

**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.

SIXTH REPORT OF THE RECEIVER

May 18, 2021

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AND IN THE MATTER OF HANFENG EVERGREEN INC.

**SIXTH REPORT OF THE RECEIVER
May 18, 2021**

INTRODUCTION

1. Hanfeng Evergreen Inc. (“**Hanfeng**” or the “**Company**”) was a holding company for certain entities that were incorporated and, at the relevant times, operated in China. By mid-August 2014, Hanfeng’s principal remaining un-monetized asset was all the issued and outstanding shares (the “**Shares**”) of Hanfeng Slow-Release Fertilizer Co., Ltd., the Company’s wholly owned subsidiary in China (the “**Chinese Subsidiary**”).
2. On August 20, 2014, following an application by Hanfeng, the Ontario Superior Court of Justice (the “**Court**”) issued an order (the “**Approval Order**”) approving a share transfer agreement (the “**Share Transfer Agreement**”) dated August 8, 2014 and the transaction contemplated therein (the “**Share Transfer Transaction**”). The Approval Order provided for vesting of all of the Shares in Heilongjiang Pengcheng Fertilizer Co. Ltd., as purchaser, upon the completion of the Share Transfer Transaction.
3. Pursuant to an order issued by this Court on August 20, 2014, Ernst & Young Inc. (“**EYI**”) was appointed as receiver and manager (the “**Receiver**”) of the assets, undertakings and properties of Hanfeng, pursuant to section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended.
4. The primary purpose of the receivership proceedings (the “**Receivership Proceedings**”) was to complete the Share Transfer Transaction and effect a distribution of the proceeds thereof.

5. As described in prior reports of the Receiver, in the course of attempting to advance the Share Transfer Transaction, the Receiver uncovered information that led to serious concerns over:
 - (a) the identity of the purported purchaser (“**New Pengcheng**”) that was engaged under the Share Transfer Transaction, which was found by the Receiver to have no connection with Heilongjiang Pengcheng Fertilizer Co. Ltd, the purchaser named in the Approval Order;
 - (b) New Pengcheng’s ability and desire to close the Share Transfer Transaction;
 - (c) the potential relationship between New Pengcheng and Mr. Yu, Xinduo (“**Mr. Yu**”) - the founder, former President, former Chief Executive Officer and a former director of Hanfeng;
 - (d) the real role of Mr. Yu in the transaction; and
 - (e) previously concealed financial information of the Chinese Subsidiary.
6. A copy of the Fifth Report of the Receiver dated July 11, 2017 (without appendices) which provides greater details about the concerning information uncovered by the Receiver is attached hereto as **Appendix “A”**.
7. Also as described in prior reports of the Receiver, the Receiver was unable to complete the Share Transfer Transaction due to the actions of New Pengcheng and Mr. Yu.
8. 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 a deposit of RMB 12.4 million (approximately \$2.48 million CAD; the “**Deposit**”) that was paid to the Receiver in August 2014.
9. As a result of the Chinese Litigation, the Receiver paused most workstreams in these receivership proceedings with a view to preserving liquidity, pending the outcome of the Chinese Litigation.

PURPOSE

10. The purpose of this sixth report of the Receiver (the “**Sixth Report**”) is to report to the Court on the outcome of the Chinese Litigation commenced by New Pengcheng and the Receiver’s next steps as a result of same.

TERMS OF REFERENCE

11. In preparing the Sixth Report and making the comments herein, the Receiver has been provided with, and has relied upon, certain unaudited, draft and/or internal financial information, prepared from the Company’s books and records, discussions with employees of the Company and information from other third-party sources (collectively, the “**Information**”). Except as described in the Sixth Report:
 - (a) the Receiver has not audited, reviewed or otherwise attempted to verify the accuracy or completeness of the Information in a manner that would wholly or partially comply with the Generally Accepted Assurance Standards pursuant to the Canadian Institute of Chartered Accountants Handbook and, accordingly, the Receiver expresses no opinion or other form of assurance in respect of the Information; and
 - (b) the Receiver has prepared the Sixth Report in its capacity as a court-appointed officer solely for the use of this Court and the stakeholders in these proceedings and will make copies of the Sixth Report and the prior reports available on the Receiver’s case website at www.ey.com/ca/hanfeng.
12. All monetary amounts contained herein are expressed in Canadian dollars, unless otherwise stated.

OUTCOME OF THE CHINESE LEGAL PROCEEDINGS

13. As stated above, New Pengcheng asserted a claim for the return of the Deposit. This was a critical issue facing the estate, which, as early as July 17, 2015, had funds of only C\$2.3 million. This amount was less than the Deposit before taking into account accrued and unpaid professional fees - as was reported in the Receiver’s Second Report. If New

Pengcheng's claim was successful, the estate would have no funds left to address other claims or actions and administer the receivership proceedings.

