

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

**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**

Court File No.: CV-11-431153-00CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

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*

**SUPPLEMENTARY FACTUM OF
INVESCO CANADA LTD.
NORTHWEST & ETHICAL INVESTMENTS L.P., and
COMITÉ SYNDICAL NATIONAL DE RETRAITE BÂTIRENTE INC.**

(Motion for Notice Approval)

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Comité Syndical National de Retraite
Bâtirente Inc.

TO: THE SERVICE LIST

Part I – OVERVIEW & FACTUAL BACKGROUND

1. Invesco Canada Ltd., Northwest & Ethical Investments L.P., and Comité Syndical National de Retraite Bâtirente Inc. (the “Funds”) object to the lack of clarity and meaningful information in the Proposed Notice. The Funds rely on their written submissions dated December 18, 2012.
2. On December 19, 2012, the Class Counsel in the Ontario and Quebec class proceedings and Ernst & Young LLP (“E&Y”) obtained an Order adjourning the settlement approval hearing of a proposed settlement between them (“E&Y Settlement”) from January 4, 2013 to February 4, 2013.
3. The hearing on this motion was also adjourned to December 20, 2012 to allow Class Counsel to file new materials addressing the new timetable approved by this Court and to ostensibly address the concerns of the Funds and U.S. Class Counsel who act for putative class members in a proposed class action filed in the Southern District of New York. The new materials include a new Proposed Notice.¹
4. These supplementary submissions address the new materials served by Class Counsel on December 19, 2012 at 5.10 P.M.
5. The new materials fail to provide any evidence explaining how depriving investors of their well-established rights to opt out of class settlements, by forcing through a third party release and bar order in favor of E&Y, notwithstanding the objection of the Funds and U.S. Class Counsel, serves any legitimate purpose in the *CCAA* proceeding.
6. As described more fully below, the new Proposed Notice fails to provide meaningful notice of the most unusual feature of the E&Y Settlement, the granting of a

¹ The Proposed Notice attached as Exhibit J to the Affidavit of Jonathan Ptak sworn December 17, 2012 will be referred to as the “old Proposed Notice”.

third party release to E&Y without fundamental opt out rights for investors. The new Proposed Notice also fails to provide meaningful notice with respect to the third party release framework approved in the Plan of Compromise and Reorganization (“Plan”).

7. The new Proposed Notice does not provide meaningful information to putative class members as required by law to protect their rights and interests. The new Proposed Notice uses vague and technical language to avoid exposing the E&Y Settlement for what it is, an unprecedented attack on investors’ rights to procedural fairness and due process. This is particularly unreasonable in light of the express language in the E&Y Settlement requiring that there be no opt outs.² The Court should not approve such inadequate notice.

Part II -- ISSUES AND THE LAW

A. No Adequate Notice of the Extinguishment of Opt Out Rights

8. Similarly to the old Proposed Notice, the new Proposed Notice does not mention opt out rights, and does not state that members of the putative class are being deprived of statutory opt out rights as part of the E&Y Settlement.³

9. The new Proposed Notice also fails to mention that the framework approved in the Plan will impose a release in favour of E&Y on all persons who may have a claim against E&Y as long as several procedural conditions are met, none of which allow a meaningful opportunity to opt out.

10. Notices are intended to allow class members to make informed, balanced and independent decisions.⁴ The Ontario legislature created notice and opt out provisions that

² Minutes of Settlement at para. 10, Compendium of Invesco Canada Ltd., Northwest & Ethical Investments L.P., and Comité Syndical National de Retraite Bâtirente Inc. (“Compendium of the Funds”), Tab 1.

³ *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 9.

form a sophisticated procedure to advance access to justice in a manner that is fair to plaintiffs and defendants. As stated by the Parliamentary Secretary to the Attorney General during the second reading of the *CPA*:

The procedure contained in these bills is a sophisticated one that treats plaintiffs and defendants fairly and with an even hand...Members of the class who do not wish to participate in the class proceeding will have the opportunity to exclude themselves from, or opt out of, the proceeding...The representative plaintiff will be required to ensure that class members obtain notice of the proceeding.⁵

[Emphasis added]

11. The opt out process is integral to class proceedings, and putative class members must be informed of any impact on their potential right to opt-out. The Courts have set out the important link between the opt out rights and notice:

¶59 This court has consistently spoken of the importance of a fair and informed opt-out process in which class members are protected from coercion and from misleading, incomplete, biased or otherwise inappropriate information ...⁶

[Emphasis added]

12. The Courts have held that there is no jurisdiction, under the *CPA* or otherwise, to bind absent class members to class settlements that they have not been notified of.⁷

⁴ *Mangan v. Inco Ltd.*, [1998] O.J. No. 551 at paras. 21-22 (S.C.J.), Book of Authorities of Invesco Canada Ltd., Northwest & Ethical Investments L.P., and Comité Syndical National de Retraite Bâtirente Inc. (“Authorities of the Funds”), Tab 2.

