Court File No.: CV-12-9930-00CL

**ONTARIO**
**SUPERIOR COURT OF JUSTICE**
**(COMMERCIAL LIST)**

**IN THE MATTER OF THE RECEIVERSHIP OF First Leaside Wealth Management Inc. and the Applicants listed on Schedule "A" (**collectively**, "FIRST LEASIDE")**

# BOOK OF AUTHORITIES OF THE RECEIVER
## (RE: APPROVAL OF SETTLEMENT AGREEMENT)
## (Returnable July 10, 2019)

July 5, 2019


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| **Tab** | **Description** |
|---|---|
| 1. | *Labourers' Pension Fund of Central and Eastern Canada v Sino-Forest Corp.*, 2013 ONSC 1078, aff'd 2013 ONCA 456 |
| 2. | *Ravelston Corp. Re.*, 2005 CarswellOnt 4267, 142 ACWS (3d) 18 |
| 3. | *Canadian Microtunneling Ltd. Re*, 2010 ONSC 6171 |

# TAB 1

2013 ONSC 1078
Ontario Superior Court of Justice [Commercial List]

Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp.

2013 CarswellOnt 3361, 2013 ONSC 1078, 100 C.B.R. (5th) 30, 227 A.C.W.S. (3d) 930, 37 C.P.C. (7th) 135

# In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended

In the Matter of a Plan of Compromise or Arrangement of Sino-Forest Corporation, Applicant

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) In., TD Securities Inc., Dundee Securities Corporation, RBC Dominion Securities Inc., Scotia Capital Inc., CIBC World Markets Inc., Merrill Lunch 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

Morawetz J.

Heard: February 4, 2013
Judgment: March 20, 2013
Docket: CV-12-9667-00CL, CV-11-431153-00CP

Counsel: Kenneth Rosenberg, Max Starnino, A. Dimitri Lascaris, Daniel Bach, Charles M. Wright, Jonathan Ptak, for Ad Hoc Committee of Purchasers including the Class Action Plaintiffs
Peter Griffin, Peter Osborne, Shara Roy, for Ernst & Young LLP, John Pirie and David Gadsden, for Pöyry (Beijing) Consulting Company Ltd.
Robert W. Staley for Sino-Forest Corporation
Won J. Kim, Michael C. Spencer, Megan B. McPhee for Objectors, Invesco Canada Ltd., Northwest & Ethical Investments LP and Comité Syndical National de Retraite Bâtirente Inc.
John Fabello Rebecca Wise, for Underwriters
Ken Dekker, Peter Greene for BDO Limited
Emily Cole, Joseph Marin for Allen Chan
James Doris for U.S. Class Action
Brandon Barnes for Kai Kit Poon
Robert Chadwick, Brendan O'Neill for Ad Hoc Committee of Noteholders
Derrick Tay, Cliff Prophet for Monitor, FTI Consulting Canada Inc.
Simon Bieber for David Horsley
James Grout for Ontario Securities Commission
Miles D. O'Reilly, Q.C. for Junior Objectors, Daniel Lam and Senthilvel Kanagaratnam

Subject: Insolvency; Civil Practice and Procedure; Corporate and Commercial; Securities

**Headnote**

Bankruptcy and insolvency --- Bankruptcy and insolvency jurisdiction — Jurisdiction of courts — Jurisdiction of general courts

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To approve settlement in class proceedings — Representative plaintiffs were some of stakeholders who claimed defendant forestry company and other defendants misstated its financial results, misrepresented its timber rights, overstated value of its assets and concealed material information about its business operations from investors, causing collapse of artificially inflated share price — Representative plaintiffs began class proceedings against forestry company, which was comprised of components related to shareholders and noteholders — Forestry company entered protection under Companies' Creditors Arrangement Act — Settlement reached between representative plaintiffs and particular defendant — Representative plaintiffs brought motion for approval of settlement — Motion granted — Proceedings were appropriate for approval of settlement, and court had jurisdiction in respect of both Companies' Creditors Arrangement Act and Class Proceeding Act — CCAA proceedings could not be ignored despite any ill-effect on opt-out rights in class proceedings — Claim fell within the Companies' Creditors Arrangement Act, and could be subject of settlement and could include claims of all creditors in class — Until settlement was concluded and proceeds paid, there could be no distribution of settlement proceeds to parties entitled to receive them, and approval of release in settlement was necessary to effect any distribution.

Bankruptcy and insolvency --- Proposal — Approval by court — General principles
Where class proceedings ongoing — Representative plaintiffs were some of stakeholders who claimed defendant forestry company and other defendants misstated its financial results, misrepresented its timber rights, overstated value of its assets and concealed material information about its business operations from investors, causing collapse of artificially inflated share price — Representative plaintiffs began class proceedings against forestry company, which was comprised of components related to shareholders and noteholders — Forestry company entered protection under Companies' Creditors Arrangement Act — Settlement reached between representative plaintiffs and particular defendant — Representative plaintiffs brought motion for approval of settlement — Motion granted — Claims in release were rationally related to purpose of the plan in Companies' Creditors Arrangement Act and were necessary for it — Without approval of settlement, objectives of plan remained unfulfilled due to practical inability to distribute settlement proceeds — Defendant made significant monetary contribution to plan -- Plan benefited claimants in form of tangible distribution -- Release was fair and reasonable and not overly broad or offensive to public policy — Clear that claims asserted against forestry company had to be addressed as part of restructuring — Unencumbered participation of forestry company's subsidiaries is crucial to restructuring.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Orders, awards and related procedures — Termination of proceedings
Settlement — Representative plaintiffs were some of stakeholders who claimed defendant forestry company and other defendants misstated its financial results, misrepresented its timber rights, overstated value of its assets and concealed material information about its business operations from investors, causing collapse of artificially inflated share price — Representative plaintiffs began class proceedings against forestry company, which was comprised of components related to shareholders and noteholders — Forestry company entered protection under Companies' Creditors Arrangement Act — Settlement reached between representative plaintiffs and particular defendant — Representative plaintiffs brought motion for approval of settlement — Motion granted — Claims in release were rationally related to purpose of the plan in Companies' Creditors Arrangement Act and were necessary for it — Without approval of settlement, objectives of plan remained unfulfilled due to practical inability to distribute settlement proceeds — Defendant made significant monetary contribution to plan -- Plan benefited claimants in form of tangible distribution -- Release was fair and reasonable and not overly broad or offensive to public policy — Clear that claims asserted against forestry company had to be addressed as part of restructuring — Unencumbered participation of forestry company's subsidiaries is crucial to restructuring.

MOTION by representative plaintiffs for approval of settlement in class proceeding.

***Morawetz J.*:**

**Introduction**

1 The Ad Hoc Committee of Purchasers of the Applicant's Securities (the "Ad Hoc Securities Purchasers' Committee" or the "Applicant"), including the representative plaintiffs in the Ontario class action (collectively, the "Ontario Plaintiffs"), bring this motion for approval of a settlement and release of claims against Ernst & Young LLP [the "Ernst & Young

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Settlement", the "Ernst & Young Release", the "Ernst & Young Claims" and "Ernst & Young", as further defined in the Plan of Compromise and Reorganization of Sino-Forest Corporation ("SFC") dated December 3, 2012 (the "Plan")].

2 Approval of the Ernst & Young Settlement is opposed by Invesco Canada Limited ("Invesco"), Northwest and Ethical Investments L.P. ("Northwest"), Comité Syndical National de Retraite Bâtirente Inc. ("Bâtirente"), Matrix Asset Management Inc. ("Matrix"), Gestion Férique and Montrusco Bolton Investments Inc. ("Montrusco") (collectively, the "Objectors"). The Objectors particularly oppose the no-opt-out and full third-party release features of the Ernst & Young Settlement. The Objectors also oppose the motion for a representation order sought by the Ontario Plaintiffs, and move instead for appointment of the Objectors to represent the interests of all objectors to the Ernst & Young Settlement.

3 For the following reasons, I have determined that the Ernst & Young Settlement, together with the Ernst & Young Release, should be approved.

**Facts**

***Class Action Proceedings***

4 SFC is an integrated forest plantation operator and forest productions company, with most of its assets and the majority of its business operations located in the southern and eastern regions of the People's Republic of China. SFC's registered office is in Toronto, and its principal business office is in Hong Kong.

5 SFC's shares were publicly traded over the Toronto Stock Exchange. During the period from March 19, 2007 through June 2, 2011, SFC made three prospectus offerings of common shares. SFC also issued and had various notes (debt instruments) outstanding, which were offered to investors, by way of offering memoranda, between March 19, 2007 and June 2, 2011.

6 All of SFC's debt or equity public offerings have been underwritten. A total of 11 firms (the "Underwriters") acted as SFC's underwriters, and are named as defendants in the Ontario class action.

