2013, Responding Motion Record of the Respondents (Appellants), Invesco Canada Ltd., Northwest & Ethical Investments L.P., Comité Syndical National de Bâtirente Inc. Matrix Asset Management Inc., Gestion Férique and Montrusco Bolton Investments Inc. [“Appellants’ Motion Record”], Tab 3, pp. 15-20.

the Sino-Forest debacle) and the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*") (in the proceeding involving Sino-Forest's insolvency). The Class Action Plaintiffs' argument in their motion to quash that the E&Y settlement approval occurred only under the *CCAA* defies obvious reality, and is contradicted by their co-movant, E&Y.⁵

4. Because the E&Y settlement was made and approved under both the *CPA* and the *CCAA*, the Appellants have prudently decided to pursue appellate review utilizing appropriate procedures under both statutes. The appropriate procedure under the *CPA* is the present appeal coupled with the Appellants' present motion for representative status for the appeal under section 30(5) of the *CPA*.

5. The remaining issues are whether the Appellants have standing to appeal under this Court's decision in *Dabbs v. Sun Life Assurance Co. of Canada*⁶; and whether this appeal is manifestly devoid of merit. The decision in *Dabbs* denying appeal rights to non-party class members on the ground that such dissenting class members could and should have opted out of the class action reflected a rationale that is conspicuously absent on the facts of the present situation – because opt-out rights are being explicitly denied to the Appellants. With respect to representation, the Appellants are the only parties who can and will represent opt-outs' and objectors' interests on this appeal. The Appellants respectfully submit that Justice Morawetz's approval of the E&Y settlement explicitly in derogation of the opt-out rights asserted by the Appellants under the *CPA* contradicted fundamental class action law and procedure, and deserves careful review on the merits in this appeal.

⁵ Factum of Ernst & Young LLP (Motion to Quash Appeal Returnable June 28, 2013) at para. 17 ("Justice Morawetz sat as both *CCAA* judge and *CPA* judge.") ["E&Y Factum"].

⁶ *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 3622 at paras. 18-21 (C.A.) ["*Dabbs*"], **Brief of Authorities of Ernst & Young LLP, Tab 6.**

PART II – FACTS

6. The Appellants set forth here some additional facts to supplement or correct the recitals in E&Y's and the Class Plaintiffs' facts.
7. The market in Sino-Forest stock collapsed after allegations of fraud against Sino-Forest were made public in early June 2011. Sino-Forest notes were also significantly devalued. The Class Action Plaintiffs won carriage of the class action, titled second in the caption on this appeal, which was commenced on behalf of share and note purchasers against Sino-Forest and other parties, including E&Y. The Appellants are institutional investment funds that were share purchaser members of the putative class (but were not named representative plaintiffs) in the class action.
8. In March 2012, the Class Action Plaintiffs reached a settlement with one of the defendants in the class action, Pöyry (Beijing) Consulting Company Limited ("Pöyry"). Ten days later, Sino-Forest entered reorganization proceedings under the *CCAA*, on March 30, 2012, and a *CCAA* litigation stay was entered. Justice Morawetz, the *CCAA* judge, lifted the stay to allow the class action court to consider and ultimately approve the proposed Pöyry settlement. In September 2012, Justice Perell, the *CPA* judge, approved the settlement and notice was disseminated to putative class members who were provided the right to opt out of the settlement.⁷ The notice stated that class members opting out of the settlement would also be opting out of the entire class proceeding:

IF YOU CHOOSE TO OPT OUT OF THE CLASS, YOU WILL BE OPTING OUT OF THE **ENTIRE** PROCEEDING. THIS MEANS THAT YOU WILL BE UNABLE TO PARTICIPATE IN ANY FUTURE SETTLEMENT OR JUDGMENT REACHED WITH OR AGAINST THE REMAINING DEFENDANTS.⁸

⁷ Order of the Honourable Mr. Justice Perell, dated September 25, 2012, Schedule B, Appellants' Motion Record, Tab 11, pp. 151-208.

⁸ *Ibid.*, Appellants' Motion Record, Tab 11B, pp. 203.

9. The Appellants ultimately opted out by the mandated January 15, 2013 deadline.⁹

10. Meanwhile, the *CCAA* proceedings were moving forward. Attempts to sell Sino-Forest's assets for the benefit of the company's creditors, who were mostly noteholders, failed, so plans were advanced to place the assets in Newco entities, in which the creditors would be granted ownership interests as part of the reorganization plan. A plan of compromise and reorganization was first proposed in August 2012, and modifications were issued over the following months. The versions contained standard language providing that all claims against Sino-Forest and certain officers and directors would be barred except claims described in section 5.1(2) of the *CCAA*, claims of fraud, claims of conspiracy, and insured claims. Given the economics involved, it was clear that there would be no plan distributions to shareholders or share purchaser class members on their equity claims against Sino-Forest. Noteholders and so-called Noteholder Class Action claimants were treated as creditors in the plan entitled to receive distributions under the plan.

11. Notably, all versions of the reorganization plan, including the October 19 and November 28, 2012 versions of the plan distributed or available to creditors in connection with the scheduled vote on the plan in late November, contained a provision in Article 7.5 confirming that the equity class action claims against "Third Party Defendants," including E&Y, and the underwriters, were preserved and not affected by the plan.¹⁰

12. Unbeknownst to the Appellants and other outsiders, on November 29, 2012, counsel for E&Y and the Class Action Plaintiffs concluded a settlement, reflected in hastily drawn Minutes of

⁹ Opt out form of Invesco Canada Ltd., Motion Record of Ernst & Young LLP, Tab 26, p. 907; Opt out form of Comité Syndical National de Retraite Bâtirente Inc., Motion Record of Ernst & Young LLP, Tab 27, p. 908; Opt out form of Northwest & Ethical Investments L.P., Matrix Asset Management Inc., Gestion FÉRIQUE, and Montrusco Bolton Investments Inc., Exhibits "E" to "H" to the Affidavit of Tanya T. Jemec sworn January 18, 2013, Appellants' Motion Record, Tabs 5A-5D, pp. 40-47.