⁵ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 35th Parl, 1st Sess, (18 November 1991) at 1640 (David Winninger), Supplementary Book of Authorities of Book of Authorities of Invesco Canada Ltd., Northwest & Ethical Investments L.P., and Comité Syndical National de Retraite Bâtirente Inc. (“Supplementary Authorities of the Funds”), Tab 4.

⁶ *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2012 ONSC 4317, 2012 CarswellOnt 9321 at para. 59 (S.C.J.) [“*Pet Valu*”], Supplementary Authorities of the Funds, Tab 1.

⁷ *Paramount Pictures (Canada) Inc. v. Dillon*, 2006 CarswellOnt 3536 at paras. 15-16 (S.C.J.), Supplementary Authorities of the Funds, Tab 3.

13. Protection of putative class members from incomplete notice is even more important in the present circumstances in light of the parties' attempt to contract out of the statutory opt out rights, a practice which apart from being impermissible is "objectionable in principle, given the policy thrust of the Act."⁸

14. The Court must intervene and impose conditions on communications with class members when they fail to properly explain the effect of opt out rights or any limitations on pursuing individual claims.⁹

15. It is necessary for this Court, acting in both its capacity under the *CCAA* and the *CPA*, to ensure that putative class members are informed in clear and plain language that the approval of the E&Y settlement will compromise their opt out rights and will release E&Y from any future claims.

B. Failure to Use Clear and Plain Language

16. The new Proposed Notice is five pages in length and contains dense paragraphs with information that is at best peripheral to its purpose, which is to: (1) inform putative class members of the E&Y Settlement and the settlement approval hearing scheduled for February 4, 2013; (2) that putative class members' right to opt out of the E&Y Settlement will be extinguished if the Court approves the settlement; and, (3) putative class members may object at the settlement approval hearing.

17. In contrast, the Pöyry Notice of Tentative Settlement was three pages long and did not include extensive background on the Sino-Forest *CCAA* proceedings. Class Counsel chose to use considerably more detail and text in outlining secondary issues such as the subsequent Court hearings in connection with the E&Y Settlement.

⁸ *Davies v. Clarington (Municipality)*, 2010 ONSC 418 at para. 32 (S.C.J.), Supplementary Authorities of the Funds, Tab 2; *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 9, 17, 19, 29.

⁹ *Pet Valu*, *supra* note 6 at para. 60, 61, 72 and 81 (S.C.J.), Supplementary Authorities of the Funds, Tab 1.

18. The new Proposed Notice fails to clearly state, in capped and bold letters, that this notice may affect the rights of the readers and there is no opt out from the E&Y Settlement if it is approved by the Court.

19. It is well established that natural justice requires class action notices to be drafted in clear and plain language such that the reasonable reader can easily comprehend the implications of the proposed settlement on their legal rights.¹⁰

20. Due to the unusual nature of the E&Y Settlement and the third party release framework in the Plan, only strongly worded, capped and bolded phrases such the following examples, could adequately inform the reader:

**READ THIS NOTICE CAREFULLY AS YOUR LEGAL RIGHTS WILL BE
COMPROMISED IF THIS SETTLEMENT IS APPROVED**

...

**YOU WILL HAVE NO ABILITY TO OPT OUT OR EXCLUDE YOURSELF
FROM THE APPROVED SETTLEMENT.**

THIS IS YOUR ONLY OPPORTUNITY TO OBJECT TO THE SETTLEMENT:

- **YOUR LEGAL RIGHTS WILL BE AFFECTED AND YOU WILL BE BOUND BY THE SETTLEMENT TERMS; AND,**
- **YOU WILL BE FOREVER BARRED FROM COMMENCING OR CONTINUING ANY CLAIM AGAINST ERNST & YOUNG IN ANY WAY RELATED TO SINO-FOREST**

IF THE SETTLEMENT IS APPROVED AND OTHER LEGAL CONDITIONS ARE MET.

C. Failure to Provide Notice of Certification Hearing or Adequate Definition of Terms

¹⁰ *Currie v. McDonald's Restaurants of Canada Ltd.* (2005), 74 O.R. (3d) 321at para. 42 (Ont. C.A.), Authorities of the Funds, Tab 1.


21. Despite having the benefit of the Funds' submissions dated December 18, 2012, the new Proposed Notice fails to make any reference to certification of a settlement class for the E&Y Settlement.

