

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**

**APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT
ACT*, R.S.C. 1985, c. C-36, AS AMENDED**

NOTICE OF APPEAL OF BDO LIMITED

THE RESPONDENT (APPELLANT IN THE APPEAL), BDO LIMITED (“BDO”), APPEALS to the Court of Appeal from the Order of The Honourable Mr. Justice Morawetz dated July 27, 2012 made at Toronto, Ontario.

THE APPELLANT ASKS that the Order below be set aside and an Order be granted as follows:

1. An Order abridging the time for service and filing of this Notice of Appeal, Factum, Appeal Book and Compendium and other materials required to perfect this appeal, validating service by email and dispensing with any further service, such that the appeal is properly returnable on a date to be fixed by the Registrar;
2. Dismissing the Equity Claims Motion brought by Sino-Forest Corporation (“Sino”), as defined below;
3. Declaring that any indemnification claims against Sino asserted by BDO and other appellants in the companion appeals with this appeal, are not “equity claims” as

defined in the *Companies' Creditors Arrangement Act*, RSC 1985, c.C-36, as amended (the "CCAA");

4. Ordering that BDO's claims are to be dealt with as unsecured creditor claims in accordance with the Claims Procedure Order, as defined below;

5. Awarding to BDO its costs of the appeal and the motion appealed from; and

6. Such other and further relief as counsel may advise and this Honourable Court permit.

THE GROUNDS OF APPEAL are as follows:

1. On March 30, 2012 Sino sought and was granted an order of the Ontario Superior Court of Justice which provided protection from its creditors pursuant to the provisions of the CCAA;

2. Sino and various other parties, including BDO, have been named as defendants in a class action currently pending before the Ontario Courts (the "Class Action");

3. BDO was the auditor of Sino from for the years 2005 and 2006 and remained auditor for Sino until August 2007, when it was replaced by Ernst & Young LLP;

4. The Class Action seeks damages from Sino, BDO and various other defendants in connection with certain alleged misrepresentations in the public disclosure by Sino, including alleged misrepresentations in Sino's financial statements and in documents pursuant to which Sino shares and notes were offered to members of the public;

5. BDO has indemnity claims against Sino and its officers and directors arising from Sino's breach of the contractual and common law duties Sino owed to BDO pursuant to BDO's engagement as Sino's auditor;

6. On April 14, 2012, Sino sought and was granted a claims procedure order by the Ontario Superior Court of Justice (the "Claims Procedure Order");

7. The Claims Procedure Order expressly provides mechanisms and procedures for the identification and determination of all claims against Sino, its subsidiaries, and its officers and its directors, including a procedure for the determination of any dispute in relation to such determination - "equity claims" as defined in the CCAA, s. 2;

8. BDO filed proofs of claim against Sino and its officers and directors in accordance with the Claims Procedure Order by the claims bar date of June 20, 2012 for claims arising from the breach of the contractual and common law duties Sino owed to BDO pursuant to its engagement of BDO as its auditor;

9. Before the claims bar date pursuant to the Claims Procedure Order had passed, Sino brought a motion by way of Notice of Motion dated June 8, 2012 seeking a pre-determination of the nature of some of the very claims that were to be submitted and assessed under the Claims Procedure Order, namely, whether shareholder claims and certain claims for contribution and indemnity by third party service providers to Sino, including BDO, were "equity claims" as defined under s.2 of the CCAA (the "Equity Claims Motion");

10. Over the objection of BDO and certain of Sino's other third party creditors that the Equity Claims Motion was premature and contrary to the process contemplated by the Claims Procedure Order, the motions judge heard the Equity Claims Motion on June 26, 2012;

11. On July 27, 2012, the motions judge granted the order sought by Sino on the Equity Claims Motion and declared that indemnity claims by BDO and other third party service providers to Sino are equity claims as defined under the CCAA, except to the extent that these parties' claims seek compensation for certain defence costs associated with the Class Action;

