

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

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 AND
ARRANGEMENT OF SINO-FOREST CORPORATION**

Court of Appeal File No.: C56961
Court of Appeal File No.: M42453
S.C.J. Court File No: CV-11-431153-00CP

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

**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 BANC OF
AMERICA SECURITIES LLC**

Defendants

Proceeding under the Class Proceedings Act, 1992

**FACTUM OF THE CLASS ACTION PLAINTIFFS
(MOTION TO QUASH RETURNABLE JUNE 28, 2013)**

May 10, 2013

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Action

TO: ATTACHED SERVICE LIST

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PART I – THE FACTS

Overview

1. The Ad Hoc Committee of Purchasers of the Applicant's Securities, including the Representative Plaintiffs in the Ontario Class Action (collectively, the "Class Action Plaintiffs") move to quash the Notice of Appeal dated April 18, 2013 (the "Notice of Appeal") in Court File No. C56961 purportedly filed pursuant to subsections 30(3) and 30(5) of the *Class Proceedings Act, 1992* ("CPA") and section 6(1)(b) of the *Courts of Justice Act* (the "CJA") by 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., represented by Kim Orr Barristers P.C. ("Kim Orr") and referred to herein as the "Kim Orr Group."

2. Subsections 30(3) and 30(5) of the CPA do not confer the Kim Orr Group with a right to appeal the order approving the settlement between the Class Action Plaintiffs and Ernst & Young LLP (the "Settlement Approval Order") or with a right to appeal the order dismissing the Kim Orr Group's motion for appointment as representatives of the objectors to the E&Y Settlement (the "Representation Dismissal Order"). First, the Kim Orr Group are not parties and have no rights under subsection 30(3) of the CPA. Second, the Kim Orr Group cannot demonstrate their adequacy as representatives for the class in order to claim a right of appeal under subsection 30(5).

3. Whether the Settlement Approval Order and the Representation Dismissal Order were made under the CCAA or the CPA as they assert, the Kim Orr Group's rights of appeal must be found in those statutes. There is no gap to be filled by the residual appeal rights contained in paragraph 6(1)(b) of the *Courts of Justice Act* ("CJA").

4. Finally, the Kim Orr Group is not without redress for its concerns. That redress, however, is limited to seeking leave to appeal pursuant to section 13 of the CCAA. The Notice of Appeal must therefore be quashed.

Background

5. These proceedings arise out of the downfall of Sino-Forest Corporation (“Sino-Forest”), a forestry company that maintained principal operations in mainland China, after allegations of fraud emerged in June of 2011 against certain founders and high level managers and executives of the company.¹

6. Following those allegations, multiple civil and enforcement proceedings ensued, including several securities class actions in Ontario Courts. In January of 2012, Justice Perell, sitting as case management judge, decided a contested carriage motion between three competing groups of plaintiffs and their counsel.² The Class Action Plaintiffs were granted carriage by Justice Perell and their counsel, Siskinds LLP and Koskie Minsky LLP (“Class Counsel”), were appointed to represent them. A group represented by Kim Orr Barristers P.C. and including certain members of the Kim Orr Group was ranked third of the three competing groups.³

7. After they were granted carriage, the Class Action Plaintiffs took steps to advance their action, including entry into a settlement agreement with one of Sino-Forest’s advisors which was ultimately approved by Courts in Ontario and Quebec.⁴

1 Reasons for Decision of Justice Morawetz dated March 20, 2013 at para 9, Motion Record of Ernst & Young LLP, Tab 4, pp 28 – 29.

2 Reasons for Decision regarding Carriage of Justice Perell dated January 6, 2012, Motion Record of Ernst & Young LLP, Tab 9, pp. 186.

3 Reasons for Decision of Justice Morawetz dated March 20, 2013 at para 11, Motion Record of Ernst & Young LLP, Tab 4, pp. 29.

4 Affidavit of Charles Wright sworn January 10, 2013, at paras 50 – 52, Motion Record of Ernst & Young LLP, Tab 11, pp. 305.