7 Since 2000, SFC has had two auditors: Ernst & Young, who acted as auditor from 2000 to 2004 and 2007 to 2012, and BDO Limited ("BDO"), who acted as auditor from 2005 to 2006. Ernst & Young and BDO are named as defendants in the Ontario class action.

8 Following a June 2, 2011 report issued by short-seller Muddy Waters LLC ("Muddy Waters"), SFC, and others, became embroiled in investigations and regulatory proceedings (with the Ontario Securities Commission (the "OSC"), the Hong Kong Securities and Futures Commission and the Royal Canadian Mounted Police) for allegedly engaging in a "complex fraudulent scheme". SFC concurrently became embroiled in multiple class action proceedings across Canada, including Ontario, Quebec and Saskatchewan (collectively, the "Canadian Actions"), and in New York (collectively with the Canadian Actions, the "Class Action Proceedings"), facing allegations that SFC, and others, misstated its financial results, misrepresented its timber rights, overstated the value of its assets and concealed material information about its business operations from investors, causing the collapse of an artificially inflated share price.

9 The Canadian Actions are comprised of two components: first, there is a shareholder claim, brought on behalf of SFC's current and former shareholders, seeking damages in the amount of $6.5 billion for general damages, $174.8 million in connection with a prospectus issued in June 2007, $330 million in relation to a prospectus issued in June 2009, and $319.2 million in relation to a prospectus issued in December 2009; and second, there is a noteholder claim, brought on behalf of former holders of SFC's notes (the "Noteholders"), in the amount of approximately $1.8 billion. The noteholder claim asserts, among other things, damages for loss of value in the notes.

10 Two other class proceedings relating to SFC were subsequently commenced in Ontario: *Smith et al. v. Sino-Forest Corporation et al.*, which commenced on June 8, 2011; and *Northwest and Ethical Investments L.P. et al. v. Sino-Forest Corporation et al.*, which commenced on September 26, 2011.

11 In December 2011, there was a motion to determine which of the three actions in Ontario should be permitted to

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proceed and which should be stayed (the "Carriage Motion"). On January 6, 2012, Perell J. granted carriage to the Ontario Plaintiffs, appointed Siskinds LLP and Koskie Minsky LLP to prosecute the Ontario class action, and stayed the other class proceedings.

***CCAA Proceedings***

12 SFC obtained an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") on March 30, 2012 (the "Initial Order"), pursuant to which a stay of proceedings was granted in respect of SFC and certain of its subsidiaries. Pursuant to an order on May 8, 2012, the stay was extended to all defendants in the class actions, including Ernst & Young. Due to the stay, the certification and leave motions have yet to be heard.

13 Throughout the CCAA proceedings, SFC asserted that there could be no effective restructuring of SFC's business, and separation from the Canadian parent, if the claims asserted against SFC's subsidiaries arising out of, or connected to, claims against SFC remained outstanding.

14 In addition, SFC and FTI Consulting Canada Inc. (the "Monitor") continually advised that timing and delay were critical elements that would impact on maximization of the value of SFC's assets and stakeholder recovery.

15 On May 14, 2012, an order (the "Claims Procedure Order") was issued that approved a claims process developed by SFC, in consultation with the Monitor. In order to identify the nature and extent of the claims asserted against SFC's subsidiaries, the Claims Procedure Order required any claimant that had or intended to assert a right or claim against one or more of the subsidiaries, relating to a purported claim made against SFC, to so indicate on their proof of claim.

16 The Ad Hoc Securities Purchasers' Committee filed a proof of claim (encapsulating the approximately $7.3 billion shareholder claim and $1.8 billion noteholder claim) in the CCAA proceedings on behalf of all putative class members in the Ontario class action. The plaintiffs in the New York class action filed a proof of claim, but did not specify quantum of damages. Ernst & Young filed a proof of claim for damages and indemnification. The plaintiffs in the Saskatchewan class action did not file a proof of claim. A few shareholders filed proofs of claim separately. No proof of claim was filed by Kim Orr Barristers P.C. ("Kim Orr"), who represent the Objectors.

17 Prior to the commencement of the CCAA proceedings, the plaintiffs in the Canadian Actions settled with Pöyry (Beijing) Consulting Company Limited ("Pöyry") (the "Pöyry Settlement"), a forestry valuator that provided services to SFC. The class was defined as all persons and entities who acquired SFC's securities in Canada between March 19, 2007 to June 2, 2011, and all Canadian residents who acquired SFC securities outside of Canada during that same period (the "Pöyry Settlement Class").

18 The notice of hearing to approve the Pöyry Settlement advised the Pöyry Settlement Class that they may object to the proposed settlement. No objections were filed.

19 Perell J. and Émond J. approved the settlement and certified the Pöyry Settlement Class for settlement purposes. January 15, 2013 was fixed as the date by which members of the Pöyry Settlement Class, who wished to opt-out of either of the Canadian Actions, would have to file an opt-out form for the claims administrator, and they approved the form by which the right to optout was required to be exercised.

20 Notice of the certification and settlement was given in accordance with the certification orders of Perell J. and Émond J. The notice of certification states, in part, that:

> IF YOU CHOOSE TO OPT OUT OF THE CLASS, YOU WILL BE OPTING OUT OF THE **ENTIRE** PROCEEDING. THIS MEANS THAT YOU WILL BE UNABLE TO PARTICIPATE IN ANY FUTURE SETTLEMENT OR JUDGMENT REACHED WITH OR AGAINST THE REMAINING DEFENDANTS.

21 The opt-out made no provision for an opt-out on a conditional basis.

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22 On June 26, 2012, SFC brought a motion for an order directing that claims against SFC that arose in connection with the ownership, purchase or sale of an equity interest in SFC, and related indemnity claims, were "equity claims" as defined in section 2 of the CCAA, including the claims by or on behalf of shareholders asserted in the Class Action Proceedings. The equity claims motion did not purport to deal with the component of the Class Action Proceedings relating to SFC's notes.

23 In reasons released July 27, 2012 [*Sino-Forest Corp.*, *Re*, 2012 ONSC 4377 (Ont. S.C.J. [Commercial List])], I granted the relief sought by SFC (the "Equity Claims Decision"), finding that "the claims advanced in the shareholder claims are clearly equity claims". The Ad Hoc Securities Purchasers' Committee did not oppose the motion, and no issue was taken by any party with the court's determination that the shareholder claims against SFC were "equity claims". The Equity Claims Decision was subsequently affirmed by the Court of Appeal for Ontario on November 23, 2012 [*Sino-Forest Corp.*, *Re*, 2012 ONCA 816 (Ont. C.A.)].

***Ernst & Young Settlement***

24 The Ernst & Young Settlement, and third party releases, was not mentioned in the early versions of the Plan. The initial creditors' meeting and vote on the Plan was scheduled to occur on November 29, 2012; when the Plan was amended on November 28, 2012, the creditors' meeting was adjourned to November 30, 2012.

25 On November 29, 2012, Ernst & Young's counsel and class counsel concluded the proposed Ernst & Young Settlement. The creditors' meeting was again adjourned, to December 3, 2012; on that date, a new Plan revision was released and the Ernst & Young Settlement was publicly announced. The Plan revision featured a new Article 11, reflecting the "framework" for the proposed Ernst & Young Settlement and for third-party releases for named third-party defendants as identified at that time as the Underwriters or in the future.

26 On December 3, 2012, a large majority of creditors approved the Plan. The Objectors note, however, that proxy materials were distributed weeks earlier and proxies were required to be submitted three days prior to the meeting and it is evident that creditors submitting proxies only had a pre-Article 11 version of the Plan. Further, no equity claimants, such as the Objectors, were entitled to vote on the Plan. On December 6, 2012, the Plan was further amended, adding Ernst & Young and BDO to Schedule A, thereby defining them as named third-party defendants.

27 Ultimately, the Ernst & Young Settlement provided for the payment by Ernst & Young of $117 million as a settlement fund, being the full monetary contribution by Ernst & Young to settle the Ernst & Young Claims; however, it remains subject to court approval in Ontario, and recognition in Quebec and the United States, and conditional, pursuant to Article 11.1 of the Plan, upon the following steps:

> (a) the granting of the sanction order sanctioning the Plan including the terms of the Ernst & Young Settlement and the Ernst & Young Release (which preclude any right to contribution or indemnity against Ernst & Young);
>
> (b) the issuance of the Settlement Trust Order;
>
> (c) the issuance of any other orders necessary to give effect to the Ernst & Young Settlement and the Ernst & Young Release, including the Chapter 15 Recognition Order;
>
> (d) the fulfillment of all conditions precedent in the Ernst & Young Settlement; and
>
> (e) all orders being final orders not subject to further appeal or challenge.

28 On December 6, 2012, Kim Orr filed a notice of appearance in the CCAA proceedings on behalf of three Objectors: Invesco, Northwest and Bâtirente. These Objectors opposed the sanctioning of the Plan, insofar as it included Article 11, during the Plan sanction hearing on December 7, 2012.

