Court File No. CV-14-10667-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

IN THE MATTER OF AN APPLICATION UNDER SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. c. C.43 (as amended)

AND IN THE MATTER OF HANFENG EVERGREEN INC.

FACTUM OF THE RECEIVER
(Motion returnable February 22, 2018)

February 16, 2018

STIKEMAN ELLIOTT LLP

Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, ON M5L 1B9

Daniel S. Murdoch LSUC# 53123l
Tel: (416) 869-5529

Maria Konyukhova LSUC#: 52880V
Tel: (416) 869-5230

C. Haddon Murray LSUC#: 61640P
Tel: (416) 869-5239
Fax: (416) 947-0866

Lawyers for the Receiver,
Ernst & Young, Inc.

Court File No. CV-14-10667-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

IN THE MATTER OF AN APPLICATION UNDER SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. c. C.43 (as amended)

AND IN THE MATTER OF HANFENG EVERGREEN INC.

FACTUM OF THE RECEIVER
(Motion returnable February 22, 2018)

PART I - INTRODUCTION

1. On August 28, 2014, the moving party, Harbin Pengcheng Fertilizer Co. Ltd. ("**New Pengcheng**" or the "**Purchaser**"), paid to the Receiver a deposit of RMB 12.4 million (approximately $2.48 million CAD; the "**Deposit**") pursuant to a share transfer agreement dated August 8, 2014 (the "**Share Transfer Agreement**") by which the Purchaser was to acquire all of the shares of the main operating subsidiary of Hanfeng Evergreen Inc. ("**Hanfeng**"). By order dated August 20, 2014 (the "**Appointment Order**") this Court appointed Ernst & Young Inc. ("**EY**") as Receiver of Hanfeng in order to complete the Share Transfer Agreement.

2. For reasons set out below, the Share Transfer Agreement did not close. Following its receipt approximately 3½ years ago, the Receiver retained, commingled, and proceeded to deplete the Deposit by using those funds to pay the costs associated with this receivership proceeding.

3. As early as July 17, 2015, in its Second Report, the Receiver advised this Court that it held funds of only $2.3 million CAD, which is less than the Deposit. In its Fifth Report dated

July 11, 2017, the Receiver advised this Court that it held at that time approximately $2 million CAD. Throughout this period, New Pengcheng has known that the Receiver held the proceeds from the Deposit and was spending them.

4. In August 2015, New Pengcheng commenced proceedings in China against Hanfeng and EY, among others (the "**Chinese Litigation**"), claiming that Hanfeng breached the Share Transfer Agreement and that it should be refunded the amount of the Deposit. New Pengcheng was unsuccessful in the Chinese Litigation. The highest court in China, the People's Supreme Court, dismissed New Pengcheng's application for retrial, and New Pengcheng concedes that there is no stay of execution on the judgment, which renders it final.

5. Despite this extended passage of time, including the crystallization of the dispute in August 2015 by the commencement of the Chinese Litigation and the known use of the Deposit funds, only now does New Pengcheng seek amendments to the Appointment Order to prevent the Receiver from using the Deposit to fund this receivership proceeding.

6. The Receiver is an officer of this Court. The Appointment Order, in accordance with well-established practice, grants the Receiver protections for its fees and disbursements. The Receiver and its advisors performed their duties in reliance on those protections. The Receiver's fees and those of its counsel have been approved as fair and reasonable. Now, New Pengcheng asks this Court to amend the Appointment Order to remove the protections that it previously granted to the Receiver, and on which the Receiver, in good faith, relied. The proposed amendments would call into question whether a receiver or monitor can ever rely on the protections in their appointment orders.

7. The proposed amendments would also neutralize the ability of the Receiver to perform its duties. This motion is less about preventing the Receiver from paying fees already incurred, and more about hamstringing the Receiver in its ability to perform its duties.

8. As set out below, the relief sought by New Pengcheng is not just and convenient, and the amendments should not be granted. The amendments are highly prejudicial to the Receiver and Hanfeng's stakeholders, and would thwart the Receiver in its attempts to perform the duties contemplated of it under the Appointment Order.