8. In March 2012, Sino-Forest sought insolvency protection under the *CCAA*.⁵ Thereafter, the Class Action Plaintiffs took numerous steps through Class Counsel to represent the interests of the proposed class members and to protect their claims, including:

- (a) Participating in various contested and consent proceedings before the Court supervising the *CCAA* proceedings;
- (b) Obtaining representative status under the Court's order dated May 14, 2012 (the "Claims Procedure Order"), and in June 2012, filing a proof of claim on behalf of all of the members of the class they proposed to represent;
- (c) Participating in a Court ordered mediation in September 2012 pursuant to order dated July 25, 2012 (the "Mediation Order"); and
- (d) Engaging in ongoing bilateral negotiations and a mediation with E&Y which resulted in the E&Y Settlement.⁶

9. The Kim Orr Group, meanwhile, took no action in the *CCAA* proceedings or otherwise to protect even their own interests.⁷

10. In December of 2012, Sino-Forest's stakeholders completed negotiation of a Plan of Arrangement and Compromise (the "Plan"). The Plan provided for a workable framework to resolve the claims of various Sino-Forest stakeholders for the benefit of a successful restructuring of the company. The Plan received overwhelming support from Sino-Forest's creditors when put to a vote under the supervision of the Court. By order dated December 10, 2012 (the "Plan Sanction Order"), Justice Morawetz approved the Plan.⁸

11. On November 29, 2012, the Class Action Plaintiffs entered into a settlement agreement with Ernst & Young LLP ("E&Y") which was conditional on approval through the framework

⁵ Reasons for Decision of Justice Morawetz dated March 20, 2013 at para 12, Motion Record of Ernst & Young LLP, Tab 4, p 29.

⁶ Affidavit of Charles Wright sworn January 10, 2013 at paras 48 - 49, Motion Record of Ernst & Young LLP, Tab 11, pp 98 - 103.

⁷ Reasons for Decision of Justice Morawetz dated March 20, 2013 at para 28, Motion Record of Ernst & Young LLP, Tab 4, p 31.

⁸ Endorsement of Justice Morawetz for Plan Sanction dated December 10 at para 2, Motion Record of Ernst & Young LLP, Tab 7, p 160.

contained in the Plan. It contemplated a \$117 million contribution by E&Y to the Plan for distribution among certain Sino-Forest stakeholders in exchange for a release of all Sino-Forest related claims against E&Y (the “E&Y Settlement”).⁹

12. The E&Y Settlement was crafted as part of the CCAA restructuring and provided releases to E&Y, as well as to Sino-Forest in respect of the claims made by E&Y. As a result, Regional Senior Justice Then assigned the matter to Justice Morawetz, who then exercised the court’s power in his dual capacity as the CCAA and class action judge to approve the E&Y Settlement in March 2013.

The Kim Orr Group

13. Just before the court hearing pertaining to the Plan approval, and immediately following the announcement of the proposed settlement with E&Y, the Kim Orr Group appeared in the CCAA proceedings for the first time. The Kim Orr Group opposed the approval of the Plan.¹⁰

14. Having been unsuccessful in their opposition to the Plan, the Kim Orr Group opposed the E&Y Settlement and sought to be appointed representatives for the objectors to the E&Y Settlement who totalled approximately 0.24% of Sino-Forest’s beneficial shareholders. By way of contrast, over 99% of class members did not object, and two major institutional securities holders of Sino-Forest who collectively controlled more than 25% of Sino-Forest’s shares actively supported the E&Y Settlement, along with the Class Action Plaintiffs.¹¹

9 Reasons for Decision of Justice Morawetz dated March 20, 2013 at para 27, Motion Record of Ernst & Young LLP, Tab 4, p 31.

10 Reasons for Decision of Justice Morawetz dated March 20, 2013 at para 28, Motion Record of Ernst & Young LLP, Tab 4, p 31.

11 Reasons for Decision of Justice Morawetz dated March 20, 2013 at para 33, Motion Record of Ernst & Young LLP, Tab 4, p 32.

