

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

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

**RESPONDING FACTUM OF ERNST & YOUNG LLP
(Motion Re: Stay of Proceedings returnable May 8, 2012)**

May 4, 2012

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April 27, 2012

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
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**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

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

**RESPONDING FACTUM OF ERNST & YOUNG LLP
(Motion Re: Stay of Proceedings returnable May 8, 2012)**

PART I - OVERVIEW

1. The Applicant, Sino-Forest Corporation (“Sino-Forest” or the “Company”), brings this motion to seek advice and directions on the scope of the stay of proceedings (the “Stay”) granted by this Honourable Court by order dated March 30, 2012 (the “Initial Order”), in connection with the Company filing for protection under the *Companies' Creditors Arrangement Act* (the “CCAA”):

- (a) to confirm or clarify (to the extent necessary) that the Stay applies to all claims and all defendants in the litigation to which Sino-Forest is a defendant (the “Class Actions”), including the Ontario action identified in Court File No. CV-11-431153-CP (the “Ontario Class Action”) and the Quebec action identified in Court File No. 200-06-000132 (the “Quebec Class Action”); or
- (b) in the alternative, that the Stay granted in the Initial Order be extended, *nunc pro tunc*, to include all claims and all defendants in the Class Actions.

2. Ernst & Young LLP (“E&Y”) supports Sino-Forest’s motion. The Stay did or should apply to all other defendants, including E&Y, in the Class Actions,:

- (a) the *CCAA* is remedial legislation to be given large and liberal interpretation;
- (b) the Court has broad powers to effect the purposes of the *CCAA*, including to maintain the *status quo* and facilitate restructuring;
- (c) the language of the Initial Order – staying litigation “in respect of” Sino-Forest and its Business and Property – is broad and captures litigation against third party defendants;
- (d) the claims against the third party defendants in the Class Actions, including E&Y, are necessarily derivative of the claims against the Company; and
- (e) allowing the Class Actions to proceed against the third parties would be prejudicial to the Company as well as E&Y and is not in the best interests of stakeholders.

3. In a corollary motion, counsel for a self-styled Ad Hoc Committee of Purchasers of the Applicant’s Securities, including the proposed representative plaintiffs in the Ontario Class Action, (the “Ontario Plaintiffs”) seek to lift the Stay for the purposes of a proposed settlement with Pöyry (Beijing) Consulting Company Ltd. (“Pöyry”). Pöyry is one of several defendants in the Class Actions.

4. The Ontario Plaintiffs have failed to discharge their heavy burden to show why lifting the Stay for the purposes of the Pöyry settlement is necessary or in the best interests of stakeholders.

In any event, the Pöyry settlement was completed following the Company's *CCAA* application and in violation of this Court's Initial Order staying the proceedings, at least as against Sino-Forest.

PART II - THE FACTS

5. During the periods relevant to the Class Actions, E&Y was retained as Sino-Forest's auditor – from 2007 until it resigned on April 5, 2012.

Reference: Affidavit of W. Judson Martin sworn April 23, 2012 ("April 23 Martin Affidavit") , Motion Record of Sino-Forest Corporation, at para. 13, Tab 2

6. On June 2, 2011, a short-seller, Muddy Waters LLC and its principal, Carson Block, issued a report which purported to reveal alleged fraud at the Company and cast various aspersions on the Company's advisors. In the wake of that report, Sino-Forest's share price plummeted and Muddy Waters and Carson Block profited handsomely from their short position.

Reference: Affidavit of W. Judson Martin sworn March 30, 2012, at para, 114 ("March 30 Martin Affidavit") attached as Exhibit A to Affidavit of W. Judson Martin sworn April 23, 2012, Motion Record of Sino-Forest Corporation, Tab 2

7. E&Y was served with a multitude of class action claims in numerous jurisdictions including Ontario and Quebec. In Ontario alone, E&Y was served with four competing proposed class actions. Following a carriage motion, an uneasy peace was brokered between two law firms and a number of proposed representative plaintiffs were absorbed into what is now the Ontario Class Action.

