

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)**

B E T W E E N :

**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.**

Applicants
(Moving Parties/Appellants)

- and -

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known as BDO MCCABE LO LIMITED), ALLEN T.Y. CHAN, KAI KIT POON, DAVID
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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), 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,
ROBERT WONG and PÖYRY (BEIJING) CONSULTING COMPANY LIMITED**

Respondents
(Respondents)

Proceeding under the *Class Proceedings Act, 1992*

**APPLICATION FOR LEAVE TO APPEAL OF THE APPLICANTS 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.**

Section 40 of the *Supreme Court Act*, R.S.C. 1995, c. S-26
Rules 25(1) of the *Rules of the Supreme Court of Canada*, SOR/2002-156

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(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)**

BETWEEN:

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*The Trustees of the Labourers' Pension Fund
of Central and Eastern Canada, et al. v. Sino-
Forest Corporation, et al.*

File Number: _____

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)**

BETWEEN:

**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.**

Applicants
(Appellants)

- and -

**SINO-FOREST CORPORATION, ERNST & YOUNG LLP, BDO LIMITED (formerly
known as BDO MCCABE LO LIMITED), ALLEN T.Y. CHAN, KAI KIT POON, DAVID
J. HORSLEY, 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), 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,
ROBERT WONG and PÖYRY (BEIJING) CONSULTING COMPANY LIMITED**

Respondents
(Respondents)

Proceeding under the *Class Proceedings Act, 1992*

**NOTICE OF APPLICATION FOR LEAVE TO APPEAL
OF THE APPLICANTS**

**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.**

Section 40 of the *Supreme Court Act*, R.S.C. 1995, c. S-26
Rules 25(1) of the *Rules of the Supreme Court of Canada*, SOR/2002-156

TAKE NOTICE that 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. (“Applicants”) hereby apply for leave to appeal to the Court, pursuant to section 40(1) of the *Supreme Court Act*, R.S.C. 1995, c. S-26, from the judgment of the Court of Appeal for Ontario, Court File Numbers C56961, M42436 and M42453, made June 28, 2013, quashing the Applicants’ appeal of the orders of the Honourable Mr. Justice Morawetz dated March 20, 2013 and for costs of this leave application, or any further or other order that the Court may deem appropriate;

AND FURTHER TAKE NOTICE that this application for leave is made on the following grounds:

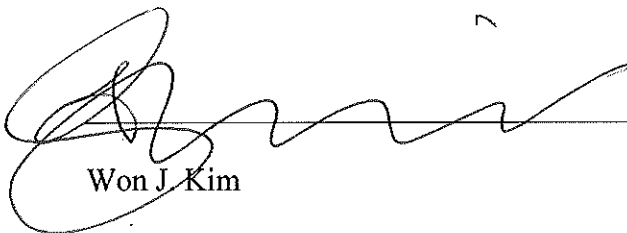
1. In this case, the courts below approved a settlement between a class action plaintiff and a settling defendant that explicitly prohibited absent class members from opting out in order to pursue their claims individually, and the Court of Appeal held that such absent class members did not have standing to appeal the denial of their opt-out rights.
2. This Court and the provincial courts have always protected the right of class members to opt out of class action certifications and settlements as a fundamental hallmark of procedural fairness. Within class actions, opt-out rights serve as a counter-weight against inadequate class settlements, which may lose their viability if enough class members are dissatisfied and opt out. The rights are so important that Canadian courts will not recognize class judgments rendered elsewhere unless opt-out rights were part of the class action procedure there.
3. The present proceeding involves the largest securities fraud in recent Canadian history: the Sino-Forest case. Sino-Forest was an Ontario company listed on the TSX, but its forestry operations were largely in China. Its market capitalization at the end of 2010 was over \$6 billion, but a report in June 2011 claiming that the company was a “near total fraud” caused the stock to collapse. Class action securities claims have been commenced against the company and its auditors, experts, directors and officers, and underwriters. Sino-Forest itself sought insolvency protection under the

Companies' Creditors Arrangement Act R.S.C. 1985, c. C-36 ("*CCAA*") in March 2012.