15. Despite the Kim Orr Group's opposition, Justice Morawetz granted the Settlement Approval Order and declined to appoint them as representatives for those who objected to the E&Y Settlement.¹²

16. Following the granting of those orders, the Kim Orr Group has:

- (a) Sought leave to appeal to this Court in respect of the granting of the Plan Sanction Order under the CCAA;
- (b) Sought leave to appeal to this Court in respect of the granting of the Settlement Approval Order and the Representation Dismissal Order under the CCAA; and
- (c) Served and filed an appeal directly to this Court from the Settlement Approval Order and the Representation Dismissal Order pursuant to subsections 30(3) and 30(5) of the CPA and section 6(1)(b) of the CJA which the Class Action Plaintiffs are seeking to quash in the within motion.

PART II – ISSUES AND THE LAW

A. The Issue:

17. The CPA provisions on which the Kim Orr Group seeks to rely do not confer a direct right of appeal to this Court upon them, for the following reasons:

- (a) *first*, the orders from which the Kim Orr Group seeks to appeal are orders made under the CCAA, which specifies that appeals from orders made thereunder are to be made to this Court, with leave;
- (b) *second*, even if this were an appeal properly governed by the appeal provisions of the CPA, the CPA does not confer a right on the Kim Orr Group as non-parties to the class action;

¹² Reasons for Decision of Justice Morawetz dated March 20, 2013, Motion Record of Ernst & Young LLP, Tab 4, p 26; Settlement Approval Order of Justice Morawetz dated March 20, 2013, Motion Record of Ernst & Young LLP, Tab 2, p 7; Representation Dismissal Order of Justice Morawetz dated March 20, 2013, Motion Record of Ernst & Young LLP, Tab 3, p 22.

(c) *third*, even if an appeal under subsections 30(3) and 30(5) of the *CPA* is available from these orders upon the appointment of the Kim Orr Group as representatives, the Kim Orr Group cannot satisfy the precondition for exercising that right because its members are clearly not suitable representatives for the class, and are not acting in the interests of the class for whom they seek to pursue the appeal; and

(d) *finally*, since the Kim Orr Group's appeals are brought pursuant to the *CCAA* and/or the *CPA*, the provisions of those statutes govern any appeal they might have and, as such, they have no right of appeal conferred by the *CJA*.

B. The Orders were made under the CCAA

18. The *Approval Decision* leaves no doubt that the Settlement Approval and Representation Dismissal Orders were made under the *CCAA*.¹³ The E&Y Settlement was negotiated for implementation in the context of Sino-Forest's insolvency and through the Plan sanctioned by the Court, and approval was sought to implement the E&Y Settlement through the Plan.¹⁴

19. Two orders of the *CCAA* court have made it clear that the stakeholders' claims, including those of the Kim Orr Group and other class members, are now claims governed by the *CCAA*: (1) the Claims Procedure Order; and (2) the court's order of June 26, 2012 (affirmed by this Court on November 23, 2012) (the "Equity Claims Decision") which defines all claims advanced by shareholders as equity claims within the *CCAA*.¹⁵

13 Reasons for Decision of Justice Morawetz dated March 20, 2013 [*Approval Decision*], Motion Record of Ernst & Young LLP (Motion to Quash Returnable June 28, 2013), Tab 2, pp 26-41.

14 *Ibid* at paras 28-33

15 *Ibid* at para 23, 41 and 72.

20. By virtue of the Court's Claims Procedure Order of May 14, 2012, the only claims extant against E&Y are those for which a proof of claim was filed in accordance with that Order. Claims for which no proof of claim was filed were barred by the Claims Procedure Order.

21. The Class Action Plaintiffs were authorized to and did file a proof of claim on a representative basis, while the Kim Orr Group neither objected to proceeding on that basis nor filed a proof of claim of its own.¹⁶ The claims settled by the E&Y Settlement would thus have been barred by way of the Claims Procedure Order but for the claim filed by the Class Action Plaintiffs. That claim was a claim filed in the CCAA proceeding.