Reference: April 23 Martin Affidavit, Motion Record of Sino-Forest Corporation, Tab 2, at paras. 7-8
Smith v. Sino-Forest Corporation, 2012 ONSC 24 attached as Exhibit D to the Affidavit of Daniel Bach sworn April 11, 2012, Motion Record of the Proposed Representative Plaintiffs, Tab 2

8. The plaintiffs in the Class Action claim damages in the aggregate, and against all defendants, of \$9.2 billion on behalf of resident and non-resident shareholders and noteholders. The causes of action alleged are both statutory, under the *Securities Act (Ontario)*, and at common law, claiming for negligence and negligent misrepresentations to primary and secondary market purchasers. The central claim is that Sino-Forest and its advisors, including the auditors and underwriters, misrepresented that the Company's financial statements complied with generally accepted accounting principles. The claims against E&Y and the other third party defendants are that they failed in their gatekeeping function.

Reference: Proposed Fresh and Amended Statement of Claim, attached as Exhibit B to the Affidavit of Daniel Bach sworn April 11, 2012 ("April 11 Bach Affidavit"), Motion Record of the Proposed Representative Plaintiffs, Tab 2

9. On March 30, 2012, this Court granted the Initial Order, which stayed the proceedings. On April 13, 2012, this Court extended the Stay until June 1, 2012.

Reference: April 23 Martin Affidavit, Motion Record of Sino-Forest Corporation, Tab 2, at para. 5

10. E&Y has contractual claims of indemnification against Sino-Forest and its subsidiaries for all relevant years, in respect of its annual audits as well as related to prospectus and note offerings. E&Y also has statutory and common law claims of contribution and/or indemnity against Sino-Forest and its subsidiaries for all relevant years. It appears that similar claims for contribution and indemnity have been or will be made by the defendant underwriters and the Company's former auditors BDO.

Reference: April 23 Martin Affidavit at paras. 13-15, Exhibits H and I, Motion Record of Sino-Forest Corporation, Tabs, 2 2-H, 2-I
Exhibits A-J to the Affidavit of Christina Shiels sworn April 24, 2012, Motion Record of E&Y, Tabs 1A-J

11. The evidence filed by the Company demonstrates clearly that it is not in the interest of its stakeholders for management's time and effort to be diverted from the restructuring and sales process to the Class Actions at this critical time. It is submitted that this would inevitably occur if the Class Actions were permitted to continue against the other defendants.

Reference: Motion Record of Sino-Forest Corporation, Notice of Motion
Tab 1
April 23 Martin Affidavit, Motion Record of Sino-Forest
Corporation, Tab 2, at para. 25

12. It would also be prejudicial to Sino-Forest for the Class Actions to continue without them should the CCAA restructuring fail. The likely result would be to force the company back into the Class Actions at a later stage in the litigation or for there to be a parallel proceeding. This raises the spectre of duplication, inconsistent findings and wasted judicial resources.

13. Given the nature of the gatekeeping claims against E&Y and the other third party defendants, the Company's participation in any Class Action is of central importance. It would be prejudicial to E&Y and the other defendants to proceed without the Company.

PART III - THE LAW

A. The CCAA is Broad and Purposive

14. The CCAA is remedial legislation which should be given a large and liberal interpretation:

The modern approach to interpretation of the Act in accordance with its nature and purpose militates against a narrow interpretation and towards one that facilitates and encourages compromises and arrangements.

Reference: *ATB Financial v. Metcalfe and Mansfield Alternative Investments II Corp.*, [2008] O.J. No. 3164 (C.A.) at paras. 44 and 74-95 [*Metcalfe and Mansfield*], EY Brief of Authorities, Tab 1

15. The Court has broad discretion to stay proceedings on terms it sees fit:

The Court has always had an inherent jurisdiction to grant a stay of proceedings whenever it is just and convenient to do so, in order to control its process or prevent an abuse of that process.

Reference: *Campeau v. Olympia & York Developments*, [1992] O.J. No. 1946 at 4 (Gen. Div.) [*Campeau*], EY Brief of Authorities, Tab 2

16. The Court's jurisdiction in granting a stay in the context of the CCAA extends to both preserving the *status quo* and facilitating a restructuring.