PART II - THE FACTS

A. The Share Transfer Agreement

9. The Share Transfer Agreement was an international deal involving the sale by Hanfeng, a Canadian public company, of all of the shares of its main operating subsidiary, Hanfeng Slow-Release Fertilizer Co., Ltd. (the "**Chinese Subsidiary**"), a Chinese company, to a Chinese purchaser. The transaction was initially proposed to the board of directors of Hanfeng by Xinduo Yu, the founder and former CEO of Hanfeng, as well as its largest shareholder.

10. The purchase price under the Share Transfer Agreement was RMB 198 million (approximately $40,000,000) to be paid in the following manner:

(a) 5% deposit of RMB 12.4 million due August 19, 2014 (the "**Deposit**");

(b) 15% interim payment of RMB 37.2 million due September 3, 2014 (the "**Interim Payment**"); and

(c) the balance of RMB 148.8 million due 10 days after closing.

Second Report of the Receiver dated July 7, 2015 at para 17 [**Second Report**]

11. After receiving the Deposit on August 28, 2014, the Purchaser failed to make the Interim Payment on time. The Purchaser claimed this was because it required certain regulatory approvals. As a result, the Receiver authorized Mr. Yu, as legal representative of the Chinese Subsidiary and on behalf of the Receiver, to enter into an escrow agreement (the "**Escrow Agreement**") with New Pengcheng for the payment of the Interim Payment to Minsheng Bank (the "**Escrow Bank**") on February 16, 2017.

Second Report at paras 31 to 33

12. New Pengcheng again failed to make payment on time. The Receiver entered into a further agreement with New Pengcheng for the remittance of the Interim Payment in three installments on April 3, 17 and 30, 2015. New Pengcheng only made two of the three payments for a total of RMB 10 million to the Escrow Bank (the "**Escrow Funds**"). The remainder of the Interim Payment in the amount of RMB 27 million was due on April 30, 2015, but was never deposited.

Second Report at para 35

13. During this time, the Receiver became aware of issues with respect to the identity of New Pengcheng which raised concerns about the ability and intent of the Purchaser to close the transaction. In particular, the Receiver discovered that, immediately prior to the execution of the Share Transfer Agreement, the name of the purchaser was changed from "Heilongjiang Pengcheng Fertilizer Co., Ltd." ("**HLJ Pengcheng**") to the Chinese language translation of "Harbin Pengcheng Fertilizer Co., Ltd." (New Pengcheng).

Second Report at para 40 to 41

14. HLJ Pengcheng is a well-established company, whereas New Pengcheng appears to be a shell company with no operations that was registered on August 4, 2014 (four days prior to the signing of the Share Transfer Agreement).

Second Report at para 41(d)

15. The Receiver proceeded to investigate potential connections between Mr. Yu and New Pengcheng. Mr. Yu had advised Hanfeng's board of directors that the transaction was with HLJ Pengcheng, and proceeded to insist that New Pengcheng is an affiliate of HLJ Pengcheng (to date, no evidence of any such relationship has been provided).

Second Report at paras 43 and 44

16. As a result of the failure of New Pengcheng to complete the Interim Payment and the above-noted concerns regarding the identity of the purchaser, the Receiver stopped taking further steps to obtain the necessary regulatory approvals for the Share Transfer Agreement and the transaction did not close.

Fifth Report of the Receiver dated July 11, 2017 at para 18 [**Fifth Report**]

B. Attempt to preserve Escrow Funds

17. The Receiver was informed by Mayer Brown LLP (Chinese counsel to the Receiver) that, starting the week of July 13, 2015, New Pengcheng had repeatedly contacted the Escrow Bank requesting the return of the Escrow Funds to New Pengcheng.

Third Report of the Receiver dated September 24, 2015 at para 20 [**Third Report**]

18. By letter dated August 5, 2015, The Receiver informed the Escrow Bank and New Pengcheng that it would not consent to the designation of a successor account under the Escrow Agreement or release of the Escrow Funds back to New Pengcheng. The Receiver

also instructed Mr. Yu that he was not to authorize to cause any change to the Escrow Funds without written instructions from the Receiver.

