

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 PROPOSED PLAN OF COMPROMISE OR
ARRANGEMENT OF SINO-FOREST CORPORATION

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

Appellants on Appeal

- and -

Sino-Forest Corporation

Respondent on Appeal

NOTICE OF APPEAL

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 (the “Appellants” or “Underwriters”) APPEAL to the Court of Appeal for Ontario from the Order of Mr. Justice Morawetz of the Ontario Superior Court of Justice (Commercial List) (the “Court”), dated July 27, 2012 (the “Equity Claims Order”), made at Toronto, Ontario.

THE APPELLANTS ASK that the Equity Claims Order be set aside and judgment be granted as follows:

1. An Order abridging the time for service of the Notice of Appeal, Appeal Book and Compendium and other materials relating to this appeal, validating such service and dispensing with any further service such that the appeal is properly returnable on a date to be fixed by the Registrar;
2. An Order dismissing the Equity Claims Motion (as such term is defined below); and
3. Such further and other relief as the lawyers for the Appellants may request and this Appellate Court may permit.

THE GROUNDS OF APPEAL are as follows:

1. *Class Actions.* Sino-Forest Corporation (“Sino-Forest”) and certain of its current and former officers, directors and employees, along with Sino-Forest’s current and former auditors, technical consultants and various underwriters involved in prior equity and debt offerings (the “Offerings”) were named as defendants in one or more proposed class action lawsuits commenced in 2011 in Ontario, Quebec, Saskatchewan and New York (the “Class Actions”).
2. The Class Actions involve allegations that the public disclosure made by Sino-Forest contained misrepresentations, including in prospectus disclosure relating to the Offerings, and in the company’s quarterly and annual continuous disclosure. The plaintiffs in the Class Actions seek to represent classes of owners of debt and equity securities of Sino-Forest. The Underwriters are among the defendants named in certain of the Class Actions.
3. In connection with the Offerings, certain Underwriters entered into agreements with Sino-Forest and certain of its subsidiaries (the “Sino-Forest Subsidiary Companies”) providing that Sino-Forest and, with respect to certain Offerings of notes, the Sino-Forest Subsidiary Companies, have agreed to indemnify and hold harmless the Underwriters in connection with an array of matters that could arise from the Offerings. All such agreements were entered into prior to the Amendments (as such term is defined below).

4. *CCAA Proceedings.* On March 30, 2012, Sino-Forest sought and obtained from the motions judge an Initial Order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"), which provided it with protection from creditors, consisting of the holders of Sino-Forest's shares and notes, as well as persons with indemnity claims, including the Underwriters.

5. On May 14, 2012, the motions judge made the Claims Procedure Order, which required claims against Sino-Forest, its directors and officers, and its subsidiaries to be filed by June 21, 2012 (although with respect to claims against subsidiaries, no court ordered deadline for filing proofs of claim has been set, as the subsidiaries are not Applicants in the CCAA proceedings). The Underwriters duly filed proofs of claim pursuant to the Claims Procedure Order.

6. *Equity Claims Order.* On June 26, 2012, the motions judge heard the motion (the "Equity Claims Motion") by Sino-Forest seeking the Equity Claims Order. Sino-Forest sought declarations that certain independent, third-party indemnification claims (the "Contractual Indemnity Claims") against Sino-Forest given to the Underwriters as part of their contractual retainers to provide underwriting services in connection with certain of the Offerings are "equity claims" as defined in section 2 of the CCAA.

7. On July 27, 2012, the motions judge made the Equity Claims Order, which, *inter alia*, declared that the Contractual Indemnity Claims were equity claims, other than in so far as they consist of defence costs. Such determination affects the Appellants' entitlement to vote on a CCAA plan of compromise or arrangement, distributions under such plan, relative priorities among creditors and the statutory subordination of claims.

8. *Errors of the Motions Judge.* The motions judge erred in determining that the Contractual Indemnity Claims are equity claims at all.

9. The motions judge made the following specific errors:

- (a) The motions judge erred in his interpretation of section 2 of the CCAA (definition of "equity claims", and in particular, subsection (e) of said definition (the "CCAA Equity Claims Definition")), in concluding that the CCAA Equity Claims Definition includes as equity claims the claims of contractual, arm's length

indemnity claimants such as underwriters who are not shareholders and whose claims are not in respect of equity interests held by such claimants.

