Court of Appeal File No.: M42399
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.: M42399
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 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.**

(Motion for Leave to Appeal from E&Y Settlement Approval Order
and Representation Dismissal Order)

May 10, 2013

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TO: THE SERVICE LIST

PART I – APPELLANTS AND ORDER APPEALED FROM

1. 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 Investment Inc. are institutional investors moving for leave to appeal two orders entered in the two proceedings titled above: the "E&Y Settlement Order," dated March 20, 2013, approving the settlement of claims asserted against Ernst & Young LLP ("E&Y"), and the "Representation Dismissal Order," also dated March 20, 2013, dismissing the Appellants' motion for appointment as representatives of investors who object to the E&Y Settlement and for relief from the effect of the representation order sought by the Ontario Plaintiffs and Class Counsel.

2. The first three Appellants have previously moved for leave to appeal the order of the court in the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 ("*CCAA*") proceeding titled above, dated December 10, 2012 (the "Sanction Order"), sanctioning the Plan of Compromise and Reorganization ("Plan") of Sino-Forest Corporation ("Sino-Forest" or the "applicant").

3. The two motions for leave have been consolidated for consideration by this Court. Accordingly, the Appellants in the present motion respectfully refer the Court to the Factum (dated January 29, 2013) and Reply Factum (dated March 1, 2013), along with the accompanying motion record and books of authorities of the Appellants, previously submitted with respect to the proposed appeal of the Sanction Order, and will in the present factum address facts and legal issues that have emerged since then.

4. As described below, Justice Morawetz's entry of the E&Y Settlement Order and Representation Dismissal Order confirm the importance of appellate review in this litigation.

5. Sino-Forest's complete corporate disintegration, resulting as it did from an apparent fraud, is by far the largest and most public investment debacle in Canada in the past decade and is one of the first major tests of how the secondary market misrepresentation provisions of Part XXIII.1 of the *Securities Act* will operate in practice -- particularly in class actions. It continues to be a widely publicized and visible dispute on that ground alone.

6. Sino-Forest's subsequent entry into *CCAA* restructuring proceedings, and the interaction between those proceedings and the securities class action, raise serious issues of considerable public interest. There is little to no guidance about the intersection of the *Class Proceedings Act, 1992* ("*CPA*")[1] and *CCAA*.

7. The coordination between the class action court and the *CCAA* court to lift the *CCAA* stay of the class action so the settlement of class claims against the expert defendant Pöyry (Beijing) Consulting Company Limited ("Pöyry") could be effectuated using normal class action procedures was a reassuring indication that the system was working well.

8. It is the view of the Appellants that E&Y, the Ontario Plaintiffs, and the other parties to the proceedings below have engaged in unnecessary and unjustified overreaching in diverting the proposed E&Y class action settlement away from its normal home in the class action court. The parties moved to approve the E&Y settlement within a *CCAA* environment that the parties specifically engineered to deprive class members of their fundamental class action right to exercise opt outs -- despite the fact that E&Y is solvent and is not a *CCAA* restructuring applicant. This is also notwithstanding the fact that the E&Y settlement and release were not integral to the Sino-Forest restructuring, and despite the specific wording in section 6(8) of the *CCAA* that prohibits precisely these types of compromises from being effectuated and administered within a *CCAA* Plan.

9. The issues raised by the Superior Court's decision to approve the E&Y Settlement despite the offending no-opt-out provision amply satisfy the four criteria used by this Court in evaluating whether leave to appeal should be granted, as discussed below.

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[1] *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ["*CPA*"].

PART II – FACTUAL OVERVIEW

10. As set forth in the Appellants' Factum in support of leave to appeal the Sanction Order, the parties and the Court in the *CCAA* proceeding segmented the proposed implementation of third-party defendant settlements into several installments: first, the "framework" was established under Article 11 of the Plan in the Sanction Order[2]; second, eligible third party defendants in the class action could apply to be listed as designated as "Named Third Party Defendants" to use the framework established by Article 11.2 of the Plan[3] ; third, settlements could be submitted to the *CCAA* Court for approval, as was being done with the E&Y Settlement; fourth, if settlements were approved, they could be implemented, and eventually the allocation of any proceeds would also be subject to court approval.

11. After the Sanction Order was issued, the parties and the court below proceeded with steps to effectuate the E&Y Settlement. An approval hearing was scheduled for early January 2013. On December 13, 2012, the parties obtained an assignment of the Sino-Forest class action to Justice Morawetz (who was already handling the *CCAA* proceeding) for purposes of the E&Y Settlement.[4] The approval hearing was eventually rescheduled to be heard on February 4, 2013.

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[2] Sanction Order of the Hon. Mr. Justice Morawetz, dated December 10, 2012, **Motion Record of the Appellants (Motion for Leave to Appeal from the Sanction Order) , Tab 4.**

[3] Named Third Party Defendants listed are thirteen underwriters ("Underwriters"), Ernst & Young LLP ("E&Y") and BDO Limited ("BDO") and their affiliates or related parties, as well as Allen Chan, Kai Kit Poon and David Horsley. See Schedule A to Plan of Compromise and Reorganization, December 3, 2012, **Motion Record of the Appellants (Motion for Leave to Appeal from the Sanction Order) , Tab 4A, pp. 440-536**; Letter from Ms. Jennifer Stam to the Service List, dated January 11, 2013, Exhibit "R" to the affidavit of Yonatan Rozenszajn, sworn January 28, 2013,**Motion Record of the Appellants (Motion for Leave to Appeal from the Sanction Order), Tab 3R, pp. 394-397;** Letter from Mr. James Orr to Ms. Jennifer Stam, dated January 11, 2013, Exhibit "S" to the affidavit of Yonatan Rozenszajn, sworn January 28, 2013 **Motion Record of the Appellants (Motion for Leave to Appeal from the Sanction Order), Tab 3S, pp.398-400;** Letter from Ms. Jennifer Stam to Mr. James Orr, dated January 12, 2013, Exhibit "T" to the affidavit of Yonatan Rozenszajn, sworn January 28, 2013, **Motion Record of the Appellants (Motion for Leave to Appeal from the Sanction Order), Tab 3T, pp. 401-402.**

[4] Direction of the Hon. Mr. Justice Then and Justice Morawetz re: Settlement Approval, dated December 13, 2012, **Motion Record of the Appellants (Motion for Leave to Appeal from E&Y Settlement Approval Order and Representation Dismissal Order)**, Tab 19.