¹⁰ See for example Sino-Forest's Plan of Compromise and Reorganization dated August 14, 2013, Article 7.5, p. 49, Motion Record of Ernst & Young LLP, Tab 18, p. 856.

Settlement. The text of the Minutes provided that the settlement was to be “approved and implemented” in the *CCAA* proceedings, “conditional upon full and final releases and claims bar orders in favour of EY and which satisfy and extinguish all claims against EY, and without opt-outs, and as contemplated by the additional terms attached hereto as Schedule B hereto and incorporated as part of these Minutes of Settlement.”¹¹ Schedule B, however, listed “Court Proceedings” including *CCAA* and the Ontario Class Action, with the latter including “opt-out threshold agreeable to E&Y.”¹² As part of the settlement, E&Y agreed to pay, when all conditions were met, \$117 million into a Settlement Trust for distribution to anyone who might assert Sino-Forest securities-related claims against E&Y.

13. The proposed settlement was announced on Monday, December 3, 2012. A newly revised reorganization Plan was also released, with new provisions in Article 11 providing a “framework” for possible settlements with E&Y and other defendants in the class action, accompanied by *CCAA* releases for settling defendants; and specific provisions for the E&Y settlement.¹³ The creditors’ meeting, which after multiple postponements had been re-scheduled to occur on that day, went ahead, and the new Plan was overwhelmingly approved by creditors – though most had submitted proxies delegating voting authority to nominees, and obviously most had not seen the new Plan when their votes were cast to approve it. Equity claimants, including share purchaser class members (such as the Appellants), were not entitled to vote on the Plan.

¹¹ Minutes of Settlement dated November 29, 2012, at para. 10, Motion Record of Ernst & Young LLP, Tab 19, p. 867.

¹² *Ibid.* at Schedule B at p.2, Motion Record of Ernst & Young LLP, Tab 19, p. 872. E&Y has since confirmed that this provision is not just theoretical: “The opt-out threshold referred to at Schedule B of the Minutes of Settlement, if it ever became operative, is at the discretion of Ernst & Young and would be set by it at such time.” Responses to Questions on Written Cross-Examination on Affidavit of Mike P. Dean sworn January 11, 2013, dated January 29, 2013, Q. 3, p. 2, Appellants’ Motion Record, Tab 8, p. 66.

¹³ Plan of Compromise and Reorganization dated December 3, 2012, article 11, attached as Schedule A to the Plan Sanction Order of Justice Morawetz dated December 10, 2012, Motion Record of Ernst & Young LLP, Tab 5, pp. 140-142.

14. The Appellants, which as putative class members had previously been satisfied that the reorganization had been proceeding in a routine fashion without any prejudicial aspects, were alarmed about the apparent attempt to limit or negate any opt-out rights with respect to claims against E&Y. As the facts emerged (the Minutes of Settlement themselves were withheld from public release for a few days), several of the Appellants authorized their present counsel to oppose that aspect of the Plan and settlement.

15. On December 7, 2012, Sino-Forest moved before Justice Morawetz to have the new Plan sanctioned. Three of the Appellants appeared at the sanction hearing despite the short notice. They opposed the sanctioning of Article 11 on the basis that it was not integral to the restructuring of Sino-Forest and that it impermissibly rendered their *CPA* opt-out rights illusory or extinguished them. The parties to the *CCAA* proceeding contended that only the “framework” for third-party releases was proposed for sanctioning, so the opposition by the Appellants was premature, since the E&Y settlement itself would be considered for approval at a later time.

16. On December 10, 2012, Justice Morawetz issued his Plan Sanction Order.¹⁴ He dismissed the Appellants’ concerns as premature, holding that the E&Y settlement was separate from the Plan as it would not become effective unless and until the settlement was approved and other conditions were met.¹⁵

17. The Appellants have moved for leave to appeal the Sanction Order.

¹⁴ Plan Sanction Order of the Honourable Mr. Justice Morawetz dated December 10, 2013, Motion Record of Ernst & Young LLP, Tab 5, pp. 42-158.

¹⁵ Reasons of Justice Morawetz, 2012 ONSC 7050, December 12, 2012 at para. 48, Motion Record of Ernst & Young LLP, Tab 6, p. 165; Endorsement of Justice Morawetz, 2012 ONSC 7041, December 10, 2012 at para. 20, Motion Record of Ernst & Young LLP, Tab 7, p. 175.

18. On December 13, 2012, Regional Senior Justice Then designated Justice Morawetz to hear the motion to approve the E&Y settlement and ancillary matters under the *CCAA* and the *CPA*.¹⁶

19. On December 21, 2012, Justice Morawetz, in his capacity as a designated judge under the *CPA*, approved a notice program and the language of a notice form advising class members of the proposed E&Y settlement.¹⁷ The notice is substantially similar to typical court approved class action notices of proposed settlement. A hearing on the settlement approval motion was initially set for January 4, 2013, and later rescheduled to February 4, 2013.¹⁸

20. On December 31, 2012, Class Counsel publicized in a memorandum to institutional investors that they believed that their agreement to extinguish class members' statutory opt-out rights had resulted in E&Y's payment of a "substantial premium" in settlement consideration.¹⁹

21. On January 30, 2013, Sino-Forest implemented its restructuring Plan. This primarily involved transfer of the assets of Sino-Forest and its subsidiaries to the Newco entities established in the restructuring, and distribution of ownership interests to creditors. The implementation occurred without any assurance that the E&Y settlement or any other settlement with a third party defendant would be approved and consummated, and without regard to whether *CCAA* releases of such defendants would ever be granted.

22. In response to the class action notice, 91 objections (including the Appellants') were submitted; 84 were counted as valid and timely.²⁰ The Appellants' objections were that: it is

¹⁶ Fifteenth Report of the Monitor, dated January 28, 2013 at para. 39, Motion Record of Ernst & Young LLP, Tab 17, p. 808.

¹⁷ Order of the Honourable Mr. Justice Morawetz, dated December 21, 2012, Appellants' Motion Record, Tab 7, p. 49-64.