Reference: *Re Stelco Inc.*, [2005] O.J. No. 1171 (C.A.) at para. 36, EY Brief of Authorities, Tab 3

B. The Stay Applies or Should Apply to all Third Parties

17. The Courts have held that, in certain circumstances, these goals may be more properly accomplished by staying all aspects of proceedings where the applicant company is a defendant.

Reference: *Campeau, supra*

Timminco Limited (Re), 2012 ONSC 2515 (S.C.J.) at para. 23 [*Timminco*], EY Brief of Authorities, Tab 4

18. The language of the Initial Order is broad enough to apply to E&Y and the third party defendants. The Stay is not limited to proceedings "against" the Company. The Stay expressly applies to all proceedings "against or in respect of" Sino-Forest and its Business or Property:

17. This Court orders that until and including April 29, 2012, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against or in respect of the Applicant or the Monitor, or affecting the Business or the Property, except with the written consent of the Applicant and the Monitor, or with leave of this Court, and any and all and all Proceedings currently under way against or in respect of the Applicant or affecting the Business or the Property are

hereby stayed and suspended pending further Order of this Court.
[Emphasis Added]

Reference: Initial Order dated March 30, 2012; see also paras. 18-20 and 24

19. The words “in respect of” have been given a very broad interpretation by the Supreme Court of Canada:

The words “in respect of” are, in my opinion, words of the widest possible scope. They import such meanings as “in relation to”, “with reference to”, or “in connection with”. The phrase “in respect of” is probably the widest of any expression intended to convey some connection between two related subject matters.

Reference: *Sarvanis v. Canada*, 2002 SCC 28 at para. 20, EY Brief of Authorities, Tab 5

20. Where an action against the applicant and third parties arises from the same “nucleus of operative facts”, a stay may apply to those third parties.

Reference: *Menegon v. Philip Services Corp.*, [1999] O.J. No. 4080 at para. 29 (S.C.J.), EY Brief of Authorities, Tab 6

21. In *Campeau*, the action stemmed from a series of real estate transactions and shareholder agreements between the plaintiffs and the defendant, Olympia & York. National Bank of Canada was named as a co-defendant as a result of alleged misconduct by its representative on the Board of Directors of the plaintiff Campeau Corporation. The plaintiffs sought damages of \$1 billion.

22. Olympia & York filed for *CCAA* protection and the plaintiffs’ claim was stayed against Olympia & York. National Bank of Canada sought to have the stay apply to it as well. National

Bank argued that Olympia & York was central to the claims made by the plaintiffs and that the action could not proceed without them. The Court agreed:

While there may not be a great deal of prejudice to National Bank in allowing the action to proceed against it, I am satisfied that there is little likelihood of the action proceeding very far or very effectively unless and until Olympia & York – whose alleged misdeeds are the real focal point of the attack on both sets of defendants – is able to participate.

Reference: *Campeau, supra*, at 6

23. This Court recently reached a similar conclusion in *Timminco*. There, the CCAA applicants were also defendants in an uncertified or proposed class proceeding. The co-defendant to the class proceeding was a third party consulting firm (Photon). The plaintiff sought to lift the stay against the applicants and Photon in order to seek leave to appeal to the Supreme Court of Canada from an order that part of the proposed action was statute-barred. In the alternative, the plaintiff sought to have the appeal proceed against the defendant Photon only.

24. Morawetz J. held that it made sense that the stay the proceedings applied to Photon as well as the applicants, and that to do otherwise would be wasteful of judicial resources:

With respect to the claim against Photon, as pointed out by their counsel, it makes no sense to lift the stay only as against Photon and leave it in place with respect to the Timminco Entities. As counsel submits, the Timminco Entities have an interest in both the legal issues and the factual issues that may be advanced if Mr. Penneyfeather proceeds as against Photon, as any such issues as are determined in Timminco's absence may cause unfairness to Timminco, particularly, if Mr. Penneyfeather later seeks to rely on those findings as against Timminco. I am in agreement with counsel's submission that to make such an order would be prejudicial to Timminco's business and property. In addition, I accept the submission that it would also be unfair to Photon to require it to answer Mr. Penneyfeather's allegations in the absence of Timminco as counsel has indicated that Photon will necessarily rely on documents and information produced by Timminco as part of its own defence.

