

Court of Appeal File No.:
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 OR ARRANGEMENT OF SINO-FOREST CORPORATION**

Court of Appeal File No.:
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 MERRILL LYNCH, PIERCE,
FENNER & SMITH INCORPORATED (successor by merger to Banc of America
Securities LLC)**

Defendants

Proceeding under the *Class Proceedings Act, 1992*

NOTICE OF MOTION FOR LEAVE TO APPEAL

THE APPELLANTS, 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. (“Appellants”), seek leave to appeal to a Panel of three judges of the Court of Appeal from the order dated March 20, 2013 (“Settlement Approval Order”) of the Honourable Mr. Justice Morawetz approving the Ernst & Young LLP Settlement (“E&Y Settlement”) and third party release of Ernst & Young LLP (“E&Y Release”).

The Appellants also seek leave to appeal to a Panel of three judges of the Court of Appeal from the order dated March 20, 2013 (“Representation Dismissal Order”) of Justice Morawetz dismissing the Appellants’ motion for a representation order and dismissing their request for relief from the binding effect of the representation order appointing certain other persons (the Ontario Plaintiffs) as representatives, as part of the restructuring proceedings of Sino-Forest Corporation (“Sino-Forest” or the “applicant”).

THE APPELLANTS ASK:

- a) that leave be granted to appeal from the Settlement Approval Order;
- b) that leave be granted to appeal from the Representation Dismissal Order;
- c) if this Court permits proposed non-debtor third-party settlements and releases to be heard in the Sino-Forest CCAA proceedings, that the Appellants be appointed as representatives of all equity claimants and/or all objectors;
- d) for an order consolidating the present motions for leave to appeal, should leave be granted, with the pending motion for leave to appeal from the order dated December 10, 2012 of the Honourable Mr. Justice Morawetz, Court of Appeal File No.: M42068 (“Sanction Order”), and all related appeals;
- e) for an order directing that the hearings of the motions for leave to appeal and the appeals of the Sanction Order, Settlement Approval Order, and Representation

Dismissal Order be consolidated and heard together before a panel of three judges, orally; and

- f) for an order expediting the hearing of all such motions for leave to appeal and all such appeals of the Sanction Order, Settlement Approval Order, and Representation Dismissal Order.

PROPOSED METHOD OF HEARING:

The motion will be heard in writing, 36 days after service of the moving parties' motion record, factum and transcripts, if any, or on the filing of the moving parties' reply factum, if any, whichever is earlier, pursuant to Rule 61.03.1(1) of the *Rules of Civil Procedure*, or if the Court so directs, orally together with the appeal.

THE GROUNDS FOR THE MOTION ARE:

1. Justice Morawetz erred in entering the Settlement Approval Order approving the E&Y Settlement and E&Y Release under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") in connection with the Plan of Compromise and Reorganization of Sino-Forest Corporation (the "Plan"), and the appeal is therefore meritorious, particularly in that:

(a) as a matter of law and fact, the E&Y Settlement and the E&Y Release were not and are not reasonably connected and necessary to the restructuring of the applicant, and do not meet the requirements for third-party non-debtor releases set forth in *ATB Financial v. Metcalfe and Mansfield Alternative Investments II Corp.*, 2008 ONCA 587;

(b) the CCAA does not provide jurisdiction for the court supervising a CCAA restructuring plan to release claims asserted against a person other than the applicant,

its subsidiaries, or its directors or officers, when the persons whose claims are being released are not creditors of the applicant who voted on the plan;

(c) the Ontario Plaintiffs did not appropriately and adequately represent the members of the class whose claims against E&Y are proposed to be settled and released;

(d) the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, provides an adequate and appropriate alternative framework for the proposed settlement of the class action claims asserted against E&Y;

(e) the terms of the E&Y Settlement do not provide any assurance that settlement consideration would flow to the parties whose claims are proposed to be settled and released;

(f) the terms of the E&Y Settlement were construed by the Court not to provide opt out rights to the members of the class whose claims against E&Y are proposed to be settled and released; and

(g) the Court did not address or decide whether the amount of consideration in the proposed E&Y Settlement was fair, reasonable, and adequate;

2. Justice Morawetz erred in entering the Representation Dismissal Order, particularly in that the Appellants would have appropriately and adequately represented the interests of the members of the class who are equity claimants and/or the members who objected to the proposed E&Y Settlement, without any conflict of interest, and the interests of justice would have been served thereby;

3. The point on the proposed appeal is of significance to the practice, in that the circumstances in which non-debtor third-party releases are properly available in

connection with CCAA restructuring plans, particularly concerning class action claims asserted against auditor and underwriter defendants in securities litigations, has the potential to affect many future cases if the releases are made available as a matter of routine practice, as was the case here;

4. The appropriateness of the E&Y Settlement and E&Y Release is of significance to the action, both as they affect the Appellants' ability to pursue separate claims after opting out, and as they affect claims against the 15 other defendants in the Ontario Class Action who are positioning themselves in the CCAA proceeding to enter into settlements and receive releases similar to the E&Y Release;

5. The Plan has been implemented and the CCAA litigation stay has expired. The proposed appeal will not unduly hinder the progress of the CCAA proceeding;

6. This motion and the motion for leave to appeal the Sanction Order, pending in Court of Appeal File No.: M42068, concern a common principal issue: under what circumstances are non-debtor third-party releases available in CCAA restructuring plans;

7. The present motions for leave, the motion for leave to appeal the Sanction Order, and the appeals of the Sanction Order, Settlement Approval Order, and Representation Dismissal Order should be heard together as soon as possible by this Court;

8. The CCAA, in particular, sections 6, 13, and 14 thereof;

9. Sections 6 and 134 of the *Courts of Justice Act*;

10. Sections 30(3) and 30(5) of the *Class Proceedings Act, 1992*;

11. Rules 6.01, 10, and 61 of the *Rules of Civil Procedure*; and

12. such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTS WILL BE USED AT THE HEARING OF THE MOTION:

1. The motion materials filed below on the hearing before Justice Morawetz and orders made and the Monitor's reports filed in the CCAA proceedings; and
2. such other documents as counsel may advise and this Honourable Court may permit.

April 9, 2012

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TO: THE SERVICE LIST

Court of Appeal File No.:
Commercial Court File No.: CV-12-9667-00CL

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

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

Court of Appeal File No.:
Superior Court File No.: CV-10-414302CP

THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND
EASTERN CANADA, et al.
Plaintiffs

-and- SINO-FOREST CORPORATION, et al.
Defendants

COURT OF APPEAL FOR ONTARIO

(Proceeding Commenced at Toronto)

NOTICE OF MOTION FOR LEAVE TO APPEAL

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