¹⁸ File Direction of the Honourable Mr. Justice Morawetz dated December 19, 2012, Appellants' Motion Record, Tab 6, p. 48.

¹⁹ Memorandum by Siskinds LLP dated December 31, 2012, Exhibit "E" to the Affidavit of Eric J. Adelson sworn January 18, 2013 at p.2, Appellants' Motion Record, Tab 4A, p. 34.

improper to trade away class members' opt out rights or render them illusory through use of a full and final release in favour of E&Y, provided in exchange for premium consideration; it is improper to approve a release to E&Y as a non-debtor third party; it is improper to approve the E&Y settlement to bind class members who have opted out and without certification, notice and opt out rights; it is improper to appoint the Class Action Plaintiffs as a representative of objectors with adverse interests; and it is improper to approve the E&Y settlement in installments in the absence of any plan for distribution or allocation.²¹

23. The motion to approve the E&Y settlement was heard on February 4, 2013. The parties moved under a dual style of cause for approval under the *CCAA* and *CPA*. The releases in favour of E&Y were to run against all "Securities Claimants," meaning any person who purchased, sold, or held Sino-Forest securities, as defined by the *Securities Act*, R.S.O. 1990, c. 5 ("*Securities Act*"), at any time. This definition thus includes share purchasers during the class period, who are defined as equity claimants under the *CCAA*. The Settlement Trust established to hold the settlement proceeds, when all conditions were met, was distributable to Securities Claimants, but allocation was not further specified.

24. The Appellants objected to the approval of the E&Y settlement under both the *CPA* and *CCAA*. The Appellants argued that, with respect to Sino-Forest's *CCAA* proceeding, E&Y was a non-debtor third-party and thus was not eligible for having claims against it settled and released under the *CCAA*, based on the standards set forth by this Court in *Re Metcalfe & Mansfield Alternative Investments II Corp.* 92 O.R.(3d) 513 (C.A.) ["*Metcalfe*"]. The E&Y settlement and release were not integral and necessary to the success of Sino-Forest's restructuring Plan; the

²⁰ Fourteenth Report of the Monitor, dated January 22, 2013 at para. 4, Motion Record of Ernst & Young LLP, Tab 15, p. 363.

²¹ Affidavit of Eric J. Adelson sworn January 18, 2012 at para. 5, Appellants' Motion Record, Tab 4, pp. 22-24. See also Notices of Objection for the Appellants, Motion Record of Ernst & Young LLP, Tab 15, pp. 435-6, 491-2, 518-9, 555-6, 570-1, 578-9.

settlement should have been effectuated solely under the *CPA*, as the Pöyry settlement was; and the release would negate the Appellants' statutory opt out rights.²² The Appellants also contended that other aspects of the settlement and release – no fraud carve-out, payment of premium to extinguish opt-out rights, lack of information on amount of E&Y's insurance coverage – indicated the settlement was not fair and reasonable.

25. The Class Action Plaintiffs also moved for a representation order appointing them as representatives of all Securities Claimants. The Appellants objected that the Class Action Plaintiffs did not represent them, and in fact had adverse interests; the Appellants brought a motion seeking to represent the objectors to the E&Y settlement.

26. On March 20, 2013, Justice Morawetz approved the E&Y settlement.²³ His reasons were based primarily on his finding that the settlement represented the only possible monetary distribution under the reorganization Plan to “creditors” and “stakeholders.” Justice Morawetz also granted a representation order to the Class Action Plaintiffs, and dismissed the Appellants' representation motion. After accepting that he had jurisdiction under the *CPA*, Justice Morawetz nevertheless held that he would not approve the E&Y settlement solely under the *CPA* and would not recognize opt-outs.²⁴

27. In the course of the appointments to finalize wording of the E&Y Settlement Approval Order, the Appellants raised a concern that the proposed order, when read in conjunction with the finding in the reasons that the settlement funds would be a distribution under the Plan, could

²² Factum of the Objectors for Motion for Settlement Approval, dated January 30, 2013 [“Factum of the Objectors”], **Appellants' Motion Record, Tab 9, p. 69-116.**

²³ Settlement Approval Order, *supra* note 2, **Motion Record of Ernst & Young LLP, Tab 2, pp. 7-21.**

²⁴ Reasons for Decision of the Honourable Mr. Justice Morawetz dated March 20, 2013, *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation*, 2013 ONSC 1078 at paras. 42, 72-73 (S.C.J.) [“Settlement Endorsement”], **Motion Record of Ernst & Young LLP, Tab 4, pp. 33, 40.**

prevent share purchaser class members from receiving any of the funds, due to the operation of section 6(8) of the *CCAA*:²⁵

6(8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.²⁶

28. Justice Morawetz dismissed the Appellants' concerns and signed the proposed order with minor modifications.²⁷

29. On April 19, 2013, the Appellants served a Notice of Appeal asserting a right of appeal under section 30(3) of the *CPA* from the orders of Justice Morawetz dated March 20, 2013. Concurrently, because the orders were also entered under the *CCAA*, the Appellants brought a motion for leave to appeal from those orders pursuant to the *CCAA*. The Appellants also brought a motion for directions on administrative matters related to the appeal and motions for leave to appeal. The motion for directions included a motion for leave to act as the representative party under section 30(5) of the *CPA* on their direct *CPA* appeal.²⁸ On May 1, 2013, Justice Simmons of this Court deferred the *CPA* section 30(5) motion to the three-judge panel assigned to hear the motion to quash the *CPA* appeal.

²⁵ Letter from Kim Orr Barristers P.C. to the Honourable Mr. Justice Morawetz dated March 26, 2013, **Appellants' Motion Record, Tab 14, pp. 213-215.**

²⁶ *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, s. 6(8).