4. In December 2012, on the day of the creditors' vote on the *CCAA* reorganization plan, the plaintiffs' counsel in the as-yet-uncertified class action and defendant Ernst & Young LLP (E&Y), Sino-Forest's main auditor, announced a proposed settlement for \$117 million. The settlement terms explicitly prohibited opt outs by any class members. Class counsel later explained that E&Y was willing to pay more in order to avoid opt outs. The *CCAA* plan, amended to reflect this new approach, also provided that the other class action defendants -- including the former CEO accused by the Ontario Securities Commission of masterminding the fraud -- could qualify for no-opt-out settlements as well. All parties to the *CCAA* proceeding favored this approach.
5. The Applicants are institutional investors in Sino-Forest who suffered significant losses and who are absent class members. As soon as they heard about the no-opt-out provision of the proposed settlement, they objected in the Superior Court. The Applicants respectfully submit that class members' rights to opt out and pursue their claims individually are fundamental to procedural fairness in class actions, and a settlement that explicitly abrogates those rights should not be countenanced.
6. While insolvent debtor applicants in *CCAA* proceedings may obtain full (no-opt-out) releases of claims against them, including class claims, as part of their reorganization, there is no proper statutory or equitable basis for extending no-opt-out releases and settlements to parties that are not insolvent applicants. There is no reason to permit class counsel and E&Y to prohibit and neuter opt-out rights as a term of the settlement. Nevertheless, acting under both the Ontario Class Proceedings Act and the *CCAA*, the courts below approved E&Y's no-opt-out settlement and the *CCAA* "framework" for similar settlements by other defendants.
7. Ultimately, allowing abrogation of opt-out rights would have the perverse consequence of damaging investors' trust in the integrity of Canada's legal system dealing with financial and investor affairs, and thus would in the long run impair the proper functioning of Canadian capital markets.

8. When the Applicants sought to appeal the Superior Court's denial of their opt-out rights under the Ontario Class Proceedings Act, the Court of Appeal dismissed their appeal for lack of standing.
9. This proposed appeal thus raises the following questions of public importance:
 - a. In a class action, is it permissible for a settling defendant and the counsel for (uncertified) class plaintiffs to agree on an explicit no-opt-out provision as part of the proposed settlement, and for the court to approve such a provision?
 - b. Does a *CCAA* insolvency proceeding pending against a company that is a defendant in a class action give the *CCAA* court jurisdiction or discretion to provide non-opt-out releases to other (non-applicant, solvent) defendants?
 - c. Do absent class members lack standing under the Class Proceedings Act to appeal an order approving the settlement of a class proceeding that explicitly prohibits them from opting out?
10. The Applicants' position is that a class member's right to opt out of a class proceeding is fundamental and it is of public importance to ensure that the right is not abrogated. If a settlement is approved under provincial class proceedings legislation with a no-opt-out provision such that class members are not allowed to prosecute their own claims, it is of public importance to ensure that those class members may appeal that decision.

Dated at Toronto, Ontario this 20th day of September, 2013.



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NOTICE TO THE RESPONDENTS: A respondent may serve and file a memorandum in response to this application for leave to appeal within 30 days after service of the application. If no response is filed within that time, the Registrar will submit this application for leave to appeal to the Court for consideration pursuant to section 43 of the *Supreme Court Act*.

File Number: _____

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)**

BETWEEN:

**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.**

Applicants
(Moving Parties/Appellants)

- and -

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INCORPORATED (successor by merger to Banc of America Securities LLC), THE
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Respondents
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Proceeding under the *Class Proceedings Act, 1992*

