Court of Appeal File Numbers: C56118 / C56115 / C56125
Superior Court File No. CV-12-9667-00CL

COURT OF APPEAL FOR ONTARIO

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

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

FACTUM OF THE RESPONDENT SINO-FOREST CORPORATION

Dated: November 6, 2012

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I. OVERVIEW

1. The former auditors and underwriters of Sino-Forest Corporation ("SFC") appeal from the order of Justice Morawetz dated July 27, 2012. Justice Morawetz held that their claims against SFC for contribution and indemnity, other than for defence costs, arising from claims against them by SFC's shareholders, are "equity claims" as defined in section 2 of the *Companies' Creditors Arrangement Act* (the "CCAA").

2. The CCAA was amended in 2009 to provide expressly for the subordination of equity claims. Subsection 6(8) of the CCAA now prohibits the court from sanctioning a CCAA plan that includes payment on account of equity claims before all creditor claims are paid in full. Section 22.1 now provides that equity claimants should not vote at a meeting of creditors unless the court orders otherwise. And subsection 2(1) now defines "equity claims" to include a claim in respect of shares of a company, including a claim for monetary loss resulting from the

ownership, purchase or sale of shares, as well as contribution or indemnity in respect of such a claim.

3. In classifying the indemnification claims resulting from shareholder claims as equity claims, the 2009 amendments made clear that the classification of indemnity claims under the CCAA depends on the nature of the underlying claim giving rise to the indemnity claim, not on the identity of the claimant, the relationship between the claimant and the debtor giving rise to an indemnification right, or the manner in which the indemnification claim is drafted.

4. SFC is facing massive litigation claims in four class action lawsuits in Canada and the United States. SFC's former auditors and underwriters have been sued in the same lawsuits. The lawsuits assert claims on behalf of both shareholders and holders of SFC's debt securities. Arising from these lawsuits, SFC's former auditors and underwriters have advanced equally large indemnification claims against SFC, seeking to impose on SFC any liability they might have to SFC's shareholders and noteholders as asserted in the four class actions.

5. To assist SFC in developing a CCAA plan that could carry a creditor vote, SFC brought a motion seeking an order that claims by shareholders in the four class actions ("Shareholder Claims") are equity claims under the CCAA. In the same motion, SFC sought an order that contribution and indemnity claims against SFC, arising from claims by shareholders in the four class actions ("Related Indemnity Claims"), also are equity claims under the CCAA. The motion did not seek relief in respect of noteholder claims in the class actions or in respect of indemnification claims arising from noteholder claims.

6. SFC's motion was not opposed by parties representing the plaintiffs in the class actions, nor by SFC's Board of Directors, who also have indemnification claims against SFC in relation to the class actions. The motion was opposed only by SFC's former auditors and underwriters.

7. In making the order requested by SFC, Justice Morawetz stated that the "plain language in the definition of 'equity claim' does not focus on the identity of the claimant. Rather it focuses on the nature of the claim. In this case, it seems clear that the Shareholder Claims led to the Related Indemnity Claims. Put another way, the inescapable conclusion is that the Related Indemnity Claims are being used to recover an equity investment."

8. In reaching this conclusion, Justice Morawetz rejected arguments made by the appellants based on case law prior to the 2009 CCAA amendments, noting that the amendments "came into force after the cases relied upon by the underwriters and the auditors".

9. Justice Morawetz's decision was correct. The plain language of the amended CCAA cannot support the interpretation of the definition of "equity claim" advanced by SFC's former auditors and underwriters.

II. FACTS

10. As set out below, SFC disagrees with the characterization of the facts in the appellants' facta.

A. Background

11. SFC is a forest plantation operator and forest products company. The majority of SFC's plantations are located in the People's Republic of China (the "PRC").

12. On March 30, 2012, Justice Morawetz made an Initial Order granting a stay of proceedings against SFC and certain of its subsidiaries, and appointing FTI Consulting Canada Inc. as Monitor. The stay of proceedings has been extended and continues in force.

> Initial Order dated March 30, 2012, Appeal Book and Compendium of Ernst & Young LLP, Tab 4
>
> Stay Extension Order dated May 31, 2012, Exhibit "A" to the Affidavit of Elizabeth Fimio, sworn September 10, 2012 (the "Second Fimio Affidavit"), Compendium of Sino-Forest Corporation, Tab 2, p. 256

13. Noteholders holding in excess of $1,296,000,000, and approximately 72% of SFC's total noteholder debt of approximately $1.8 billion, have executed written support agreements to support SFC's proposed plan of compromise and reorganization (the "Plan"). There is significant support for SFC to emerge from CCAA protection as a going concern to maximize value for all stakeholders with an economic interest in SFC. Pursuant to the Plan, the recoverable value will be distributed to the Noteholders and certain other holders of debt claims. Subordinated "equity claims" will not receive any recovery given that the debt claims will not be paid in full.

> Press Release dated June 8, 2012, Exhibit "E" to the Affidavit of Elizabeth Fimio sworn June 8, 2012 (the "Fimio Affidavit"), Compendium of Sino-Forest Corporation, Tab 1, p. 250

B. The Urgent Need to Have These Proceedings Successfully Completed

14. Since filing for protection under the CCAA, SFC has repeatedly advised that the CCAA proceedings must be completed as soon as possible. SFC is running out of cash and its business is deteriorating. In its pre-filing report, the Monitor said that "Sino-Forest's state of affairs is such that it cannot maintain a status quo for much longer."

> Pre-Filing Report of the Monitor dated March 30, 2012, Compendium of Evidence of the Underwriters Named in Class Actions (Motion Seeking Leave to Appeal) incorporated by reference in the Appeal Book and Compendium of the Underwriters, Tab 1, p. 1068 at para. 21

Endorsement of Justice Morawetz dated July 27, 2012, Appeal Book and Compendium of the Underwriters, Tab 3, p. 23 at para. 7

C. Decision Under Appeal Not Premature

15. From the outset of SFC's CCAA proceeding, it has been clear that the Court would be required to determine if the indemnification claims of SFC's former auditors and underwriters arising from the Shareholder Claims are equity claims as defined in the CCAA.

Endorsement of Justice Morawetz dated July 27, 2012, Appeal Book and Compendium of the Underwriters, Tab 3, p. 34 at paras. 71-73

16. By the time the motion was argued, Justice Morawetz had made a Claims Procedure Order, as a result of which proofs of claim were filed by the former auditors and underwriters.