29 At the Plan sanction hearing, SFC's counsel made it clear that the Plan itself did not embody the Ernst & Young Settlement, and that the parties' request that the Plan be sanctioned did not also cover approval of the Ernst & Young

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Settlement. Moreover, according to the Plan and minutes of settlement, the Ernst & Young Settlement would not be consummated (*i.e.* money paid and releases effective) unless and until several conditions had been satisfied in the future.

30 The Plan was sanctioned on December 10, 2012 with Article 11. The Objectors take the position that the Funds' opposition was dismissed as premature and on the basis that nothing in the sanction order affected their rights.

31 On December 13, 2012, the court directed that its hearing on the Ernst & Young Settlement would take place on January 4, 2013, under both the CCAA and the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA"). Subsequently, the hearing was adjourned to February 4, 2013.

32 On January 15, 2013, the last day of the opt-out period established by orders of Perell J. and Émond J., six institutional investors represented by Kim Orr filed opt-out forms. These institutional investors are Northwest and Bâtirente, who were two of the three institutions represented by Kim Orr in the Carriage Motion, as well as Invesco, Matrix, Montrusco and Gestion Ferique (all of which are members of the Pöyry Settlement Class).

33 According to the opt-out forms, the Objectors held approximately 1.6% of SFC shares outstanding on June 30, 2011 (the day the Muddy Waters report was released). By way of contrast, Davis Selected Advisors and Paulson and Co., two of many institutional investors who support the Ernst & Young Settlement, controlled more than 25% of SFC's shares at this time. In addition, the total number of outstanding objectors constitutes approximately 0.24% of the 34,177 SFC beneficial shareholders as of April 29, 2011.

**Law and Analysis**

***Court's Jurisdiction to Grant Requested Approval***

34 The Claims Procedure Order of May 14, 2012, at paragraph 17, provides that any person that does not file a proof of claim in accordance with the order is barred from making or enforcing such claim as against any other person who could claim contribution or indemnity from the Applicant. This includes claims by the Objectors against Ernst & Young for which Ernst & Young could claim indemnity from SFC.

35 The Claims Procedure Order also provides that the Ontario Plaintiffs are authorized to file one proof of claim in respect of the substance of the matters set out in the Ontario class action, and that the Quebec Plaintiffs are similarly authorized to file one proof of claim in respect of the substance of the matters set out in the Quebec class action. The Objectors did not object to, or oppose, the Claims Procedure Order, either when it was sought or at any time thereafter. The Objectors did not file an independent proof of claim and, accordingly, the Canadian Claimants were authorized to and did file a proof of claim in the representative capacity in respect of the Objectors' claims.

36 The Ernst & Young Settlement is part of a CCAA plan process. Claims, including contingent claims, are regularly compromised and settled within CCAA proceedings. This includes outstanding litigation claims against the debtor and third parties. Such compromises fully and finally dispose of such claims, and it follows that there are no continuing procedural or other rights in such proceedings. Simply put, there are no "opt-outs" in the CCAA.

37 It is well established that class proceedings can be settled in a CCAA proceeding. See *Robertson v. ProQuest Information & Learning Co.*, 2011 ONSC 1647 (Ont. S.C.J. [Commercial List]) [*Robertson*].

38 As noted by Pepall J. (as she then was) in *Robertson*, para. 8:

> When dealing with the consensual resolution of a CCAA claim filed in a claims process that arises out of ongoing litigation, typically no court approval is required. In contrast, class proceedings settlements must be approved by the court. The notice and process for dissemination of the settlement agreement must also be approved by the court.

39 In this case, the notice and process for dissemination have been approved.

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40 The Objectors take the position that approval of the Ernst & Young Settlement would render their opt-out rights illusory; the inherent flaw with this argument is that it is not possible to ignore the CCAA proceedings.

41 In this case, claims arising out of the class proceedings are claims in the CCAA process. CCAA claims can be, by definition, subject to compromise. The Claims Procedure Order establishes that claims as against Ernst & Young fall within the CCAA proceedings. Thus, these claims can also be the subject of settlement and, if settled, the claims of all creditors in the class can also be settled.

42 In my view, these proceedings are the appropriate time and place to consider approval of the Ernst & Young Settlement. This court has the jurisdiction in respect of both the CCAA and the CPA.

***Should the Court Exercise Its Discretion to Approve the Settlement***

43 Having established the jurisdictional basis to consider the motion, the central inquiry is whether the court should exercise its discretion to approve the Ernst & Young Settlement.

***CCAA Interpretation***

44 The CCAA is a "flexible statute", and the court has "jurisdiction to approve major transactions, including settlement agreements, during the stay period defined in the Initial Order". The CCAA affords courts broad jurisdiction to make orders and "fill in the gaps in legislation so as to give effect to the objects of the CCAA." [*Nortel Networks Corp., Re*, 2010 ONSC 1708 (Ont. S.C.J. [Commercial List]), paras. 66-70 ("*Re Nortel"*)); *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299, 72 O.T.C. 99 (Ont. Gen. Div. [Commercial List]), para. 43]

45 Further, as the Supreme Court of Canada explained in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.), para. 58:

> CCAA decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly described as "the hothouse of real time litigation" has been the primary method by which the CCAA has been adapted and has evolved to meet contemporary business and social needs (internal citations omitted). ...When large companies encounter difficulty, reorganizations become increasingly complex. CCAA courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the Debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the CCAA.

46 It is also established that third-party releases are not an uncommon feature of complex restructurings under the CCAA [*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.) ("*ATB Financial*"); *Nortel Networks Corp., Re*, *supra*; *Robertson*, *supra*; *Muscletech Research & Development Inc., Re* (2007), 30 C.B.R. (5th) 59, 156 A.C.W.S. (3d) 22 (Ont. S.C.J. [Commercial List]) ("*Muscle Tech*"); *Grace Canada Inc., Re* (2008), 50 C.B.R. (5th) 25 (Ont. S.C.J. [Commercial List]); *Allen-Vanguard Corp., Re*, 2011 ONSC 5017 (Ont. S.C.J. [Commercial List])].

47 The Court of Appeal for Ontario has specifically confirmed that a third-party release is justified where the release forms part of a comprehensive compromise. As Blair J. A. stated in *ATB Financial*, *supra*:

> 69. In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).
>
> 70. The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan ...

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71. In the course of his reasons, the application judge made the following findings, all of which are amply supported on the record:

a) The parties to be released are necessary and essential to the restructuring of the debtor;

b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;

c) The Plan cannot succeed without the releases;

d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan; and

e) The Plan will benefit not only the debtor companies but creditor Noteholders generally.

72. Here, then — as was the case in T&N — there is a close connection between the claims being released and the restructuring proposal. The tort claims arise out of the sale and distribution of the ABCP Notes and their collapse in value, just as do the contractual claims of the creditors against the debtor companies. The purpose of the restructuring is to stabilize and shore up the value of those notes in the long run. The third parties being released are making separate contributions to enable those results to materialize. Those contributions are identified earlier, at para. 31 of these reasons. The application judge found that the claims being released are not independent of or unrelated to the claims that the Noteholders have against the debtor companies; they are closely connected to the value of the ABCP Notes and are required for the Plan to succeed ...

73. I am satisfied that the wording of the CCAA — construed in light of the purpose, objects and scheme of the Act and in accordance with the modern principles of statutory interpretation — supports the court's jurisdiction and authority to sanction the Plan proposed here, including the contested third-party releases contained in it.

. . .

78. ... I believe the open-ended CCAA permits third-party releases that are reasonably related to the restructuring at issue because they are encompassed in the comprehensive terms "compromise" and "arrangement" and because of the double-voting majority and court sanctioning statutory mechanism that makes them binding on unwilling creditors.

. . .

113. At para. 71 above I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here — with two additional findings — because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:

a) The parties to be released are necessary and essential to the restructuring of the debtor;

b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;

c) The Plan cannot succeed without the releases;

d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;

e) The Plan will benefit not only the debtor companies but creditor Noteholders generally;

f) The voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,

g) The releases are fair and reasonable and not overly broad or offensive to public policy.

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48 Furthermore, in *ATB Financial*, *supra*, para. 111, the Court of Appeal confirmed that parties are entitled to settle allegations of fraud and to include releases of such claims as part of the settlement. It was noted that "there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given".

***Relevant CCAA Factors***

49 In assessing a settlement within the CCAA context, the court looks at the following three factors, as articulated in *Robertson*, *supra*:

(a) whether the settlement is fair and reasonable;

(b) whether it provides substantial benefits to other stakeholders; and

(c) whether it is consistent with the purpose and spirit of the CCAA.

50 Where a settlement also provides for a release, such as here, courts assess whether there is "a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan". Applying this "nexus test" requires consideration of the following factors: [*ATB Financial*, *supra*, para. 70]

(a) Are the claims to be released rationally related to the purpose of the plan?

(b) Are the claims to be released necessary for the plan of arrangement?