I am also in agreement with the submission that it would be wasteful of judicial resources to permit the class proceedings to proceed as against Photon but not Timminco as, in addition to the duplicative use of court time, there would be the possibility of inconsistent findings on similar or identical factual issues and legal issues. For these reasons, I have concluded that it is not appropriate to lift the stay as against Photon. [Emphasis added]

Reference: *Timminco, supra* at para. 23-24

25. These principles are apt to the Class Actions. It is alleged misdeeds of Sino-Forest and its officers and directors that are at the heart of the plaintiffs' actions. The claims against E&Y and the other advisors are, generally, that they are alleged to have failed in their "gatekeeper" function to detect those misdeeds.

Reference: Proposed Fresh and Amended Statement of Claim, attached as Exhibit B to the Bach Affidavit, Motion Record of the Proposed Representative Plaintiffs, Tab 2

26. All aspects of the Class Actions, including the claims against E&Y, are "in respect of" the Company and arise from the same nucleus of operative facts.

27. In the absence of the Company or any of its officers or directors, the Class Actions cannot be effectively prosecuted or defended. The Class Actions are in their infancy. Certification has not been granted in any of the actions. If the Class Actions were stayed against the Company (and its officers and directors), but not against the other defendants, it could lead to an absurd and prejudicial result for the plaintiffs, the Company and the other defendants.

28. In addition to any prejudice to E&Y in defending the Class Actions, failing to stay the proceedings against it would also affect E&Y's claims for contribution and indemnity against the Company. E&Y has contractual, statutory and common law claims of contribution and indemnity against the Company for the yearly audits as well as the prospectus and note offerings.

EY's claims for indemnification are not limited to engagement letters entered into between it and the Company on or after September 2010.

29. In these circumstances, it is fair and efficient that the stay extend to the third party defendants in the Class Action, including E&Y. It accomplishes the goals of the *CCAA* to maintain the *status quo* and facilitate the restructuring, by focusing the Company's (and the stakeholders') time and resources on the *CCAA* process.

C. The Stay Should Not be Lifted for the Purposes of the Pöyry Settlement

30. The Ontario Plaintiffs seek to have the stay lifted for the purposes of having a settlement with one of the defendants, Pöyry, approved. In the Ontario Class Action, the plaintiff is required to obtain: (a) leave; (b) court approval of a notice process; (c) certification of the action against Pöyry; and (d) an order that the settlement is fair to the proposed class.

31. E&Y filed a factum dated April 19, 2012 in respect of the lifting of the stay for the Pöyry settlement process. E&Y relies upon that factum for the purposes of this motion.

32. Following that factum, counsel for the Ontario Plaintiffs filed a supplementary affidavit of Daniel Bach sworn April 26, 2012, purporting to clarify the answers he gave on cross-examination and in answers to undertakings.

Reference: Affidavit of Daniel Bach sworn April 26, 2012 ("April 26 Bach Affidavit"), Motion Record of the Proposed Representative Plaintiffs, Tab 1

Cross-Examination of Daniel Bach on his Affidavit sworn April 11, 2012, held on April 17, 2012, Responding Brief of E&Y for Motion Returnable April 20, 2012, Tab 1

Answers to Undertakings and Refusals given on Cross-Examination of Daniel Bach on his Affidavit sworn April 11, 2012, held on April 17, 2012 (“Bach Answers to Undertakings”), Responding Brief of E&Y for Motion Returnable April 20, 2012, Tab 2

33. Mr. Bach purported to clarify that the Pöyry settlement agreement was finalized prior to the date of the Initial Order, although:

- (a) It was not executed by all parties until April 2, 2012;

Reference: Bach Answers to Undertakings, Qs 209, 218 at pages 53-54, Responding Brief of E&Y for Motion Returnable April 20, 2012, Tab 2

- (b) A “material term” of the contract was amended on March 26, 2012, following the signature of some parties on March 22, 2012;