²⁷ File Direction of the Honourable Mr. Justice Morawetz dated March 28, 2013, **Appellants' Motion Record, Tab 17, p. 238;** Letter from Lenczner Slaght Royce Smith Griffin LLP to the Superior Court of Justice dated March 27, 2013, **Appellants' Motion Record, Tab 16, p. 237;** Letter from Paliare Roland Rosenberg Rothstein LLP to the Superior Court of Justice dated March 27, 2013, **Appellants' Motion Record, Tab 15, pp. 216-236.**

²⁸ **Amended Notice of Motion (Motion for Directions) dated April 17, 2013, Appellants' Motion Record, Tab 2, p. 8-14.** See also Notice of Motion (Motion for Directions) dated April 17, 2013, **Appellants' Motion Record, Tab 1, p. 1-7.**

30. The Appellants accordingly are addressing in this factum both the motions to quash made by E&Y and the Class Action Plaintiffs and the *CPA* section 30(5) motion made by the Appellants – as E&Y and the Class Action Plaintiffs have done in their moving factums.

PART III – ISSUES AND THE LAW

31. The Appellants identify four issues to be determined:

1. Was Justice Morawetz’s order approving the E&Y settlement made under both the *CPA* and the *CCAA*?
2. Was that order an “order related to the aggregate assessment of monetary relief or a judgment on common issues” under section 30(3) of the *CPA*?
3. Is the Appellants’ direct appeal under the *CPA*, in conjunction with their motion for leave to act as the representative party on the appeal, proper or should it be quashed?
4. Is the appeal “manifestly devoid of merit” or should it be heard on the merits?

Issue No. 1: Justice Morawetz’s order approving the E&Y settlement was made under both the *CCAA* and the *CPA*.

32. The Class Action Plaintiffs contend that the orders approving the E&Y settlement and granting representation rights to those plaintiffs “were made under the *CCAA*” and, apparently, not under the *CPA* – from which they conclude that an appeal under the *CPA* cannot be proper.²⁹

33. As noted above, Justice Morawetz was appointed to hear matters relating to the E&Y settlement under the *CPA* as well as the *CCAA*.³⁰ It was necessary for Justice Morawetz to be granted authority under the *CPA* as a designated judge due to section 34 of the *CPA* which requires

²⁹ Factum of the Class Action Plaintiffs (Motion to Quash Returnable June 28, 2013) at paras. 18-27 [“Plaintiffs Factum”].

³⁰ Fifteenth Report of the Monitor, dated January 28, 2013 at para. 39, Motion Record of Ernst & Young LLP, Tab 17, p. 808.

all class action motions before the common issues trial to be heard by the same judge, unless the regional senior judge assigns another judge for that purpose.³¹ To ensure that the E&Y class action settlement was binding on the class, the parties were required to move under section 29 of the *CPA* to approve it before a *CPA* designated judge.³² It was not open to Justice Morawetz as a designated judge under the *CPA*, in a proceeding under a dual-style of cause, to approve the E&Y settlement solely under the *CCAA* and to disregard the right to opt-out pursuant to section 9 of the *CPA*.³³

34. Case management of class proceedings by designated judges under the *CPA* was intended to foster expertise in the application of the *CPA*. Designated judges are expected to be familiar with the *CPA* and to apply its provisions in accordance with existing and developing jurisprudence. The requirement for the same class action judge to hear all motions prior to the common issues trial in section 34 of the *CPA* is not a mere formality. It is rather a part of a legislative code designed to protect absent class members. Accordingly, the orders from which an appeal is now taken are decisions under the *CPA*.

35. Justice Morawetz's order approving the E&Y settlement is likewise full of references to the *CPA* as well as the *CCAA*: the Class Action Plaintiffs were granted representative status "in these insolvency proceedings ... and in the Ontario Class Action...";³⁴ the settlement and release were approved as fair and reasonable "for the purposes of both proceedings";³⁵ one of the provisions approved was that, on the Ernst & Young Settlement Date, "the Ontario Class Action shall be

³¹ *CPA*, *supra* note 1, ss. 34(1), 34(2).

³² *Robertson v. ProQuest Information and Learning Co.*, [2011] O.J. No. 1160 at para. 8 (S.C.J.), Brief of Authorities of Ernst & Young LLP, Tab 8; *CPA*, *supra* note 1, s. 29.

³³ *CPA*, *supra* note 1, s. 9.

³⁴ Settlement Approval Order, *supra* note 2 at para. 4, Motion Record of Ernst & Young LLP, Tab 2, p. 10.

³⁵ *Ibid.* at para. 7, Motion Record of Ernst & Young LLP, Tab 2, p. 11.

dismissed against Ernst & Young”;³⁶ and, the releases apply to claims “in the Ontario Class Action.”³⁷

36. Similarly, Justice Morawetz’s Endorsement leaves no doubt that his decision was made under both the *CCAA* and the *CPA*. He noted that he directed the approval hearing to take place “under both the *CCAA* and the *Class Proceedings Act*.”³⁸ He found that his court “has the jurisdiction in respect of both the *CCAA* and the *CPA*.”³⁹ On the fundamental point at issue here, he ruled: “[a]lthough the right to opt-out of a class action is a fundamental element of procedural fairness in the Ontario class action regime, this argument cannot be taken in isolation. It must be considered in the context of the *CCAA*.”⁴⁰ He clearly did not exclude the application of the *CPA*.

37. Under these circumstances, the Class Action Plaintiffs’ position that the E&Y settlement and release did not occur in the class proceeding, as well as in the *CCAA* proceeding, cannot plausibly be maintained.

Issue No. 2: The E&Y settlement approval order qualifies as an appealable order under section 30(3) of the CPA

38. Section 30(3) of the *CPA* provides:

A party may appeal to the Court of Appeal from a judgment on common issues and from an order under section 24, other than an order that determines individual claims made by class members.⁴¹

Section 24 allows the court to “determine the aggregate or a part of a defendant’s liability to class members and give judgment accordingly” when specified conditions are met.⁴² In this case, both prongs are satisfied.

³⁶ *Ibid.* at para. 12f, Motion Record of Ernst & Young LLP, Tab 2, p. 13.

³⁷ *Ibid.* at para. 13, Motion Record of Ernst & Young LLP, Tab 2, p. 13.