(c) Are the parties who have claims released against them contributing in a tangible and realistic way? and

(d) Will the plan benefit the debtor and the creditors generally?

***Counsel Submissions***

51 The Objectors argue that the proposed Ernst & Young Release is not integral or necessary to the success of Sino-Forest's restructuring plan, and, therefore, the standards for granting thirdparty releases in the CCAA are not satisfied. No one has asserted that the parties require the Ernst & Young Settlement or Ernst & Young Release to allow the Plan to go forward; in fact, the Plan has been implemented prior to consideration of this issue. Further, the Objectors contend that the $117 million settlement payment is not essential, or even related, to the restructuring, and that it is concerning, and telling, that varying the end of the Ernst & Young Settlement and Ernst & Young Release to accommodate opt-outs would extinguish the settlement.

52 The Objectors also argue that the Ernst & Young Settlement should not be approved because it would vitiate opt-out rights of class members, as conferred as follows in section 9 of the CPA: "Any member of a class involved in a class proceeding may opt-out of the proceeding in the manner and within the time specified in the certification order." This right is a fundamental element of procedural fairness in the Ontario class action regime [*Fischer v. IG Investment Management Ltd.*, 2012 ONCA 47 (Ont. C.A.), para. 69], and is not a mere technicality or illusory. It has been described as absolute [*Durling v. Sunrise Propane Energy Group Inc.*, 2011 ONSC 266 (Ont. S.C.J.)]. The opt-out period allows persons to pursue their self-interest and to preserve their rights to pursue individual actions [*Mangan v. Inco Ltd.* (1998), 16 C.P.C. (4th) 165, 38 O.R. (3d) 703 (Ont. Gen. Div.)].

53 Based on the foregoing, the Objectors submit that a proposed class action settlement with Ernst & Young should be

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approved solely under the CPA, as the Pöyry Settlement was, and not through misuse of a third-party release procedure under the CCAA. Further, since the minutes of settlement make it clear that Ernst & Young retains discretion not to accept or recognize normal opt-outs if the CPA procedures are invoked, the Ernst & Young Settlement should not be approved in this respect either.

54 Multiple parties made submissions favouring the Ernst & Young Settlement (with the accompanying Ernst & Young Release), arguing that it is fair and reasonable in the circumstances, benefits the CCAA stakeholders (as evidenced by the broad-based support for the Plan and this motion) and rationally connected to the Plan.

55 Ontario Plaintiffs' counsel submits that the form of the bar order is fair and properly balances the competing interests of class members, Ernst & Young and the non-settling defendants as:

(a) class members are not releasing their claims to a greater extent than necessary;

(b) Ernst & Young is ensured that its obligations in connection to the Settlement will conclude its liability in the class proceedings;

(c) the non-settling defendants will not have to pay more following a judgment than they would be required to pay if Ernst & Young remained as a defendant in the action; and

(d) the non-settling defendants are granted broad rights of discovery and an appropriate credit in the ongoing litigation, if it is ultimately determined by the court that there is a right of contribution and indemnity between the co-defendants.

56 SFC argues that Ernst & Young's support has simplified and accelerated the Plan process, including reducing the expense and management time otherwise to be incurred in litigating claims, and was a catalyst to encouraging many parties, including the Underwriters and BDO, to withdraw their objections to the Plan. Further, the result is precisely the type of compromise that the CCAA is designed to promote; namely, Ernst & Young has provided a tangible and significant contribution to the Plan (notwithstanding any pitfalls in the litigation claims against Ernst & Young) that has enabled SFC to emerge as Newco/NewcoII in a timely way and with potential viability.

57 Ernst & Young's counsel submits that the Ernst & Young Settlement, as a whole, including the Ernst & Young Release, must be approved or rejected; the court cannot modify the terms of a proposed settlement. Further, in deciding whether to reject a settlement, the court should consider whether doing so would put the settlement in "jeopardy of being unravelled". In this case, counsel submits there is no obligation on the parties to resume discussions and it could be that the parties have reached their limits in negotiations and will backtrack from their positions or abandon the effort.

***Analysis and Conclusions***

58 The Ernst & Young Release forms part of the Ernst & Young Settlement. In considering whether the Ernst & Young Settlement is fair and reasonable and ought to be approved, it is necessary to consider whether the Ernst & Young Release can be justified as part of the Ernst & Young Settlement. See *ATB Financial, supra*, para. 70, as quoted above.

59 In considering the appropriateness of including the Ernst & Young Release, I have taken into account the following.

60 Firstly, although the Plan has been sanctioned and implemented, a significant aspect of the Plan is a distribution to SFC's creditors. The significant and, in fact, only monetary contribution that can be directly identified, at this time, is the $117 million from the Ernst & Young Settlement. Simply put, until such time as the Ernst & Young Settlement has been concluded and the settlement proceeds paid, there can be no distribution of the settlement proceeds to parties entitled to receive them. It seems to me that in order to effect any distribution, the Ernst & Young Release has to be approved as part of the Ernst & Young Settlement.

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61 Secondly, it is apparent that the claims to be released against Ernst & Young are rationally related to the purpose of the Plan and necessary for it. SFC put forward the Plan. As I outlined in the Equity Claims Decision, the claims of Ernst & Young as against SFC are intertwined to the extent that they cannot be separated. Similarly, the claims of the Objectors as against Ernst & Young are, in my view, intertwined and related to the claims against SFC and to the purpose of the Plan.

62 Thirdly, although the Plan can, on its face, succeed, as evidenced by its implementation, the reality is that without the approval of the Ernst & Young Settlement, the objectives of the Plan remain unfulfilled due to the practical inability to distribute the settlement proceeds. Further, in the event that the Ernst & Young Release is not approved and the litigation continues, it becomes circular in nature as the position of Ernst & Young, as detailed in the Equity Claims Decision, involves Ernst & Young bringing an equity claim for contribution and indemnity as against SFC.

63 Fourthly, it is clear that Ernst & Young is contributing in a tangible way to the Plan, by its significant contribution of $117 million.

64 Fifthly, the Plan benefits the claimants in the form of a tangible distribution. Blair J.A., at paragraph 113 of *ATB Financial*, *supra*, referenced two further facts as found by the application judge in that case; namely, the voting creditors who approved the Plan did so with the knowledge of the nature and effect of the releases. That situation is also present in this case.

65 Finally, the application judge in *ATB Financial*, *supra*, held that the releases were fair and reasonable and not overly broad or offensive to public policy. In this case, having considered the alternatives of lengthy and uncertain litigation, and the full knowledge of the Canadian plaintiffs, I conclude that the Ernst & Young Release is fair and reasonable and not overly broad or offensive to public policy.

66 In my view, the Ernst & Young Settlement is fair and reasonable, provides substantial benefits to relevant stakeholders, and is consistent with the purpose and spirit of the CCAA. In addition, in my view, the factors associated with the *ATB Financial* nexus test favour approving the Ernst & Young Release.

67 In *Nortel Networks Corp., Re*, *supra*, para. 81, I noted that the releases benefited creditors generally because they "reduced the risk of litigation, protected Nortel against potential contribution claims and indemnity claims and reduced the risk of delay caused by potentially complex litigation and associated depletion of assets to fund potentially significant litigation costs". In this case, there is a connection between the release of claims against Ernst & Young and a distribution to creditors. The plaintiffs in the litigation are shareholders and Noteholders of SFC. These plaintiffs have claims to assert against SFC that are being directly satisfied, in part, with the payment of $117 million by Ernst & Young.

68 In my view, it is clear that the claims Ernst & Young asserted against SFC, and SFC's subsidiaries, had to be addressed as part of the restructuring. The interrelationship between the various entities is further demonstrated by Ernst & Young's submission that the release of claims by Ernst & Young has allowed SFC and the SFC subsidiaries to contribute their assets to the restructuring, unencumbered by claims totalling billions of dollars. As SFC is a holding company with no material assets of its own, the unencumbered participation of the SFC subsidiaries is crucial to the restructuring.

69 At the outset and during the CCAA proceedings, the Applicant and Monitor specifically and consistently identified timing and delay as critical elements that would impact on maximization of the value and preservation of SFC's assets.

70 Counsel submits that the claims against Ernst & Young and the indemnity claims asserted by Ernst & Young would, absent the Ernst & Young Settlement, have to be finally determined before the CCAA claims could be quantified. As such, these steps had the potential to significantly delay the CCAA proceedings. Where the claims being released may take years to resolve, are risky, expensive or otherwise uncertain of success, the benefit that accrues to creditors in having them settled must be considered. See *Nortel Networks Corp., Re*, *supra*, paras. 73 and 81; and *Muscletech*, *supra*, paras. 19-21.