- (b) The motions judge failed to properly construe subsections (a) to (e) of the CCAA Equity Claims Definition. The words “contribution or indemnity in respect of a claim” used in subsection (e) are meant to apply to claims arising from an indemnity granted in favour of shareholders of a company and not to claims arising from a contractual indemnity granted in favour of an independent third party.
- (c) The motions judge erred in holding that the amendments (the “Amendments”) to Canadian bankruptcy and insolvency legislation that came into effect in September 2009 substantively altered the law so as to subordinate and treat as equity claims the claims of contractual, arm’s length indemnity claimants such as underwriters who are not shareholders and whose claims are not in respect of equity interests held by such claimants.
- (d) The motions judge erred in finding that the characterization of the Contractual Indemnity Claims as equity claims turns on the nature of the underlying claim that triggers the indemnity claim, as opposed to the nature and origin of the indemnity claim as a contractual term provided as part of a contract for services. The law distinguishes between claimants who hold equity claims and those who hold debt claims. Arm’s length contracting parties who obtain contractual indemnities in relation to their supply of services do not hold equity claims.
- (e) The motions judge erred in finding that the Contractual Indemnity Claims are being used to recover an equity investment. The Contractual Indemnity Claims are not in respect of an equity interest held by the claimant (and therefore are not equity claims) and must be distinguished from the claims of shareholders, themselves. The Underwriters’ indemnity claims are based on their status as contractual counterparties to Sino-Forest that supplied services to Sino-Forest. The relationship between the Underwriters and Sino-Forest bears no hallmarks of an equity relationship, and claims arising from their commercial and contractual

dealings are, in no sense of the word, equity claims. The claims of the Underwriters and shareholders are legally distinct and should be so considered.

10. In addition, the motion judge's Endorsement failed to properly consider the following issues:

- (a) In the Endorsement, the motions judge does not address the legislative background to the amendments to section 2 of the CCAA or the statutory interpretation consequences flowing from it. The Amendments, including, *inter alia*, the amendments to section 2 of the CCAA, were widely regarded as codifying and articulating existing law rather than changing the law; however, the motions judge erred in construing the language of the amendments as changing the law with respect to the treatment of contractual, third-party indemnity claims in CCAA proceedings. Nor was there extrinsic evidence before the motions judge to support a finding that Parliament intended to change or did, in fact, change the common law as it existed at the time of the Amendments.
- (b) The pre-Amendments case law remains relevant for the reasons discussed above. Historically, common law practice was such that on the insolvency of a company, the claims of creditors rank ahead of the claims of shareholders. This is premised on the notion that shareholders are higher risk takers, having willingly chosen to tie their investment to the fortunes of the corporation, as opposed to creditors who choose a lower level of exposure to risk. The Amendments properly construed are a codification of the established common law prohibitions against various creative attempts by shareholders (not arm's length third parties) upon the bankruptcy or insolvency of a company to characterize as debts claims that were, in substance, claims for the recovery of an equity investment. The motions judge failed to take into account this common law in reaching his conclusion regarding the Contractual Indemnity Claims.
- (c) In the Endorsement, the motions judge does not address the nature of the claims made by the Underwriters. Contractual Indemnity Claims are claims of Underwriters against Sino-Forest, triggered in this instance by claims brought by

shareholders against the Underwriters, as opposed to direct shareholder claims against Sino-Forest. Third-party Contractual Indemnity Claims, such as those held by the Underwriters, are not of a kind or nature precluded by case law prior to the Amendment, nor the subject of the Amendments, themselves. The Underwriters' indemnity claims are based on their status as contractual counterparties to Sino-Forest that supplied services to Sino-Forest. The Underwriters bargained for, *inter alia*, certain protections in the relevant agreements with Sino-Forest, including the indemnity provisions contained therein. The Contractual Indemnity Claims of the Underwriters are derivative of the Underwriters' status as contractual counterparties to Sino-Forest in respect of the indemnities as opposed to derivative of the claims of shareholders.

11. The CCAA, and, in particular, the CCAA Equity Claims Definition.

12. Such further and other grounds as the lawyers for the Appellants may advise and this Appellate Court may permit.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

13. By motion dated August 16, 2012 the Appellants sought leave to appeal the final Equity Claims Order of Mr. Justice Morawetz of the Ontario Superior Court of Justice (Commercial List), in accordance with sections 13 and 14 of the CCAA and Rule 61.03.1 of the *Rules of Civil Procedure* (Ontario);

14. The Court of Appeal for Ontario has jurisdiction to hear appeals from final orders of the Ontario Superior Court of Justice pursuant to section 6(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43;

15. Leave to appeal was granted by Order of the Court of Appeal for Ontario by Endorsement dated October 10, 2012, together with the related appeals in Court File No. M41654 and Court File No. M41655, with the appeals to be heard on an expedited basis on a date to be fixed by the Registrar; and

16. Rule 61 of the *Rules of Civil Procedure* (Ontario), R.R.O. 1990, O. Reg. 194.

October 16, 2012

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**IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,
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**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF SINO-FOREST CORPORATION**

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

COURT OF APPEAL FOR ONTARIO

**NOTICE OF APPEAL OF THE UNDERWRITERS
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