Reference: Bach Answers to Undertakings, Qs 211, 212 and 215 at page 54, Responding Brief of E&Y for Motion Returnable April 20, 2012, Tab 2

- (c) Not until after the Initial Order was made (on March 30, 2012 at 4:54pm and 5:51pm respectively) did two (2) signatories sign or indicate that they would sign the materially amended agreement; and

Reference: Bach Answers to Undertakings, Qs 211, 212 and 215 at page 54, Responding Brief of E&Y for Motion Returnable April 20, 2012, Tab 2

April 12 Bach Affidavit at paras. 18-20 and at Tabs G and H, Motion Record of the Proposed Representative Plaintiffs, Tabs 1, 1G-H

- (d) It is entirely unclear why Jonathan Bida signed the agreement on April 2, 2012 on behalf of Koskie Minsky LLP in the absence of Kirk Baert, but did not sign it earlier.

34. In these circumstances, the Ontario Plaintiffs have failed to show why it is in the best interests of stakeholders that the Stay be lifted for the purposes of its unilateral settlement with one of the parties. It also sets an unfair and prejudicial precedent for these *CCAA* proceedings.

PART IV - ORDER REQUESTED

35. E&Y seeks the following order:

- (a) the Initial Order stayed all actions against the third party, E&Y, in the proceedings in which the Applicant is a defendant, including the Ontario Class Action in Court File No. CV-11-431153-00CP and Quebec Class Action in Court File No. 200-06-000132-111;
- (b) in the alternative, the Stay in the Initial Order shall be extended to stay all actions against the third party, E&Y, in the proceedings in which the Applicant is a defendant, including the Ontario Class Action in Court File No. CV-11-431153-00CP and Quebec Class Action in Court File No. 200-06-000132-111;
- (c) all extensions of the Initial Order shall operate in favour of E&Y on the same terms as in (a) or (b) above;
- (d) the Ontario Plaintiff's motion to list the Stay for the purposes of the Poyry settlement is denied; and
- (e) costs of this motion on a partial indemnity basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of May, 2012.



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SCHEDULE "A"

LIST OF AUTHORITIES

1. *ATB Financial v. Metcalfe and Mansfield Alternative Investments II Corp.*, [2008] O.J. No. 3164 (C.A.)
2. *Campeau v. Olympia & York Developments*, [1992] O.J. No. 1946 at 6 (Gen. Div.)
3. *Re Stelco Inc.*, [2005] O.J. No. 1171 (C.A.)
4. *Timminco Limited (Re)*., 2012 ONSC 2515 (S.C.J.)
5. *Sarvanis v. Canada*, 2002 SCC 28
6. *Menegon v. Philip Services Corp.*, [1999] O.J. No. 4080 (S.C.J.)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Companies' Creditors Arrangement Act

R.S.C., 1985, c. C-36

General power of court

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

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

Rights of suppliers

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

- (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
- (b) requiring the further advance of money or credit.
- 2005, c. 47, s. 128.

Stays, etc. — initial application

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

- (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

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

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

- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

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

Restriction

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

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

Stays — directors

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

Exception

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

Persons deemed to be directors

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

- 2005, c. 47, s. 128.

Persons obligated under letter of credit or guarantee

11.04 No order made under section 11.02 has affect on any action, suit or proceeding against a person, other than the company in respect of whom the order is made, who is obligated under a letter of credit or guarantee in relation to the company.

- 2005, c. 47, s. 128.

11.05 [Repealed, 2007, c. 29, s. 105]

Member of the Canadian Payments Association

11.06 No order may be made under this Act that has the effect of preventing a member of the Canadian Payments Association from ceasing to act as a clearing agent or group clearer for a company in accordance with the *Canadian Payments Act* or the by-laws or rules of that Association.

- 2005, c. 47, s. 128, 2007, c. 36, s. 64.