Third Report at para 23(b)

Fourth Report of the Receiver dated April 4, 2017 at para 33 [**Fourth Report**]

19. Despite the Receiver's clear instructions to Mr. Yu and the Escrow Bank, the Receiver's Chinese counsel learned that Mr. Yu had provided written consent on behalf of Hanfeng to the Escrow Bank, resulting in the Escrow Funds being released back to New Pengcheng in August 2015.

Fourth Report at para 34

C. The Chinese Litigation

20. On August 3, 2015, New Pengcheng commenced the Chinese Litigation in the Harbin Intermediate Court (the "**Harbin Court**"). At first instance, the Harbin Court found in favour of New Pengcheng and ordered the Deposit, plus interest, be returned by Hanfeng to New Pengcheng. The Receiver appealed the decision to the Heilongjiang Provincial People's High Court (the "**Heilongjiang Provincial Court**"). The Heilongjiang Provincial Court granted the appeal in a decision dated September 18, 2017.

Fifth Report at paras 38 to 43

Supplement to the Fifth Report of the Receiver dated November 10, 2017 at para 7-10 **[Supplement to the Fifth Report]**

21. New Pengcheng applied to the Supreme People's Court of the People's Republic of China (the "**Supreme People's Court**") to request a re-trial of the Heilongjiang Provincial Court decision. On or about December 12, 2017, the Supreme People's Court dismissed New Pengcheng's application.

Affidavit of David Liu sworn January 15, 2018 at para 12 [**Liu Affidavit**]

22. New Pengcheng's Chinese counsel, David Liu, now states that he has made a "request for protest" to the Supreme People's Procuratorate of the People's Republic of China. He acknowledges that there is now no stay of execution of judgment in China as a result of this protest.

Liu Affidavit at para 13

D. Prosecuting the Receiver's Action

23. Following the failure of the Share Transfer Transaction, the only significant assets remaining in the Receivership are:

(a) Cash of approximately $2 million, which includes the remaining proceeds of the Deposit; and

(b) The Receiver's right to commence a claim in connection with the failure of the Share Transfer Agreement and other claims relating to the Chinese Subsidiary.

24. The Chinese Subsidiary is likely insolvent with no residual value for its shareholder, Hanfeng, in a liquidation. Among other reasons, in 2016 the Receiver became aware of various loans incurred by the Chinese Subsidiary of up to $87.6 million that were not reflected on its internal financial statements.

Supplement to the Fifth Report at para 24

25. On March 22, 2016, the Receiver commenced an action in this Court naming Mr. Yu and his wife Lei Li (a former director and officer of Hanfeng, and together with Mr. Yu, the "**Yu Defendants**") as defendants (the "**Receiver's Action**"). The Receiver's Action alleges that the Yu Defendants fraudulently represented the true identity and corporate history of

New Pengcheng, breached their fiduciary duties to Hanfeng, and improperly dissipated funds from the Chinese Subsidiary. The Receiver claims restitution or damages in the total amount of Canadian currency sufficient to purchase RMB 865,600,000 (approximately $173,000,000).

Fifth Report at para 24-25

E. Communications from New Pengcheng

26. Prior to the release of the decision of the Heilongjiang Provincial Court in September 2017, New Pengcheng had not appeared in this receivership proceeding.

27. The Receiver brought a motion (the "**Approval Motion**") for an order approving its fees, the fees of its counsel, and certain reports that had not yet been approved, which was returnable November 20, 2017. The Yu Defendants opposed the Approval Motion.

28. The Approval Motion resulted in various correspondence sent on behalf of New Pengcheng:

(a) By letter dated October 13, 2017, Mr. Liu, Chinese counsel to New Pengcheng, advised that he was filing an application for re-trial with the People's Supreme Court, and he urged the Receiver "not to dispose of" the Deposit. Mr. Liu further stated that "[t]he Procedure for Trial Supervision is the **last legal remedy measure**, please wait patiently for the **trial result of the Supreme People's Court** before disposing the Fund of the Entruster." This letter first came to the attention of the Receiver when it was included in the responding motion record served by the Yu Defendants on October 19, 2017.

(b) On November 8, 2017, Mr. Liu responded to service of the motion record for the Approval Motion stating that "As attorney to [New Pengcheng], I am not concerned about the case you sent me."