71 Implicit in my findings is rejection of the Objectors' arguments questioning the validity of the Ernst & Young Settlement and Ernst & Young Release. The relevant consideration is whether a proposed settlement and third-party release sufficiently benefits all stakeholders to justify court approval. I reject the position that the $117 million settlement payment is not essential, or even related, to the restructuring; it represents, at this point in time, the only real monetary consideration

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available to stakeholders. The potential to vary the Ernst & Young Settlement and Ernst & Young Release to accommodate opt-outs is futile, as the court is being asked to approve the Ernst & Young Settlement and Ernst & Young Release as proposed.

72 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.

73 Even if one assumes that the opt-out argument of the Objectors can be sustained, and optout rights fully provided, to what does that lead? The Objectors are left with a claim against Ernst & Young, which it then has to put forward in the CCAA proceedings. Without taking into account any argument that the claim against Ernst & Young may be affected by the claims bar date, the claim is still capable of being addressed under the Claims Procedure Order. In this way, it is again subject to the CCAA fairness and reasonable test as set out in *ATB Financial*, *supra*.

74 Moreover, CCAA proceedings take into account a class of creditors or stakeholders who possess the same legal interests. In this respect, the Objectors have the same legal interests as the Ontario Plaintiffs. Ultimately, this requires consideration of the totality of the class. In this case, it is clear that the parties supporting the Ernst & Young Settlement are vastly superior to the Objectors, both in number and dollar value.

75 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.

76 The Objectors are, in fact, part of the group that will benefit from the Ernst & Young Settlement as they specifically seek to reserve their rights to "opt-in" and share in the spoils.

77 It is also clear that the jurisprudence does not permit a dissenting stakeholder to opt-out of a restructuring. [*Sammi Atlas Inc., Re* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List])).] 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.

78 SFC is insolvent and all stakeholders, including the Objectors, will receive less than what they are owed. By virtue of deciding, on their own volition, not to participate in the CCAA process, the Objectors relinquished their right to file a claim and take steps, in a timely way, to assert their rights to vote in the CCAA proceeding.

79 Further, even if the Objectors had filed a claim and voted, their minimal 1.6% stake in SFC's outstanding shares when the Muddy Waters report was released makes it highly unlikely that they could have altered the outcome.

80 Finally, although the Objectors demand a right to conditionally opt-out of a settlement, that right does not exist under the CPA or CCAA. By virtue of the certification order, class members had the ability to opt-out of the class action. The Objectors did not opt-out in the true sense; they purported to create a conditional opt-out. Under the CPA, the right to opt-out is "in the manner and within the time specified in the certification order". There is no provision for a conditional opt-out in the CPA, and Ontario's single opt-out regime causes "no prejudice...to putative class members". [CPA, section 9; *Osmun v. Cadbury Adams Canada Inc.* (2009), 85 C.P.C. (6th) 148 (Ont. S.C.J.), paras. 43-46; and *Eidoo v. Infineon Technologies AG*, 2012 ONSC 7299 (Ont. S.C.J.).]

***Miscellaneous***

81 For greater certainty, it is my understanding that the issues raised by Mr. O'Reilly have been clarified such that the effect of this endorsement is that the Junior Objectors will be included with the same status as the Ontario Plaintiffs.

**Disposition**

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82 In the result, for the foregoing reasons, the motion is granted. A declaration shall issue to the effect that the Ernst & Young Settlement is fair and reasonable in all the circumstances. The Ernst & Young Settlement, together with the Ernst & Young Release, is approved and an order shall issue substantially in the form requested. The motion of the Objectors is dismissed.

*Motion granted.*

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2013 ONCA 456
Ontario Court of Appeal

Sino-Forest Corp., Re

2013 CarswellOnt 8896, 2013 ONCA 456, [2013] O.J. No. 3085, 230 A.C.W.S. (3d) 124

# 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

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, Poyry (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 Incorported (successor by merger to Banc of America Securities LLC) Proceedings under the Class Proceedings Act, 1992, Defendants

J. MacFarland J.A., David Watt J.A., Gloria Epstein J.A.

Judgment: June 26, 2013
Docket: CA M42068, M42399

Proceedings: refusing leave to appeal *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp.* (2013), 37 C.P.C. (7th) 135, 100 C.B.R. (5th) 30, 2013 ONSC 1078, 2013 CarswellOnt 3361 (Ont. S.C.J. [Commercial List]); and refusing leave to appeal *Sino-Forest Corp., Re* (2012), 2012 CarswellOnt 15913, 2012 ONSC 7050 (Ont. S.C.J. [Commercial List])

Counsel: James C. Orr, Won J. Kim, Megan B. McPhee, Michael C. Spencer, for Moving Parties, Invesco Canada Ltd., Northwest & Ethical Investments L.P., and Comité Syndical National de Retraite Bâtirente Inc.
Ken Rosenberg, Massimo Starnino, Jonathan Ptak, Jonathan Bida, Charles M. Wright, A. Dimitri Lascaris, for Ad Hoc Committee of Purchasers of the Applicant's Securities, including the Representative Plaintiffs in the Ontario Class Action
Benjamin Zarnett, Robert Chadwick, Brendan O'Neill, for Respondent Ad Hoc Committee of Noteholders
Peter R. Greene, Kathryn L. Knight, Kenneth A. Dekker, for Responding Party, DBO Limited
Robert W. Staley, Kevin Zych, Derek J. Bell, Raj Sahni, Jonathan Bell, for Sino-Forest Corporation
David Bish, John Fabello, Adam M. Slavens, for Underwriters
Derrick Tay, Clifton Prophet, Jennifer Stam, for FTI Consulting Canada Inc., in its capacity as Monitor
Peter H. Griffin, Peter J. Osborne, Shara N. Roy, for Ernst & Young LLP

Subject: Insolvency; Civil Practice and Procedure

**Headnote**

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Appeals
There were two motions for leave to appeal in proceedings under Companies' Creditors Arrangement Act (CCAA) — Motions related to supervising judge's approval of settlement releasing E.Y. from any claims arising from its auditing of company — Settlement was part of company's plan of compromise and reorganization — Leave to appeal was sought for order sanctioning plan of compromise and reorganization and approving settlement — Motions dismissed — Leave to appeal

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in CCAA proceedings was to be granted sparingly and only where there were serious and arguable grounds that were of real and significant interest to parties — Test for granting leave to appeal in CCAA proceedings was not met — Proposed appeal of sanction order was moot, as plan had been implemented — There was no basis to interfere with decision approving settlement.

MOTIONS for leave to appeal from judgment reported at *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp.* (2013), 37 C.P.C. (7th) 135, 100 C.B.R. (5th) 30, 2013 ONSC 1078, 2013 CarswellOnt 3361 (Ont. S.C.J. [Commercial List]), and judgment reported at *Sino-Forest Corp., Re* (2012), 2012 CarswellOnt 15913, 2012 ONSC 7050 (Ont. S.C.J. [Commercial List]), in proceedings under *Companies' Creditors Arrangement Act*.

**Per curiam:**

1 Leave to appeal is denied.

2 The test for granting leave to appeal in *CCAA* proceedings is well-settled. It is to be granted sparingly and only where there are serious and arguable grounds that are of real and significant interest to the parties. In determining whether leave ought to be granted, this court is required to consider the following four-part inquiry:

- Whether the point on the proposed appeal is of significance to the practice;
- Whether the point is of significance to the action;
- Whether the proposed appeal is *prima facie* meritorious or frivolous; and
- Whether the appeal will unduly hinder the progress of the action.

See *Country Style Food Services Inc., Re* (2002), 158 O.A.C. 30 (Ont. C.A. [In Chambers]).

3 In our view the proposed appeals fail to meet this stringent test.

4 These motions for leave to appeal relate to the supervising judge's approval of a settlement releasing Ernst & Young LLP from any claims arising from its auditing of Sino-Forest Corporation.

5 The Ernst & Young settlement is part of Sino-Forest's Plan of Compromise and Reorganization ("the Plan") following a bankruptcy triggered by allegations of corporate fraud. The settlement has the support of all parties to the *CCAA* proceedings, including the Monitor, Sino-Forest's creditors and a group of plaintiffs seeking to recover their investment losses in a contemplated, but not yet certified, class action ("the Ontario Plaintiffs").

6 These motions for leave to appeal are brought by a single group of Sino-Forest investors, collectively known as Invesco, who together held approximately 1.6% of Sino-Forest's outstanding shares at the time of its collapse. Invesco chose not to participate in any of the chose not to participate in any of the chose not to participate in any of the

7 Invesco is represented by Kim Orr LLP, the firm that ranked last in a fight for carriage of the Ontario class action against Sino-Forest and its auditors and underwriters. In January 2012, Perell J. awarded carriage of that action to Koskie Minsky and Siskinds LLP, with the Ontario Plaintiffs as the proposed representative plaintiffs. No appeal was taken from the order of Perell J.

