

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

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

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

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**FACTUM OF ALLEN T. Y. CHAN  
(Motions returnable October 9 & 10, 2012)**

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**PART I – OVERVIEW**

1. This factum is filed by Allen T. Y. Chan (“**Mr. Chan**”) in response to motions brought by the Ad Hoc Committee of Purchasers (the “**Class Action Plaintiffs**”) of Sino-Forest Corporation (“**SFC**”) for an order lifting the stay of proceedings imposed by the Initial Order (the “**Stay**”); or, in the alternative, lifting the Stay against the Third Party Defendants; or, in the further alternative, lifting the Stay to require the Third Party Defendants to serve and file responding materials, if any, in the Leave and Certification Motions, and to deliver statements of defence and other ancillary relief.
2. The Ad Hoc Committee of Purchasers has not offered any grounds or evidence to this Honourable Court to justify the exercise of the Court's discretion to lift the Stay to permit the Leave and Certification Motions to proceed. Further, it has not demonstrated any compelling reason that this Court should make an order allowing it to isolate the Third Party Defendants and pursue the Class Actions solely against them.

3. Mr. Chan's position is that this Honourable Court should not grant the relief requested by the Ad Hoc Committee of Purchasers because it is premature and would unfairly compromise Mr. Chan's ability to defend himself, which could result in a miscarriage of justice.

## **PART II – THE FACTS**

4. Mr. Chan was Chairman, Chief Executive Officer and Director of SFC until his resignation from those offices on August 26, 2011. He continued as Founding Chairman Emeritus of SFC until his resignation on April 17, 2012. Mr. Chan was born, educated and resides in Hong Kong, China.
5. SFC and certain of its current and former directors and officers, including Mr. Chan, Mr. Horsley and Mr. Poon, SFC's current and former auditors, technical consultants and underwriters have been named as defendants in one or more class action lawsuits in Ontario, Quebec, Saskatchewan and New York (collectively, the "**Class Actions**").
6. The plaintiffs in the class action commenced in Ontario have claimed damages in the aggregate, and against all defendants, of \$9.2 billion on behalf of resident and non-resident shareholders and noteholders of SFC. Similar claims are advanced in the class actions commenced in Quebec, Saskatchewan and New York.
7. The claims of the Class Action Plaintiffs have been determined by order of this Honourable Court dated July 27, 2012 to be equity claims within the meaning of s.2 of the CCAA (the "**Equity Claims Order**").

### PART III - LAW AND ARGUMENT

8. A stay of proceedings is extraordinary relief intended to restrain judicial or extra-judicial conduct, including proceedings in any action against a debtor company that could impair the ability of the debtor company to continue its business and to focus its efforts on the negotiation of a compromise or plan of arrangement.

*Campeau v. Olympia & York Developments Ltd.*, 1992  
CarswellOnt 185 (Gen Div) at paras 19-20, 23-25

9. The purpose of s.11 of the *Companies' Creditors Arrangement Act* ("CCAA") is to maintain the status quo for a period of time to allow the company to organize without the distraction of litigation.

*Northland Properties Ltd. (Re)*, (1988) 73 C.B.R. (N.S.) 141, 1988  
CarswellBC 553 (B.C.S.C.) at para. 7

10. Where a proceeding against both the company and third parties arises from the "same nucleus of operative facts", the court can exercise its broad jurisdiction and grant a stay order that includes certain third parties. The inclusion of third parties is warranted to facilitate compromises and arrangements in the course of commercial restructuring negotiations. Section 11.03 of the CCAA explicitly authorizes the court to include directors and officers.

*Menegon v. Phillip Services Corp.*, (1999) 11 C.B.R. (4<sup>th</sup>) 262,  
1999 CarswellOnt 3240 (S.C.J.) at para 29

*Stelco Inc. (Re)*, (2005) 75 O.R. (3d) 5, 2005 CarswellOnt 1188  
(C.A.) at paras 36, 38

11. These motions brought by the Ad Hoc Committee of Purchasers and the pending Class Actions are examples of exactly the type of proceedings that the stay provisions seek to avoid.

**The Stay Should Not be Lifted**

12. A stay is not to be lifted except in extraordinary circumstances including:

- (a) Fraud in obtaining the stay;
- (b) A fundamental change in circumstances;
- (c) An overriding lack of fairness; and
- (d) The discovery of additional evidence.