Affidavit of Monica Palko sworn February 5, 2018 [**Palko Affidavit**], Exhibit "A"

(c) On November 16, 2017, David Moore, counsel to the Yu Defendants, forwarded a letter to the Receiver written by Mr. Liu claiming that it had sent a retrial appeal to the Supreme People's Court which had been "formally accepted and recorded". The letter went on to state that the Supreme Court accepting the appeal "means that the second trial judgment… is not a final judgment" and "shows that the Supreme People's Court thinks that this judgment does exist [*sic*] wrong decisions that is [*sic*] not in conformity with the law of China and needs to be corrected t [*sic*] retrial procedures."

Palko Affidavit, Exhibit "B"

(d) In an email to the service list dated November 17, 2018, New Pengcheng's Chinese counsel wrote that:

> After receiving our retrial application and relevant evidential materials, the Supreme People's Court determined that our application for retrial meets the conditions for initiating retrial and decided to put the case on file … This shows that the Supreme People's Court found our retrial reasoning , The [sic] second instance judgment is in error need [sic] to be corrected.

Palko Affidavit, Exhibit "C"

Mr. Liu counsel further stated "Please be patient to wait the results of the retrial, **<u>the time will not be long</u>**. **<u>When the Supreme Court results issued,</u>**

<u>no matter what the outcome of retrial is, we will accept the result without any further objection</u>."

Palko Affidavit, Exhibit "C"

(e) Mr. Liu counsel repeated similar statements in a letter to the Receiver dated November 29, 2017.

Palko Affidavit, Exhibit "D"

(f) In an email to Paul Pape, New Pengcheng's Canadian counsel, on December 3, 2017, Mr. Liu claimed that the application for retrial had been accepted by the Supreme People's Court and that "[they] are confident" that the retrial hearing is coming. Mr. Pape communicated this to the Court.

Palko Affidavit, Exhibit "E"

29. Mr. Liu's statements were false. On December 12, 2017, the Supreme People's Court rejected New Pengcheng's application for a re-trial.

Notice of Motion of New Pengcheng dated February 15 at para 12.

30. Mr. Moore's dockets for this period, which he attached to the responding cost submissions of the Yu Defendants in respect of the Approval Motion, state that he had correspondence with David Liu, contacted potential counsel for New Pengcheng, and had "extensive follow-up and discussions with Joanna Nairn and Paul Pape."

Supplemental affidavit of Monica Palko sworn February 16, 2018 [**Supplemental Palko Affidavit**], Exhibit "D": Responding Cost Submissions of Mr. Yu and Ms. Li dated January 16, 2018, Appendix "B"

31. Mr. Pape attended the hearing of the Approval Motion but advised the Court that he was only in the process of being retained and emphasized that as of that hearing his client was not attorning to the jurisdiction.

32. Justice Myers released his decision granting the Approval Motion on November 30, 2017. On the same day, counsel to the Receiver advised Mr. Pape of the decision and the Receiver's intention to pay its outstanding fees. The following day, Mr. Pape wrote to the Receiver stating:

> The deposit funds are not "property" in accordance with the Order of Justice Matheson of August 20, 2014. The referred payment will be in breach of that Order.
>
> Today I will obtain a 9:30 appointment before Justice Myers on Monday, December 4, 2017 to schedule an urgent motion to restrain the Receiver from making such payment, and if need be, to amend the Order of Justice Matheson.
>
> Supplemental Palko Affidavit, Exhibits "A" and "B"

33. The parties appeared before Justice Myers on December 11, 2017, whose endorsement notes that that parties are seeking to schedule "a motion by Mr. Pape's client to prevent the Receiver from utilizing funds whose status is in issue in Chinese Litigation". The Receiver agreed that it would not pay its fees until January 10, 2018, to allow time from New Pengcheng to bring such a motion.