12. On December 31, 2012, Class Counsel publicized in a memorandum to institutional investors that they believed that E&Y was paying a "substantial premium" in the settlement, in return for the provision extinguishing class members' statutory opt out rights.[5]

13. The Appellants (as Objectors below) submitted timely objections to the E&Y Settlement to the Monitor. The objections were: that it was improper for the parties to trade away opt out rights, or render opt out rights illusory by granting the settling defendant a full and final release in exchange for a substantial premium payment; that it would be improper to approve a release to E&Y; that it would be improper to bind opt-outs to the settlement; that it would be improper to appoint the Ontario Plaintiffs as representatives of investors who objected to the settlement; and that it would be improper to approve the settlement in installments in the absence of any plan for distribution or allocation of the proceeds.

14. The Monitor received 93 objections (including from the Appellants); 84 were counted as valid and timely.[6]

15. Sino-Forest's Plan was implemented on January 30, 2013.[7] According to the Plan, as approved in the Sanction Order, on that date the assets of Sino-Forest were deemed conveyed to Newco entities established by the Plan; Affected Creditors received their allotted shares and notes in Newco; reserves were established; and creditors' claims were compromised.

16. The Plan implementation was divorced from the E&Y Settlement -- the settlement approval hearing was still in the future.

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[5] Memorandum of Siskinds LLP, Exhibit "X" to the Affidavit of of Yonatan Rozenszajn, sworn January 28, 2013 ("Siskinds Memo"), **Motion Record of the Appellants (Motion for Leave to Appeal from the Sanction Order), Tab 3X,.**

[6] Fourteenth Report of the Monitor, dated January 22, 2013 ("Fourteenth Repor"), **Responding Motion Record of Ernst & Young LLP (Motion for Leave to Appeal from Sanction Order), Tab 21.**

[7] Monitor's Certificate of Implementation, **Motion Record of the Appellants (Motion for Leave to Appeal from E&Y Settlement Approval Order and Representation Dismissal Order), Tab 22.**

17. The approval hearing proceeded on February 4, 2013. All parties in the *CCAA* proceeding supported the settlement. The Appellants opposed. The Appellants held just under 4 million Sino-Forest shares when the fraud was revealed on June 2, 2011.[8] The Ontario Plaintiffs -- still appearing as an "Ad Hoc Committee" because a class had not yet been certified in the case -- held just over 1 million Sino-Forest shares on that date.[9] As share purchasers, both the Appellants and the Ontario Plaintiffs were equity claimants as against Sino-Forest, so none of them were permitted to vote on Sino-Forest's reorganization Plan as creditors.

18. Justice Morawetz issued his E&Y Settlement Approval Order and Representation Dismissal Order on March 20, 2013.[10] In his Endorsement, he approved the settlement and release, stating as follows:

a) two Sino-Forest shareholders controlling more than 25% of the shares on June 30, 2011 "support the Ernst & Young Settlement"[11];

b) the *CCAA* court has jurisdiction to approve class action settlements;[12]

c) third-party releases "are not an uncommon feature of complex restructurings under the *CCAA*" and are justified "where the release forms part of a comprehensive compromise," *citing ATB Financial v. Metcalfe and Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 ("*Metcalfe*");[13]

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[8] Affidavit of Eric J. Adelson, sworn January 18, 2013; Affidavit of Daniel Simard, sworn January 18, 2013; Affidavit of Tanya Jemec, sworn January 18, 2013, **Motion Record of the Appellants (Motion for Leave to Appeal from E&Y Settlement Approval Order and Representation Dismissal Order), Tabs 11, 12, & 13.**

[9] Affidavit of Charles Wright sworn January 10, 2013 at para. 73, **Motion Record of the Appellants (Motion for Leave to Appeal from E&Y Settlement Approval Order and Representation Dismissal Order), Tab 5.**

[10] Order of the Hon. Mr. Justice Morawetz re: Settlement Approval, dated March 20, 2013 ("*Settlement Approval Order*"); Order of the Hon. Mr. Justice Morawetz re: Representation Dismissal, dated March 20, 2013 ("*Representation Dismissal Order*"), **Motion Record of the Appellants (Motion for Leave to Appeal from E&Y Settlement Approval Order and Representation Dismissal Order), Tabs 2 &3.**

[11] Neither entity has ever appeared in the proceedings and no evidence is cited for this assertion.

[12] Reasons of the Hon. Mr. Justice Morawetz re: Settlement Approval and Representation Dismissal ("Settlement Approval Endorsement"), dated March 20, 2013, **Motion Record of the Appellants (Motion for Leave to Appeal from E&Y Settlement Approval Order and Representation Dismissal Order), Tab 4.**

[13] *Ibid.*, at para. 46.

d) the E&Y Release can be justified as part of the E&Y Settlement because it provides $117 million, the "only monetary contribution that can be directly identified, at this time," to Sino-Forest's creditors; "in order to effect any distribution, the Ernst & Young Release has to be approved as part of the Ernst & Young Settlement"; [14]

e) the claims to be released against E&Y are "rationally related to the purpose of the Plan and necessary for it," and are "intertwined" with the claims of E&Y against Sino-Forest; [15]

f) although Sino-Forest's restructuring "can, on its face, succeed, as evidenced by its implementation, the reality is that without the approval of the Ernst & Young Settlement, the objectives of the Plan remain unfulfilled due to the practical inability to distribute the settlement proceeds"; [16]

g) E&Y is "contributing in a tangible way to the Plan, by its significant contribution of $117 million" and the Plan "benefits the claimants" and the "voting creditors who approved the Plan did so with the knowledge of the nature and effect of the releases"; [17]

h) the releases were "fair and reasonable and not overly broad or offensive to public policy"; [18]

i) the settlement is "fair and reasonable, provides substantial benefits to relevant stakeholders, and is consistent with the purpose and spirit of the CCAA"; [19]

j) "there is a connection between the release of claims against Ernst & Young and a distribution to creditors. The plaintiffs in the litigation are shareholders and

[14] *Ibid.*, at para. 60.
[15] *Ibid.*, at para. 61.
[16] *Ibid.*, at para.62.
[17] *Ibid.*, at para.63 &64.
[18] *Ibid.*, at para.65.
[19] *Ibid.*, at para.66.