Endorsement of Justice Morawetz dated July 27, 2012, Appeal Book and Compendium of the Underwriters, Tab 3, at paras. 30, 37, 43 & 75

Proof of Claim regarding Sino-Forest Corporation, dated June 19, 2012, Portion of Exhibit "A" to the Affidavit of Iryna Dubinets, sworn June 22, 2012, Appeal Book and Compendium of BDO Limited, Tab 7

Proof of Claim of Ernst & Young LLP, Exhibit "A" and Schedules "A1" and "A2" to the Affidavit of Christina Shiels [the "Shiels Affidavit"], sworn June 21, 2012, Appeal Book and Compendium of Ernst & Young LLP, Tab 7

17. Justice Morawetz concluded that the issues to be resolved on the motion did not depend on the validity or quantification of any claims filed by the former auditors or underwriters, and that the issues on the motion were not premature. As the supervising judge he was uniquely positioned to make that determination, and his decision on this point should not be disturbed.

Endorsement of Justice Morawetz dated July 27, 2012, Appeal Book and Compendium of the Underwriters, Tab 3, p. 35 at para. 75

D. Class Action Claims Asserted against SFC

18. As indicated above, SFC has been sued in four class actions, with other parties also sued in each of the actions. Each action is brought on behalf of both shareholders and noteholders, and each action alleges misrepresentations in connection with SFC's public disclosures. The four actions are described below.[1] The order under appeal was not opposed by parties representing plaintiffs in the class actions.

1. Ontario

19. By Fresh as Amended Statement of Claim dated April 26, 2012, the plaintiffs in the Ontario class action (the "Ontario Class Action") assert various claims against SFC, its current and former officers and directors, Ernst & Young ("E&Y"), BDO Limited ("BDO"), Poyry (Beijing) Consulting Company Limited ("Poyry") and SFC's underwriters (the "Underwriters").

> Fresh as Amended Statement of Claim (Ontario), Exhibit "A" to the Fimio Affidavit, Compendium of Sino-Forest Corporation, Tab 1, p. 3

20. The Ontario Class Action plaintiffs seek approximately $9.2 billion against SFC and the other defendants on behalf of SFC's shareholders and noteholders during the proposed class period for damages arising from the purchase of SFC's shares and notes at allegedly inflated prices as a result of alleged misrepresentations contained within SFC's public filings.

> Fresh as Amended Statement of Claim (Ontario), Exhibit "A" to the Fimio Affidavit, Compendium of Sino-Forest Corporation, Tab 1, p. 3

2. Quebec

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[1] The Quebec and New York class action claims have been amended since the motion under appeal was argued. The factum has been prepared based on the pleadings that were before Justice Morawetz. The amendments are not material to the issues under appeal.

21. By action filed on June 9, 2011, the plaintiff commenced a class action in Quebec (the "Quebec Class Action") against SFC, its current and former officers and directors, E&Y, and Poyry.

> Motion to Authorize the Bringing of a Class Action and to Obtain the Status of Representative (the "Quebec Claim"), Exhibit "B" to the Fimio Affidavit, Compendium of Sino-Forest Corporation, Tab 1, p. 132

22. The Quebec Class Action does not specify the quantum of damages sought, instead stating in more general terms that the petitioner seeks "damages in an amount equal to the losses that it and the other Members of the Group suffered as a result of purchasing or acquiring the securities of Sino at inflated prices during the Class Period" as a result of alleged misrepresentations contained within SFC's public filings. The Quebec Class Action is brought on behalf of shareholders and noteholders.

> Quebec Claim, Exhibit "B" to the Fimio Affidavit, Compendium of Sino-Forest Corporation, Tab 1, p. 132

3. Saskatchewan

23. By Statement of Claim dated December 1, 2011, the plaintiff commenced a class action in Saskatchewan (the "Saskatchewan Class Action") against SFC, Allen Chan and David Horsley.

> Statement of Claim dated December 1, 2011, Exhibit "C" to the Fimio Affidavit, Compendium of Sino-Forest Corporation, Tab 1, p. 154

24. The Saskatchewan Class Action does not specify the quantum of damages sought, instead stating in more general terms that the plaintiff seeks "aggravated and compensatory damages against the Defendants in an amount to be determined at trial" on behalf of SFC's shareholders

and noteholders during the proposed class period for damages arising from the purchase of SFC's shares and notes at allegedly inflated prices as a result of alleged misrepresentations contained within SFC's public filings.

> Statement of Claim dated December 1, 2011, Exhibit "C" to the Fimio Affidavit, Compendium of Sino-Forest Corporation, Tab 1, p. 154

4. New York

25. By a Complaint dated January 27, 2012, the plaintiffs commenced a class action in the Supreme Court of the State of New York (the "New York Class Action") against SFC, Allen Chan, David Horsley, Kai Kit Poon, a subset of the Underwriters (Banc of America Securities LLC and Credit Suisse Securities (USA) LLC), E&Y and Ernst & Young Global Limited.

> Verified Class Action Complaint dated January 27, 2012, Exhibit "D" to the Fimio Affidavit, Compendium of Sino-Forest Corporation, Tab 1, p. 198

26. On behalf of SFC's shareholders and noteholders, the plaintiffs in the New York Class Action seek damages arising from the purchase of SFC's shares and notes at allegedly inflated prices.

> Verified Class Action Complaint dated January 27, 2012, Exhibit "D" to the Fimio Affidavit, Compendium of Sino-Forest Corporation, Tab 1, p. 198

E. Indemnity Claims Asserted against SFC

27. As set out above, the plaintiffs in the Class Actions have named parties other than SFC as defendants, including the Underwriters and SFC's former auditors, E&Y and BDO. The following table identifies which third parties have been named as defendants in the Class Actions:

Claims Against Third Parties

	ONT	QUE	SASK	NY
E&Y LLP	X	X	-	X
BDO	X	-	-	-
Underwriters	X	-	-	X

28. The corresponding claims asserted by each of these third parties against SFC are described below.

1. Ernst & Young

29. E&Y filed a proof of claim for approximately $7.154 billion CDN and $1.805 billion US for indemnification arising from the Class Action plaintiffs' claims in the actions in which it is named as a defendant.

> Proof of Claim of Ernst & Young, Exhibit "A" to the Shiels Affidavit, Appeal Book and Compendium of Ernst & Young LLP, Tab 7, p. 120

30. Although E&Y's claim corresponds to the Class Action plaintiffs' claims against E&Y, E&Y has attempted to characterize its proof of claim as both claims for indemnity as well as "direct" claims against SFC for breach of contract, negligent misrepresentation, fraudulent misrepresentation and reputational loss.