³⁸ Settlement Endorsement, *supra* note 24 at para. 31, Motion Record of Ernst & Young LLP, Tab 4, p. 32.

³⁹ *Ibid.* at para. 42, Motion Record of Ernst & Young LLP, Tab 4, p. 33.

⁴⁰ *Ibid.* at para. 75, Motion Record of Ernst & Young LLP, Tab 4, p. 40.

⁴¹ *CPA*, *supra* note 1, s. 30(3).

39. Neither E&Y nor the Class Action Plaintiffs have argued in their factums that a settlement approval order is not appealable as a “judgment on common issues” or a determination of aggregate liability against a defendant under section 30(3) of the *CPA*. E&Y’s argument that the Appellants lack standing focuses entirely on whether the Appellants can properly move for leave to act as a representative party under section 30(5) of the *CPA* to pursue the appeal under section 30(3).⁴³ Similarly, the Class Action Plaintiffs’ brief argument on section 30(3) discusses only the issue concerning leave to act as a representative party.⁴⁴ The representative party issue is addressed in the next section of this factum.

40. We will nevertheless briefly address the separate issue of whether a settlement approval order can satisfy section 30(3). In *Dabbs*, this Court declined to decide that threshold question, preferring instead to dispose of the appeal made by an absent class member appellant by declining to grant leave under section 30(5), because the appellant could preserve his rights by opting out of the class action.⁴⁵

41. Settlement approval orders are equivalent to final judgments and are appealable. The issue has been addressed in decisions involving settlements of cases where there are parties under disability pursuant to Rule 7.08 of the *Rules of Civil Procedure* – where court approval of settlements is required. The test for settlement approval under this and similar regimes⁴⁶ is in essence the same: “the court must find that in all the circumstances the settlement is fair, reasonable and in the best interests of those affected by it”.⁴⁷ Courts have indicated that settlement

⁴² *CPA*, *ibid.* s. 24.

⁴³ E&Y Factum, *supra* note 5 at paras. 25-32.

⁴⁴ Plaintiffs Factum, *supra* note 29 at paras. 28-30.

⁴⁵ *Dabbs*, at para. 15, **Brief of Authorities of Ernst & Young LLP, Tab 6.**

⁴⁶ See also section 242(2) of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, which requires court approval of settlements in derivative actions.

⁴⁷ *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 at para. 9 (Gen. Div.), **Book of Authorities of the Respondents (Appellants), Invesco Canada Ltd., Northwest & Ethical Investments L.P., Comité Syndical**

approval orders in those contexts are final dispositions of the parties' rights and are therefore equivalent to appealable judgments.

42. In *Tsaoussis v. Baetz*,⁴⁸ this Court observed:

¶13 In my view, a judgment approving the settlement of a minor's personal injury claim that has been signed, entered and not appealed is final, and must be given the same force and effect as any other final judgment.⁴⁹

[Emphasis added]

The necessary implication of this passage is that a settlement approval order can be appealed.⁵⁰ In another decision, *McRitchie v. Natale*,⁵¹ the court similarly observed that a decision approving a minor's settlement represents a "final disposition." This jurisprudence relating to settlement approval orders under Rule 7.08 applies by analogy to the treatment of settlement approval orders under the *CPA*.

43. If leave is granted to a class member under section 30(5), the class member's appeal proceeds under section 30(3), according to the last phrase in section 30(5). It is implicit from the way E&Y and the Class Action Plaintiffs have addressed section 30(5) here – discussed in the next section of this factum – that if leave under section 30(5) is granted, the appeal should proceed. Particularly given the fact that the *CPA* is a remedial statute and should be given a generous, broad, liberal and purposive interpretation,⁵² it would be an implausible interpretation of the *CPA* to prohibit class members who qualify under section 30(5) from appealing settlement approval orders

National de Bâtirente Inc. Matrix Asset Management Inc., Gestion Férique and Montrusco Bolton Investments Inc. [“Appellants’ Authorities”], Tab 2.

⁴⁸ *Tsaoussis (Litigation guardian of) v. Baetz* (1998), 41 O.R. (3d) 257, [1998] O.J. No. 3516 (C.A.), **Appellants’ Authorities, Tab 7**, leave to appeal to S.C.C. ref’d, [1998] S.C.C.A. No. 518.

⁴⁹ *Ibid.*, at para. 13, **Appellants’ Authorities, Tab 7**.

⁵⁰ This Court regularly hears appeals from settlement approval orders under Rule 7.08. See *Wu Estate v. Zurich Insurance Co.*, [2006] O.J. No. 1939 (C.A.) **Appellants’ Authorities, Tab 8**; *Grass (Litigation Guardian of) v. Women’s College Hospital*, [2007] O.J. No. 2918 (C.A.), **Appellants’ Authorities, Tab 3**.

⁵¹ *McRitchie v. Natale*, 2011 ONSC 3400, [2011] O.J. No. 2489 at para. 19 (S.C.J.), **Appellants’ Authorities, Tab 6**.

⁵² *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 15, **Appellants’ Authorities, Tab 4**.

on the ground that the orders are not common issue judgments or determinations of a defendant's aggregate liability.

Issue No. 3: The Appellants should be granted leave to act as the representative party for the purposes of this appeal

44. Section 30(5) of the *CPA* provides:

30(5) If a representative party does not appeal as permitted by subsection (3), or if a representative party abandons an appeal under subsection (3), any class member may make a motion to the Court of Appeal for leave to act as the representative party for the purposes of subsection (3).⁵³

45. Under this section, if a representative party does not bring an appeal under section 30(3), “any class member may make a motion to the Court of Appeal for leave to act as the representative party” for the purposes of appeal. In *Dabbs*, this Court refused to grant such leave because the class members there could have preserved their rights by opting out of the proposed settlement.⁵⁴ The situation here is exactly to the contrary -- the Appellants have been explicitly denied the right to opt out of the E&Y settlement. If the E&Y settlement is finalized, it will forever release the Appellants' claims against E&Y relating to Sino-Forest. Moreover, as briefly described above, it is possible that the entire class of share purchasers in the class action may not be able to receive any of the settlement proceeds, due to the operation of section 6(8) of the *CCAA*⁵⁵ and the fact that creditors are not being fully paid under the Plan. In order to protect their interests as opt outs (in the Pöyry settlement), and also to promote access to justice for all equity claimant class members,

⁵³ *CPA*, *supra* note 1, s. 30(5).