> *Re: Hanfeng Evergreen Inc*, Court File No. CV-14-10667-00CL, Endorsement of Justice Myers dated December 11, 2017, Tab 1 of the Book of Authorities of the Receiver

34. The decision of the People's Supreme Court was not communicated to the Receiver's Chinese counsel until late December 2017. By January 10, 2018, New Pengcheng had not served any motion. In a letter dated January 12, 2018, from Receiver's counsel to Mr. Pape and Mr. Moore, Receiver's counsel expressed surprise at being advised the day previous that

New Pengcheng was not accepting the result of the People's Supreme Court and pursuing some heretofore unmentioned "request for protest".

Supplemental Palko Affidavit, Exhibit "C"

35. On January 15, 2018, New Pengcheng served its motion record seeking a determination that the Deposit is not "Property" as stated in the Appointment Order and seeking to restrain the Receiver from using those funds.

36. On February 13, 2018, after the Receiver had provided its responding materials and 6 business days prior to the scheduled hearing, New Pengcheng delivered an entirely new notice of motion seeking, instead, to amend the Appointment Order. Based on New Pengcheng's factum, it would appear that it has abandoned the relief sought in the original notice of motion, including injunctive relief and the contention that the Receiver is not entitled under the current order to utilize the proceeds of the Deposit, in favour of seeking an amendment to the Appointment Order.

PART III - ISSUES

37. The issues to be determined on this motion are:

(a) Is it just and convenient for the Court to amend the Appointment Order as requested by New Pengcheng?

(b) In the alternative, should the Court order that the Receiver is liable to repay funds in the amount of the Deposit back to New Pengcheng if the Chinese courts finally determine that the Deposit is property of New Pengcheng?

PART IV - LAW AND ARGUMENT

A. THE AMENDMENTS ARE NOT JUST AND CONVENIENT

38. The Appointment Order provides that:

(a) The Receiver is appointed over all of the Property (paragraph 2);

(b) All funds collected by the Receiver are to be paid out in accordance with the terms of the Appointment Order (paragraph 13); and

(c) The Receiver is entitled to the Receiver's Charge, a super-priority charge in respect of Professional Fees (paragraph 18).

> *Re: Hanfeng Evergreen Inc*, Court File No. CV-14-10667-00CL, Order of Justice Matheson dated August 20, 2014, Tab 2 of the Book of Authorities of the Receiver

39. A deposit paid as a portion of the purchase price for a transaction constitutes sale proceeds to which security interests in the debtor attach.

> *Terra Nova Management Ltd v. Halcyon Health Spa Ltd.,* 2005 BCSC 1017 at para 46. Tab 3 of the Book of Authorities of the Receiver
>
> *Alma College v. United Church of Canada,* [1997] O.J. No. 4129 (Ont. Gen. Div.), aff'd [1998] O.J. No. 4896 (Ont. C.A.) at para 27, Tab 4 of the Book of Authorities of the Receiver

40. New Pengcheng appears to have abandoned the position taken in its original notice of motion that the Deposit does not constitute Property of Hanfeng, as that term is used in the Appointment Order. Instead, New Pengcheng asks to amend the Appointment Order to retroactively exclude the Deposit from Hanfeng's Property. There is no justification for this request.

1. <u>The Deposit is not Held in Trust</u>

41. New Pengcheng can point to nothing in the Share Transfer Agreement or at law that supports the contention that the proceeds of the Deposit were not available for use by the

Receiver. The amendments proposed by New Pengcheng would retroactively impose a trust over the proceeds of the Deposit, to be held pending the outcome of the Chinese Litigation, even though the Receiver has been utilizing these funds for the past 3½ years, and this Court has approved the reports and activities of the Receiver where it was expressly disclosed that the proceeds of the Deposit were being used for that purpose. The Receiver is aware of no precedent for such an Order.

> Third Report at para 43
>
> Fourth Report at para 40
>
> *Re: Hanfeng Evergreen Inc*, Court File No. CV-14-10667-00CL, Endorsement of Justice Myers dated November 30, 2017, Tab 5 of the Book of Authorities of the Receiver

42. New Pengcheng has not identified any statute that would give rise to a deemed trust, nor has it established the intention to create an express trust. In order to establish a constructive trust New Pengcheng must establish an unjust enrichment or a wrongful act such a fraud or breach of a duty of loyalty. No evidence has been adduced in respect of either requirement.