> Proof of Claim of Ernst & Young, Exhibit "A" to the Shiels Affidavit, Appeal Book and Compendium of Ernst & Young LLP, Tab 7, p. 131 at para. 2

31. Other than a $10 million claim for damage to reputation (which is unaffected by the order under appeal), E&Y's purported "direct" claims against SFC are in fact more accurately described as indemnification claims disguised as direct claims. Any damages that E&Y claims under these causes of action are limited to the damages it would suffer as a result of a successful

damages award in favour of the Class Action plaintiffs against E&Y. E&Y's proof of claim makes specific reference to each of the Class Actions and the damages sought against E&Y in each Class Action. This is the essence of a contribution or indemnity claim.

> Proof of Claim of Ernst & Young, Exhibit "A" to the Shiels Affidavit, Appeal Book and Compendium of Ernst & Young LLP, Tab 7, p. 134 at para. 11

2. BDO

32. BDO has asserted indemnification claims against SFC for approximately $8.2 billion resulting from the plaintiffs' claims against BDO in the Ontario Class Action. BDO's proof of claim makes specific reference to the Ontario Class Action (the only Class Action in which it was named as a defendant) and the damages sought against BDO by the Ontario Class Action plaintiffs.

> Proof of Claim of BDO Limited, Exhibit "A" to the Affidavit of Iryna Dubinets, sworn June 22, 2012, Appeal Book and Compendium of BDO Limited, Tab 7, p. 100 at para. 6

3. Underwriters

33. The Underwriters have asserted indemnification claims against SFC resulting from the Class Action plaintiffs' claims against the Underwriters in the Ontario and New York Class Actions. While the Underwriters' proofs of claim had been filed with the Monitor, the Underwriters chose not to file their proofs of claim before Justice Morawetz on the motion. The proofs of claim of the Underwriters are similar to those filed by E&Y and BDO.

4. Officers and Directors

34. Contrary to the assertions contained in paragraph 65 of E&Y's Factum, SFC's current and former officers and directors filed indemnity claims related to the Class Actions, which are

equally affected by the order under appeal. The order provides that *all* claims for contribution or indemnity related to or arising from the Shareholder Claims are "equity claims" as defined by the CCAA. The directors and officers did not oppose the order.

> Order of Justice Morawetz dated July 27, 2012, Appeal Book and Compendium of the Underwriters, Tab 2

F. Findings and Conclusions of Justice Morawetz

35. In his reasons granting the relief requested by SFC, Justice Morawetz correctly concluded that the Shareholder Claims and the Related Indemnity Claims are clearly equity claims. In reaching the latter conclusion, Justice Morawetz also held that "Shareholder Claims underlie the Related Indemnity Claims."

> Endorsement of Justice Morawetz dated July 27, 2012, Appeal Book and Compendium of the Underwriters, Tab 3, p. 35 at para. 77

36. Following the 2009 amendments to the CCAA, section 2 now includes the following definitions:

> "equity claim" means a claim that is in respect of an equity interest, including a claim for, among others, [...]
>
> > (d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, [...]
> >
> > (e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d);
>
> "equity interest" means
>
> > (a) in the case of a company other than an income trust, a share in the company — or a warrant or option or another

> right to acquire a share in the company — other than one that is derived from a convertible debt [...]
>
> *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, as amended, s. 2 [emphasis added]

37. Justice Morawetz discussed the effect of the 2009 amendments to the CCAA:

> [78] In my view, the CCAA Amendments have codified the treatment of claims addressed in the pre-amendment cases and have further broadened the scope of equity claims.
>
> ...
>
> [87] It has been argued that the amendments did nothing more than codify pre-existing common law. In many respects, I accept this submission. However I am unable to accept this submissions when considering s. 2(1) of the CCAA, which provides clear and specific language directing that "equity claim" means a claim that is in respect of an equity interest, including a claim for, among other things, "(e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d)".
>
> [88] Given that a shareholder claim falls within s. 2(1)(d), the plain words of subsections (d) and (e) lead to the conclusions that I have set out above.
>
> [89] I fail to see how the very clear words of subsection (e) can be seen to be a codification of existing law. To arrive at the conclusion put forth by E&Y, BDO and the Underwriters would require me to ignore the specific words that Parliament has recently enacted.
>
> [90] I cannot agree with the position put forth by the Underwriters or by the auditors on this point. The plain wording of the statute has persuaded me that it does not matter whether an indemnity claim is seeking no more than allocation of fault and contribution at common law, or whether there is a free-standing contribution and indemnity claim based on contracts.
>
> Endorsement of Justice Morawetz dated July 27, 2012, Appeal Book and Compendium of the Underwriters, Tab 3, p. 35 at paras. 78, 87-90

38. Justice Morawetz determined that the plain language in the definition of "equity claim" does not focus on the identity of the claimant, but rather "focuses on the nature of the claim."

Justice Morawetz determined that in this case "it seems clear that the Shareholder Claims led to the Related Indemnity Claims" and that "the inescapable conclusion is that the Related Indemnity Claims are being used to recover an equity investment."

> Endorsement of Justice Morawetz dated July 27, 2012, Appeal Book and Compendium of the Underwriters, Tab 3, p. 35 at para. 79

39. Justice Morawetz concluded that it would be "totally inconsistent to arrive at a conclusion that would enable any of E&Y, BDO or the Underwriters, through a claim for indemnification, to be treated as creditors when the underlying actions of the shareholders cannot achieve the same status. To hold otherwise would indeed provide an indirect remedy where a direct remedy is not available."

> Endorsement of Justice Morawetz dated July 27, 2012, Appeal Book and Compendium of the Underwriters, Tab 3, p. 35 at para. 82

40. Justice Morawetz recognized that the legal construction of the claims of E&Y, BDO and the Underwriters as against SFC is different than the claims of the shareholders against SFC, but concluded that the distinction is not reflected in the language of the CCAA "which makes no distinction based on the status of the party but rather focuses on the substance of the claim."

> Endorsement of Justice Morawetz dated July 27, 2012, Appeal Book and Compendium of the Underwriters, Tab 3, p. 36 at para. 85

41. Justice Morawetz noted that the cases relied upon by E&Y, BDO and the Underwriters predated the CCAA statutory amendments, and were superseded by the clear language of the 2009 amendments enacted in paragraphs 2(1)(d) and 2(1)(e) of the CCAA.