Noteholders of SFC. These plaintiffs have claims to assert against SFC that are being directly satisfied, in part, with the payment of $117 million by Ernst & Young";[20]

k) the release of claims by E&Y allowed Sino-Forest and its subsidiaries "to contribute their assets to the restructuring, unencumbered by claims totaling billions of dollars";[21]

l) E&Y's indemnity claims would need to be finally determined "before the CCAA claims could be quantified," which would entail significant delay;[22]

m) the Objectors' arguments were rejected; the relevant consideration is whether the settlement and release "sufficiently benefits all stakeholders to justify court approval," and in this case the $117 million is "the only real monetary consideration available to all stakeholders";[23]

n) the Objectors are wrong that the settlement should be approved solely under the *CPA*, because Sino-Forest is insolvent and under *CCAA* protection, so stakeholder claims are to be considered in the context of a CCAA regime;[24] and

o) "Although 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." The Objectors are, in fact, part of the group that will "share in the spoils" from the E&Y Settlement.[25]

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[20] *Ibid.*, at para.67.
[21] *Ibid.*, at para.68.
[22] *Ibid.*, at para.70.
[23] *Ibid.*, at para.71.
[24] *Ibid.*, at para. 72.
[25] *Ibid.*, at para.75.

19. Justice Morawetz also dismissed the Appellants' motion for an order allowing them to represent objecting claimants and for relief from Ontario Plaintiffs' representation order.[26] Without providing specific reasons, Justice Morawetz approved the Ontario Plaintiffs' request to be appointed as representatives of all Securities Claimants.

20. Following the release of reasons, the parties exchanged correspondence and attended before Justice Morawetz to settle the form of the Settlement Approval Order.[27] The Appellants raised the concern that the proposed order, in conjunction of with the reasoning for approving the E&Y settlement as a distribution under the Plan, would violate section 6(8) of the *CCAA*. Justice Morawetz dismissed the Appellants concerns and signed a slightly modified version of the Settlement Approval Order.[28]

21. In the Sino-Forest class proceeding, Justice Perell has scheduled a hearing on class certification and ancillary motions for the week of February 24-28, 2014.

PART III – QUESTIONS ON APPEAL

22. The Appellants propose the following questions to be answered if leave to appeal is granted:

1) Did Justice Morawetz err in entering the Settlement Approval Order under the *CCAA* in connection with Sino-Forest's Plan, particularly in that:

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[26] Representation Dismissal Order, **Motion Record of the Appellants (Motion for Leave to Appeal from E&Y Settlement Approval Order and Representation Dismissal Order), Tab 3.**

[27] Letter from Mr. Michael Spencer to the Hon. Mr. Justice Morawetz re: appointment to settle form of order, March 26, 2013; Letter from Mr. Max Starnino to the Hon. Mr. Justice Morawetz re: appointment to settle form of order, dated March 27, 2013; Letter from Mr. Peter Griffin to the Hon. Mr. Justice Morawetz re: appointment to settle form of order, dated March 27, 2013, **Motion Record of the Appellants (Motion for Leave to Appeal from E&Y Settlement Approval Order and Representation Dismissal Order), Tabs 14-16.**

[28] Direction of the Hon. Mr. Justice Morawetz to Mr. Michael Spencer and Mr. Max Starnino re: appointment to settle form of order, dated March 28, 2013, **Motion Record of the Appellants (Motion for Leave to Appeal from E&Y Settlement Approval Order and Representation Dismissal Order), Tab 17.**

a) as a matter of law and fact, the E&Y Settlement and the E&Y Release were not and are not reasonably connected and necessary to the restructuring of the applicant, and do not meet the requirements for third-party non-debtor releases set forth in *Metcalfe*;

b) the *CCAA* does not provide jurisdiction for the court supervising a *CCAA* restructuring plan to release claims asserted against a person other than the applicant, its subsidiaries, or its directors or officers, by equity-level claimants against the applicant who are not entitled to vote on the plan;

c) the Ontario Plaintiffs did not appropriately and adequately represent the members of the class whose claims against E&Y are proposed to be settled and released;

d) the *CPA* provides an adequate and appropriate alternative framework for the proposed settlement of the class action claims asserted against E&Y;

e) the terms of the E&Y Settlement, if implemented as a distribution to creditors under the Plan, violate section 6(8) of the *CCAA* and do not provide any assurance that settlement consideration would flow to the parties whose claims are proposed to be settled and released;

f) the terms of the E&Y Settlement were construed by the court not to provide opt out rights to the members of the class whose claims against E&Y are proposed to be settled and released; and

g) the court did not address whether the amount of consideration in the proposed E&Y settlement was fair, reasonable, and adequate;

2) Justice Morawetz erred in entering the Representation Dismissal Order, particularly in that

the Appellants would have appropriately and adequately represented the interests of the members of the class who objected to the proposed E&Y Settlement, without any conflict of interest, and the interests of justice would have been served thereby.

PART IV – ISSUES AND THE LAW

23. In the *CCAA* context, leave to appeal is to be granted where there are serious and arguable grounds that are of real and significant interest to the parties. A four-part inquiry governs the Court's determination of whether leave ought to be granted:

a) whether the point on the proposed appeal is of significance to the practice;

b) whether the point is of significance to the action;

c) whether the proposed appeal is *prima facie* meritorious or frivolous; and

d) whether the appeal will unduly hinder the progress of the action. [29]

24. For the reasons stated below, and also for the reasons set forth in the Factum of the Appellants on the consolidated motion for leave to appeal the Sanction Order, the proposed appeal satisfies the test for leave.