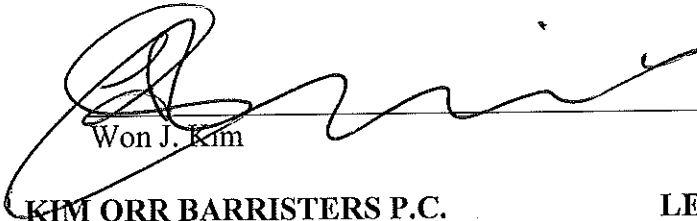
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Section 40 of the *Supreme Court Act*, R.S.C. 1995, c. S-26
Rules 25(1) of the *Rules of the Supreme Court of Canada*, SOR/2002-156

I, Won J. Kim, counsel for the Applicants, 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., hereby certify that:

- (a) there is no sealing or confidentiality order in effect in the file from a lower court or the Court, and there is no document filed that includes information subject to a sealing or confidentiality order or that is classified as confidential by legislation;
- (b) there is no sealing order or ban on the publication of evidence or the name or identity of a party or witness; and,
- (c) there is no confidential information or document filed that includes such information that is subject to limitations on public access by virtue of specific legislation.

Dated at Toronto, Ontario this 20th day of September, 2013.



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Action against the Applicant

COURT OF APPEAL FOR ONTARIO

CITATION: Labourers' Pension Fund of Central and Eastern Canada v.
Sino-Forest Corporation, 2013 ONCA 500
DATE: 20130729
DOCKET: C56961 M42453

MacFarland, Watt & Epstein JJ.A.

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 and Arrangement of Sino-Forest Corporation

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 McCable 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

Kirk M. Baert, Joathan Ptak, and Massimo Starino, for the moving parties, class action plaintiffs

Peter H. Griffin and Peter J. Osborne, for Lawyers Ernst & Young LLP

Michael C. Spencer and Megan B. McPhee, Yonatan Rozenszajn, and Tanya T. Jemec, for responding parties, Invesco Canada Ltd., Northwest & Ethical Investments L.P., and Comité Syndical National de Retraite Bâtirente Inc.

Derek J. Bell, for respondent Sino-Forest Corporation

Brandon Barnes and Susan E. Friedman, for the respondent Kai Kit Poon

Joseph Marin, for the respondent Allen Chan

John Fabello and Adam Slavens, for the respondent Underwriters

Heard and released orally: June 28, 2013

Motion to quash.

ENDORSEMENT

[1] Earlier this week, this court denied the respondent objectors, represented by Mr. Spencer and Ms. McPhee, leave to appeal under the *CCAA* for reasons given at that time.

[2] In these motions to quash, we need only consider whether the appellants (the respondent objectors) have a right of appeal under s. 30 of the *Class Proceedings Act (CPA)*.

[3] The appellants rely on ss. 30(3) and (5) of the *CPA*. In our view, they do not come within either section.

[4] Under s. 30(3) only a party to a class proceeding has a direct appeal to the court from a judgment on common issues or an order under s. 24 of the *CPA* on an aggregate assessment of monetary relief. The appellants are not parties to

the class proceeding and therefore cannot appeal as of right under s. 30(3). It is only under s. 30(5) that a class member has any right to appeal and then only if that member first obtains leave of this court to act as a representative party for the purposes of subsection (3): the right of appeal from a judgment on common issues or under s. 24. These appeals are neither.

[5] Accordingly, for these reasons, the appeals are quashed and the motion to act as representative plaintiff is dismissed.

[6] Costs to each of the moving parties fixed in the sum of \$7500.00, inclusive of disbursements and HST.

Mustuland J.
David West J.A.
Gloria Foster J.A.

Court of Appeal File No.: C56961
Court of Appeal File No.: M42436
Court of Appeal File No.: M42453
S.C.J. Court File No.: CV-12-9667-00CL

COURT OF APPEAL FOR ONTARIO

THE HONOURABLE JUSTICE MACFARLAND) FRIDAY, THE
THE HONOURABLE JUSTICE WATT) 28TH DAY OF JUNE,
THE HONOURABLE JUSTICE EPSTEIN) 2013

**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
Court of Appeal File No.: M42436
Court of Appeal File No.: 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 (BELJING)
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

ORDER

THIS MOTION, made by Ernst & Young LLP ("E&Y"), for an order quashing the within appeal (Court of Appeal File No.: C56961) was heard this day at Osgoode Hall, 130 Queen Street West, Toronto.