22. Justice Morawetz expressly found that the E&Y Settlement was a part of the CCAA plan process, noting that claims such as those resolved by the E&Y Settlement are regularly compromised and settled in CCAA proceedings.¹⁷

23. Justice Morawetz expressly rejected the argument that the claims of the Kim Orr Group and other shareholders were not subject to compromise under the CCAA and that the E&Y Settlement should be considered solely in the context of the CPA, because those claims cannot be considered in isolation from claims against Sino-Forest.¹⁸

24. Justice Morawetz thus proceeded to evaluate the E&Y Settlement pursuant to the CCAA and to make the Settlement Approval and Representation Dismissal Orders pursuant to the powers conferred by the CCAA in light of the leading authorities such as *ATB Financial*¹⁹ and

¹⁶ *Ibid* at paras 34-35

¹⁷ *Ibid* at para 36

¹⁸ *Ibid* at paras 40 and 72.

¹⁹ *ATB Financial v Metcalf and Mansfield Alternative Investments II Corp*, 2008 ONCA 587, Brief of Authorities Class Action Plaintiffs ("Class Plaintiffs' Auth."), Tab 1.

Nortel,²⁰ and concluded that the settlement was “consistent with the purpose and spirit of the *CCAA*.”²¹

25. Justice Morawetz’s reasons leave no doubt that he considered himself to be exercising jurisdiction conferred by the *CCAA* in granting these orders. They were therefore made in proceedings “conducted and rendered under the *CCAA* within the meaning of s 13 and therefore leave to appeal is required.”²²

26. Section 13 provides that any person dissatisfied with an order made under the *CCAA* may appeal such an order upon obtaining leave to do so.²³ Section 13 clearly defines the rights of appeal from the Settlement Approval Order and the Representation Dismissal Order.

27. It is inappropriate for the Kim Orr Group “to rely on the *CCAA* jurisdiction for the preservation and determination of their claims but seek to avoid its leave requirements for the purpose of an appeal.”²⁴

C. The Kim Orr Group has no appeal rights under *CPA* subsection 30(3).

28. Even if this Court determines that the Settlement Approval Order and/or the Representation Dismissal Order give rise to appeal rights under the *CPA*, this Court has held that a class member (which is what the members of the Kim Orr Group are if this matter is considered in the context of the *CPA*) do not have appeal rights from an order approving a settlement.²⁵

²⁰ *Nortel Networks Corp (Re)*, 2010 ONSC 1708, Class Plaintiffs’ Auth., Tab 8.

²¹ *Approval Decision*, *supra* note 1 at paras 66 and 70.

²² *Hemosol Corp (Re)*, 2007 ONCA 124 at para 3, Class Plaintiffs’ Auth., Tab 6.

²³ *Companies Creditors Arrangement Act*, RSC 1985, c C-36, as amended, (“*CCAA*”), s 13.

²⁴ *Sandhu v MEG Place LP Investment Corp*, 2012 ABCA 91 at para 17, Class Plaintiffs’ Auth., Tab 9.

²⁵ *Dabbs v Sun Life Assurance Co of Canada*, 27 CPC (4th) 243 (CA) [*Dabbs*] at para 11, Class Plaintiffs’ Auth., Tab 3.

29. The *CPA* creates a clear distinction between a representative party and a class member,²⁶ which also has been recognized in the Supreme Court of Canada jurisprudence.²⁷ Class members are not parties to litigation.²⁸

30. Pursuant to subsection 30(3), only a party to a class proceeding has a direct appeal to this Court from a judgment on common issues or an order pursuant to section 24 of the *CPA* on aggregate assessment of monetary relief. The Kim Orr Group, however, are not parties to the class proceedings, and so have no standing to bring such an appeal as of right.

D. The Kim Orr Group cannot gain appeal rights under subsection 30(5)

31. Since the members of the Kim Orr Group are not parties to the proceedings from which the Settlement Approval Order relates, they must obtain leave to step in as a representative party in order to advance an appeal under subsection 30(3). A class member seeking to appeal to this Court under subsection 30(3) must seek and obtain leave; “[a]bsent leave, class members have no standing to bring an appeal to this court under the Act.”²⁹

32. The words “representative party” as they appear in subsection 30(5) must be read to mean a representative plaintiff or defendant appointed by the Court to act as such in a certification order.