> *Soulos v Korkontzilas* [1997] 2 SCR 217 at para 43, Tab 6 of the Book of Authorities of the Receiver

43. There is no unjust enrichment or wrongful act. In *Morell v. Nedoma*, The British Columbia Supreme Court held that a contract giving rise to a non-refundable deposit is a juristic reason for the retention of the deposit.

> *Pettkus v. Becker*, [1980] 2 SCR 834, 1980 CanLII 22 (SCC) at p. 844, Tab 7 of the Book of Authorities of the Receiver
>
> *Morell v. Nedoma*, 2007 BCSC 431 Tab 8 of the Book of Authorities of the Receiver

44. In the context of a bankruptcy, the New Brunswick court of Queen’s Bench held that:

> In proving the existence of a constructive trust in a bankruptcy setting, the standard of proof is high; and given that the BIA provides a code by which legislators have balanced the interests of

> those adversely affected by the bankruptcy, the legal rights of creditors should not be defeated unless it would be unconscionable not to recognize a constructive trust"
>
> *Re: McKinnon*, 2006 CarswellNB 158, 2006 NBQB 108, Tab 9 of the Book of Authorities of the Receiver

45. New Pengcheng has not even attempted to meet the standard of proof required to prove the existence of a constructive trust. Instead, it appears to take as given that if China's highest court, the People's Supreme Court, is somehow overturned, and a re-trial is ordered, and it is successful on the re-trial, that it has a right to recover "the Deposit", when in fact all it would have in the unlikely event this were to come to pass is an unsecured claim against Hanfeng estate. It is worth noting that even in the Harbin Court decision, where New Pengcheng was initially successful against Hanfeng, the Chinese court nevertheless dismissed any claim against EY in its personal capacity.

> Supplement to the Fifth Report at para 8(c)

46. New Pengcheng is in no different position from any other contingent unsecured creditor, other than the fact that its contingent unsecured claim has been finally dismissed by the highest court in China.

2. <u>The Request for Amendment is Late and Prejudicial</u>

47. Requests to amend or vary orders, including appointment orders, must be brought promptly, and amendments should not be granted if requests are delayed and parties have relied on the terms of the order. As stated by Justice Newbould in *DBCD Spadina Ltd et al v. Norma Walton et al*:

> [14] Rule 37.14(1) provides that a party affected by an order obtained on motion without notice may move to set it aside or vary it by a motion "that is served forthwith after the order comes to the person's attention and names the first available hearing date that is

> at least three days after the service of the notice of motion". As the November 5, 2013 order was received by Mr. Brudner on November 22, 2013, any motion to vary it was required to be served "forthwith" thereafter. **No such motion was served for six months and it was not brought on for hearing for another five months.** Counsel for the mortgagees concedes rule 37.14 is a problem but one that can be overcome by particular case law, which I shall deal with shortly.
>
> [15] In M*uscletech Research and Development Inc.* (Re) (2006), 2006 CanLII 1020 (ON SC), 19 C.B.R. (5th) 54 in discussing a comeback motion relating to a CCAA Initial Order, Farley J. stated **"Comeback relief, however, cannot prejudicially affect the position of parties who have relied bona fide on the previous order in question." I agree entirely with that statement and in my view it is equally applicable to a motion to vary a receivership order,** which is essentially what the November 5, 2013 order was, the word Manager instead of Receiver being used in an attempt to put a better face on the order to the marketplace. [emphasis added]
>
> *DBCD Spadina Ltd et al v. Norma Walton et al,* 2015 ONSC 870 at paras 14 and 15, citing with approval, *Muscletech Research and Development Inc., Re*, 2006 CanLII 1020 at para 5, Tab 10 of the Book of Authorities of the Receiver

48. Similarly, in *Canada North Group Inc (Companies' Creditors Arrangement Act),* Justice Topolniski held that a challenge to super-priority security interests by the CRA in a CCAA proceeding could not succeed because, among other things, the Initial Order was granted one month and six days prior to the comeback hearing:

> Comeback motions must be made post haste because of delay prejudice and the mounting prejudice caused by the momentum of proceeding itself - which Rowbothom JA described as the virtual impossibility of unscrambling the egg in *Temple City*.
>
> *Canada North Group Inc (Companies' Creditors Arrangement Act)*, 2017 ABQB 550 at para 56, aff'd by Alberta Court of Appeal, 2017 ABCA 363, Tab 11 of the Book of Authorities of the Receiver

49. New Pengcheng paid the Deposit to the Receiver 3½ years ago. It sought no protections in respect of the Deposit at that time. The Chinese Litigation was commenced by New Pengcheng in August 2015. It similarly sought no protections in respect of the Deposit at that time, even though it included EY in its personal capacity as a party to the Chinese

Litigation. The Receiver and its counsel have relied on the standard protections contained in the Appointment Order throughout this time. It would be highly prejudicial for the rug to be pulled out from under them now.

50. New Pengcheng submits that the amendments it seeks do not prejudice the Receiver or its counsel because they are both solvent and will not suffer from the delay in payment of their fees. In order to minimize expenditures to the Hanfeng estate, the Receiver has, since the Approval Motion, voluntarily agreed to delay payment of professional fees on the understanding that New Pengcheng would accept the decision of the People's Supreme Court, which was expected in relatively short order. However, it is now clear that New Pengcheng is not accepting that decision, and will continue to pursue new avenues to seek to delay the progress of this receivership proceeding.

3. The Chinese Litigation has been Dismissed

51. For the reasons set out above, the status or result of the Chinese Litigation is irrelevant to whether the Receiver's fees have priority over the proceeds from the Deposit. Nevertheless, the record shows that the Chinese Litigation has been finally dismissed by China's highest court, and New Pengcheng has failed to advance any admissible evidence to establish that its 'request to protest' has any chance of succeeding, let alone a good one.

52. The statement by New Pengcheng's Chinese counsel, Mr Liu, that the 'request to protest' may be successful" is not admissible evidence. Not only have Mr. Liu's prior statements about the status of the Chinese Litigation been unreliable, his statements are at best characterized as advocacy, not evidence. This Court should give no weight to his opinions.

53. The Supreme Court of Canada has repeatedly confirmed that foreign law must be proven by expert evidence. This Court cannot accept Mr. Liu's opinion as though he is an independent and qualified expert witness.

> *Drew Brown v. The Ship "Orient Trader" and her Owners,*[1974] 34 D.L.R. (3d) 339 at p. 345 citing Dicey and Morris in *Conflict of Laws*, 8th ed. (1967) , p. 1113 and *Allen v. Hay* (1922), 69 D.L.R. 193 at pp. 195-6, 64 S.C.R. 76, Tab 12 to the Book of Authorities of the Receiver

54. New Pengcheng argues at paragraph 19 of its factum that "there is evidently an issue in the Chinese litigation which has divided the courts, indicating that the probability of success is not low". It further states, at paragraph 20, that the Receiver has not adduced evidence to dispute that the appeal decision contains errors. The onus is on New Pengcheng to prove foreign law should it wish to rely on it for this extraordinary request to amend the Appointment Order. The Receiver need rely on nothing more than the dismissal of the Chinese Litigation by China's highest court.

4. <u>Comity has no Application</u>

55. At paragraphs 21 to 24 of its factum, New Pengcheng argues that this Court should amend the Appointment Order in recognition of the principle of comity. Comity is entirely inapplicable to this motion.

56. As, stated by the Supreme Court of Canada in *Chevron Corp. v. Yaigue:*

> In *Morguard*, this Court stated that comity refers to "the deference and respect due by other states to <u>**the actions of a state legitimately taken within its territory**</u>", as well as "the recognition which one nation allows within its territory to the <u>**legislative, executive or judicial acts of another nation**</u>, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws"
>
> *Chevron Corp. v. Yaiguaje*, 2015 SCC 42 at para 51, quoting *Morguard Investments Ltd. v. De Savoye,* [1990] 3 SCR 1077 pp. 1095-96, quoting with approval the U.S. Supreme Court's foundational articulation of the concept of comity in *Hilton v. Guyot*, 159 U.S. 113 (1895), at pp. 163-64, Tab 13 to the Book of Authorities of the Receiver

57. Thus a Canadian court might invoke comity in the recognition and enforcement of a foreign order, or recognizing and giving effect to the rights of a party under a foreign law. In this instance, the Chinese appellate court has held that New Pengcheng has no right to the Deposit and the Supreme People's Court has refused any further re-trial. The decision is final as there is no stay of execution. There is simply no foreign order or law supporting New Pengcheng's position for this Court to recognize in this case.