1) Whether it was proper for the lower court to grant E&Y a non-debtor third-party release under the *CCAA* is a question of significance to the practice and to this action, and the Appellants' position is meritorious

25. As stated in the Factum of the Appellants on the motion for leave to appeal the Sanction Order, the Sino-Forest debacle presents our litigation system with a large and dismal financial failure to sort out, yet the contours of the situation are quite routine. Securities issued by a TSX company plummet after serious allegations of improprieties are publicized; a class action follows,

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[29] *Timminco Limited (Re)*, 2012 ONCA 552, at para. 2, **Book of Authorities (Motion for Leave to Appeal from the Sanction Order), Tab 27.**

naming as defendants parties who may be liable to injured investors, including the issuer, directors and officers, experts, and auditors; the company itself files for protection under the *CCAA*. The "ground rules" for adjudicating the investors' claims against the class action defendants are certainly significant to complex litigation practitioners and to the parties to the action. This pattern may be repeated in almost identical fashion in major cases of alleged securities fraud that devolve to *CCAA* proceedings. Given the magnitude of the failure and the attention paid to it in the media, the broader public interest is implicated as well in setting down the appropriate ground rules.

26. The parties here have already identified the main authority governing resolution of the propriety of non-debtor third-party releases in this situation: *Metcalfe*[30], and the other cases before and after it applying the relevant principles.

27. The Appellants' position is meritorious. As is now evident, the Plan was implemented before the E&Y Settlement and the E&Y Release were approved. Under these circumstances, no one can credibly say that the settlement and release were essential to the Plan. Indeed, Justice Morawetz held that the Plan has already on its face succeeded in restructuring Sino-Forest, without E&Y getting a release.[31] It is not a plausible reading of *Metcalfe* to conclude that the last-minute and contrived connection between the E&Y Settlement and the Plan satisfies the stringent and exceptional requirements for imposing non-debtor third-party releases on non-consenting claimants in *CCAA* proceedings, under *Metcalfe*.

28. None of the explanations by E&Y, the Ontario Plaintiffs, or Sino-Forest about the supposed importance of the settlement and release to the Plan are convincing. E&Y did not have the ability to veto the Plan in the creditors' vote; in fact all the third-party defendants together did not have

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[30] *Re Metcalfe & Mansfield Alternative Investments II Corp.* 92 O.R.(3d) 513 (C.A.) ["*Metcalfe*"], **Book of Authorities (Motion for Leave to Appeal from the Sanction Order), Tab 16.**

[31] Settlement Approval Reasons, **Motion Record of the Appellants (Motion for Leave to Appeal from E&Y Settlement Approval Order and Representation Dismissal Order), Tab 4,** at para. 62.

that ability.[32] Although E&Y had indemnification claims against Sino-Forest, most of them were equity claims because they were based on E&Y's possible liability to share purchaser investors in the class action, and thus those claims were released in the Plan; E&Y had no leverage because of them. If E&Y had sought leave to appeal the classification of its indemnification claims as equity claims to the Supreme Court of Canada, its claims would have been valued and reserved against, but the restructuring would not have been held up. Similarly, E&Y's "noteholder" class action indemnification claims, if not released, would have been valued and reserved against -- this would not have held up the restructuring.

29. The salient feature of the Plan -- the conveyance of the assets of Sino-Forest and its subsidiaries[33] to the Newco entities and distribution of Newco securities to creditors -- could and would have proceeded regardless of positions taken by E&Y or any other class action defendants.

30. But for the overreaching by E&Y and the Ontario 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.

31. The admission by Class Counsel that the $117 million settlement amount included a "substantial premium" that E&Y was willing to pay for the no-opt-out feature of the settlement[34] compounds the overall unfairness of the process -- opt-outs' rights were relinquished, not as a matter of right or principle, but instead as a bargaining point in the settlement negotiations.

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[32] Supplemental Report to the Thirteenth Report of the Monitor, **Motion Record (Motion for Leave to Appeal from E&Y Settlement Approval Order and Representation Dismissal Order), Tab 18**. Since E&Y's (and other third party defendants'') indemnity claims related to share purchaser claims were deemed equity claims by the Court of Appeal (see *Sino-Forest Corporation (Re),* 2012 ONSC 4377 (Sup. Ct.), aff'd 2012 ONCA 0816 (C.A.), it was only left with noteholder class action indemnity claims which were capped at $150 million and defence cost claims which amount in total to a small fraction of the total voting rights.

[33] The fact that E&Y asserted indemnification claims against Sino-Forest subsidiaries, as well as the company itself, is irrelevant in view of Justice Morawetz's decision, *correctly* applying the *Metcalfe* principles, that the release of claims asserted against the subsidiaries was *essential* to the success of the Plan. See *Sino-Forest (Re)*, 2012 ONSC 7050 at para. 74.

[34] Memorandum of Siskinds LLP dated December 31, 2012, **Motion Record of the Appellants (Motion for Leave to Appeal from the Sanction Order),** Tab 3X.

32. In *1250264 Ontario Inc. v. Pet Valu Canada Inc.*[35], this Court recently *reconfirmed* 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.*[36]
>
> [Emphasis added]

33. 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 approving the E&Y settlement and release in these circumstances.

2) Approval of the E&Y settlement as a distribution to creditors under the Plan would violate section 6(8) of the CCAA and may lead to confiscation of share purchasers' litigation rights

34. The Settlement Approval Order provides that the E&Y settlement funds are to be paid into a "Settlement Trust" for distribution to "Securities Claimants," according to an allocation process to be determined later.[37] "Securities Claimants" is defined for the purpose of the E&Y settlement as a temporally unbounded class of all persons who acquired Sino-Forest securities, as defined by the

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[35] *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2013 ONCA 279 ["*Pet Value*"], **Book of Authorities (Motion for Leave to Appeal from E&Y Settlement Approval Order and Representation Dismissal Order), Tab 1.**

[36] *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), **Book of Authorities (Motion for Leave to Appeal from E&Y Settlement Approval Order and Representation Dismissal Order), Tab 1.**

[37] Settlement Approval Order, **Motion Record of the Appellants (Motion for Leave to Appeal from E&Y Settlement Approval Order and Representation Dismissal Order), Tab 2.** at para. 10.