33. In order for a representative plaintiff to be appointed, the Court must be satisfied, based on some evidence, that the proposed representative will fairly and adequately represent the

²⁶ *Ibid* at para 7.

²⁷ *Western Canadian Shopping Centres Inc v Dutton*, [2001] 2 SCR 534 at para 39: “the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit.”, Class Plaintiffs’ Auth., Tab 11.

²⁸ *Haddad v Kaitlin Group Ltd*, 2012 ONSC 4515 at para 18, Class Plaintiffs’ Auth., Tab 5.

²⁹ *Dabbs*, *supra* note 13 at para 10.

interests of the class, and that the representative does not have an interest in conflict with the interests of other class members.³⁰ The Kim Orr Group cannot satisfy these requirements.

34. In *Dabbs*, this Court described the considerations applicable to the evaluation of a motion for leave to act as a representative party pursuant subsection 30(5), as being guided by “the best interests of the class and in particular by a consideration whether the class member applying would fairly and adequately represent the interests of the class.”³¹

35. In this context, the Kim Orr Group faces the additional burden of establishing not only that it is an appropriate representative, but that its members will provide superior representation to that provided by the Class Action Plaintiffs, because they are in effect seeking to displace the representation provided by the Class Action Plaintiffs to date.

36. The record is devoid of any evidence supporting those propositions, and in fact it is clear that the opposite is true. The Kim Orr Group has consistently failed to demonstrate any intention or capacity to represent the class:

- (a) Justice Perell denied carriage of the class action to Kim Orr and even ranked Kim Orr last of the 3 groups competing for carriage of the Sino-Forest class action;
- (b) The Kim Orr Group has deferred to the representation of the Class Action Plaintiffs throughout the CCAA proceeding;
- (c) No proof of claim was filed by the Kim Orr Group. The Class Action Plaintiffs filed a proof of claim on behalf of the whole class, including the Kim Orr Group;
- (d) The Kim Orr Group did not seek to participate in the court-ordered mediation in September, 2012;
- (e) Neither Kim Orr nor the Kim Orr Group ever sought any information from Class Counsel as to the class action or the CCAA proceeding, or took any steps in the CCAA proceeding to protect their own interests;

³⁰ *Class Proceedings Act, 1992*, SO 1992, c 6, (“CPA”) at para 5(1)(e).

³¹ *Dabbs*, *supra* note 13 at para 19.

(f) The Kim Orr Group are the only class members who seek to set the settlement agreement aside. According to their opt-out forms, the members of the Kim Orr Group collectively held 3,921,618 Sino shares on June 2, 2011, the day on which the initial Muddy Waters report on Sino-Forest was released. This constitutes approximately 1.6% of the approximately 246 million shares which Sino had outstanding on June 30, 2011 and Sino-Forest's financial statements for the three and six months ended June 30, 2011.

37. In contrast, the Class Action Plaintiffs have vigorously protected the interests of the class.

Class Counsel, on behalf of the Class Action Plaintiffs, has:

- (a) Entered into tolling agreements with the defendants;
- (b) Brought a motion for certification of the Ontario action under the *Class Proceedings Act, 1992*;
- (c) Brought a motion for leave to proceed with statutory claims under Part XXIII.1 of the Ontario *Securities Act*;
- (d) Brought a motion requiring the defendants to deliver a statement of defence and to set a timetable for the hearing of the leave and certification motions;
- (e) Appeared numerous times in the Insolvency Proceeding, including motions: (1) to lift the CCAA stay partially or fully; (2) regarding the claims procedure; (3) to permit a motion to approve a litigation funding arrangement for this action; (4) for a representation order; (5) to effect the Pöyry settlement; (6) to secure access to non-public documents that were relevant to the claims advanced in Canadian actions; and (7) to schedule the mediation.

38. In addition to their failure to demonstrate any intention or capacity to act in a representative capacity, the Kim Orr Group appears to be asserting positions that are contrary to the interests and wishes of the class they seek to represent.