58. The relief sought by New Pengcheng in this case amounts to requesting that a Canadian court create a stay of execution in Canada where no such stay is provided for under Chinese law. Such a step would not represent recognition of the "legislative, executive or judicial acts of another nation", it would represent interference with such acts.

B. THE RECEIVER SHOULD NOT BE LIABLE FOR THE DEPOSIT

59. In the alternative, New Pengcheng asks this Court to make "an order requiring the Receiver to pay back [New Pengcheng] an amount equivalent to the Deposit if it is finally determined in China that the Deposit is the property of [New Pengcheng]."

60. This request is frankly more outlandish than the request to amend the Appointment Order, and is not supported by any argument or authority in New Pengcheng's factum. The request is, firstly, untimely, given the current state of the Chinese Litigation. This Court should not be making advance decisions about how to address or interpret a Chinese court decision that has not been rendered. In any event, and more importantly, the request should fail for all the reasons set out above as to why the Receiver's Charge has priority over any unsecured contingent claim of New Pengcheng.

PART V - ORDER REQUESTED

61. For the foregoing reasons, it is respectfully submitted that this court should deny the relief sought by New Pengcheng in the within motion with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of February, 2018.

Stikeman Elliott LLP

Lawyers For the Receiver,
Ernst & Young Inc.

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Re: Hanfeng Evergreen Inc*, Court File No. CV-14-10667-00CL, Endorsement of Justice Myers dated December 11, 2017

2. *Re: Hanfeng Evergreen Inc*, Court File No. CV-14-10667-00CL, Order of Justice Matheson dated August 20, 2014

3. *Terra Nova Management Ltd v. Halcyon Health Spa Ltd.,* 2005 BCSC 1017

4. *Alma College v. United Church of Canada,* [1997] O.J. No. 4129 (Ont. Gen. Div.), aff'd [1998] O.J. No. 4896 (Ont. C.A.)

5. *Re: Hanfeng Evergreen Inc*, Court File No. CV-14-10667-00CL, Endorsement of Justice Myers dated November 30, 2017

6. *Soulos v Korkontzilas* [1997] 2 SCR 217

7. *Pettkus v. Becker*, [1980] 2 SCR 834, 1980 CanLII 22 (SCC)

8. *Morell v. Nedoma*, 2007 BCSC 431

9. *Re: McKinnon*, 2006 CarswellNB 158, 2006 NBQB 108

10. *DBCD Spadina Ltd et al v. Norma Walton et al,* 2015 ONSC 870

11. *Canada North Group Inc (Companies' Creditors Arrangement Act)*, 2017 ABQB 550 at para 56, aff'd by Alberta Court of Appeal, 2017 ABCA 363

12. *Drew Brown v. The Ship "Orient Trader" and her Owners,[*1974] 34 D.L.R. (3d) 339

13. *Chevron Corp. v. Yaiguaje*, 2015 SCC 42

SCHEDULE "B"
RELEVANT STATUTES

IN THE MATTER OF AN APPLICATION UNDER SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. c. C.43 (as amended)

Court File No. CV-14-10667-00CL

AND IN THE MATTER OF HANFENG EVERGREEN INC.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

FACTUM OF THE RECEIVER
(RETURNABLE FEBRUARY 22, 2018)

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Daniel S. Murdoch LSUC# 53123L
Tel: (416) 869-5529
Email: dmurdoch@stikeman.com

Maria Konyukhova LSUC#: 52880V
Tel: (416) 869-5230
Email: mkonyukhova@stikeman.com

C. Haddon Murray LSUC#: 61640P
Tel: (416) 869-5239
Email: hmurray@stikeman.com
Fax: (416) 947-0866

Lawyers for the Receiver,
Ernst & Young Inc.