

Court of Appeal File No.: C56961
Court of Appeal File No.: M42453
S.C.J. 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 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
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(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
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AMERICA SECURITIES LLC

Defendants

Proceeding under the *Class Proceedings Act, 1992*

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(MOTION TO QUASH RETURNABLE JUNE 28, 2013)**

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TO: ATTACHED SERVICE LIST

Court of Appeal File No.:
Court of Appeal File No.: M42404
Court of Appeal File No.: M42399
S.C.J. Court File No.: CV-12-9667-00CL

COURT OF APPEAL FOR ONTARIO

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Court of Appeal File No.:
Court of Appeal File No.: M42404
Court of Appeal File No.: M42399
S.C.J. Court File No.: CV-11-431153-00CP

COURT OF APPEAL FOR ONTARIO

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OVERVIEW

1. The Class Action Plaintiffs repeat and rely on their Moving Factum dated May 10, 2013, and provide the following submissions in reply to the Kim Orr Group's Responding Factum dated May 17, 2013.

2. The only right of appeal which may accrue to the Kim Orr Group is that contained in section 13 of the *Companies' Creditors Arrangement Act* ("CCAA"), which requires leave to appeal. Contrary to the Kim Orr Group's submissions, the *Class Proceedings Act, 1992* ("CPA") does not provide class members with a right of appeal from the Settlement Approval Order.

3. This reply factum addresses the following points:

(a) **The Kim Orr Group improperly relies on subsections 30(3) and 30(5) of the CPA as providing it a right to appeal to this Court:** Those provisions of the CPA provide for an appeal from a judgment on common issues or an aggregate award of damages under section 24 of the CPA. The Settlement Approval Order is neither a common issues judgment nor an aggregate award of damages.

(b) **Even if subsection 30(5) of the CPA provides an avenue for the Kim Orr Group to appeal to this Court, they seek leave to represent the wrong group:** a class member relying on subsection 30(5) of the CPA is required to act on behalf of the entire class, not a particular subset.

(c) **The Kim Orr Group seeks to circumvent the leave to appeal requirement in section 13 of the CCAA:** the Kim Orr Group asserts the motions judge erred in using his powers under the CCAA to release claims without the ability to opt out of the release. The Kim Orr Group seeks to appeal from the application of the CCAA, not the CPA. The Kim Orr Group should use the appeal route provided in the CCAA, which requires leave to appeal.

Issue 1: Subsections 30(3) and 30(5) of the CPA do not apply.

4. Rights of appeal are created entirely by statute, and this Court's jurisdiction is limited to those powers that are conferred upon it by the applicable statute.¹ The Kim Orr Group relies on subsections 30(3) and (5) of the *CPA* to provide a right of appeal.

5. The *CPA* draws distinctions between the rights accorded to parties and those accorded to class members.² Class members, such as the Kim Orr Group purport to be, have no right to appeal except as specifically provided in section 30 of the *CPA*.³

6. The Kim Orr Group seeks to rely on subsections 30(3) and (5) of the *CPA* as providing an appeal right directly to this Court from the Settlement Approval Order. Subsections 30(3) and (5) of the *CPA* state:

(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.

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).⁴

¹ *R v Abdullah*, [2002] OJ no 1118 at para 1 (CA), Supplemental Brief of Authorities of Class Action Plaintiffs dated May 27, 2013 ("Supp. Class Plaintiffs' Auth."), Tab 4; *Kourtessis v Canada (Minister of National Revenue - MNR)*, [1993] 2 SCR 53 at para 39, Supp. Class Plaintiffs' Auth., Tab 3; *Kedia International Inc v Royal Bank of Canada*, 2007 BCCA 47 at para 8, Supp. Class Plaintiffs' Auth., Tab 2.

² *Dabbs v Sun Life Assurance Co of Canada* (1998), 27 CPC (4th) 243 at paras 7, 12-14 (CA) [*Dabbs*], Brief of Authorities of Class Action Plaintiffs dated May 10, 2013 ("Class Plaintiffs' Auth."), Tab 3.

³ *CPA*, ss 14, 29, and 30.

⁴ *CPA*, ss 30(3) and (5).

7. Subsections 30(3) and 30(5) of the *CPA* are limited to appeals from a common issues judgment (s 27 of the *CPA*) or an aggregate award of damages (s 24 of the *CPA*). They do not provide a right to appeal from an order approving a settlement under section 29 of the *CPA*.