39. In approving the E&Y Settlement as fair and reasonable, Justice Morawetz found that E&Y's \$117 million contribution to the Plan was significant, represented the sole identifiable monetary contribution for distribution to Sino-Forest's stakeholders, and substantially benefited all relevant stakeholders.³² A miniscule portion of the class, including the Kim Orr Group, has objected to the E&Y Settlement. A very substantial segment of the class actively supports it, and

³² *Approval Decision*, *supra* note 1 at paras 60 and 66.

a huge majority has not objected despite being afforded the opportunity to do so.³³ The wishes of this very small group of class members ought not to govern the entire class.³⁴

40. The Kim Orr Group's appeal, if successful, could have the effect of depriving the class members of the very substantial benefits of the E&Y Settlement, and will leave them with protracted and circular litigation that is "risky, expensive or otherwise uncertain of success."³⁵

41. The Kim Orr Group's failure to take any steps to protect even their own interests on fundamental issues such as the filing of claims and attempts to resolve outstanding claims through Court ordered mediation amounts in substance to acquiescence to the representation of the Class Action Plaintiffs.

42. The Kim Orr Group chose, in Justice Morawetz's words, "on their own volition, not to participate in the CCAA process ... [and] relinquished their right to file a claim and take steps, in a timely way, to assert their rights to vote in the CCAA proceeding."³⁶ They are not appropriate representatives for this class.

E. There is no Residual Right of Appeal under the CJA

43. Given the specific appeal rights conferred by the CCAA and, if applicable, the CPA, the general appeal rights contained in the CJA have no application to the appeals that the Kim Orr Group seeks to assert. The operation of paragraph 6(1)(b) of the CJA is excluded by those more specific provisions of those statutes:

³³ *Ibid* at para 33.

³⁴ *Dabbs*, *supra* note 13 at para 19.

³⁵ *Approval Decision*, *supra* note 1 at paras 62 and 70.

³⁶ *Ibid* at para 78.

[...] when a statute creates a specific right of appeal, another statute providing a more general right of appeal, like the *CJA*, cannot be used to create a different right of appeal than that set out in the specific legislation.³⁷

44. Appeals are entirely creatures of statute. The principles of statutory interpretation dictate that where specific appeal rights are conferred on specific persons under certain conditions, as is the case under *CCAA* and, to the extent applicable, the *CPA*, there is no recourse to more general rights of appeal found elsewhere. To find otherwise would defeat the intention of the legislature in inserting those appeal rights.³⁸

45. Rights of appeal in relation to all orders made under the *CCAA* are expressly addressed by sections 13 and 14. All such appeals are to this Court, with leave. Those are the only rights of appeal conferred on the Kim Orr Group.

46. If, however, the Kim Orr Group's assertion that the Settlement Approval Order is in effect a judgment on the common issues or determining aggregate damages is correct, their appeal rights are codified in subsections 30(3) and 30(5) of the *CPA* which they cannot, for the reasons set out above, access.

47. In neither scenario is there a gap which it is necessary to fill by recourse to paragraph 6(1)(b) of the *CJA*.

CONCLUSION

48. The Kim Orr Group's only appeal from the Settlement Approval Order and the Representation Dismissal Order is governed by the *CCAA*, which requires that leave to appeal be obtained. The appeal rights conferred by the *CCAA* are exhaustive of the Kim Orr Group's rights.

³⁷ *Cavanaugh v Grenville Christian College*, 2013 ONCA 139 at para 27, Class Plaintiffs' Auth., Tab 2.

³⁸ *Dabbs*, *supra* note 13 at para 15.

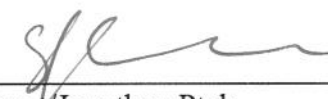
49. Alternatively, the Kim Orr Group cannot assert the appeal rights contained in subsections 30(3) and 30(5) of the *CPA*. None of the members of the Kim Orr Group was a party to the class proceeding in which the Settlement Approval Order was made. The Kim Orr Group has not established and cannot establish that it is a suitable representative for the class, as it must, in order to pursue an appeal pursuant to subsection 30(5).