Securities Act, R.S.O. 1990, c. S. 5, which includes debt instruments such as notes or equity securities such as publicly traded shares.[38]

35. The class action claims being settled as against E&Y were asserted on behalf of a class defined as all person and entitles 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.[39] 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).

36. 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 consideration. Class Counsel stated that those persons would receive distributions of the $117 million.[40]

37. As described in the Facts section above, Justice Morawetz viewed the $117 million as a contribution to Sino-Forest's reorganization Plan, not to members of the proposed class in the class action.[41] He defined the intended recipients of the $117 million as "creditors" and "relevant stakeholders" -- not as class members.[42] He further stated: "there is a connection between the release of claims against Ernst & Young and a distribution to creditors. The plaintiffs in the litigation are shareholders and Noteholders of SFC. These plaintiffs have claims to assert against SFC that are being directly satisfied, in part, with the payment of $117 million by Ernst &

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[38] Settlement Approval Order, **Motion Record of the Appellants (Motion for Leave to Appeal from E&Y Settlement Approval Order and Representation Dismissal Order), Tab 2.** at Appendix "A

[39] Notice of Proposed Settlement with Ernst & Young LLP in English, **Motion Record of the Appellants (Motion for Leave to Appeal from E&Y Settlement Approval Order and Representation Dismissal Order), Tab 21.**

[40] *Ibid.*

[41] Settlement Approval Reasons, **Motion Record of the Appellants (Motion for Leave to Appeal from E&Y Settlement Approval Order and Representation Dismissal Order), Tab 4.** at para. 60.

[42] *Ibid* at Para. 54, 60, 64, 66, 67 and 71.

Young."[43] This articulation was incorrect, in that the plaintiffs (class members) in the class action are not shareholders and Noteholders, they are share and note purchasers during the class period; also, the settlement satisfies class members' claims against E&Y, not against Sino-Forest.

38. These conceptual errors by the motion judge are important – they are not just a technicality. Section 6(8) 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.

39. 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.

40. Resolution of this conflict is important for practitioners who may in the future handle class actions in which a main defendant enters *CCAA* insolvency proceedings, and also for untangling these problems in the present litigation.

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[43] *Ibid* at para. 67

3) The Court below failed to consider the adequacy of the settlement amount and to insist on a fraud carve-out

41. The motions judge did not address the adequacy of the $117 million of settlement consideration in his Endorsement. Neither E&Y nor the Ontario Plaintiffs provided any justification for deciding whether the amount was adequate, other than to make clear that their negotiations leading to that amount were adversarial and difficult. With the possible exception of the underwriter defendants, it is likely that the E&Y Settlement consideration (if paid to class members) may form the bulk of the recompense received by investors in this $6+ billion debacle. It is improper for this case and for this practice area that adequacy of consideration did not receive any judicial attention.

42. Class Counsel and E&Y have declined to disclose the amount of insurance coverage available to E&Y in resolving the claims at issue. One would expect, in a case involving audit failure as severe as alleged in this case, that coverage would be exhausted in any settlement. If that is not the case, the reasonableness of the amount of the proposed settlement would be highly dubious.

43. This Court in *Metcalfe* was careful to note that the third-party releases at issue there included limited carve-outs so that certain fraud claims were not released.[44] The E&Y Release is exceptionally broad and overrides the exclusions preventing release of fraud claims found elsewhere in the Plan. This aspect of the settlement is not fair and reasonable, and would set an unfortunate precedent for future cases.

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[44] *Ibid*, at para. 109.

4) Resolution of the Appellants' positions on who should represent the interests of objecting claimants in contested *CCAA* proceedings is of significance to the practice and to this action, and the Appellants' position is meritorious.

44. The Sino-Forest class proceeding has not yet been class certified, and the Ontario Plaintiffs did not pursue their motion early in the *CCAA* proceedings for a representation order. Justice Morawetz recognized the Ontario Plaintiffs, who designated themselves the Ad Hoc Committee of Purchasers of the Applicant's Securities, as acting in the *CCAA* proceeding on behalf of the proposed class members, including the Appellants, without entering a representation order under Rule 10 of the *Rules of Civil Procedure*.

45. The Ad Hoc Committee finally moved for a representation order as part of the E&Y Settlement process and its motion was granted.[45] The Appellants opposed appointment of the Ad Hoc Committee to represent those who objected to the settlement, and moved to be appointed instead.[46] Justice Morawetz granted the Ad Hoc Committee's motion and denied the Appellants' motion.

46. The lower court's appointment of the Ad Hoc Committee to represent the Appellants after the clear adversity of the two groups was apparent was contrary to the letter and spirit of the rules on representation orders.

47. The general authority of a *CCAA* court to grant a Representation Order derives from Rule 10.01 of the *Rules of the Civil Procedure*, which allows a court to appoint one or more persons to represent any person or a class of persons who are unborn or unascertained or who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot

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[45] Notice of Motion re: E&Y Settlement Approval, **Motion Record of the Appellants (Motion for Leave to Appeal from E&Y Settlement Approval Order and Representation Dismissal Order), Tab 6.**

[46] [46] Notice of Motion and Amended Notice of Motino re: Releif from the Binding Effect pf Settlement Approval Order and Representation Order, **Motion Record of the Appellants (Motion for Leave to Appeal from E&Y Settlement Approval Order and Representation Dismissal Order), Tab 10.**

be readily ascertained, found or served.[47] The factors to be considered in deciding on a representation order in *CCAA* proceedings include: vulnerability and resources of the group; benefit to the debtor; social benefit to be derived from representation; facilitation of administration; avoidance of multiplicity of legal retainers; balance of convenience; whether it is fair and just to the parties; whether the representative counsel has already been appointed for those have similar interests; and the position of other stakeholders and the Monitor.[48] A representation order is not appropriate when the class of persons is overly broad, already represented by counsel, there is no issue with respect to ascertaining the members of the class, or conflicts of interests are present between class members.[49] The interest of judicial economy does not override persons' rights to have their representative or counsel of choice and to pursue their own litigation or settlement strategy against a common defendant.[50]

