Ontario Securities Commission
Commission des valeurs mobilières de l'Ontario
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Toronto ON M5H 3S8

IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, AS AMENDED

- AND -

IN THE MATTER OF
SINO-FOREST CORPORATION, ALLEN CHAN, ALBERT IP, ALFRED C.T. HUNG, GEORGE HO AND SIMON YEUNG

REASONS AND DECISION ON A MOTION

Hearing: June 24, 2015

Decision: June 30, 2015

Panel:

James D. Carnwath, Q.C.	- Chair of the Panel
Edward P. Kerwin	- Commissioner
Deborah Leckman	- Commissioner

Appearances:

Markus Koehnen	- For Albert Ip, Alfred C.T. Hung, George Ho and Simon Yeung
Hugh Craig Carlo Rossi	- For Staff of the Commission
Emily Cole	- For Allen Chan

No one appeared on behalf of Sino-Forest Corporation

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REASONS AND DECISION

I. BACKGROUND

[1] This is a decision in respect of a motion brought on the 117th day of the hearing on the merits in this matter. Counsel for four of the Respondents requested that we permit written witness statements in lieu of oral examinations-in-chief of the remaining witnesses to assist in a more expeditious resolution of this proceeding. Those witnesses, of course, would be subject to cross-examination.

[2] On June 24, 2015, we heard submissions from the parties and delivered our ruling orally, with reasons to follow. These are those reasons.

[3] The Ontario Securities Commission (the "**Commission**") issued a Notice of Hearing and Enforcement Staff of the Commission ("**Staff**") filed a Statement of Allegations in this matter, both dated May 22, 2012, in respect of Sino-Forest Corporation ("**Sino-Forest**"), Allen Chan, Albert Ip, Alfred C.T. Hung, George Ho, Simon Yeung and David Horsley (collectively, the "**Respondents**"). Mr. Horsley settled with the Commission. Mr. Chan is represented by Ms. Emily Cole and Messers Ip, Hung, Ho and Yeung are represented by Mr. Markus Koehnen. Sino-Forest has indicated that it does not intend to participate in this matter and no one has appeared on its behalf at the hearing on the merits.

[4] The Notice of Hearing set July 12, 2012 for a first appearance before the Commission. On July 12, 2012, all parties appeared before the Commission and consented to the hearing being adjourned to October 10, 2012.

[5] On October 10, 2012, the hearing was adjourned to January 17, 2013.

[6] On January 17, 2013, all parties appeared before the Commission and requested that the hearing be adjourned to May 13, 2013 for the purpose of conducting a pre-hearing conference.

[7] On May 13, 2013, a pre-hearing conference was commenced before the Commission. The pre-hearing conference was adjourned to July 19, 2013 and was continued on August 13, 2013.

[8] On August 13, 2013, dates were set for the hearing on the merits to commence on June 2, 2014 and continue until February 13, 2015. 110 days were scheduled.

[9] There followed further pre-hearing conferences on September 10, 2013, October 10, 2013, December 2, 2013, January 31, 2014, February 18, 2014, March 18, 2014, April 22, 2014, June 23, 2014, August 20, 2014 and August 21, 2014, during which orders were made adjourning the hearing on the merits to commence on September 2, 2014 and conclude on June 29, 2015.

[10] The hearing on the merits began on September 2, 2014 with 118 days scheduled, ending June 29, 2015.

[11] At the request of the parties, additional dates were set for the hearing on the merits. On May 27, 2015, the parties were told December 17, 2015 is the last day for hearing evidence, including any reply. The parties have been reminded of this date several times since.

[12] June 24, 2015 was the 117th day of the hearing on the merits. Following June 24, 2015, 60 days remain to conclude the hearing by December 17, 2015. This would total 177 hearing dates.

[13] At this time, Staff's case in chief is complete and Mr. Chan's case in chief is substantially complete. The vast majority of the remaining hearing dates will be used for the continued examination of witnesses called by Mr. Koehnen's clients, whose case began on the 81st day of the hearing on the merits. On June 23, 2014, Mr. Koehnen submitted to the Panel that the hearing may well not be completed by December 17, 2015. To ensure this does not happen, he proposed that the balance of his witnesses testify by way of written statements, to be followed by cross-examination of those witnesses in person.

II. SUBMISSIONS OF THE PARTIES

[14] Mr. Koehnen brought this motion on the basis of what he identified as two risks, going forward:

a. The risk that evidence will not be completed by the December 17, 2015 deadline if we continue to follow the conventional common law trial model; and

b. The risk that his clients will be deprived of access to justice because they will be unable to continue to fund their case when their insurance coverage runs out.