8 There are two motions for leave to appeal before the court.

- *M42068* — Invesco seeks leave to appeal the supervising judge's order dated December 10, 2012 [2012 CarswellOnt 15919 (Ont. S.C.J. [Commercial List])], sanctioning a Plan of Compromise and Reorganization for Sino-Forest (the "Sanction Order")

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• *M42399* — Invesco seeks leave to appeal the supervising judge's orders dated March 20, 2013 [2013 CarswellOnt 3361 (Ont. S.C.J. [Commercial List])], approving the Ernst & Young settlement and dismissing Invesco's motion for an order to represent all prospective class members who oppose the settlement (the "Settlement Order" and the "Representation Dismissal Order").

9 By order of Simmons J.A. dated May 1, 2013, the motion for leave to appeal the Sanction Order was ordered to be consolidated and heard together with the motion for leave to appeal the Settlement Order and the Representation Dismissal Order.

10 The motions for leave to appeal are opposed by Sino-Forest, the Monitor, Sino-Forest's auditors and underwriters, the Ontario Plaintiffs, and a group representing Sino-Forest's major creditors.

**The Sanction Order**

11 The supervising judge dismissed Invesco's arguments opposing the Sanction Order on the ground that, since the settlement was not part of the Plan at that point, its objections were premature. It could raise those objections when the court considered whether or not to approve the settlement.

12 Invesco did not move to stay this order and the Plan has since been implemented. This proposed appeal is moot, and in any event, we see no basis to interfere with the supervising judge's decision.

**The Settlement Order and the Representation Dismissal Order**

13 In approving the settlement, the supervising judge applied the test set out in *Robertson v. ProQuest Information & Learning Co.*, 2011 ONSC 1647 (Ont. S.C.J. [Commercial List]). And because the proposed settlement provided for a release to Ernst & Young, he went on to consider the test prescribed by this court in *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 92 O.R. (3d) 513 (Ont. C.A.), leave to appeal refused, [2008] S.C.C.A. No. 337 (S.C.C.) (*"ATB Financial*"). He found that the proposed settlement met those requirements. He concluded that the Ernst & Young settlement was fair and reasonable, provided substantial benefits to relevant stakeholders and was consistent with the purpose and spirit of the *CCAA*.

14 There is no basis on which to interfere with his decision. The issues raised on this proposed appeal are, at their core, the very issues settled by this court in *ATB Financial*.

15 Having dismissed their objection to the settlement order, it follows that Invesco's motion for a representation order would also be dismissed.

16 The motions for leave to appeal are dismissed.

17 Costs are to the responding parties on the motions on a partial indemnity scale fixed in the sum of $1,500 per motion inclusive of disbursements and applicable taxes.

*Motions dismissed.*

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# TAB 2

2005 CarswellOnt 4267
Ontario Superior Court of Justice [Commercial List]

Ravelston Corp., Re

2005 CarswellOnt 4267, 142 A.C.W.S. (3d) 18, 14 C.B.R. (5th) 207

# 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 THE RAVELSTON CORPORATION LIMITED AND RAVELSTON MANAGEMENT INC.

AND IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED, AND THE COURTS OF JUSTICE ACT, R.S.O. 1990, c. C.43, AS AMENDED

Farley J.

Heard: August 25, 2005
Judgment: August 26, 2005
Docket: 05-CL-5863

Counsel: Alex MacFarlane for RSM Richter Inc. in its capacity as Receiver, Interim Receiver and Monitor of The Ravelston Corporation Limited, Ravelston Management Inc. Argus Corporation Limited, 509643 N.B. Inc., 509644 N.B. Inc., 509645 N.B. Inc., 509646 N.B. Inc., 509647 Inc.
Matthew Gottlieb for Hollinger Inc.
Robert W. Staley, Derek J. Bell for Hollinger International Inc.
Lyndon Barnes, Nancy Roberts for CanWest Global Communications Corporation

Subject: Insolvency

**Headnote**

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"
Management services agreement existed between R company, C Corp. and NP — R company gave C Corp. notice of termination of management services agreement on day before R company filed for protection under Companies' Creditors Arrangement Act — Litigation ensued between receiver of R company and C Corp. regarding agreement — Receiver and C Corp. settled dispute subject to court approval for payment by C Corp. to receiver of $12.75 million, which was 50 percent of amount claimed by receiver — H International opposed settlement — Receiver brought motion for court approval of settlement — Settlement approved — If litigation had not been settled, decision would have been made on all-or-nothing basis — There was nothing approaching certainty of result — Settlement on 50-percent basis fell within general range of acceptability of fair and commercial reasonable basis.

MOTION by receiver for court approval of settlement.

***Farley J.*:**

1 These are the short reasons promised yesterday where I approved the settlement between the Receiver of Ravelston and CanWest concerning the dispute between them as to the termination fee owing under the Management Services Agreement

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dated November 15, 2000 between Ravelston, CanWest and National Post. As I pointed out, the business efficacy of the Management Services Agreement may well be questioned; however what was to be decided by me was not that, but rather the issue of the termination arrangements.

2 The Receiver and CanWest — the day before the hearing of this dispute reached a settlement, subject to court approval, whereby the parties would exchange mutual releases and CanWest would pay the Receiver $12.75 million. This amounted to 50% of the amount the Receiver was claiming pursuant to the notice of termination which Ravelston gave CanWest the day before Ravelston filed for protection pursuant to the CCAA (with the Receiver being the monitor under the CCAA proceedings) and for the appointment of the Receiver as the court appointed receiver of Ravelston. The two Hollinger companies, Inc. and International, were not happy with the amount of the settlement, although it appears that both were content with a settlement at a higher amount being paid the Receiver. Inc. did not support the approval of the settlement but did not oppose it. International actively opposed the settlement; its position was that the Receiver ought to have obtained a settlement in the 75% range. Both Inc. and International assert that they ought to have been more involved with the settlement process as they assert a special relationship owing to claimed security interests in the claim and its proceeds. One could well posit a situation where the process of settlement could have been improved by more involvement of Inc. and International. However, what we are concerned with is not perfection, but rather has there been material and relevant prejudice so as to taint the process to the degree that the court ought not to entertain the settlement. However, in this situation, Mr. Gottlieb for Inc. volunteered that Inc. had been alerted to the settlement prior to its being entered into, albeit just immediately prior (where in my view it would have been better to have alerted Inc. that settlement discussions were to be actively engaged in and then given progress reports at meaningful times along the way). International was kept more abreast of the situation; the Receiver and its Canadian counsel dialogued with International's counsel, Mr. Staley, including a meeting on June 7, 2005 which, *inter alia*, dealt with International's view concerning the dispute with CanWest. The Receiver of course had the benefit of the active participation of International leading up to the hearing scheduled for August 17th including a detailed factum by International opposing the CanWest position that it owed nothing. On August 15th, Mr. Staley was advised that the Receiver would be meeting with CanWest's counsel the next day to see if a settlement could be reached. While Mr. Staley was otherwise engaged on the 16th, he did indicate that a settlement would be preferable to having the matter litigated. International did not ask that another lawyer be allowed to participate in or observe the settlement discussions, nor did it indicate that a floor amount should be achieved in order that International would be supportive of a settlement.

3 The Receiver submitted that a motion to approve a settlement entered into by a court-appointed receiver is analogous to a motion to approve a sale of assets by a court-appointed receiver so that the 4 part set of principles/considerations of *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.) at para. 16 would come into play. See *Bakemates International Inc., Re*, [2003] O.J. No. 3191 (Ont. S.C.J.), affirmed 2004 CarswellOnt 2339 (Ont. C.A.). However, it seems to me that there is a subtle distinction to make between reliance on a receiver's commercial expertise concerning a recommended sale and the receiver's expertise in regards to a settlement of a legal dispute (while of course taking into account that such a receiver will have had appropriate legal advice from its own counsel). That distinction is based on the fact that the court is the "expert" in respect of the law and will generally be in a better position to assess the law involved in a situation than it would be as to the commercial aspects of a sale of property. In this regard, one may wish to consider the analogous situation of expert opinions as discussed in *R. v. Mohan*, [1994] 2 S.C.R. 9 (S.C.C.). Thus it seems to me that the court, with the assistance of counsel (both counsel supporting the approval of a settlement and counsel opposing), should conduct an analysis of the strengths and weaknesses of the case, including the general vagaries of litigation plus the benefits of certainty and the avoidance of delay concerning possible appeals, sufficient for the court to conclude that the proposed settlement fell within the range of what was fair and commercially reasonable. The case here involved an all or nothing result if the case went on to a court decision.

4 I have had the benefit of reviewing in detail the material for the August 17th hearing immediately prior to being advised that the Receiver and CanWest had reached a settlement, subject to court approval. In my view there was much to be said for the merits of each side's position. There was much to be said about the pros and cons — and it was carefully detailed in that material and so was said. I have now had as well the benefit of the material filed and argued concerning the approval of the settlement as concerns the merits of the dispute which was to have been heard on August 17th. If the case had not settled, then I would have had to make a decision, a decision on an all or nothing basis. I would have made that decision — but I cannot predict now what it would have been, nor could I predict how the Court of Appeal would have decided, given the fact that inevitably my decision would have been appealed. It would have been an interesting decision to write. There certainly was no slam-dunk either way, nor nothing approaching that certainty of result. In my view, the settlement on a 50% basis

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falls within the general range of acceptability on a fair and commercially reasonable basis. I therefore have approved the settlement.