48. The Ontario Plaintiffs' decision to accept a proposed settlement with E&Y that included a blanket release and gave away class members' opt out rights set up the conflict from the outset of this process. Furthermore, the Objectors are represented by counsel. Applying the factors above, it is clearly inappropriate to grant the Ontario Plaintiffs a representation order over parties who are represented by counsel and with whom they have conflicts of interest. Again, it will be important

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[47] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 10.01; *Nortel Networks Corp., Re.*, 2009 CarswellOnt 3028, 53 C.B.R. (5th) 196 at para. 10 (S.C.J.) ("*Nortel*"), **Book of Authorities (Motion for Leave to Appeal from E&Y Settlement Approval Order and Representation Dismissal Order), Tab 6.**

[48] *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 9398(Sup. Ct.), **Book of Authorities (Motion for Leave to Appeal from E&Y Settlement Approval Order and Representation Dismissal Order), Tab 4.**; *Nortel, Ibid; Re Canwest Publishing Inc./Publications Canwest Inc.*, 2010 CarswellOnt 1344, 65 C.B.R. (5th) 152, **Book of Authorities (Motion for Leave to Appeal from E&Y Settlement Approval Order and Representation Dismissal Order), Tab 5.**

[49] *Bruce (Township) v. Thornburn*, 1986 CarswellOnt 2124, 57 O.R. (2d) 77 at para. 24 (Div. Ct.), **Book of Authorities (Motion for Leave to Appeal from E&Y Settlement Approval Order and Representation Dismissal Order), Tab 3**; *Ravelston Corp. (Re)*, 2007 CarswellOnt 7288, O.J. No. 4350 at para. 9 (S.C.J.), **Book of Authorities (Motion for Leave to Appeal from E&Y Settlement Approval Order and Representation Dismissal Order), Tab 7.**

[50] *Attard* v. *Maple Leaf Foods Inc.*, 1998 CarswellOnt 1548, 20 C.P.C. (4th) 346 at para. 4 (Ont. Gen. Div.), **Book of Authorities (Motion for Leave to Appeal from E&Y Settlement Approval Order and Representation Dismissal Order), Tab 2.**

for future complex cases, and for this case, for proper guidelines for appointment of representatives to be set forth by this Court.

5) This appeal, if leave is granted, will not disrupt the implementation of the Plan or otherwise hinder the *CCAA* proceeding

49. Sino-Forest's reorganization principally involved marshalling the assets of the company and its subsidiaries and transferring them into the Newco entities, which the qualifying creditors owned. The parties contended that the assets needed to be dealt with promptly in order to avoid deterioration. The Plan proposed to the creditors for vote in late November 2012 evidently accomplished all those goals, independent of resolving claims against third-party defendants in the class action. The distribution of interests in the Newco entities was the main consideration provided to creditors under the Plan.

50. Nothing in this proposed appeal will disturb that process, which was implemented on January 30, 2013.

51. Obviously, the parties knew and accepted the fact that consideration of the E&Y Settlement in the lower court would not occur until after the implementation date, and thus was not assured to be approved as part of the Plan. Just as Justice Morawetz could (and should) have declined to approve the E&Y Settlement as proposed, without disturbing the other aspects of the Plan, so too can this Court.

52. The Appellants respectfully submit that the E&Y Settlement should have been presented to the lower court and considered under the normal procedures applicable under the *CPA,* including preservation of the right of class members to opt out and prosecute their claims individually, and

without entry of no-opt-out releases in E&Y's favor in the *CCAA* proceeding. If this Court agrees, then E&Y will have to decide whether to settle in the face of the Appellants' opt outs. That is the normal way a proposed class settlement should have been structured from the outset, and this Court would only be putting it on the track where it belonged in the first place.

PART V – RELIEF SOUGHT

53. The Funds respectfully request that this Court grant leave to appeal the E&Y Settlement Approval Order and Representation Dismissal Order .

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 10th DAY OF May, 2013

Michael C. Spencer.

Won J. Kim P.C

Megan B. McPhee

Lawyers for 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.

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Schedule A—Authorities

Jurisprudence

No.	Case
1.	*1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2013 ONCA 279 (C.A.)
2.	*Attard* v. *Maple Leaf Foods Inc.*, 1998 CarswellOnt 1548, 20 C.P.C. (4th) 346 (Ont. Gen. Div.)
3.	*Bruce (Township) v. Thornburn*, 1986 CarswellOnt 2124, 57 O.R. (2d) 77 (Div. Ct.)
4.	*Canwest Global Communications Corp., Re*, 2009 CarswellOnt 9398 (S.C.J.)
5.	*Canwest Publishing Inc./Publications Canwest Inc. Re*, 2010 CarswellOnt 1344, 65 C.B.R. (5th) 152 (S.C.J.)
6.	*Metclafe & Mansfield Alternative Investments II Corp. (Re)*, 92 O.R.(3d) 513 (C.A.).
7.	*Nortel Networks Corp., Re*, 2009 CarswellOnt 3028 (S.C.J.)
8.	*Ravelston Corp. (Re)*, 2007 CarswellOnt 7288, O.J. No. 4350 (S.C.J.)
9.	*Timminco Limited (Re)*, 2012 ONCA 552.

Schedule B—Legislation

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

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.

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

1(1) In this Act,

"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")

***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.

***Rules of Civil Procedure*, R.R.O. 1990, reg. 194**

10.01 (1) In a proceeding concerning,

(a) the interpretation of a deed, will, contract or other instrument, or the interpretation of a statute, order in council, regulation or municipal by-law or resolution;

(b) the determination of a question arising in the administration of an estate or trust;

(c) the approval of a sale, purchase, settlement or other transaction;

(d) the approval of an arrangement under the *Variation of Trusts Act*;

(e) the administration of the estate of a deceased person; or

(f) any other matter where it appears necessary or desirable to make an order under this subrule,

a judge may by order appoint one or more persons to represent any person or class of persons who are unborn or unascertained or who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served.