⁵⁴ *Dabbs*, *supra* note 6 at para. 20, Brief of Authorities of Ernst & Young LLP, Tab 6.

⁵⁵ The E&Y Settlement has been approved as a distribution to creditors under the Plan. Section 6(8) of the *CCAA* prohibits distribution to equity claimants before all non-equity claimants have been paid in full. The Appellants, along with other share purchaser class members, are deemed to be equity claimants. Since creditors and other non-equity claimants in the Sino-Forest restructuring have not been paid in full, equity claimants may be at risk of being prevented from obtaining any allocation of the E&Y settlement funds. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, s. 6(8).

the Appellants seek leave to act as the representative party on the appeal, so that these important questions can be resolved on the merits.

46. Justice O'Connor's treatment in *Dabbs* of the class member's motion for leave to act as the representative party on appeal was limited to two paragraphs at the end of his decision. In addition to noting the moving parties' opt out rights, the judge was highly critical of the attempt by a single class member (out of an estimated class numbering 400,000) to set aside a settlement approved by courts in three jurisdictions. In short, Justice O'Connor was hostile to the merits of the appeal.

47. Unlike *Dabbs*, this is not a case of a single class member wishing to set aside a class action settlement because it does not accord with his subjective view of fairness. The Appellants are institutional investors who collectively owned significantly more shares than the Class Action Plaintiffs.⁵⁶ The class action has not yet been certified and the Class Action Plaintiffs have not been appointed as the representative plaintiffs on behalf of the class. The Appellants filed notices of appearance entitling them to participate at the E&Y settlement approval hearing.⁵⁷ Material information with respect to the allocation of settlement funds has not yet been released. No opt outs were allowed. There were more than 88 objections to the E&Y settlement – which could qualify as numerous and “fierce” opposition.⁵⁸

⁵⁶ Opt out form of Invesco Canada Ltd., Motion Record of Ernst & Young LLP, Tab 26, p. 907; Opt out form of Comité Syndical National de Retraite Bâtirente Inc., Motion Record of Ernst & Young LLP, Tab 27, p. 908; Opt out form of Northwest & Ethical Investments L.P., Matrix Asset Management Inc., Gestion FÉRIQUE, and Montrusco Bolton Investments Inc., Exhibits “E” to “H” to the Affidavit of Tanya T. Jemec sworn January 18, 2013, Appellants’ Motion Record, Tabs 5A-5D, pp. 40-47; Affidavit of Charles Wright sworn January 10, 2013 at para. 72, Motion Record of Ernst & Young LLP, Tab 11, pp. 301-2.

⁵⁷ Notice of Appearance of Invesco Canada Ltd., Northwest & Ethical Investments L.P. and Comité Syndical National de Retraite Bâtirente Inc., December 6, 2012, Appellants’ Motion Record, Tab 12, pp. 209-210; Notice of Appearance of Matrix Asset Management Inc., Gestion Férique and Montrusco Bolton Investments Inc., Appellants’ Motion Record, Tab 13, pp. 211-212.

⁵⁸ Fourteenth Report of the Monitor, para. 4, Motion Record of Ernst & Young LLP, Tab 15, p. 363; Supplemental Report to the Fourteenth Report of the Monitor dated February 1, 2013 at para. 5, Motion Record of Ernst & Young LLP, Tab 16, p. 691; see *Kidd v. Canada Life Assurance Company of Canada*, 2013 ONSC 1868 at paras. 20, 21 171 (S.C.J.) where the presence of over 90 objectors to a settlement was described in those terms, Appellants’ Authorities, Tab 5.

48. The Appellants here are not seeking to displace the Class Action Plaintiffs as named plaintiffs in their class action or as prospective class representatives on class certification. The Appellants' section 30(5) motion is made only with respect to this proposed appeal. But, if the Appellants' motion is denied, no one will pursue appellate arguments under the *CPA* that fundamental class action opt-out rights cannot be abrogated as is being attempted in this settlement; and perhaps no one will be able to ensure that the settlement proceeds are properly allocated.

49. Accordingly, the Appellants suggest that the situation here is much different from that in *Dabbs*. As discussed more completely in the next section of this factum, at the very least it is important for an appellate court to review and, we believe, set aside E&Y's and the Class Action Plaintiffs' overreaching use of the *CCAA* to render class members' fundamental opt out rights nugatory. Inasmuch as the settling parties appreciated the possibility that opt outs might occur (as indicated by the passage in Schedule B of the Minutes of Settlement, quoted in the fact section above), the Appellants' insistence on their rights cannot properly be viewed as an attempt to "spoil" the settlement for other class members -- but rather simply to ensure that the process is fair, and that the E&Y settlement funds (if the settlement becomes final) go to the appropriate claimants.

Issue No. 4: The proposed appeal is not "manifestly devoid of merit"; it should be heard on its merits

50. The Appellants have previously summarized the substance of their arguments with respect to the fundamental nature of the *CPA* safeguards in their initial motion factum.⁵⁹ The Appellants have addressed some of the merits, albeit directed towards the *CCAA* aspects of this decision, in their factum for leave to appeal the Settlement Approval Order and Representation Dismissal

⁵⁹ Factum of the Objectors, *supra* note 22, at paras. 22-101, Appellants' Motion Record, Tab 9, p. 78-104.

Order.⁶⁰ Much of the governing law is similar, although of course this proposed *CPA* appeal would focus on *CPA* law.