8. The Kim Orr Group attempts to contort the Settlement Approval Order into one that attracts the *CPA* right of appeal under section 30(3) by way of subsection 30(5). They should not be permitted to do so.

9. A common issues judgment under section 27 of the *CPA* is a determination of the common issues as certified in the class proceeding under subsection 5(1) of the *CPA*. An aggregate award of damages under section 24 of the *CPA* is made where a court determines that damages can be assessed on an aggregate basis for the entire class rather than requiring individual class members to prove their damages through individual hearings. To award aggregate damages, a court must determine (a) monetary relief is claimed on behalf of some or all class members; (b) no liability questions remain to be determined; and (c) the aggregate damages can be determined without proof by individual class members.⁵

10. Settlement approval does not require any determination of common issues or a determination of whether an aggregate assessment of damages is available. Settlement approval requires an assessment only of whether a settlement in a class proceeding is fair, reasonable and in the best interests of the class. The Settlement Approval Order was not a common issues judgment or an aggregate award of damages. Subsections 30(3) and (5) do not apply.

⁵ *CPA*, s 24.

11. Furthermore, the Kim Orr Group wrongly asserts that settlement approval orders made under section 29 of the *CPA* are analogous to orders made under Rule 7.08, and are thus appealable as of right to this Court as final orders. This argument ignores that these appeals arise in a different statutory context than an order approving a settlement under Rule 7.08 is made. Specifically, appeal rights for orders made under Rule 7.08 are provided by the *Courts of Justice Act*, whereas the *CPA* does not provide a right to appeal from an order approving a settlement pursuant to section 19.

12. The Kim Orr Group's attempt to 'supplement' the appeal provisions of the *CPA* is unfounded. Their position renders subsection 30(3) of the *CPA* redundant and frustrates its specific wording.⁶ The Kim Orr Group's reliance on inapposite cases, which in any event do not stand for the proposition that such rights of appeal may be extended to non-parties, is misplaced.

Issue 2: The Kim Orr Group's request for appointment as a "representative party" is fatally flawed.

13. In determining whether the Kim Orr Group should be granted leave to act as representative parties for the purposes of subsection 30(3), this Court is guided by the best interests of the class as a whole.⁷ "the broad and guiding 'best interests' principle developed in recognition of the distinction that must be made between the interests of individual class members and the interests of the class as a whole."⁸

14. The Kim Orr Group concedes that they are not seeking to displace the Class Action Plaintiffs who have now been appointed on two separate occasions to represent the class.⁹ Their

⁶ *Dabbs*, *supra* note 2 at paras 15 and 17.

⁷ *Ibid* at para 19.

⁸ *Fantl v Transamerica Life Canada* (2009), 95 OR (3d) 767 at para 51 (CA), Supp. Class Plaintiffs' Auth., Tab 1.

⁹ Factum of the Kim Orr Group dated May 17, 2013 at para 48.

only explicit statement about who it is they seek to represent is at paragraph 5 of their factum, where they say:

With respect to representation, the [Kim Orr Group] are the only parties who can and will represent opt-outs' and objectors' interests on this appeal. **[Emphasis added]**

15. Subsection 30(5) permits a class member to seek leave to represent a class as a whole in an appeal where a previously appointed representative plaintiff declines to do so. The Kim Orr Group does not apparently seek to represent the class, and as set out in the Class Action Plaintiffs original factum, there is no basis for concluding that the Kim Orr Group is capable of doing so.

Issue 3: The Kim Orr Group seeks to circumvent the requirement for leave to appeal in section 13 of the CCAA.

16. The Kim Orr Group asserts that the motion judge erred in using his powers under the *CCAA* to release their claims without the ability to opt out so that they may pursue their own actions against Ernst & Young.¹⁰ The purported absence of a right to opt out is a function of the fact that the E&Y Settlement is being implemented through the *CCAA*, and that as such, the appeal they wish to pursue is an appeal relating to the application of the *CCAA*.

17. In *Dabbs*, this Court noted that an absence of a right of appeal from a settlement approval order for a class member was not fatal because in the normal course, a class member who is dissatisfied with a settlement agreement approved pursuant to the *CPA* section 29 may opt out.¹¹ The Kim Orr Group argues that this is a basis upon which to distinguish this case from *Dabbs*.¹²

¹⁰ Given the absence of any attempt to commence proceedings or even protect their own interests in the 15 months since their counsel was denied carriage of the class action, the sincerity of that concern is dubious.