(2) Where an appointment is made under subrule (1), an order in the proceeding is binding on a person or class so represented, subject to rule 10.03.

(3) Where in a proceeding referred to in subrule (1) a settlement is proposed and some of the persons interested in the settlement are not parties to the proceeding, but,

> (a) those persons are represented by a person appointed under subrule (1) who assents to the settlement; or
>
> (b) there are other persons having the same interest who are parties to the proceeding and assent to the settlement,

the judge, if satisfied that the settlement will be for the benefit of the interested persons who are not parties and that to require service on them would cause undue expense or delay, may approve the settlement on behalf of those persons.

(4) A settlement approved under subrule (3) binds the interested persons who are not parties, subject to rule 10.03.

10.02 Where it appears to a judge that the estate of a deceased person has an interest in a matter in question in the proceeding and there is no executor or administrator of the estate, the judge may order that the proceeding continue in the absence of a person representing the estate of the deceased person or may by order appoint a person to represent the estate for the purposes of the proceeding, and an order in the proceeding binds the estate of the deceased person, subject to rule 10.03, as if the executor or administrator of the estate of that person had been a party to the proceeding.

10.03 Where a person or an estate is bound by reason of a representation order made under subrule 10.01 (1) or rule 10.02, an approval under subrule 10.01 (3) or an order that the proceeding continue made under rule 10.02, a judge may order in the same or a subsequent proceeding that the person or estate not be bound where the judge is satisfied that,

> (a) the order or approval was obtained by fraud or non-disclosure of material facts;
>
> (b) the interests of the person or estate were different from those represented at the hearing; or

(c) for some other sufficient reason the order or approval should be set aside.

Schedule C-Excerpts of the Plan of Compromise and Reorganization

ARTICLE 1
INTERPRETATION

1.1 Definitions

In the Plan, unless otherwise stated or unless the subject matter or context otherwise requires:

"Ernst & Young Claim" means any and all demands, claims, actions, Causes of Action, counterclaims, suits, debts, sums of money, accounts, covenants, damages, judgments, orders, including injunctive relief or specific performance and compliance orders, expenses, executions, Encumbrances and other recoveries on account of any claim, indebtedness, liability, obligation, demand or cause of action of whatever nature that any Person, including any Person who may claim contribution or indemnification against or from them and also including for greater certainty the SFC Companies, the Directors (in their capacity as such), the Officers (in their capacity as such), the Third Party Defendants, Newco, Newco II, the directors and officers of Newco and Newco II, the Noteholders or any Noteholder, any past, present or future holder of a direct or indirect equity interest in the SFC Companies, any past, present or future direct or indirect investor or security holder of the SFC Companies, any direct or indirect security holder of Newco or Newco II, the Trustees, the Transfer Agent, the Monitor, and each and every member (including members of any committee or governance council), present and former affiliate, partner, associate, employee, servant, agent, contractor, director, officer, insurer and each and every successor, administrator, heir and assign of each of any of the foregoing may or could (at any time past present or future) be entitled to assert against Ernst & Young, including any and all claims in respect of statutory liabilities of Directors (in their capacity as such), Officers (in their capacity as such) and any alleged fiduciary (in any capacity) whether known or unknown, matured or unmatured, direct or derivative, foreseen or unforeseen, suspected or unsuspected, contingent or not contingent, existing or hereafter arising, based in whole or in part on any act or omission, transaction, dealing or other occurrence existing or taking place on, prior to or after the Ernst & Young Settlement Date relating to, arising out of or in connection with the SFC Companies, the SFC Business, any Director or Officer (in their capacity as such) and/or professional services performed by Ernst & Young or any other acts or omissions of Ernst & Young in relation to the SFC Companies, the SFC Business, any Director or Officer (in their capacity as such), including for greater certainty but not limited to any claim arising out of:

(a) all audit, tax, advisory and other professional services provided to the SFC Companies or related to the SFC Business up to the Ernst & Young Settlement Date, including for greater certainty all audit work performed, all auditors' opinions and all consents in respect of all offering of SFC securities and all regulatory compliance delivered in

respect of all fiscal periods and all work related thereto up to and inclusing the Ernst & Young Settlement Date;

(b) all claims advanced or which could have been advanced in any or all of the Class Actions;

(c) all claims advanced or which could have been advanced in any or all actions commenced in all jurisdictions prior the Ernst & Young Settlement Date; or

(d) all Noteholder Claims, Litigation Trust Claims or any claim of the SFC Companies,

"Ernst & Young Settlement" means the settlement as reflected in the Minutes of Settlement executed on November 29, 2012 between Ernst & Young LLP, on behalf of itself and Ernst & Young Global Limited and all member firms thereof and the plaintiffs in Ontario Superior Court Action No. CV-11-4351153-00CP and in Quebec Superior Court No. 200-06-00132-111, and such other documents contemplated thereby.

"**Named Third Party Defendant Settlement**" means a binding settlement between any applicable Named Third Party Defendant and one or more of: (i) the plaintiffs in any of the Class Actions; and (ii) the Litigation Trustee (on behalf of the Litigation Trust) (if after the Plan Implementation Date), provided that, in each case, such settlement must be acceptable to SFC (if on or prior to the Plan Implementation Date), the Monitor, the Initial Consenting Noteholders (if on or prior to the Plan Implementation Date) and the Litigation Trustee (if after the Plan Implementation Date), and provided further that such settlement shall not affect the plaintiffs in the Class Actions without the consent of counsel to the Ontario Class Action Plaintiffs.