> Endorsement of Justice Morawetz dated July 27, 2012, Appeal Book and Compendium of the Underwriters, Tab 3, p. 36 at paras. 86-88

G. Status of the SFC CCAA

42. On August 31, 2012, Justice Morawetz granted a Meeting Order to enable SFC to hold a meeting of creditors and send to creditors a proposed CCAA Plan and other meeting materials. As this Court permitted after granting leave to appeal, the meeting materials were mailed to creditors on October 24, 2012 and the meeting has been scheduled for November 29, 2012. The Plan is premised on the correctness of the order of Justice Morawetz that is under appeal.

III. LAW AND ARGUMENT

A. Standard of Review

43. The issues considered by Justice Morawetz required him to apply a legal standard to a set of facts and therefore are questions of mixed fact and law. As the issue is not purely a matter of statutory interpretation, a "less searching standard of review is appropriate".

> *Nolan v. Ontario (Superintendent of Financial Services),* 2007 ONCA 416 at para. 33, Brief of Authorities of Sino-Forest Corporation, Tab 1

44. Justice Morawetz has supervised SFC's CCAA proceeding since SFC filed for creditor protection. This Court and other appellate courts have recognized that judges acting in a supervisory role under the CCAA, and particularly experienced commercial list judges, are entitled to great deference. The decisions of CCAA judges are only to be interfered with in the event of unreasonable acts, errors in principle or manifest errors. Courts have also stated that an appellate court should exercise its powers sparingly as a supervising CCAA judge has an ongoing management process similar to that of a judge making orders during a trial.

> *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.) at para. 63, Brief of Authorities of Sino-Forest Corporation, Tab 2
>
> *Canadian Union of Public Employees v. Royal Crest Lifecare Group Inc. (Trustee of)* (2004), 181 O.A.C. 115 at para. 23, Brief of Authorities of Sino-Forest Corporation, Tab 3

Liberty Oil & Gas Ltd. (Re), 2003 ABCA 158 at para. 20, Brief of Authorities of Sino-Forest Corporation, Tab 4

45. Justice Morawetz's decision is correct and the appellants' appeal must be dismissed even if the Court applies a correctness standard to its review.

B. Background to CCAA Amendments

46. Prior to the 2009 amendments to the CCAA, courts regularly recognized that there is a fundamental difference between shareholder equity claims and debt claims as they relate to an insolvent entity. The rule – which one court described as the "fundamental corporate principle" – is that "[s]hareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditors' claims are not being paid in full." Shareholders have no economic interest in an insolvent enterprise.

Blue Range Resource Corp. (Re.), [2000] 4 W.W.R. 738 (Alta. Q.B.) at para. 29, Brief of Authorities of Sino-Forest Corporation, Tab 5

Stelco Inc. (Re) (2006), 14 B.L.R. (4th) 260 (Ont. S.C.J.) at paras. 15-17, Brief of Authorities of Sino-Forest Corporation, Tab 6

Royal Bank of Canada v. Central Capital Corp. (1996), 132 D.L.R. (4th) 223 (Ont. C.A.), per Weiler J.A, at para. 67, Brief of Authorities of Sino-Forest Corporation, Tab 7

47. The basis for this differentiation flows from the fundamentally different nature of debt and equity investments. Shareholders have unlimited upside potential when purchasing shares. Creditors usually have no corresponding upside potential. Their expectation is to be repaid with whatever interest was negotiated. Justice Pepall, as she then was, stated the underlying rationale as follows:

> This principle is premised on the notion that shareholders are understood to be higher risk participants who have chosen to tie their investment to the fortunes of the corporation. In contrast, creditors choose a lower level of exposure, the assumption being

> that they will rank ahead of shareholders in an insolvency. Put differently, amongst other things, equity investors bear the risk relating to the integrity and character of management.
>
> *Nelson Financial Group Ltd. (Re)*, 2010 ONSC 6229 at para. 25 [*Nelson Financial*], Brief of Authorities of Sino-Forest Corporation, Tab 8

48. As a result, courts have subordinated equity claims and denied such claims a vote in CCAA plans. Even if a shareholder commences an action seeking recovery of damages, a shareholder cannot through a lawsuit convert an equity interest into a debt interest.

> *Blue Range Resource Corp. (Re), supra,* Brief of Authorities of Sino-Forest Corporation, Tab 5
>
> *Stelco Inc. (Re)* (2006), *supra,* Brief of Authorities of Sino-Forest Corporation, Tab 6
>
> *EarthFirst Canada Inc. (Re),* 2009 ABQB 316, Brief of Authorities of Sino-Forest Corporation, Tab 9
>
> *Nelson Financial, supra,* Brief of Authorities of Sino-Forest Corporation, Tab 8

49. Case law interpreting the CCAA prior to the 2009 amendments was inconsistent in the treatment of indemnification claims. In some cases indemnification claims arising from equity claims were treated as equity claims and subordinated, whereas in other cases indemnification claims were not subordinated. In those latter instances, this led to the peculiar result that a shareholder was entitled to obtain indirectly – through indemnification – what he could not obtain directly.

> *ROI Fund Inc. v. Gandi Innovations Ltd.,* 2011 ONSC 5018 [*Return on Innovation*], Brief of Authorities of Sino-Forest Corporation, Tab 10
>
> *ROI Fund Inc. v. Gandi Innovations Ltd.*, 2012 ONCA 10 [*Return on Innovation* (C.A.)], Brief of Authorities of Sino-Forest Corporation, Tab 11
>
> *Blue Range Resource Corp. (Re), supra,* Brief of Authorities of Sino-Forest Corporation, Tab 5
>
> *EarthFirst Canada Inc. (Re), supra,* Brief of Authorities of Sino-Forest Corporation, Tab 9
>
> *National Bank v. Merit Energy,* 2001 ABCA 138, Brief of Authorities of Sino-Forest Corporation, Tab 12

C. The 2009 Amendments Clarify Treatment of Contribution or Indemnity Claims

50. The 2009 amendments sought to provide for the uniform treatment of contribution and indemnification claims under the CCAA arising from equity claims by adding the following language:

> "equity claim" means a claim that is in respect of an equity interest, including a claim for, among others, [...]
>
> > (d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, [...]
> >
> > (e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d);
>
> *CCAA*, s. 2 [emphasis added]

51. Subsection 6(8) of the CCAA prohibits a distribution to equity claimants prior to payment in full of all non-equity claims:

> 6(8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.
>
> *CCAA*, ss. 6(8)

52. Under section 22.1 of the CCAA, equity claimants are prohibited from voting on a plan, unless the court orders otherwise:

> 22.1 Despite subsection 22(1), creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise.