Aircraft objects

11.07 No order may be made under section 11.02 that has the effect of preventing a creditor who holds security on aircraft objects — or a lessor of aircraft objects — under an agreement with a company from taking possession of the aircraft objects

- (a) if, after the commencement of proceedings under this Act, the company defaults in protecting or maintaining the aircraft objects in accordance with the agreement;
- (b) 60 days after the commencement of proceedings under this Act unless, during that period, the company
 - (i) remedied the default of every other obligation under the agreement, other than a default constituted by the commencement of proceedings under this Act or the breach of a provision in the agreement relating to the company's financial condition,
 - (ii) agreed to perform the obligations under the agreement, other than an obligation not to become insolvent or an obligation relating to the company's financial condition, until proceedings under this Act end, and
 - (iii) agreed to perform all the obligations arising under the agreement after the proceedings under this Act end; or
- (c) if, during the period that begins 60 days after the commencement of the proceedings under this Act and ends on the day on which proceedings under this Act end, the company defaults in performing an obligation under the agreement, other than an obligation not to become insolvent or an obligation relating to the company's financial condition.
- 2005, c. 47, s. 128.

Restriction — certain powers, duties and functions

11.08 No order may be made under section 11.02 that affects

- (a) the exercise or performance by the Minister of Finance or the Superintendent of Financial Institutions of any power, duty or function assigned to them by the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* or the *Trust and Loan Companies Act*;
- (b) the exercise or performance by the Governor in Council, the Minister of Finance or the Canada Deposit Insurance Corporation of any power, duty or function assigned to them by the *Canada Deposit Insurance Corporation Act*; or
- (c) the exercise by the Attorney General of Canada of any power, assigned to him or her by the *Winding-up and Restructuring Act*.
- 2005, c. 47, s. 128.

Stay — Her Majesty

11.09 (1) An order made under section 11.02 may provide that

- (a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than
 - (i) the expiry of the order,
 - (ii) the refusal of a proposed compromise by the creditors or the court,
 - (iii) six months following the court sanction of a compromise or an arrangement,
 - (iv) the default by the company on any term of a compromise or an arrangement, or
 - (v) the performance of a compromise or an arrangement in respect of the company; and
- (b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a “province providing a comprehensive pension plan” as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a “provincial pension plan” as defined in that subsection,

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (a)(i) to (v) that may apply.

When order ceases to be in effect

(2) The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(a) or (b) cease to be in effect if

- (a) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under
 - (i) subsection 224(1.2) of the *Income Tax Act*,
 - (ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee’s premium, or employer’s premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, or
 - (iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum
 - (A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
 - (B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a “province providing a comprehensive pension plan” as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a “provincial pension plan” as defined in that subsection; or
- (b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under
 - (i) subsection 224(1.2) of the *Income Tax Act*,
 - (ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee’s premium, or employer’s premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, or
 - (iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum
 - (A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
 - (B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a “province providing a comprehensive pension plan” as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a “provincial pension plan” as defined in that subsection.

Operation of similar legislation

(3) An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(a) or (b), does not affect the operation of

- (a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,
- (b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee’s premium, or employer’s premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, or
- (c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a “province providing a comprehensive pension plan” as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a “provincial pension plan” as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

- 2005, c. 47, s. 128;
- 2009, c. 33, s. 28.

Meaning of “regulatory body”

11.1 (1) In this section, “regulatory body” means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.

Regulatory bodies — order under section 11.02

(2) Subject to subsection (3), no order made under section 11.02 affects a regulatory body’s investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.

Exception

(3) On application by the company and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court’s opinion

- (a) a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply;
- and
- (b) it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.

Declaration — enforcement of a payment

(4) If there is a dispute as to whether a regulatory body is seeking to enforce its rights as a creditor, the court may, on application by the company and on notice to the regulatory body, make an order declaring both that the regulatory body is seeking to enforce its rights as a creditor and that the enforcement of those rights is stayed.

- 1997, c. 12, s. 124;
- 2001, c. 9, s. 576;
- 2005, c. 47, s. 128;
- 2007, c. 29, s. 106, c. 36, s. 65.