12. The order made on the Equity Claims Motion significantly affects BDO's entitlement to vote on any CCAA Plan of compromise or arrangement that might be put forward by Sino;

13. In granting the Order sought on the Equity Claims Motion, the motions judge erred as follows:

- (a) The motions Judge erred in finding that the Equity Claims motion was not premature and inappropriate – given that it was brought prior to completion of the process put in place by the Claims Procedure Order, in the absence of a full evidentiary record on the claims affected, and dealt with issues already required to be addressed under the terms of the Claims Procedure Order;

- (b) The motions Judge erred in declaring that the contractual and common law claims by third parties against Sino are “equity claims” as defined under section 2 of the CCAA, despite the fact that those claims were advanced by parties, including BDO, that had never held equity in Sino and did not have claims arising from an equity interest in Sino;
- (c) The motions Judge erred in concluding that BDO’s indemnity claim as well as those advanced by the other third party service providers to Sino was “in respect of an equity interest,” despite the fact that BDO was not, and has never been, an equity holder in Sino;
- (d) The motions Judge erred in concluding that the actual and anticipated losses in respect of which BDO asserts a claim are claims that arise from equity interests, rather than claims arising from breaches of contract and misrepresentations by Sino to BDO;
- (e) The motions Judge erred in interpreting the definition of “equity claims” in s. 2 of the CCAA in a manner contrary to the express and implicit intention of the CCAA that only claims by claimants in respect of their own equity interests in the Applicant corporation are to be subordinated as equity claims, while claims by other third party creditors are to be treated in the same manner as other unsecured claims;
- (f) The motions Judge erred in interpreting the definition of “equity claims” in s. 2 of the CCAA in a manner contrary to the common law rule that only claims arising from the claimants’ own equity holdings in the subject

corporation are properly subordinated as equity claims and contrary to the intent of the relevant amendments to the CCAA that the pre-existing common law rules be codified thereunder;

- (g) The motions Judge erred in failing to consider and apply pre-existing common law rules relating to the subordination of equity claims when interpreting the definitions of “equity claims” and “equity interests” under the CCAA and in failing to consider and apply common law rules excluding claims by independent third party service providers from the definition of equity claims and treating them in the same manner as claims by other independent third parties; and
- (h) As such, the motions Judge erred in failing to conclude that indemnity claims by arm’s length third party service providers are general unsecured claims and are therefore to be treated as such in the CCAA Proceedings;

14. The CCAA and, specifically, sections 2, 6 and 22.1 thereof; and

15. Such further and other grounds as counsel may advise and this Honourable Court permit.

THE BASIS OF THE APPELLATE COURT’S JURISDICTION IS: Under the CCAA, s.13, an appeal from the Order below lies to this Court, with leave. On October 10, 2012, this Court granted leave to appeal to BDO in Court File M41655, as well as to the Underwriters (as these parties are defined in their Notice of Appeal) and to

Ernst & Young, in the two companion appeals to this appeal, Court File Nos. M41656 and M41654, respectively.

October 16, 2012

AFFLECK GREENE McMURTRY LLP
Barristers & Solicitors
365 Bay Street, Suite 200
Toronto, Ontario M5H 2V1

Peter R. Greene LSUC#: 19895V
Kenneth A. Dekker LSUC#: 40419P
Michelle E. Booth LSUC#: 53525J
Tel: (416) 360-2800
Fax: (416) 360-5960

Lawyers for BDO Limited

TO: SERVICE LIST

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

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

APPLICATION UNDER *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c.C-36, as am.

Court File No:

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at [Toronto](#)

NOTICE OF APPEAL

AFFLECK GREENE McMURTRY LLP

Barristers & Solicitors

365 Bay Street, Suite 200

Toronto, Ontario M5H 2V1

Peter R. Greene LSUC#: 19895V

Kenneth A. Dekker LSUC#: 40419P

Michelle E. Booth LSUC#: 53525J

Tel: (416) 360-2800

Fax: (416) 360-5960

Lawyers for BDO Limited