*Muscletech Research & Development Inc. (Re)*, (2006) 25 C.B.R. (5<sup>th</sup>) 231, 2006 CarswellOnt 6230 (S.C.J.) at paras 10, 11

13. A party seeking to lift a stay bears a heavy burden. In exercising its discretion whether to lift a stay, the Court must consider the broad objectives of the CCAA: to promote the re-organization and restructuring of companies.

*Canwest Global Communications Corp. (Re)*, 2011 ONSC 2215, 75 C.B.R. (5<sup>th</sup>) 156, 2011 CarswellOnt 2392 (S.C.J.) at paras 26, 27

14. The Ad Hoc Committee of Purchasers has not met that heavy burden for the following reasons:

- (a) It is premature to consider lifting the Stay before the Proposed Plan is crystallized at the sanction hearing. The Proposed Plan has not been finalized and is subject to further negotiation and amendment;

*Muscletech Research & Development Inc. (Re)*, (2006) 25 C.B.R. (5<sup>th</sup>) 231, 2006 CarswellOnt 6230 (S.C.J.) at paras 10, 11

- (b) The stay was extended on April 13, 2012, May 31, 2012 and again on September 28, 2012. On each occasion, this Court was satisfied under s. 11.02(2) of the CCAA that the order was appropriate and that SFC was acting in good faith and with due diligence.
- (c) The Ad Hoc Committee of Purchasers has not established that there is any unfairness;
- (d) The Ad Hoc Committee of Purchasers has not established that there has been any fundamental change in circumstances that would warrant lifting the stay;
- (e) The Ad Hoc Committee of Purchasers has not proffered any additional evidence that would warrant the lifting of the stay; and
- (f) None of the extraordinary circumstances noted above exist.

15. The Court will also consider the following factors with respect to a lift stay motion:

- (a) The plan is likely to fail;
- (b) The moving party shows hardship that is caused by the stay;
- (c) The moving party shows necessity for payment;
- (d) The moving party would be severely prejudiced by a refusal to lift the stay and there would be no resulting prejudice to the debtor company or the position of its creditors;
- (e) It is necessary for the moving party to take steps that could be lost by the passage of time;
- (f) After the lapse of a significant time period, the insolvent company is no closer to a proposed plan than at the commencement of the stay;

- (g) There is a real risk that a creditor's loan will become unsecured during the stay period;
- (h) It is necessary to allow the moving party to perfect a right that existed before the commencement of the stay period; and
- (i) It is in the interest of justice to do so.

*Canwest Global Communications Corp. (Re)*, 2011 ONSC 2215, 75 C.B.R. (5<sup>th</sup>) 156, 2011 CarswellOnt 2392 (S.C.J.) at paras 26, 27

16. It is respectfully submitted that none of these factors have been established by the Ad Hoc Committee of Purchasers. The Ad Hoc Committee of Purchasers have failed to establish, among other things, evidence of material prejudice or that it is otherwise equitable for the stay to be lifted.

#### **The Stay Should be Extended**

17. The stay should be extended for the following reasons:
- (a) The tolling agreement entered into by the parties in the Class Actions, which runs until February 28, 2013 protects the position of the Ad Hoc Committee of Purchasers during the continuation of the stay;
  - (b) There is no real risk that the Class Action Plaintiffs' position will be altered in any way during the Stay Period. The claims of the Class Actions Plaintiffs are, as determined by the Equity Claims Order, equity claims. Not only are they unsecured claims, but they are unaffected by the continuation of the Stay due to the tolling agreements;
  - (c) The Ad Hoc Committee of Purchasers has not demonstrated any urgency or change in circumstances; and

(d) The Ad Hoc Committee of Purchasers has not established any prejudice.

**Lifting the Stay Would Cause Prejudice to Mr. Chan**

18. In considering whether to grant the Ad Hoc Committee of Purchasers the alternative relief that it seeks against the Third Party Defendants, this Honourable Court should consider Mr. Chan's right to a fair trial and the public interest in protecting that right.

*Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2  
SCR 522 at paras 50-51, 70

19. Lifting the stay against the Third Party Defendants and permitting the Ad Hoc Committee of Purchasers to continue the Class Action against the Third Party Defendants, including Mr. Chan, but not other parties like SFC and certain of its directors and officers, would result in discovery of some parties and not others. Mr. Chan would not have access to all of the information that may be necessary for him to make full answer and defence. The court, in turn, will not have all the relevant evidence before it to ensure that justice is done and runs the risk of a miscarriage of justice.