CCAA, s. 22.1

D. Clear Wording of CCAA: Related Indemnity Claims Are Equity Claims

53. The relevant provisions of the CCAA are to be interpreted as follows:

> ...the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 21, Brief of Authorities of Sino-Forest Corporation, Tab 13

54. Reading the definition of equity claim in its context, the ordinary meaning consistent with the scheme and object of the CCAA, and supported by the intention of Parliament, demonstrates that the Related Indemnity Claims are equity claims. That is because:

(a) the underlying shareholder claims are "equity claims";

(b) the underwriter and auditor claims are claims for "contribution or indemnity"; and

(c) the underwriter and auditor claims are "in respect of" the Shareholder Claims.

(a) The Shareholder Claims are "Equity Claims"

55. The new equity claim language in the CCAA has been described by this Court as "clear and broad".

> *Nelson Financial, supra,* at para. 27, Brief of Authorities of Sino-Forest Corporation, Tab 8

56. Paragraph (d) of the "equity claim" definition in the CCAA captures the underlying Shareholder Claims. That is because they are claims for a "monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the

annulment, of a purchase or sale of an equity interest". It is alleged, among other things, that the class members purchased their securities at artificially high prices as a result of the alleged misrepresentations.

57. The Class Action plaintiffs did not dispute this characterization, did not oppose the order, and did not appeal.

(b) The Related Indemnity Claims are also Claims for "Contribution or Indemnity"

58. The definition of "equity claim" is not limited to direct claims by shareholders relating to their shareholdings. It also captures claims that would result in indirect recovery to shareholders through claims for contribution and indemnity. Paragraph (e) of the definition expressly captures as an equity claim a claim of "contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d)".

59. By definition, claims for "contribution or indemnity" are claims by one party against another. Usually, a claim of contribution or indemnity arises through claims among joint tortfeasors. This type of contribution or indemnity claim is contemplated by the *Negligence Act*, R.S.O. 1990:

> A tortfeasor may recover contribution or indemnity from any other tortfeasor who is, or would if sued have been, liable in respect of the damage to any person suffering damage as a result of a tort...
>
> *Negligence Act*, R.S.O. 1990, c. N-1, s. 2

60. And indeed, in addition to contractual claims of indemnity that are asserted by the appellants, E&Y and BDO specifically seek contribution and indemnity pursuant to the

Negligence Act from SFC in relation to the Shareholder Claims. The Underwriters also seek statutory rights of contribution and indemnity which are likely founded in the *Negligence Act.*

61. The fact that the appellants' proofs of claim seek contribution and indemnity pursuant to the *Negligence Act* is an express admission by each of the appellants that their proof of claim is made as a tortfeasor seeking contribution and indemnity from another tortfeasor (SFC) in respect of the damages allegedly suffered by the Class Action plaintiffs as a result of misrepresentations allegedly contained in SFC's public documents.

62. As noted by Justice Morawetz, there is no distinction in the CCAA between the source of any claim for contribution or indemnity, whether by statute, common law, contractual or otherwise. To the contrary, the legal characterization of a contribution or indemnity claim in an insolvency proceeding depends solely on the characterization of the primary claim upon which contribution or indemnity is sought. Applying this test, the Court in *Return on Innovation* recently characterized the contractual indemnification claims of directors and officers in respect of an equity claim as "equity claims". The Court of Appeal affirmed the Court's characterization and denied leave to appeal.

> *CCAA*, s. 2
>
> *Return on Innovation, supra* at paras. 52-62, Brief of Authorities of Sino-Forest Corporation, Tab 10
>
> *Nelson Financial, supra* at para. 26, Brief of Authorities of Sino-Forest Corporation, Tab 8

63. While certain of the appellants have artfully pled their claims so they appear as independent claims, the damages sought against SFC are undeniably the damages that are sought against the appellants by the Class Action plaintiffs. A creditor cannot, through artful drafting, change what is in substance an indemnification claim into an independent "creditor" claim.

Non-Marine Underwriters, Lloyds of London v. Scalera, [2000] 1 S.C.R. 551 at para. 82, Brief of Authorities of Sino-Forest Corporation, Tab 14

64. The fact that the Related Indemnity Claims are "contribution or indemnity claims *in respect of* a claim referred to in any of paragraphs (a) to (d)" is made all the more evident by the broad meaning ascribed by courts to the phrase "in respect of".

65. The phrase "in respect of" has been given a very wide interpretation in the case law. The Supreme Court of Canada has interpreted "in respect of" on numerous occasions and in different contexts to be words of the broadest scope conveying some link between two subject matters. One of the oft-cited quotes on this issue is from Justice Dickson (as he then was):

> The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meaning 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. [emphasis added]

Nowegijick v. The Queen, [1983] 1 S.C.R. 29 at para. 30, Brief of Authorities of Sino-Forest Corporation, Tab 15; *Markevich v. Canada*, 2003 SCC 9 at para. 26, Brief of Authorities of Sino-Forest Corporation, Tab 16; *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743 at paras. 15-17, Brief of Authorities of Sino-Forest Corporation, Tab 17

66. The wide scope attributed to "in respect of" has also been adopted by this Court in different contexts, as well as by other appellate courts in Canada.

Nastamagu v. Axa Insurance (Canada) (1997), 148 D.L.R. (4th) 244 (Ont. C.A.) at para. 10, Brief of Authorities of Sino-Forest Corporation, Tab 18; *Arsenault v. Dumfries Mutual Insurance Co.* (2002), 152 O.A.C. 224 at paras. 16-17, Brief of Authorities of Sino-Forest Corporation, Tab 19; *R. v. Clark*, 2000 ABCA 246 at para. 7, Brief of Authorities of Sino-Forest Corporation, Tab 20; *Johal v. Harstad* (1988), 47 B.C.L.R. (2d) 61 (C.A.), Brief of Authorities of Sino-Forest Corporation, Tab 21

67. Therefore, in order to fall within paragraph (e) of the definition of equity claim, the contribution or indemnity claims advanced by the appellants need only have "some connection" or "some link" to the Shareholder Claims, which clearly fall within paragraph (d).

68. As the appellants' claims for contribution and indemnity arise from the very same Shareholder Claims for the very same damages suffered as a result of purchasing the very same shares at the very same alleged inflated prices due to the very same alleged misrepresentations in the very same public filings, it is undeniable that the appellants' claims for contribution or indemnity, at an absolute minimum, have "some connection" or "some link" to the Shareholder Claims and are accordingly equally equity claims pursuant to the clear language of the CCAA.