[15] Mr. Koehnen began his submissions by citing excerpts from the recent judgment of the Supreme Court of Canada in *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87 ("***Hryniak***"):

> Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.
>
> Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.
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> …

> … undue process and protracted trials, with unnecessary expense and delay can *prevent* the fair and just resolution of disputes. The full trial has become largely illusory because, except where government funding is available, ordinary Canadians cannot afford to access the adjudication of civil disputes. …
>
> Prompt judicial resolution of legal disputes allows individuals to get on with their lives. But, when court costs and delays become too great, people look for alternatives or simply give up on justice. Sometimes, they choose to represent themselves, often creating further problems due to their lack of familiarity with the law.
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> …
>
> This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible – proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.
>
> There is, of course, always some tension between accessibility and the truth-seeking function but, much as one would not expect a jury trial over a contested parking ticket, the procedures used to adjudicate civil disputes must fit the nature of the claim. If the process is disproportionate to the nature of the dispute and the interests involved, then it will not achieve a fair and just result.
>
> [Emphasis in original]
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> (*Hryniak* at paras. 1-2, 24-25, 28 and 31-32.)

[16] Mr. Koehnen argued that we should permit his request that evidence in chief of his remaining witnesses be filed by way of written statements to ensure that this hearing is completed in time. He submitted this process will still allow us to find the facts necessary to resolve this matter and to apply legal principles to those facts, in a manner consistent with the direction from the Supreme Court in *Hryniak*.

[17] Staff objects to Mr. Koehnen's request and submits that the principle of proportionality should guide the Panel to deny his request to use written statements in this case. Sino-Forest is a former TSX-listed company, which had a market capitalization of over $6 billion by the end of the first quarter of 2011. Staff submits that the public interest and the reputation of the Commission are at stake.

[18] Mr. Koehnen provided examples of other legal forums where written witness statements have been adopted, including before the Competition Tribunal of

Canada, the Canadian International Trade Tribunal, the Commercial List of the Ontario Superior Court of Justice and in international commercial arbitration.

[19] Mr. Craig, on behalf of Staff, distinguished the current situation from the process for witness statements in other forums. He noted in particular that, where written statements are permitted, practice generally requires exchange of written statements by all parties in advance of the hearing and that they are more commonly used in situations where the facts are not at issue and findings of credibility are not required.

[20] Staff submitted that written witness statements should not be permitted in cases such as this, where credibility is an issue and respondents are subject to allegations that include fraud and misleading Staff. Mr. Craig submitted this is particularly so in this case where three of the remaining witnesses are Respondents in this proceeding, and the ability to observe the witness in examination-in-chief and cross-examination is a crucial resource to the Panel.

[21] Mr. Koehnen submitted that written statements will not be a barrier to the Panel's ability to make any necessary credibility findings since Staff will have the opportunity to challenge the credibility of witnesses through oral cross-examination.

[22] Staff also objected to the use of written witness statements at this time, on the basis that they will be drafted by counsel for respondents, which Mr. Craig described as providing a "varnished version" of the facts. He submitted this is particularly problematic in this case where some Respondents may have implicated others and where witnesses will be providing testimony in another language that will have to be translated into English.

[23] Mr. Koehnen responded that, despite risks associated with written witness statements, a balancing of the factors should lead us to permit their use in this proceeding, as has been done in other forums.

[24] Ms. Cole (on behalf of Mr. Chan) supports Mr. Koehnen.

III. DECISION OF THE PANEL

[25] The Panel finds the apparent time and expense of this case to date confirm the importance of the Supreme Court decision in *Hryniak*. A matter estimated to take 118 days has to date consumed 117 days. The cost of the hearing to date, because of its special requirements can only be the subject of an educated guess.

[26] On an average day, Staff is represented by two counsel, supported by a clerk, a student-at-law, a forensic accountant and, for half the time, an accountant fluent in Mandarin. Mr. Koehnen has been accompanied by at least one counsel, and sometimes two. Ms. Cole or one of her associates has always been present. Support staff include a registrar, a court reporter, a team of translators, when required, and a police presence outside the hearing room. The cost to the Commission is significant, as is the cost to the Respondents. To acknowledge the wisdom of the decision in *Hryniak* requires an effort to shorten the proceedings. Multiply a best guess at daily costs by 117 days and you cannot but realize the extent of the costs. Staff's submission that there is no evidence of costs to the Respondents carries insufficient weight in the face of the obvious. The matter has been costly to both sides.

[27] This is not to say that one side or the other is at fault. While on any given day, examination by counsel may appear overlong, that is often explained by difficulties of translation and those of appearances of witnesses by video-conferencing from Hong Kong, Mainland China and the Dominican Republic.

[28] We acknowledge that Staff may be slightly prejudiced by not seeing the Respondents testifying in examination-in-chief. Opinions differ as to the value of "manner and demeanour" in making findings of credibility. The slight prejudice is insufficient to outweigh the necessity to have this matter completed by December 17, 2015.

[29] We find the balance of the Respondents, Messers Hung, Ho and Yeung, and Mr. Koehnen's two additional expert witnesses may testify in chief by written statements sworn to be truthful, as communicated to the parties on June 24, 2015.

Dated at Toronto this 30th day of June, 2015.

"James D. Carnwath"

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James D. Carnwath, Q.C.

"Edward P. Kerwin"

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Edward P. Kerwin

"Deborah Leckman"

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Deborah Leckman