20. Lifting the stay against the Third Party Defendants could also result in inconsistent judicial findings, duplicative proceedings and wasted judicial resources.

21. It is inherently unfair to allow the Ad Hoc Committee of Purchasers to single out individual directors and officers and seek different recourse against them.

*Re Timminco Limited*, 2012 ONSC 2515 at paras. 23-24 (Ont.  
S.C.J.)



22. The Ad Hoc Committee of Purchasers have not met the heavy burden on them to suggest that this Honourable Court should lift the Stay. They have not established any one of the very limited circumstances in which a stay may be lifted.

*Canwest Global Communications Corp. (Re)*, 2011 ONSC 2215, 75 C.B.R. (5<sup>th</sup>) 156, 2011 CarswellOnt 2392 (S.C.J.) at paras 26, 27

*ICR Commercial Real Estate (Regina) Ltd. v Bricore Land Group Ltd.*, 2007 SKCA 72, 33 C.B.R. (5<sup>th</sup>) 50, 2007 CarswellSask 324 at paras 67, 68

*Canadian Airlines Corp. (Re)*, (2000) 19 C.B.R. (4<sup>th</sup>) 1, 2000 CarswellAlta 622 (Alta Q.B.) at paras 14, 15, 20

23. For these reasons, it is respectfully submitted that there is no basis for an order lifting the Stay. The preservation of the status quo created by the Stay under the Initial Order accords with the underlying goals of the CCAA.

**PART IV – RELIEF REQUESTED**

24. It is respectfully requested that this Court deny the relief sought by the Ad Hoc Committee of Purchasers. It is further respectfully requested that this Court allow the relief sought by SFC and order that the Stay Period imposed by the Initial Order be extended to December 3, 2012.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

October 4, 2012



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**SCHEDULE “A”  
LIST OF AUTHORITIES**

1. *Campeau v. Olympia & York Developments Ltd.*, 1992 CarswellOnt 185 (Gen. Div.)
2. *Canadian Airlines Corp. (Re)*, (2000) 19 C.B.R. (4th) 1, 2000 CarswellAlta 622 (Alta Q.B.)
3. *Canwest Global Communications Corp. (Re)*, 2011 ONSC 2215, 75 C.B.R. (5th) 156, 2011 CarswellOnt 2392 (S.C.J.)
4. *ICR Commercial Real Estate (Regina) Ltd. v Bricore Land Group Ltd.*, 2007 SKCA 72, 33 C.B.R. (5th) 50, 2007 CarswellSask 324
5. *Menegon v. Phillip Services Corp.*, (1999) 11 C.B.R. (4th) 262, 1999 CarswellOnt 3240 (S.C.J.)
6. *Muscletech Research & Development Inc. (Re)*, (2006) 25 C.B.R. (5th) 231, 2006 CarswellOnt 6230 (S.C.J.)
7. *Northland Properties Ltd. (Re)*, (1988) 73 C.B.R. (N.S.) 141, 1988 CarswellBC 553 (B.C.S.C.)
8. *Sierra Club of Canada v. Canada* (Minister of Finance), [2002] 2 S.C.R. 522
9. *Stelco Inc. (Re)*, (2005) 75 O.R. (3d) 5, 2005 CarswellOnt 1188 (C.A.)
10. *Timminco Limited (Re)*, 2012 ONSC 2515 (Ont. S.C.J.)

**SCHEDULE “B”  
RELEVANT STATUTES**

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

(An Act to facilitate compromises and arrangements between companies and their creditors)

**General power of court**

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

R.S., 1985, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 124; 2005, c. 47, s. 128.

**Rights of suppliers**

**11.01** No order made under section 11 or 11.02 has the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

(b) requiring the further advance of money or credit.

2005, c. 47, s. 128.

**Stays, etc. — initial application**

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

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

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

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

### **Stays, etc. — other than initial application**

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

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

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

### **Burden of proof on application**

(3) The court shall not make the order unless

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

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

### **Restriction**

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

2005, c. 47, s. 128, 2007, c. 36, s. 62(F).

### **Stays — directors**

**11.03** (1) An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

### **Exception**

(2) Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company.

**Persons deemed to be directors**

(3) If all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the company is deemed to be a director for the purposes of this section.

2005, c. 47, s. 128.

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