11.11 [Repealed, 2005, c. 47, s. 128]

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company’s property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

- (a) the period during which the company is expected to be subject to proceedings under this Act;
 - (b) how the company's business and financial affairs are to be managed during the proceedings;
 - (c) whether the company's management has the confidence of its major creditors;
 - (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
 - (e) the nature and value of the company's property;
 - (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
 - (g) the monitor's report referred to in paragraph 23(1)(b), if any.
- 1997, c. 12, s. 124;
 - 2005, c. 47, s. 128;
 - 2007, c. 36, s. 65.

Assignment of agreements

11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

Exceptions

(2) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

- (a) an agreement entered into on or after the day on which proceedings commence under this Act;
- (b) an eligible financial contract; or
- (c) a collective agreement.

Factors to be considered

(3) In deciding whether to make the order, the court is to consider, among other things,

- (a) whether the monitor approved the proposed assignment;
 - (b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations;
- and
- (c) whether it would be appropriate to assign the rights and obligations to that person.

Restriction

(4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

Copy of order

(5) The applicant is to send a copy of the order to every party to the agreement.

- 1997, c. 12, s. 124;
- 2005, c. 47, s. 128;
- 2007, c. 29, s. 107, c. 36, ss. 65, 112.

11.31 [Repealed, 2005, c. 47, s. 128]

Critical supplier

11.4 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

Obligation to supply

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

Security or charge in favour of critical supplier

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

Priority

(4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

- 1997, c. 12, s. 124;
- 2000, c. 30, s. 156;
- 2001, c. 34, s. 33(E);
- 2005, c. 47, s. 128;
- 2007, c. 36, s. 65.

Removal of directors

11.5 (1) The court may, on the application of any person interested in the matter, make an order removing from office any director of a debtor company in respect of which an order has been made under this Act if the court is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement being made in respect of the company or is acting or is likely to act inappropriately as a director in the circumstances.

Filling vacancy

(2) The court may, by order, fill any vacancy created under subsection (1).

- 1997, c. 12, s. 124;
- 2005, c. 47, s. 128.

Security or charge relating to director's indemnification

11.51 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Restriction — indemnification insurance

(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

- 2005, c. 47, s. 128;
- 2007, c. 36, s. 66.

Court may order security or charge to cover certain costs

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

- (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
- (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
- (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

- 2005, c. 47, s. 128;
- 2007, c. 36, s. 66.

Bankruptcy and Insolvency Act matters

11.6 Notwithstanding the *Bankruptcy and Insolvency Act*,

- (a) proceedings commenced under Part III of the *Bankruptcy and Insolvency Act* may be taken up and continued under this Act only if a proposal within the meaning of the *Bankruptcy and Insolvency Act* has not been filed under that Part; and
- (b) an application under this Act by a bankrupt may only be made with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act* but no application may be made under this Act by a bankrupt whose bankruptcy has resulted from
 - (i) the operation of subsection 50.4(8) of the *Bankruptcy and Insolvency Act*, or
 - (ii) the refusal or deemed refusal by the creditors or the court, or the annulment, of a proposal under the *Bankruptcy and Insolvency Act*.

- 1997, c. 12, s. 124.

Court to appoint monitor

11.7 (1) When an order is made on the initial application in respect of a debtor company, the court shall at the same time appoint a person to monitor the business and financial affairs of the company. The person so appointed must be a trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*.

Restrictions on who may be monitor

(2) Except with the permission of the court and on any conditions that the court may impose, no trustee may be appointed as monitor in relation to a company

- (a) if the trustee is or, at any time during the two preceding years, was
 - (i) a director, an officer or an employee of the company,
 - (ii) related to the company or to any director or officer of the company, or
 - (iii) the auditor, accountant or legal counsel, or a partner or an employee of the auditor, accountant or legal counsel, of the company; or
- (b) if the trustee is
 - (i) the trustee under a trust indenture issued by the company or any person related to the company, or the holder of a power of attorney under an act constituting a hypothec within the meaning of the *Civil Code of Quebec* that is granted by the company or any person related to the company, or
 - (ii) related to the trustee, or the holder of a power of attorney, referred to in subparagraph (i).

Court may replace monitor

(3) On application by a creditor of the company, the court may, if it considers it appropriate in the circumstances, replace the monitor by appointing another trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*, to monitor the business and financial affairs of the company.