5 Allow me to observe that in the fact circumstances of this case and the law as eventually argued in the respective factums, I agree that it is highly likely that attempts to negotiate a settlement before almost reaching the court house steps would have been premature. It was indeed necessary and appropriate that each side reflect on its own strengths and weaknesses once it had the benefit of refined argument on the strengths of the other side.

6 Mr. Gottlieb makes a fair request in my view where he asks on behalf of Inc. for advance notice of any intention to deal with the proceeds of this settlement. I leave it to the Receiver in consultation with International and Inc. to deal with the issue of proceeds disposition and notice generally.

7 Order approving settlement to issue as per my fiat.

*Order accordingly.*

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# TAB 3

2010 ONSC 6171
Ontario Superior Court of Justice [Commercial List]

Canadian Microtunneling Ltd., Re

2010 CarswellOnt 8436, 2010 ONSC 6171, 194 A.C.W.S. (3d) 433, 72 C.B.R. (5th) 303

# IN THE MATTER OF the receivership of Canadian Microtunneling Ltd. of the City of Toronto in the Province of Ontario

Newbould J.

Heard: November 8, 2010
Judgment: November 9, 2010
Docket: 08-CL-7454

Counsel: William J. Meyer Q.C., Douglas Christie for Edward White & Associates Inc., receiver of Canadian Microtunnelling Ltd.
Miles D. O'Reilly, Q.C. for Bruce A. Simpson and Swanick & Associates
Grant Braislsford for City of Hamilton
A. Weretelnyk for City of Toronto
Lawrence A. Pick for Gary Benner and Canadian Microtunnelling Ltd*

Subject: Insolvency

**Headnote**

Bankruptcy and insolvency --- Receivers — Powers, duties and liabilities
Approving settlement — Bankrupt's sole asset was judgment against city with amount owing of $555,000 to $560,000 — Judgment was obtained under s. 38 of Bankruptcy and Insolvency Act due to city terminating contract with bankrupt contractor to which bankrupt was subcontracor — Damages award included amounts owed by bankrupt to its sub-trades — Act required that any amounts beyond costs and claim of bankrupt be paid to trustee of contractor — City claimed judgment could be set aside, as it was based on fraud by bankrupt that it wished to pay statute-barred claims of subcontractors — Receiver brought motion to settle outstanding issues and costs between bankrupt and city, including approval of settlement — Motion granted — Settlement was fair and reasonable and should be approved — City's position for appeal had some substance — Settlement did not represent 25 per cent discount in amount owed, as stated by bankrupt — Evidence showed bankrupt intended to give related corporations priority over sub-trades — Bankrupt's claim that trial judge accepted that bankrupt did not intend to pay subtrades 100 per cent of amount owing was not tenable — Bankrupt may have provided misinformation regarding creditors — Claim for administration fee and amounts owing to subtrades was problematic due to operation of s. 38 — Bankrupt had improperly received amounts already paid by city and spent amount on legal fees and personal expenses while making few payments to subtrades.

MOTION by receiver for order settling issues and approving settlement.

***Newbould J.*:**

1 The receiver moves for an order authorizing and directing the receiver to settle all outstanding issues and costs between the City of Hamilton and Canadian Microtunnelling Ltd. (CML) arising out of the judgment granted by Jennings J. in favour of CML.

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2 The litigation between CML and Hamilton has some considerable history. A first trial judgment in favor CML was set aside in the Court of Appeal and a new trial directed. The new trial resulted in a judgment by Jennings J. in favor of CML dated May 17, 2005. An appeal to the Court of Appeal was unsuccessful and leave to appeal to the Supreme Court of Canada was denied on December 7, 2007. As of that date, $717,000 was owing to CML inclusive of interest and costs. On December 19, 2007 Hamilton made an interim payment of $218,507.88 to CML. The balance owing on the judgment is approximately $555,000 to $560,000.

3 On April 22, 2008 the City of Hamilton brought a motion to set aside the judgment of Jennings J. on the ground of fraud and for a new trial. Voluminous material was filed on that motion. It is alleged in that motion that Gary Benner gave false or misleading evidence before Jennings J. relating to amounts owing to subcontractors of CML.

4 CML was a subcontractor to George Robson Construction (Weston) Limited. Robson had a contract with the City of Hamilton and it was alleged that Hamilton unlawfully terminated the contract. Robson was bankrupt and CML obtained an order under section 38 of the Bankruptcy and Insolvency Act permitting it to proceed with an action against Hamilton. As part of its proof of damages, CML gave evidence of amounts owing to its sub-trades and Jennings J. included those amounts in the damage award made in favour of CML.

5 Under the section 38 order in the bankruptcy of Robson, any amount in excess of the costs of the action against Hamilton and of the claim of CML is to be paid to the trustee of Robson. Under the order of April 11, 2008 of Campbell J. appointing the receiver, the receiver was given authority over all of CML's current and future assets, undertakings and properties of every nature and kind and authorized to take control of the property of CML and to receive and collect all money now or thereafter owing to CML. The sole asset CML is the proceeds of the judgment against Hamilton.

6 Since December 2008, the receiver has participated in discussions with all interested parties with respect to settling the motion by the City of Hamilton. Hamilton has proposed terms of settlement which would provide for payment of $416,000 and for a release of its claim to be repaid the $218,507.88 previously paid to CML. All of the interested parties save for Mr. Benner, being creditors who filed claims in the receivership of CML pursuant to a claims bar order of Morawetz J. of October 27, 2009, approve of the proposed settlement. The receiver is of the opinion that the settlement is reasonable.

7 Mr. Benner opposes any settlement. His position is that there are no grounds available to the City of Hamilton to set aside the judgment of Jennings J. and that the settlement amounts to a discount of approximately 25% of the remaining unpaid portion of the judgment which he says is not warranted. I think this percentage is overstated because if one takes into account the claim by Hamilton to be reimbursed for the money previously paid to CML under the judgment, the percentage would be much less.

8 I accept the test on such a motion enunciated by Farley J in *Ravelston Corp., Re* (2005), 14 C.B.R. (5th) 207 (Ont. S.C.J. [Commercial List]) in which he stated:

> However, it seems to me that there is a subtle distinction to make between reliance on a receiver's commercial expertise concerning a recommended sale and the receiver's expertise in regards to a settlement of a legal dispute (while of course taking into account that such a receiver will have had appropriate legal advice from its own counsel). That distinction is based on the fact that the court is the "expert" in respect of the law and will generally be in a better position to assess the law involved in a situation than it would be as to the commercial aspects of a sale of property. ... Thus it seems to me that the court, with the assistance of counsel (both counsel supporting the approval of a settlement and counsel opposing), should conduct an analysis of the strengths and weaknesses of the case, including the general vagaries of litigation plus the benefits of certainty and the avoidance of delay concerning possible appeals, sufficient for the court to conclude that the proposed settlement fell within the range of what was fair and commercially reasonable.

9 The main attack made by the City of Hamilton to set aside the judgment of Jennings J. is that Mr. Benner claim damages of amounts said by him to be owing by CML to its sub-trades. It was argued by Hamilton at the trial that claims of the sub-trades were statute barred. Jennings J. accepted evidence of Mr. Benner, however, that regardless of whether the claims were statute barred, he intended to pay them. Jennings J. stated:

> [62] The plaintiff filed at Tab 132 of Exhibit 2C a summary of and backup documents for its out of pocket costs

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> incurred with respect to the project. No serious attack was made on those calculations. The defendant did submit however that many of the suppliers to whom the plaintiff is indebted have not yet been paid, and accordingly their claims against the plaintiff for payment might well be statute barred. I am not prepared to give effect to that argument, even if I could so find. The raising of the statute is a matter between the plaintiffs and their creditors. I accept Mr. Benner's evidence that he wishes to see the suppliers paid if only to maintain his reputation in the tunneling industry. I should add that the costs incurred by CMT were invoiced to Robson prior to its bankruptcy.
>
> [63] Accordingly, I allow these expenses as submitted at $231,893.00 (rounded).

10 The City of Hamilton relies upon evidence that within two weeks of Mr. Benner testifying that he would pay his creditors to preserve his reputation, he had completed registration of security documents under which his related corporations would be provided with priority to all judgment proceeds and that in response to a later motion by the City of Hamilton to pay a portion of the judgment to the sub-trades, Mr. Benner insisted that all money should be paid to his secured corporations. The inference the City seeks to draw is that at the time he gave his evidence before Jennings J., Mr. Benner had no intention of paying his sub-trades.