E. The Appellants' Proposed Interpretation is Tortuous

69. In contrast to the interpretation adopted by SFC, the appellants advance an interpretation of the definition of equity claim that is commercially absurd and inconsistent with the language chosen by Parliament. The appellants argue that a "claim" under the definition of "equity claim" can only be a claim by an equity holder against the debtor and cannot in any way relate to a claim against a third party. To support this argument, the appellants rely upon the interpretation section of the CCAA in which "claim" is defined with reference to a claim provable within section 2 of the *Bankruptcy & Insolvency Act* (the "BIA"), and upon an argument that the relevant consideration is the identity of the claimant and not the substance of the claim, even though this notion is not supported by the language of the CCAA.

CCAA, s. 2

70. The appellants' position appears to be that to fall within paragraph (e), a claim for contribution or indemnity must be a claim made by an equity holder against the debtor for a

claim by an equity holder that was brought against the debtor. In other words, this amendment is said to capture (a) shareholder claims for loss in value to their equity interests; and (b) the very unusual situation where a company would *also* indemnify shareholders for losses that they sustain (presumably as belt and suspenders to their rights as shareholders). With respect this argument is flawed for numerous reasons.

71. First, the appellants ignore the words chosen by Parliament. Paragraph (e) clearly states that the contribution or indemnity claim need only be *in respect of* a claim referred to in paragraphs (a) through (d). As discussed above, *in respect of* only requires some minimal connection between the claims. The appellants' interpretation ignores this inconvenient fact.

72. There is also no indication in the definition of "equity claim", or any other provision in the CCAA, that the determinative consideration is the identity of the claimant, as opposed to the substance of the claim. In fact, the clear language of the provision supports the opposite conclusion.

73. In addition, the interpretation advanced by the appellants ignores that paragraph (e) captures "contribution or indemnity" in respect of equity claims. The ordinary legal definition of "contribution", taken from Black's Law Dictionary, demonstrates a contrary intention to that advanced by the appellants:

> 1. The right that gives one of several persons who are liable on a common debt the ability to recover proportionately from each of the others when that one person discharges the debt for the benefit of all; the right to demand that another who is jointly responsible for a third party's injury supply part of what is required to compensate the third party... 2. One tortfeasor's right to collect from joint tortfeasors when – and to the extent that – the tortfeasor has paid more than his or her proportionate share to the injured party, the shares being determined as percentages of causal fault...

> 3. The actual payment by a joint tortfeasor of a proportionate share of what is due…
>
> Bryan A. Garner, ed., *Black's Law Dictionary*, 9th ed. (2009), Brief of Authorities of Sino-Forest Corporation, Tab 22

74. Each definition for "contribution" contemplates a joint tortfeasor having a right to collect against a fellow joint tortfeasor (much like E&Y, BDO and the Underwriters who claim to have a right to collect against SFC). There is no definition for contribution by which a plaintiff shareholder would seek contribution against the defendant debtor company. The appellants' proposed interpretation completely ignores the word "contribution". Parliament's use of the word "contribution" was purposive, and applies in a case like the present.

75. This intention of Parliament is further evidenced by the clear and broad language of the definition of "equity claim", and in the clause by clause analysis of Bill C-12, which created the definition of equity claim, where the rationale provided for the amendment indicates that an "equity claim is defined to include *any claim* that is *related to* an equity interest." This description supports Parliament's intention to include such claims within the definition of "equity claim", and demonstrates that the identity of the claimant is not a relevant factor.

> Bill C-12, Clause by Clause Analysis, Clause No. 105, Brief of Authorities of Sino-Forest Corporation, Tab 23

76. Giving effect to the clear language and plain meaning of paragraph (e), it applies where contribution or indemnity is sought in respect of another equity claim (paragraphs (a) through (d)). The appellants have brought claims against SFC for contribution and indemnity in respect of the Shareholder Claims, which are equity claims as defined in paragraph (d). This is what the plain language of paragraph (e) captures.

77. Second, adopting the appellants' interpretation would result in an absurdity and it is presumed that legislation is not intended to produce absurd consequences. Where a statutory provision is reasonably open to two interpretations, absurdity flowing from one of the interpretations justifies rejecting it in favour of the other. The notion of absurdity includes reasonableness, common sense, an unworkable or impractical result, an inconvenient result, an anomalous or illogical result, a futile or pointless result, an artificial result, as well as any other consequences judged to be undesirable.

> *Tasko v. Canada,* [1997] T.C.J. No. 9 at para. 19, Brief of Authorities of Sino-Forest Corporation, Tab 24; *Caressant Care Nursing Home of Canada Ltd. v. London and District Service Workers' Union, Local 220* (2005), 197 O.A.C. 238 (Div. Ct.) at para. 59, Brief of Authorities of Sino-Forest Corporation, Tab 25; *Walker Youth Homes Inc. v. Ottawa-Carleton District School Board,* [2004] O.J. No. 2307 (S.C.J.) at paras. 43-46, Brief of Authorities of Sino-Forest Corporation, Tab 26

78. If the appellants' interpretation were to be adopted, paragraph (e) would only be applicable where a shareholder brings an equity claim against the debtor company, and then also brings a claim for contribution or indemnity against the debtor in respect of that same shareholder's claim against the debtor. It is difficult to foresee a scenario in which this would ever occur.

79. The appellants seek to avoid this commercially unrealistic result by relying on two cases, *National Bank v. Merit Energy* and *EarthFirst Canada Inc. (Re),* in which plaintiff shareholders mischaracterized equity claims as indemnity claims, purportedly relying on indemnity provisions in their share purchase agreements. Both of these cases were pre-amendment cases and are of no help to the appellants. Moreover, neither case deals with the mischief that the appellants are attempting to convince this Court that paragraph (e) is intended to address. Paragraph (e) captures "contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to

(d)" not "a claim that is in substance captured by paragraphs (a) to (d) that the shareholder has mischaracterized as an indemnity claim".

Factum of the Appellant Ernst & Young LLP, at para. 52

80. Third, the appellants' reliance on the interpretation section of the CCAA in which "claim" is defined with reference to a claim provable within section 2 of the BIA is incorrect given that the provision does not mean that every instance of "claim" in the CCAA can only mean a claim provable within section 2 of the BIA.