22. The new Proposed Notice fails to adequately describe core terms of the Plan and Minutes of Settlement; it does not define the Settlement Trust, the Settlement Trustee or the beneficiaries of the settlement. There is also no indication in the new Proposed Notice of what standard will be employed in formulating the plan of allocation.

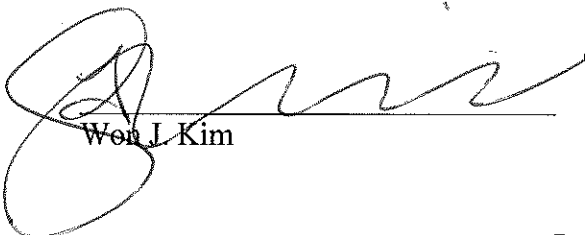
Part III – ORDER SOUGHT

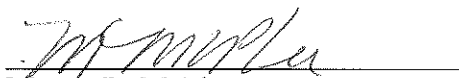
23. The Funds respectfully request that the Court dismiss the motion for Notice Approval.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 20TH DAY OF DECEMBER, 2012

for 
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for 
James C. Orr


Won J. Kim


Megan B. McPhee

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Schedule A – Authorities

Jurisprudence	
1.	<i>1250264 Ontario Inc. v. Pet Valu Canada Inc.</i> , 2012 ONSC 4317, 2012 CarswellOnt 9321 (S.C.J.).
2.	<i>Currie v. McDonald's Restaurants of Canada Ltd.</i> (2005), 74 O.R. (3d) 321(C.A.)
3.	<i>Davies v. Clarington (Municipality)</i> , 2010 ONSC 418 (S.C.J.)
4.	<i>Mangan v. Inco Ltd.</i> , [1998] O.J. No. 551 (S.C.J.)
5.	<i>Paramount Pictures (Canada) Inc. v. Dillon</i> , 2006 CarswellOnt 3536(S.C.J.)
Secondary Sources	
6.	Ontario, Legislative Assembly, <i>Official Report of Debates (Hansard)</i> , 35th Parl, 1st Sess, (18 November 1991) at 1640 (David Winninger).

Schedule B – Legislation

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.
17. (1) Notice of certification of a class proceeding shall be given by the representative party to the class members in accordance with this section.
- (2) The court may dispense with notice if, having regard to the factors set out in subsection (3), the court considers it appropriate to do so.
- (3) The court shall make an order setting out when and by what means notice shall be given under this section and in so doing shall have regard to,
- (a) the cost of giving notice;
 - (b) the nature of the relief sought;
 - (c) the size of the individual claims of the class members;
 - (d) the number of class members;
 - (e) the places of residence of class members; and
 - (f) any other relevant matter.
- (4) The court may order that notice be given,
- (a) personally or by mail;
 - (b) by posting, advertising, publishing or leafletting;
 - (c) by individual notice to a sample group within the class; or
 - (d) by any means or combination of means that the court considers appropriate.
- (5) The court may order that notice be given to different class members by different means.
- (6) Notice under this section shall, unless the court orders otherwise,
- (a) describe the proceeding, including the names and addresses of the representative parties and the relief sought;
 - (b) state the manner by which and time within which class members may opt out of the proceeding;
 - (c) describe the possible financial consequences of the proceeding to class members;
 - (d) summarize any agreements between representative parties and their solicitors respecting fees and disbursements;
 - (e) describe any counterclaim being asserted by or against the class, including the relief sought in the counterclaim;
 - (f) state that the judgment, whether favourable or not, will bind all class members who do not opt out of the proceeding;
 - (g) describe the right of any class member to participate in the proceeding;
 - (h) give an address to which class members may direct inquiries about the proceeding; and
 - (i) give any other information the court considers appropriate.
- (7) With leave of the court, notice under this section may include a solicitation of contributions from class members to assist in paying solicitor's fees and disbursements.

19. (1) At any time in a class proceeding, the court may order any party to give such notice as it considers necessary to protect the interests of any class member or party or to ensure the fair conduct of the proceeding.

(2) Subsections 17 (3) to (5) apply with necessary modifications to notice given under this section.

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.

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 File No: CV-12-9667-00CL

The Trustees of the Labourers' Pension Fund of Central and Eastern Canada, *et al.*

v. Sino-Forest Corporation, *et al.*

Court File No.: CV-11-431153-00CP

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

SUPPLEMENTARY FACTUM of INVESCO CANADA LTD., NORTHWEST & ETHICAL INVESTMENTS L.P., and COMITÉ SYNDICAL NATIONAL DE RETRAITE BÂTIRENTE INC.
(Motion for Notice Approval Returnable December 20, 2012)

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