51. The Appellants' fundamental position on this *CPA* appeal – that it was improper and unnecessary to disregard clear *CPA* provisions in order to allow the E&Y to effect a non-debtor third-party settlement and releases under the *CCAA*, in a way that renders class members' opt-out rights illusory – is meritorious. Justice Morawetz erred in his capacity as a *CPA* designated judge in imposing a no-opt-out settlement in favour of a non-debtor third party in the class action and *CCAA* proceedings on non-consenting class members, like the Appellants – particularly since they had already opted out of the class action. But for the overreaching by E&Y and the Class Action Plaintiffs, the proposed settlement of class action claims against E&Y could and should have proceeded according to normal procedures under the *CPA* before Justice Perell, following the precedent set by the Pöyry settlement.

52. In *1250264 Ontario Inc. v. Pet Valu Canada Inc.*,⁶¹ this Court recently *reconfirmed* the fundamental importance of opt out rights in class litigation. Quoting a prior decision, the Court observed:

The primary protection for the absent class members in the class proceeding process is the right to opt out of the class action. It is axiomatic that no class member need participate in a class action against his or her will.⁶²

[Emphasis added]

⁶⁰ Factum of the Appellants, Invesco Canada Ltd., Northwest & Ethical Investments L.P., Comité Syndical National de Bâtirente Inc. Matrix Asset Management Inc., Gestion Férique and Montrusco Bolton Investments Inc. (Motion for Leave to Appeal from E&Y Settlement Approval Order and Representation Dismissal Order) dated May 10, 2013, **Appellants Motion Record, Tab 10, pp. 117-150.**

⁶¹ *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2013 ONCA 279, [2013] O.J. No. 2012 (C.A.), **Appellants' Authorities, Tab 1.**

⁶² *Ibid.* at para. 41 (quoting *176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (S.C.J.), aff'd (2004), 70 O.R. (3d) 182 (Div. Ct.), leave to appeal refused (May 11, 2004), Court File No. M31109 (Ont. C.A.) paras. 75-76), **Appellants' Authorities, Tab 1.**

53. In this case, the apparent and intended effect of providing E&Y with an omnibus *CCAA* release was to deprive potential opt-outs like the Appellants from effectively exercising that right. Justice Morawetz erred in granting approval under the *CPA* for the E&Y settlement and release in these circumstances.

54. Based on the reasoning used by Justice Morawetz in his Endorsement approving the E&Y settlement as integral to the Plan – that the E&Y settlement funds (\$117 million) will be a contribution to Sino-Forest’s reorganization Plan, not to members of the proposed class in the class action⁶³ -- the Appellants have become concerned that the settlement funds may never reach share purchaser class members. Justice Morawetz defined the intended recipients of the \$117 million as “creditors” and “relevant stakeholders” -- not as class members.⁶⁴

55. The class action claims being settled as against E&Y were asserted on behalf of a class defined as all persons and entities who acquired Sino-Forest securities from March 19, 2007 to and including June 2, 2011, although it was expanded in the Court Approved Notice to include acquisition of securities as early as March 31, 2006.⁶⁵ The securities may be shares or notes. However, the class of share purchasers and note purchasers is not coextensive with “shareholders” and “noteholders” (*i.e.*, persons who currently held shares or notes at the implementation date of the Plan -- not during the class period).

56. A proper class action settlement distributes monetary proceeds to class members on whose behalf the claims in the litigation were asserted. Those are the persons entitled to the

⁶³ Settlement Endorsement, *supra* note 24 at para. 60, Motion Record of Ernst & Young LLP, Tab 4, p. 38.

⁶⁴ *Ibid* at paras. 54, 60, 64, 66, 67, 71, Motion Record of Ernst & Young LLP, Tab 4, pp. 37-40.

⁶⁵ Notice of Proposed Settlement with Ernst & Young LLP, attached as Schedule “A” to the Order of the Honourable Mr. Justice Morawetz dated December 21, 2012, Appellants Motion Record, Tab 7A, pp. 55-60.

consideration. Class Counsel stated that those persons would receive distributions from the \$117 million settlement funds.⁶⁶

57. However, section 6(8) of the *CCAA* prohibits any plan distributions to equity claimants unless creditors have been paid in full. In this case, the (non-equity) “creditors” are the holders of Sino-Forest notes as of the Plan Implementation Date -- a somewhat different group than note purchasers during the earlier class period, and a completely different group than share purchasers. Sino-Forest Noteholder creditors who are class members will not have their claims fully paid even if they were to receive the entire \$117 million from the E&Y settlement -- their claim amount is fixed and capped by the Plan at \$150 million.⁶⁷

58. Thus, Justice Morawetz’s primary justification as to how the E&Y settlement was integral to the Plan -- that it provided monetary consideration to distribute to creditors -- is in complete conflict with the principle that proceeds of a class action settlement must be distributed to class members asserting claims in the litigation. These warring concepts cannot coexist. The correct approach is that E&Y settlement funds are not a contribution under the Plan for distribution to creditors; they instead are consideration to be paid to class members in a properly administered *CPA* settlement, in which opt-out rights must be honored.

59. These concerns are meritorious and should be heard in this *CPA* appeal, as prosecuted by the Appellants as representative parties for purposes of the appeal.

⁶⁶ *Ibid.*, Appellants Motion Record, Tab 7A, pp. 55-60.

⁶⁷ Plan of Compromise and Reorganization dated December 3, 2012, attached as Schedule A to the Plan Sanction Order of Justice Morawetz dated December 10, 2012, Motion Record of Ernst & Young LLP, Tab 5, p. 77.

PART IV – ORDER REQUESTED

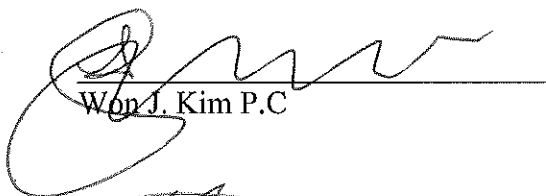
60. The Appellants respectfully request that the motions to quash the Appellants' appeal be dismissed with costs.

61. The Appellants respectfully request an order under section 30(5) of the *CPA* granting leave to the Appellants to act as the representative party for the purpose of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 17th DAY OF May, 2013



Michael C. Spencer



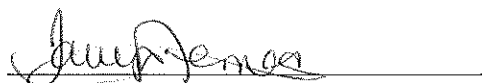
Won J. Kim P.C.