Factum of the Appellant BDO Limited, at para. 62

81. Subsection 15(2) of the *Interpretation Act,* R.S.C., 1985, c. I-21 provides:

> (2) Where an enactment contains an interpretation section or provision, it shall be read and construed
>
> > (a) as being applicable only if a contrary intention does not appear; and
> >
> > (b) as being applicable to all other enactments relating to the same subject matter unless a contrary intention appears.

82. This provision of the *Interpretation Act* directs the Court, "in forceful and unequivocal terms, not to apply interpretation sections mechanically." Therefore, where there is a contrary intention in the statute, the defined term cannot be applicable. A contrary intention can be established not only by express words, but also by the context, the scheme of the enactment, its legislative history, and other considerations or circumstances that may require a different interpretation. If a defined expression is used in a context in which the definition will not fit, "the context must be allowed to prevail over the 'artificial conceptions' of the definition clause and the word must be given its ordinary meaning."

Tasko v. Canada, supra, at paras. 24, 27 & 28 Brief of Authorities of Sino-Forest Corporation, Tab 24; *Cadillac Explorations Ltd. v. Procan Exploration Co.* (1984), 53 B.C.L.R. 353 (C.A.) at para. 15, Brief of Authorites of Sino-Forest Corporation, Tab 27; *Bank of Montreal v. Gratton* (1987), 18 B.C.L.R. (2d) 138 (C.A.) at para. 11, Brief of Authorites of Sino-Forest Corporation, Tab 28; *R. v. Scory* (1965), 51 W.W.R. 447 (Sask. Q.B.) at para. 4, Brief of Authorities of Sino-Forest Corporation, Tab 29, as cited in *R. v. Ambrose* (1999), 43 W.C.B. (2d) 441 (O.C.J.) at para. 20, Brief of Authorites of Sino-Forest Corporation, Tab 30

83. A reading of the CCAA as a whole also supports a contrary intention, as there are a number of instances in the CCAA where interpretation of the term "claim" as solely a claim against the debtor company would be illogical and absurd. For example, section 5.1 of the CCAA uses the term "claim" numerous times but the provision relates only to claims against directors. The scheme of the CCAA is inconsistent with interpreting "claim" in every provision as only a claim against the debtor company.

CCAA, s. 5.1

F. The Case Law Advanced by the Appellants is of No Help

84. E&Y, BDO and the Underwriters rely on case law that predates the 2009 amendments. They assert that the 2009 amendments sought to codify case law that was inconsistent in its treatment of indemnification claims. From this, they assert that the Court should ignore the clear language of the 2009 amendments.

85. Justice Morawetz dismissed this argument, correctly holding that while the 2009 amendments may have codified the case law regarding the subordination of equity claims, the amendments provide clear and specific language directing that a claim for contribution or indemnity in respect of an equity claim also falls within the definition of equity claim and is likewise subordinated.

Endorsement of Justice Morawetz dated July 27, 2012, Appeal Book and Compendium of the Underwriters, Tab 3, p. 36 at para. 87

86. The report of the Senate Committee that examined the 2009 CCAA amendments makes clear that the amendments were not intended to simply codify the existing case law as suggested by the moving parties.

Report of the Standing Senate Committee on Banking, Trade and Commerce, "Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act" (2003) at 158-159, Brief of Authorities of Sino-Forest Corporation, Tab 31

87. At paragraph 72 of its factum, E&Y quotes an excerpt from Hansard purporting to support its interpretation of the definition of equity claim as the speaker, Mr. Colin Carrie, M.P., cites "the right to be indemnified by the company for losses on the value of" shares as an example of a type of equity claim. Mr. Carrie was the Parliamentary Secretary to the Minister of Industry, not the relevant Minister or Deputy Minister. He was not purporting to provide, on behalf of the Government of Canada, a detailed and exhaustive description of the statute. The Supreme Court of Canada has stated that Hansard evidence is of limited weight, even where the statute is ambiguous and the evidence is relevant and reliable.

Canada 3000 Inc. (Re), 2006 SCC 24 at para. 57, Brief of Authorities of Sino-Forest Corporation, Tab 32

Rizzo & Rizzo Shoes Ltd., supra, at para. 35, Brief of Authorities of Sino-Forest Corporation, Tab 13

88. Notwithstanding the limited assistance such evidence can provide, it also does not support the appellants' interpretation and further demonstrates Parliament's intent to do more than codify the existing case law. First, in stating "that equity claims include items like..." Mr. Carrie was not providing an exhaustive list. Second, Mr. Carrie prefaced his remarks with

comments that support an intent to significantly broaden the meaning of "equity claim" to preclude all payments to equity holders before other creditors:

> In bankruptcy, of course, an equity holder has no right to be paid for their shares until all claims against the company are paid. In a restructuring, because it is a matter of negotiation, the rights of equity holders are not clear. It is possible for equity holders to get paid when other creditors are not. This is a problem as equity holders should not have greater rights in a restructuring than they would in a bankruptcy. Bill C-12 will correct this.
>
> Senate of Canada, Proceedings of the Standing Committee on Banking, Trade and Commerce, 39th Parl., 2nd Sess., No 2 (29 November 2007) at 2:25, Brief of Authorities of Sino-Forest Corporation, Tab 33

89. Contrary to the interpretation advanced by the appellants, Mr. Carrie's remarks demonstrate an intention to change the existing law by broadening the scope of equity claims. As a remedial enactment, the 2009 amendments should be given a fair, large and liberal construction and interpretation to ensure the attainment of the objects of the amendments.

> *Interpretation Act*, R.S.C. 1985 c. I-21, s. 12

G. Policy Reasons for Subordinating Claims for Contribution and Indemnity Relating to Equity Claims

90. Given the clear and unambiguous language chosen by Parliament, this Court need not be concerned about the policy rationales underlying that unambiguous language. Nevertheless, the appellants have advanced arguments that applying the clear language of the CCAA would undermine the policy rationale for subordinating equity claims. The appellants are incorrect.

91. As explained above, the policy rationale for subordinating equity claims reflects the fundamental difference between equity and debt interests and is designed to ensure that holders of equity interests do not share in the division of an insolvent company's assets until non-equity creditors are made whole. Every dollar received by E&Y, BDO and the Underwriters on account

of their Related Indemnity Claims will be a dollar that is in fact received by the equity holders of SFC.

92. To adopt the appellants' interpretation of "contribution or indemnity claims in respect of" other equity claims is to believe that Parliament intended that all an equity holder would need to do to share in the distribution of an insolvent company's assets is to sue a third party (which could include officers, directors, auditors or underwriters) who could advance a contribution or indemnity claim against the debtor. This would obliterate the clear distinction in the CCAA between the treatment of equity claims and debt claims.