- 1997, c. 12, s. 124;
- 2005, c. 47, s. 129.

No personal liability in respect of matters before appointment

11.8 (1) Despite anything in federal or provincial law, if a monitor, in that position, carries on the business of a debtor company or continues the employment of a debtor company's employees, the monitor is not by reason of that fact personally liable in respect of a liability, including one as a successor employer,

- (a) that is in respect of the employees or former employees of the company or a predecessor of the company or in respect of a pension plan for the benefit of those employees; and
- (b) that exists before the monitor is appointed or that is calculated by reference to a period before the appointment.

Status of liability

(2) A liability referred to in subsection (1) shall not rank as costs of administration.

Liability of other successor employers

(2.1) Subsection (1) does not affect the liability of a successor employer other than the monitor.

Liability in respect of environmental matters

(3) Notwithstanding anything in any federal or provincial law, a monitor is not personally liable in that position for any environmental condition that arose or environmental damage that occurred

- (a) before the monitor's appointment; or
- (b) after the monitor's appointment unless it is established that the condition arose or the damage occurred as a result of the monitor's gross negligence or wilful misconduct.

Reports, etc., still required

(4) Nothing in subsection (3) exempts a monitor from any duty to report or make disclosure imposed by a law referred to in that subsection.

Non-liability re certain orders

(5) Notwithstanding anything in any federal or provincial law but subject to subsection (3), where an order is made which has the effect of requiring a monitor to remedy any environmental condition or environmental damage affecting property involved in a proceeding under this Act, the monitor is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

- (a) if, within such time as is specified in the order, within ten days after the order is made if no time is so specified, within ten days after the appointment of the monitor, if the order is in effect when the monitor is appointed or during the period of the stay referred to in paragraph (b), the monitor
 - (i) complies with the order, or
 - (ii) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;
- (b) during the period of a stay of the order granted, on application made within the time specified in the order referred to in paragraph (a) or within ten days after the order is made or within ten days after the appointment of the monitor, if the order is in effect when the monitor is appointed, by
 - (i) the court or body having jurisdiction under the law pursuant to which the order was made to enable the monitor to contest the order, or
 - (ii) the court having jurisdiction under this Act for the purposes of assessing the economic viability of complying with the order; or
- (c) if the monitor had, before the order was made, abandoned or renounced any interest in any real property affected by the condition or damage.

Stay may be granted

(6) The court may grant a stay of the order referred to in subsection (5) on such notice and for such period as the court deems necessary for the purpose of enabling the monitor to assess the economic viability of complying with the order.

Costs for remedying not costs of administration

(7) Where the monitor has abandoned or renounced any interest in real property affected by the environmental condition or environmental damage, claims for costs of remedying the condition or damage shall not rank as costs of administration.

Priority of claims

(8) Any claim by Her Majesty in right of Canada or a province against a debtor company in respect of which proceedings have been commenced under this Act for costs of remedying any environmental condition or environmental damage affecting real property of the company is secured by a charge on the real property and on any other real property of the company that is contiguous thereto and that is related to the activity that caused the environmental condition or environmental damage, and the charge

- (a) is enforceable in accordance with the law of the jurisdiction in which the real property is located, in the same way as a mortgage, hypothec or other security on real property; and
- (b) ranks above any other claim, right or charge against the property, notwithstanding any other provision of this Act or anything in any other federal or provincial law.

Claim for clean-up costs

(9) A claim against a debtor company for costs of remedying any environmental condition or environmental damage affecting real property of the company shall be a claim under this Act, whether the condition arose or the damage occurred before or after the date on which proceedings under this Act were commenced.

- 1997, c. 12, s. 124;
- 2007, c. 36, s. 67.

Courts of Justice Act

R.S.O. 1990, CHAPTER C.43

Stay of proceedings

106. A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just. R.S.O. 1990, c. C.43, s. 106.

**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**

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

PROCEEDING COMMENCED AT TORONTO

**RESPONDING FACTUM OF ERNST & YOUNG LLP
(Motion Re: Stay of Proceedings returnable May 8, 2012)**

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