"**Named Third Party Defendants**" means the Third Party Defendants listed on Schedule "A" to the Plan in accordance with section 11.2(a) hereof, provided that only Eligible Third Party Defendants may become Named Third Party Defendant

ARTICLE 11
SETTLEMENT OF CLAIMS AGAINST THIRD PARTY DEFENDANTS

11.1 Ernst & Young

(a) Notwithstanding anything to the contrary herein, subject to: (i) the granting of the Sanction Order; (ii) the issuance of the Settlement

Trust Order (as may be modified in a manner satisfactory to the parties to the Ernst & Young Settlement and SFC (if occurring on or prior to the Plan Implementation Date), the Monitor and the Initial Consenting Noteholders, as applicable, to the extent, if any, that such modifications affect SFC, the Monitor or the Initial Consenting Noteholders, each acting reasonably); (iii) the granting of an Order under Chapter 15 of the United States Bankruptcy Code recognizing and enforcing the Sanction Order and the Settlement Trust Order in the United States; (iv) any other order necessary to give effect to the Ernst & Young Settlement (the orders referenced in (iii) and (iv) being collectively the "**Ernst & Young Orders**"); (v) the fulfillment of all conditions precedent in the Ernst & Young Settlement and the fulfillment by the Ontario Class Action Plaintiffs of all of their obligations thereunder; and (vi) the Sanction Order, the Settlement Trust Order and all Ernst & Young Orders being final orders and not subject to further appeal or challenge, Ernst & Young shall pay the settlement amount as provided in the Ernst & Young Settlement to the trust established pursuant to the Settlement Trust Order (the "**Settlement Trust**"). Upon receipt of a certificate from Ernst & Young confirming it has paid the settlement amount to the Settlement Trust in accordance with the Ernst & Young Settlement and the trustee of the Settlement Trust confirming receipt of such settlement amount, the Monitor shall deliver to Ernst & Young a certificate (the "**Monitor's Ernst & Young Settlement Certificate**") stating that (i) Ernst & Young has confirmed that the settlement amount has been paid to the Settlement Trust in accordance with the Ernst & Young Settlement; (ii) the trustee of the Settlement Trust has confirmed that such settlement amount has been received by the Settlement Trust; and (iii) the Ernst & Young Release is in full force and effect in accordance with the Plan. The Monitor shall thereafter file the Monitor's Ernst & Young Settlement Certificate with the Court.

(b) Notwithstanding anything to the contrary herein, upon receipt by the Settlement Trust of the settlement amount in accordance with the Ernst & Young Settlement: (i) all Ernst & Young Claims shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled, barred and deemed satisfied and extinguished as against Ernst & Young; (ii) section 7.3 hereof shall apply to Ernst & Young and the Ernst & Young Claims *mutatis mutandis* on the Ernst & Young Settlement Date; and (iii) none of the plaintiffs in the Class Actions shall be permitted to claim from any of the other Third Party Defendants that portion of any damages that corresponds to the liability of Ernst & Young, proven at trial or otherwise, that is the subject of the Ernst & Young Settlement.

(c) In the event that the Ernst & Young Settlement is not completed in accordance with its terms, the Ernst & Young Release and the injunctions described in section 11.1(b) shall not become effective.

11.2 Named Third Party Defendants

(a) Notwithstanding anything to the contrary in section 12.5(a) or 12.5(b) hereof, at any time prior to 10:00 a.m. (Toronto time) on December 6, 2012 or such later date as agreed in writing by the Monitor, SFC (if on or prior to the Plan Implementation Date) and the Initial Consenting Noteholders, Schedule "A" to this Plan may be amended, restated, modified or supplemented at any time and from time to time to add any Eligible Third Party Defendant as a "Named Third Party Defendant", subject in each case to the prior written consent of such Third Party Defendant, the Initial Consenting Noteholders, counsel to the Ontario Class Action Plaintiffs, the Monitor and, if occurring on or prior to the Plan Implementation Date, SFC. Any such amendment, restatement, modification and/or supplement of Schedule "A" shall be deemed to be effective automatically upon all such required consents being received. The Monitor shall: (A) provide notice to the service list of any such amendment, restatement, modification and/or supplement of Schedule "A"; (B) file a copy thereof with the Court; and (C) post an electronic copy thereof on the Website. All Affected Creditors shall be deemed to consent thereto any and no Court Approval thereof will be required.

(b) Notwithstanding anything to the contrary herein, subject to: (i) the granting of the Sanction Order; (ii) the granting of the applicable Named Third Party Defendant Settlement Order; and (iii) the satisfaction or waiver of all conditions precedent contained in the applicable Named Third Party Defendant Settlement, the applicable Named Third Party Defendant Settlement shall be given effect in accordance with its terms. Upon receipt of a certificate (in form and in substance satisfactory to the Monitor) from each of the parties to the applicable Named Third Party Defendant Settlement confirming that all conditions precedent thereto have been satisfied or waived, and that any settlement funds have been paid and received, the Monitor shall deliver to the applicable Named Third Party Defendant a certificate (the "**Monitor's Named Third Party Settlement Certificate**") stating that (i) each of the parties to such Named Third Party Defendant Settlement has confirmed that all conditions precedent thereto have been satisfied or waived; (ii) any settlement funds have been paid and received; and (iii) immediately upon the delivery of the Monitor's Named Third Party Settlement Certificate, the applicable Named Third PartyDefendant Release will be in full force and effect in accordance with the Plan. The Monitor shall thereafter file the Monitor's Named Third Party Settlement Certificate with the Court.

(c) Notwithstanding anything to the contrary herein, upon delivery of the Monitor's Named Third Party Settlement Certificate, any claims and

Causes of Action shall be dealt with in accordance with the terms of the applicable Named Third Party Defendant Settlement, the Named Third Party Defendant Settlement Order and the Named Third Party Defendant Release. To the extent provided for by the terms of the applicable Named Third Party Defendant Release: (i) the applicable Causes of Action against the applicable Named Third Party Defendant shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled, barred and deemed satisfied and extinguished as against the applicable Named Third Party Defendant; and (ii) section 7.3 hereof shall apply to the applicable Named Third Party Defendant and the applicable Causes of Action against the applicable Named Third Party Defendant *mutatis mutandis* on the effective date of the Named Third Party Defendant Settlement

Court of Appeal File No.: M42399
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.: M42399
Superior Court File No.: CV-10-414302CP

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

-and-

SINO-FOREST CORPORATION, et al.

Defendants

COURT OF APPEAL FOR ONTARIO

(Proceeding Commenced at Toronto)

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