IV. RELIEF SOUGHT

93. SFC respectfully requests that the appeal be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

BENNETT JONES LLP

Lawyers for Sino-Forest Corporation

Court of Appeal File Numbers: C56118 / C56115 / C56125
Superior Court File No. CV-12-9667-00CL

COURT OF APPEAL FOR ONTARIO

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

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

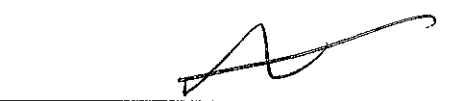
CERTIFICATE

Bennett Jones LLP, Lawyers for Sino-Forest Corporation, hereby certify that:

1. An order under Rule 61.09(2) (original record and exhibits) is not required; and

2. We estimate that **2 hours** will be required for the respondents (including SFC, the Ad Hoc Committee of Noteholders and the Monitor).

November 6, 2012



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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 OR COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

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COURT OF APPEAL FOR ONTARIO

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SCHEDULE "A" – AUTHORITIES CITED

Case Law

1. *Nolan v. Ontario (Superintendent of Financial Services),* 2007 ONCA 416

2. *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.)

3. *Canadian Union of Public Employees v. Royal Crest Lifecare Group Inc. (Trustee of)* (2004), 181 O.A.C. 115

4. *Liberty Oil & Gas Ltd. (Re),* 2003 ABCA 158

5. *Blue Range Resource Corp. (Re),* [2000] 4 W.W.R. 738 (Alta. Q.B.)

6. *Stelco Inc. (Re)* (2006), 14 B.L.R. (4th) 260 (Ont. S.C.J.)

7. *Royal Bank of Canada v. Central Capital Corp.* (1996), 132 D.L.R. (4th) 223 (Ont. C.A.)

8. *Nelson Financial Group Ltd. (Re)*, 2010 ONSC 6229

9. *EarthFirst Canada Inc. (Re),* 2009 ABQB 316

10. *ROI Fund Inc. v. Gandi Innovations Ltd.,* 2011 ONSC 5018

11. *ROI Fund Inc. v. Gandi Innovations Ltd.*, 2012 ONCA 10

12. *National Bank v. Merit Energy,* 2001 ABCA 138

13. *Re Rizzo & Rizzo Shoes Ltd.,* [1998] 1 S.C.R. 27

14. *Non-Marine Underwriters, Lloyds of London v. Scalera,* [2000] 1 S.C.R. 551

15. *Nowegijick v. The Queen,* [1983] 1 S.C.R. 29

16. *Markevich v. Canada,* 2003 SCC 9

17. *CanadianOxy Chemicals Ltd. v. Canada (Attorney General),* [1999] 1 S.C.R. 743

18. *Nastamagu v. Axa Insurance (Canada)* (1997), 148 D.L.R. (4th) 244 (Ont. C.A.)

19. *Arsenault v. Dumfries Mutual Insurance Co.* (2002), 152 O.A.C. 224

20. *R. v. Clark,* 2000 ABCA 246

21. *Johal v. Harstad* (1988), 47 B.C.L.R. (2d) 61 (C.A.)

22. *Tasko v. Canada,* [1997] T.C.J. No. 9

23. *Caressant Care Nursing Home of Canada Ltd. v. London and District Service Workers' Union, Local 220* (2005), 197 O.A.C. 238 (Div. Ct.)

24. *Walker Youth Homes Inc. v. Ottawa-Carleton District School Board,* [2004] O.J. No. 2307 (S.C.J.)

25. *Cadillac Explorations Ltd. v. Procan Exploration Co.* (1984), 53 B.C.L.R. 353 (C.A.)

26. *Bank of Montreal v. Gratton* (1987), 18 B.C.L.R. (2d) 138 (C.A.)

27. *R. v. Scory* (1965), 51 W.W.R. 447 (Sask. Q.B.)

28. *R. v. Ambrose* (1999), 43 W.C.B. (2d) 441 (O.C.J.)

29. *Canada 3000 Inc. (Re),* 2006 SCC 24

Secondary Material

1. Bryan A. Garner, ed., *Black's Law Dictionary,* 9th ed. (2009)

2. Bill C-12, Clause by Clause Analysis, Clause No. 105

3. Report of the Standing Senate Committee on Banking, Trade and Commerce, "Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act" (2003) [Excerpt]

4. Senate of Canada, Proceedings of the Standing Committee on Banking, Trade and Commerce, 39th Parl., 2nd Sess., No. 2 (29 November 2007) [Excerpt]

SCHEDULE "B" – STATUTORY REFERENCES

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

Definitions

s. 2 In this Act,

> [...]
>
> "claim" means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*;
>
> [...]
>
> "equity claim" means a claim that is in respect of an equity interest, including a claim for, among others,
>
> (a) a dividend or similar payment,
>
> (b) a return of capital,
>
> (c) a redemption or retraction obligation,
>
> (d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or
>
> (e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d);
>
> "equity interest" means
>
> (a) in the case of a company other than an income trust, a share in the company — or a warrant or option or another right to acquire a share in the company — other than one that is derived from a convertible debt [...]

Claims against directors — compromise

s. 5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

Resignation or removal of directors

(4) Where 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 debtor company shall be deemed to be a director for the purposes of this section.

Payment — equity claims

s. 6(8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

Practice

s.14(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.

Class — creditors having equity claims

s. 22.1 Despite subsection 22(1), creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise.

***Negligence Act*, R.S.O. 1990, c. N-1**

Recovery as between tortfeasors

s. 2 A tortfeasor may recover contribution or indemnity from any other tortfeasor who is, or would if sued have been, liable in respect of the damage to any person suffering damage as a result of a tort by settling with the person suffering such damage, and thereafter commencing or continuing action against such other tortfeasor, in which event the tortfeasor settling the damage shall satisfy the court that the amount of the settlement was reasonable, and in the event that the court finds the amount of the settlement was excessive it may fix the amount at which the claim should have been settled.

***Interpretation Act*, R.S.C. 1985, c. I-21**

Enactments deemed remedial

s. 12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects

Interpretation sections subject to exceptions

s. 15(2) Where an enactment contains an interpretation section or provision, it shall be read and construed

(a) as being applicable only if a contrary intention does not appear; and

(b) as being applicable to all other enactments relating to the same subject matter unless a contrary intention appears.

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 OR COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

Court of Appeal File Numbers: C56118 / C56115 / C56125
Court File No. CV-12-9667-00CL

COURT OF APPEAL FOR ONTARIO

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