Megan B. McPhee



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Schedule A—Authorities**Case**

1. *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2013 ONCA 279, [2013] O.J. No. 2012 (C.A.)
2. *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 3622 (C.A.)
3. *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (Gen. Div.)
4. *Grass (Litigation guardian of) v. Women's College Hospital*, 2007 ONCA 542, [2007] O.J. No. 2918 (C.A.)
5. *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158
6. *Kidd v. Canada Life Assurance Company of Canada*, 2013 ONSC 1868 (S.C.J.)
7. *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation*, 2013 ONSC 1078 (S.C.J.)
8. *McRitchie v. Natale*, 2011 ONSC 3400, [2011] O.J. No. 2489 (S.C.J.)
9. *Re Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, [2008] O.J. No. 3164 (C.A.)
10. *Robertson v. ProQuest Information and Learning Co.*, [2011] O.J. No. 1160 (S.C.J.)
11. *Tsaoussis (Litigation guardian of) v. Baetz* (1998), 41 O.R. (3d) 257, [1998] O.J. No. 3516 (C.A.)
12. *Wu Estate v. Zurich Insurance Co.* (2006), 27 C.P.C. (6th) 207, [2006] O.J. No. 1939 (C.A.), leave to appeal ref'd, [2006] S.C.C.A. No. 289.

Schedule B—Legislation

Canada Business Corporations Act, R.S.C. 1985, c. C-44

242 (2) An application made or an action brought or intervened in under this Part shall not be stayed, discontinued, settled or dismissed for want of prosecution or, in Quebec, failure to respect the agreement between the parties as to the conduct of the proceeding without the approval of the court given on any terms that the court thinks fit and, if the court determines that the interests of any complainant may be substantially affected by such stay, discontinuance, settlement, dismissal or failure, the court may order any party to the application or action to give notice to the complainant.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

5.1 (2) A provision for the compromise of claims against directors may not include claims that

- (a) relate to contractual rights of one or more creditors; or
- (b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

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

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

9. Any member of a class involved in a class proceeding may opt out of the proceeding in the manner and within the time specified in the certification order.

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

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

29. (1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.

(2) A settlement of a class proceeding is not binding unless approved by the court.

(3) A settlement of a class proceeding that is approved by the court binds all class members.

(4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,

- (a) an account of the conduct of the proceeding;
- (b) a statement of the result of the proceeding; and

(c) a description of any plan for distributing settlement funds.

30(3) A party may appeal to the Court of Appeal from a judgment on common issues and from an order under section 24, other than an order that determines individual claims made by class members.

30(5) If a representative party does not appeal as permitted by subsection (3), or if a representative party abandons an appeal under subsection (3), any class member may make a motion to the Court of Appeal for leave to act as the representative party for the purposes of subsection (3)

34(1) The same judge shall hear all motions before the trial of the common issues.

34(2) Where a judge who has heard motions under subsection (1) becomes unavailable for any reason, the regional senior judge shall assign another judge of the court for the purpose.

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

7.08 (1) No settlement of a claim made by or against a person under disability, whether or not a proceeding has been commenced in respect of the claim, is binding on the person without the approval of a judge.

(2) Judgment may not be obtained on consent in favour of or against a party under disability without the approval of a judge.

Securities Act, R.S.O. 1990, c. S.5

1(1) ...

“security” includes,

- (a) any document, instrument or writing commonly known as a security,
- (b) any document constituting evidence of title to or interest in the capital, assets, property, profits, earnings or royalties of any person or company,
- (c) any document constituting evidence of an interest in an association of legatees or heirs,
- (d) any document constituting evidence of an option, subscription or other interest in or to a security,
- (e) a bond, debenture, note or other evidence of indebtedness or a share, stock, unit, unit certificate, participation certificate, certificate of share or interest, preorganization certificate or subscription other than,
 - (i) a contract of insurance issued by an insurance company licensed under the *Insurance Act*, and
 - (ii) evidence of a deposit issued by a bank listed in Schedule I, II or III to the *Bank Act* (Canada), by a credit union or league to which the *Credit Unions and Caisses Populaires Act, 1994* applies, by a loan corporation or trust corporation registered under the *Loan and Trust Corporations Act* or by an association to which the *Cooperative Credit Associations Act* (Canada) applies,

- (f) any agreement under which the interest of the purchaser is valued for purposes of conversion or surrender by reference to the value of a proportionate interest in a specified portfolio of assets, except a contract issued by an insurance company licensed under the *Insurance Act* which provides for payment at maturity of an amount not less than three quarters of the premiums paid by the purchaser for a benefit payable at maturity,
 - (g) any agreement providing that money received will be repaid or treated as a subscription to shares, stock, units or interests at the option of the recipient or of any person or company,
 - (h) any certificate of share or interest in a trust, estate or association,
 - (i) any profit-sharing agreement or certificate,
 - (j) any certificate of interest in an oil, natural gas or mining lease, claim or royalty voting trust certificate,
 - (k) any oil or natural gas royalties or leases or fractional or other interest therein,
 - (l) any collateral trust certificate,
 - (m) any income or annuity contract not issued by an insurance company,
 - (n) any investment contract,
 - (o) any document constituting evidence of an interest in a scholarship or educational plan or trust, and
 - (p) any commodity futures contract or any commodity futures option that is not traded on a commodity futures exchange registered with or recognized by the Commission under the *Commodity Futures Act* or the form of which is not accepted by the Director under that Act,
- whether any of the foregoing relate to an issuer or proposed issuer; (“valeur mobilière”)

Court of Appeal File No.: C56961/M42453/M42404
Superior Court File No.: CV-12-9667-00CL

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

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

Court of Appeal File No.: C56961/M42453/M42404
Superior Court File No.: CV-10-414302CP

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

SINO-FOREST CORPORATION, et al.

-and-

Plaintiffs

Defendants

COURT OF APPEAL FOR ONTARIO

(Proceeding Commenced at Toronto)

FACTUM OF THE RESPONDENTS (APPELLANTS)

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