AND THIS MOTION, made by the Ad Hoc Committee of Purchasers of the Applicant's Securities (the "Class Action Plaintiffs"), for an order quashing the within appeal (Court of Appeal File No.: C56961) was heard this day at Osgoode Hall, 130 Queen Street West, Toronto.

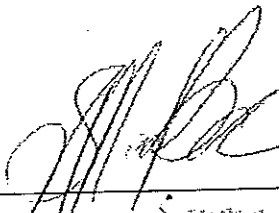
WHEREAS the motions by E&Y and Class Action Plaintiffs for an order quashing the appeal were heard together on this day, pursuant to the order of this Court dated May 1, 2013;

AND ON READING the motion records and facts of the Class Action Plaintiffs, E&Y, the responding motion record and facts of 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. (the "Appellants"), the responding facts of Credit Suisse Securities (Canada) Inc., TD Securities Inc., Dundee Securities Corporation (now known as DWM Securities Inc.), RBC Dominion Securities Inc., Scotia Capital Inc., CIBC World Markets Inc., Merrill Lynch Canada Inc., Canaccord Financial Ltd. (now known as Canaccord Genuity Corp.), 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.) and the reply factum of the Class Action Plaintiffs, and on hearing the submissions of the lawyers for the Class Action Plaintiffs, E&Y and the Appellants,

- 1. **THIS COURT ORDERS** that the motions to quash by E&Y and the Class Action Plaintiffs are granted.
- 2. **THIS COURT ORDERS** that this appeal be and hereby is dismissed.
- 3. **THIS COURT ORDERS** that the Appellants shall pay to the Class Action Plaintiffs and E&Y, each, costs in the amount of \$7,500, inclusive of disbursements and applicable taxes, within 30 days of this order.

THIS ORDER BEARS INTEREST at the rate of 3.0 percent per year commencing on June 28, 2013.



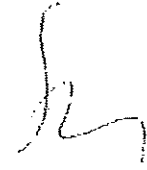
Suzanne MacPhee

*Écriteur
 Lettre de réponse à la partie*

ENTERED AT / INSCRIPT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

JUL 3 1 2013

PER / PAR:



Court of Appeal File No.: C56961
Court of Appeal File No.: M42436
Court of Appeal File No.: M42453
Commercial 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
Court of Appeal File No.: M42436
Court of Appeal File No.: M42453
Superior Court File No.: CV-10-414302CP

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

-and-

SINO-FOREST CORPORATION, et al.

Plaintiffs/Appellants

Defendants/Respondents

COURT OF APPEAL FOR ONTARIO

(Proceeding Commenced at Toronto)

ORDER

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To the Court:

Please refer to volumes II and III for the supporting documentation and authorities with respect to this application for leave. Please see tab 1 of volume II for the joint memorandum of argument which addresses both applications for leave to appeal.

File Number: _____

INVESCO CANADA LTD., et al.
Applicants (Applicants)

- and -

SINO-FOREST CORPORATION, et al.
Respondents (Respondents)

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM COURT OF APPEAL FOR
ONTARIO)**

Proceeding commenced at Toronto
Proceeding under the Class Proceedings Act, 1992

**APPLICATION FOR LEAVE TO APPEAL OF
THE APPLICANTS 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.**

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File Number: _____

INVESCO CANADA LTD., et al.
Applicants (Applicants)

- and -

SINO-FOREST CORPORATION, et al.
Respondents (Respondents)

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM COURT OF APPEAL FOR
ONTARIO)**

Proceeding commenced at Toronto
Proceeding under the Class Proceedings Act, 1992

**APPLICATION FOR LEAVE TO APPEAL OF
THE APPLICANTS INVESCO CANADA LTD.,
NORTHWEST & ETHICAL INVESTMENTS L.P.,
COMITÉ SYNDICAL NATIONAL DE RETRAITE
BÂTIRENTE INC., MATRIX ASSET
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