11 Mr. Benner stated in his affidavit sworn in opposition to the motion to accept the settlement that his statement to Justice Jennings that he wanted to see the sub-trades paid did not mean that he wanted to pay 100 cents on the dollar of all these claims and that otherwise it would mean that he pursued the litigation at great expense and expenditure of time and money without hope of any net recovery. He asserted that there is no it indication that Justice Jennings took his statement otherwise. In argument Mr. Pick asserted that it should have been apparent to Justice Jennings that expenses of 17 years of litigation would be paid before the sub-trades got their money.

12 I have some difficulty with this assertion. It is clear from the reasons of Jennings J. that he accepted Mr. Benner's evidence that he wanted to see the sub-trades paid and he allowed all of the amounts said to be owing to the sub-trades as expenses of CML. In a later order he made a cost order in favour of CML against Hamilton, which is the usual way in which expenses of litigation are provided. There is no indication that he had been led to believe anything other than that the sub-trades would be paid one hundred cents on the dollar. Whether Mr. Benner had any right to negotiate with the sub-trades to reduce the amount to be paid to them is not the issue. The issue is whether Jennings J was misled. It cannot be said that there is nothing in this point that has been raised by the City of Hamilton.

13 The City of Hamilton also asserts that Mr. Benner gave misleading evidence about one of the sub-trades named Anchor Shoring. At the trial Mr. Benner testified that Anchor was owed $31,756.60. However it was later revealed that Mr. Benner had not accepted the invoice/letter from Anchor for that amount and after discussing the matter with Anchor, he received a subsequent invoice/letter from Anchor reducing the amount to be paid to Anchor to $5,954.56. Mr. Benner states in his affidavit that he had misfiled the second letter and that he only found it in 2008. The City of Hamilton is skeptical of Mr. Benner's memory and points out that the inadvertent misfiling of the reduced invoice was at a time that would artificially inflate the quantum of his damages and the rediscovery of it was at a time that would serve to reduce the amount payable to his supplier.

14 The City of Hamilton also refers to the fact that at the trial, while Mr. Benner gave evidence of the amounts owing to CML by Robson, he failed to mention that there should be a set-off of amounts owing by CML to Robson and that this makes a difference of some $59,000 to date taking interest into account.

15 The City of Hamilton also relies upon an amount claimed at the trial to be owed by CML to one of its suppliers named Iseki Inc. in the amount of $156,025. Mr. Benner testified before Jennings J. that approximately $30,000 had been paid to Iseki and the balance was outstanding. The City of Hamilton has evidence that a former vice president of Iseki advised that Iseki Inc. had been incorporated in Delaware in 1991 with a trading office in California and that in the mid-1990s Iseki had not prospered. Iseki Inc. had closed its doors around 1998, sold its equipment and ceased to trade in California with no physical presence in North America. It is asserted that Mr. Benner must have known that as he purported to be an expert in the particular market and failed to point it out to Jennings J. In his responding affidavit in the motion by the City of Hamilton to set aside the judgment, Mr. Benner stated that he did not know about the Iseki corporate group and that he was not aware that Iseki had closed its San Diego office.

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16 The main issue in the action against the City of Hamilton was whether an oral representation was made by a representative of the City to Mr. Benner. Jennings J. preferred the evidence of Mr. Benner and in doing so stated that he accepted Mr. Benner as a credible witness. The City contends that as the credibility of Mr. Benner was central to the case, had the trial judge known of the true nature of the claims of the sub-trades, that is, had the trial judge been aware of Mr. Benner's perjuries, his credibility would have been undermined and it would have been unlikely that his evidence would have been preferred over the competing documentary evidence and testimony of the key municipal employee. Thus the City contends that the false evidence of Mr. Benner is important not only as to the amounts of the legitimate claims of various sub-trades that were accepted by Jennings J., but also important as to the overall credibility of Mr. Benner and the impact of his evidence on the crucial issue in the trial.

17 I of course am not in any position to determine whether the City of Hamilton or Mr. Benner is correct in their assertions made in the motion by the City to set aside the judgment Jennings J. I am, however, able to form a view as to whether, as asserted on behalf of Mr. Benner, there is nothing in the case of the City. In my view there is some substance to the position of the City. Mr. Benner appears to take whatever position he views as helpful to his case depending upon the situation at the time. The evidence relied upon by the City has sufficient strength to make a settlement desirable.

18 No litigation is a certainty. The motion by the City of Hamilton to set aside the judgment of Jennings J. falls into that category. It is not certain from either point of view. What is certain is that based on what has occurred to date, if the motion is not settled, it will take some considerable period of time before any final determination is made. It will also create further expense that will in the end have to be borne by the various participants, including those who have filed proofs of claim in the receivership of CML. In the circumstances, a final and timely settlement of the claim against the City of Hamilton is desirable.

19 There is another relevant matter. CML is not entitled either under the section 38 order or the claims procedure in the receivership to obtain more than its damages. While CML has filed a claim in the bankruptcy of Robson for $273,647.51, that amount consists of $200,666.32 claimed as amounts owing to the sub-trades, a 5% administration fee of $10,033.32 and lost profits of $62,947.88. The 5% administration fee is problematic. The amounts said to be owing to sub-trades will have to be proven. On the evidence before me, that too is problematic. On his recent cross-examination, Mr. Benner was evasive in the extreme as to what he had done with his sub-trades. He asserted that except for Anchor, he had either settled with them personally or they abandoned any claim because of time, a lack of interest or it wasn't worth their time. He asserted that these sub-trades were not interested in their accounts but that the City of Hamilton and Mr. Simpson had contacted them in early 2008 and had "stirred them up" for no purpose. The tenor of his answers leads one to the conclusion that he has paid little, if anything, to his sub-trades. This is consistent with the admission that of the approximately $218,500 received by him from the payment by the City of Hamilton on the judgment, he has used it for his legal expenses and personal expenses. No mention was made of using it to pay sub-trades.

20 Mr. Benner has not produced to the receiver any information or documentation regarding any settlement with any creditors of CML. He was ordered yesterday to do so by today. He has, however, already improperly received the $218,507.88 paid by the City of Hamilton and, but for approximately $79,000, he has spent the rest for his legal fees and personal expenses. That means that he has already received and spent approximately $139,500, against a claim for lost profits of approximately $63,000 and some unknown amount, likely quite small if at all, for amounts he may have paid to sub-trades. He is also entitled under the section 38 order to be paid his costs of the litigation against the City of Hamilton, which are to be assessed, but under the proposed settlement under which a further $416,000 is to be paid, it is difficult on the evidence before me to consider that Mr. Benner will not be made whole. The other creditors who have filed claims with the receiver are the ones who will suffer from any shortfall, and with the exception of Mr. Benner and his corporations, they support the settlement.

21 In my view the proposed settlement falls within the range of what is fair and reasonable. If the City were successful in its motion, there is a risk that the entire award would be wiped out and that the amount paid by the City would be recoverable.[1] The discount on the settlement of the amount still payable on the judgment is in round terms $125,000. The amount owed by CML to Robson that should have been deducted from the payable said by Mr. Benner at the trial to be owing by Robson to CML amounts with interest to approximately $59,000. The difference between the two invoices of Anchor with interest amounts to approximately $45,500. The amount said by Mr. Benner to be owing to Iseki is U.S.

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$120,000. While the issues regarding these matters are to some extent disputed by Mr. Benner, the discount in the settlement does not appear unreasonable.

22 In all the circumstances, in my view, the settlement proposed by the receiver should be accepted, and I order that the settlement be approved in the terms contained in paragraphs 2 to 6 of the draft order which is schedule A to the notice of motion by the receiver dated January 8, 2010.

23 Mr. Simpson/Swanick has brought a motion for a charging order on the proceeds of the judgment to be paid by the City of Hamilton. Mr. O'Reilly acknowledged that so long as the proceeds are paid to the receiver, a charging order is not necessary as the fees and disbursements of Simpson/Swanick, which are to be assessed, are protected by the section 38 order. I order that payment of the judgment against the City of Hamilton is to be paid by the City of Hamilton to the receiver. Thus there is no need to proceed with the motion for a charging order.

*Motion granted.*

Footnotes

[*] Although CML is in receivership, no one took objection to Mr. Pick purporting on this motion to represent CML.

[1] Of the $218507.88 paid by the City to CML, none of which until now was paid to the receiver in spite of the terms of the order of Campbell J, it was stated in court by Mr. Pick that only approximately $79,000 was available as the remainder had been spent by Mr. Benner either for legal fees or personal expenses. I ordered that the remaining amount be paid forthwith to the receiver.

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Court File No. CV-12-9930-00CL

**IN THE MATTER OF THE RECEIVERSHIP OF FIRST LEASIDE WEALTH MANAGEMENT INC. et al.**

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**(COMMERCIAL LIST)**
Proceeding commenced at Toronto

**BOOK OF AUTHORITIES OF THE RECEIVER**
**(Re: Approval of Settlement Agreement)**
**(Returnable July 10, 2019)**


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