50. Whether the orders from which the Kim Orr Group seeks to appeal were made pursuant to the *CCAA* or the *CPA*, the applicable statute provides their rights of appeal, to the exclusion of the general rights of appeal contained in the *CJA*. Paragraph 6(1)(b) of the *CJA* accordingly has no application.

51. The Class Action Plaintiffs therefore respectfully request an order quashing the Notice of Appeal in Court of Appeal Court File Number C56961, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th of May 2013

for: 
A. Dimitri Lascaris/Michael Robb

for: 
Kirk Baert/Jonathan Ptak

for: 
Ken Rosenberg/Massimo Starnino

Lawyers for the Class Action Plaintiffs

SCHEDULE “A” - LIST OF AUTHORITIES

1. *ATB Financial v Metcalf and Mansfield Alternative Investments II Corp*, 2008 ONCA 587
2. *Cavanaugh v Grenville Christian College*, 2013 ONCA 139
3. *Dabbs v Sun Life Assurance Co of Canada*, 27 CPC (4th) 243 (CA)
4. *Fulawka v Bank of Nova Scotia*, 2012 ONCA 443
5. *Haddad v Kaitlin Group Ltd*, 2012 ONSC 4515
6. *Hemosol Corp (Re)*, 2007 ONCA 124
7. *Lambert v Guidant Corp* (2009), 72 CPC (6th) 120 (Ont Sup Ct)
8. *Nortel Networks Corp (Re)*, 2010 ONSC 1708
9. *Sandhu v MEG Place LP Investment Corp*, 2012 ABCA 91
10. *W A v St Andrew’s College* (2008), 58 CPC (6th) 350 (Ont Sup Ct)
11. *Western Canadian Shopping Centres Inc v Dutton*, [2001] 2 SCR 534

SECONDARY SOURCES

12. Reasons of Justice Morawetz dated March 20, 2013

SCHEDULE "B" - RELEVANT STATUTES

Courts of Justice Act, RRO 1990, Reg 194

6. (1) An appeal lies to the Court of Appeal from,

[...]

(b) a final order of a judge of the Superior Court of Justice, except an order referred to in clause 19 (1) (a) or an order from which an appeal lies to the Divisional Court under another Act;

[...]

19. (1) An appeal lies to the Divisional Court from,

(a) a final order of a judge of the Superior Court of Justice, as described in subsections (1.1) and (1.2);

[...]

Class Proceedings Act, 1992, SO 1992, c 6

5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

[...]

(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members. 1992, c. 6, s. 5 (1).

[...]

14. (1) In order to ensure the fair and adequate representation of the interests of the class or any subclass or for any other appropriate reason, the court may, at any time in a class proceeding, permit one or more class members to participate in the proceeding.

[...]

24. (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,

(a) monetary relief is claimed on behalf of some or all class members;

(b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and

(c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

[...]

30. (3) A party may appeal to the Court of Appeal from a judgment on common issues and from an order under section 24, other than an order that determines individual claims made by class members.

[...]

(5) If a representative party does not appeal as permitted by subsection (3), or if a representative party abandons an appeal under subsection (3), any class member may make a motion to the Court of Appeal for leave to act as the representative party for the purposes of subsection (3).

Companies' Creditors Arrangement Act, RSC, 1985, c C-36

13. Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

[...]

14. (1) An appeal under section 13 lies to the highest court of final resort in or for the province in which the proceeding originated.

(2) All appeals under section 13 shall be regulated as far as possible according to the practice in other cases of the court appealed to, but no appeal shall be entertained unless, within twenty-one days after the rendering of the order or decision being appealed, or within such further time as the court appealed from, or, in Yukon, a judge of the Supreme Court of Canada, allows, the appellant has taken proceedings therein to perfect his or her appeal, and within that time he or she has made a deposit or given sufficient security according to the practice of the court appealed to that he or she will duly prosecute the appeal and pay such costs as may be awarded to the respondent and comply with any terms as to security or otherwise imposed by the judge giving leave to appeal.

**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 Nos.: C56961/M42453
S.C.J. Court File No: CV-12-9667-00-CL/
CV-11-431153-00CP

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT TORONTO

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