¹¹ *Dabbs*, *supra* note 2 at paras 8 and 20.

¹² Factum of the Kim Orr Group dated May 17, 2013 at para 49.

18. This distinction is not helpful to the Kim Orr Group's position. The absence of a right to opt out of the E&Y Settlement is a function of the exercise of the Court's power under the *CCAA*. Accordingly, any right of appeal the Kim Orr Group has derives from the *CCAA*. As Justice Morawetz wrote in his reasons for granting the Settlement Approval Order,

I do not accept that the class action settlement should be approved solely under the *CPA*. The reality facing the parties is that SFC is insolvent; it is under *CCAA* protection, and stakeholder claims are to be considered in the context of the *CCAA* regime. The Objectors' claim against Ernst & Young cannot be considered in isolation from the *CCAA* proceedings. The Claims against Ernst & Young are interrelated with claims as against SFC, as is made clear in the Equity Claims Decision and Claims Procedure Order.

[...]

Although the right to opt-out of a class action is a fundamental element of procedural fairness in the Ontario class action regime, this argument cannot be taken in isolation. It must be considered in the context of the *CCAA*.

[...]

It is also clear that the jurisprudence [under the *CCAA*] does not permit a dissenting stakeholder to opt-out of a restructuring [cites omitted]. If that were possible, no creditor would take part in any *CCAA* compromise where they were to receive less than the debt owed to them. There is no right to opt out of any *CCAA* process, and the statute contemplates that a minority of creditors are bound by the plan which a majority have approved and the court has determined to be fair and reasonable.¹³

19. It is thus clear that the absence of opt-out rights is a function of the "reality facing the parties" that these proceedings are being conducted under the *CCAA* due to SFC's insolvency. This reasoning makes plain that the orders from which the Kim Orr Group is pursuing appeal rights are orders made under the *CCAA*, and thus subject to the *CCAA*'s appeal provisions. The fact that the Settlement Approval Order may be characterized as a final determination of the Kim Orr Group's rights does not remove it from the ambit of section 13 of the *CCAA*.¹⁴

¹³ Reasons for Decision of Justice Morawetz, dated March 20, 2013, at paras 72 , 75 and 77, Motion Record of Ernst & Young LLP, Tab 4, p 40.

¹⁴ *Hemosol Corp (Re)*, 2007 ONCA 124 at para 3, Class Plaintiffs' Auth., Tab 5.

CONCLUSION

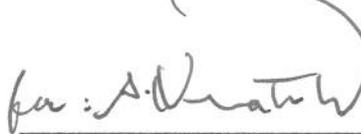
20. For the reasons set out herein and in the Class Action Plaintiffs' Factum dated May 10, 2013, the Kim Orr Group has no direct right of appeal to this Court. Leave to appeal under section 13 of the *CCAA* is required. This appeal is manifestly devoid of merit, and should be quashed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

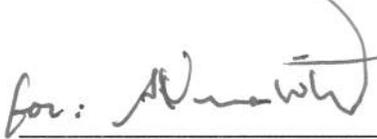
May 27, 2013

for: 

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for: 

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for: 

Ken Rosenberg/Massimo Starnino

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SCHEDULE “A” - LIST OF AUTHORITIES

1. *Dabbs v Sun Life Assurance Co of Canada* (1998), 27 CPC (4th) 243 (CA)
2. *Fantl v Transamerica Life Canada* (2009), 95 OR (3d) 767 (CA)
3. *Hemosol Corp (Re)*, 2007 ONCA 124
4. *Kedia International Inc v Royal Bank of Canada*, 2007 BCCA 47
5. *Kourtessis v Canada (Minister of National Revenue - MNR)*, [1993] 2 SCR 53
6. *R v Abdullah*, [2002] OJ no 1118 (CA)

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

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.

[...]

29. (1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.

(2) A settlement of a class proceeding is not binding unless approved by the court.

(3) A settlement of a class proceeding that is approved by the court binds all class members.

(4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,

(a) an account of the conduct of the proceeding;

(b) a statement of the result of the proceeding; and

(c) a description of any plan for distributing settlement funds.

[...]

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

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

[...]

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

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT TORONTO

**REPLY FACTUM
OF THE CLASS ACTION PLAINTIFFS
(MOTION TO QUASH)**

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