Chinese Litigation

14. The Chinese Litigation was commenced on or about August 3, 2015 in the Intermediate People's Court of Harbin City (the "**Harbin City Court**") by New Pengcheng against Hanfeng, the Chinese Subsidiary, Mr. Yu and EYI in its personal capacity and sought to terminate the Share Transfer Agreement and cause the return of the Deposit.
15. On February 15, 2017, the Harbin City Court released a decision (backdated to December 29, 2016) granting certain relief sought by New Pengcheng.
16. On March 20, 2017, the Receiver commenced an appeal to the Heilongjiang Province Superior Court (the "**Provincial Court**").
17. The Provincial Court rendered its decision dated September 18, 2017 (the "**Provincial Court Judgement**"), granting the Receiver's appeal and overturning certain parts of the Harbin City Court's decision. A copy of the Provincial Court Judgement is attached hereto as **Appendix "B"**. In summary, the Provincial Court concluded that:
 - (a) New Pengcheng had breached its contractual obligations under the Share Transfer Agreement;
 - (a) The Harbin City Court erred in applying facts and law in its decision;
 - (b) Hanfeng was entitled to keep the Deposit and New Pengcheng's motion for, *inter alia*, the return of the Deposit, was dismissed;
 - (c) The Share Transfer Agreement was terminated; and
 - (d) Court fees of RMB 200,226.04 (approximately \$40,000) and a property preservation fee of RMB 5,000 (approximately \$1,000) were to be borne by New Pengcheng.

18. New Pengcheng refused to accept the Provincial Court judgement and applied for retrial to the Supreme People's Court of China (the "**Supreme Court**"). In December 2017, the Supreme Court denied the application brought by New Pengcheng for retrial.
19. On February 12, 2018, counsel to New Pengcheng advised that New Pengcheng had applied for trial supervision (the "**Protest Application**") to Supreme People's Procuratorate in China (the "**Supreme Procuratorate**"); however, on or about May 7, 2018, after repeated inquiries by the Receiver, New Pengcheng's counsel corrected its previous statement and advised that the Protest Application was in fact filed with the Provincial Procuratorate of Heilongjiang Province (the "**Provincial Procuratorate**") and not with the Supreme Procuratorate.
20. The Provincial Procuratorate granted a decision dated August 28, 2019 dismissing the Protest Application (the "**Provincial Procuratorate's Decision**").
21. In October 2019, counsel to New Pengcheng advised the Receiver and this Court that New Pengcheng had appealed the Provincial Procuratorate's Decision to the Supreme Procuratorate.
22. In April 2021, the Receiver's Chinese counsel obtained the decision of the Supreme Procuratorate rendered on February 17, 2020, which rejected New Pengcheng's appeal and upheld the Provincial Procuratorate's Decision. The Supreme Procuratorate's decision with translation is attached hereto as **Appendix "C"**.
23. Hanfeng's entitlement to retain the Deposit has been confirmed in China now that both the court proceedings and the Protest Application proceedings have been concluded.

THE RECEIVERSHIP PROCEEDINGS IN CANADA

24. On November 30, 2017, Justice Hainey approved certain fees and disbursements of the Receiver and those of its counsel as fair and reasonable. A copy of Justice Hainey's endorsement dated November 30, 2017 is attached hereto as **Appendix "D"**.

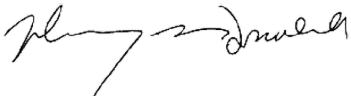
25. New Pengcheng opposed Hanfeng's entitlement to the Deposit in the Receivership Proceedings and the proposed payment of the professional fees and disbursements that were approved by the Court, on the grounds that the Chinese Litigation was ongoing.
26. During this lengthy process, New Pengcheng, through its counsel, provided the following commitments and/or undertakings:
 - (a) On or about November 17, 2017, before the Supreme Court denied New Pengcheng's application for retrial, its Chinese counsel wrote to the Receiver, stating: ".....when the Supreme Court's decision issued, regardless of the outcome of retrial is, we will accept it without any further objection"; and
 - (b) On or about July 4, 2018, New Pengcheng's Canadian counsel confirmed in writing that, if the Provincial Procuratorate denies the Protest Application, New Pengcheng will take no further steps to challenge, appeal or protest against the Provincial Court Judgement in China, Canada or any other jurisdiction.
27. New Pengcheng refused to comply with the above undertakings and continued to assert its claim after each of the Supreme Court and Provincial Procuratorate turned down the respective applications brought by New Pengcheng.
28. On November 14, 2019, Justice Hainey issued an endorsement (the "**2019 Endorsement**"), directing that the Receiver maintain the status quo and not utilize the Deposit until the Supreme Procuratorate has rendered its decision. Justice Hainey further directed that the Receiver may utilize the Deposit funds to pay the fees of the Receiver and its counsel without further order of this Court if the Supreme Procuratorate's decision is in favour of the estate. A copy of the 2019 Endorsement is attached hereto as **Appendix "E"**.
29. As stated above, on February 17, 2020, the Supreme Procuratorate rejected New Pengcheng's appeal and upheld the Provincial Procuratorate's Decision in favour of Hanfeng and the Receiver. Therefore, and in accordance with Justice Hainey's 2019 Endorsement, the Receiver processed the payment of the professional fees and expenses of the Receiver and its counsel, Stikeman Elliott LLP, that were previously approved by this Court on November 30, 2017.

NEXT STEPS

30. Due to the Chinese Litigation and uncertainty surrounding the entitlement to the Deposit, the Receiver paused certain workstreams with a view to preserving liquidity, pending the outcome of the Chinese Litigation. The activities that were put on hold included, but are not limited to:
- (a) Advancing a claims process, including the adjudication of certain claims, pursuant to an Order of September 23, 2014;
 - (b) Evaluating options to preserve and realize on any remaining assets;
 - (c) Advancing the legal action against Mr. Yu and others in Canada;
 - (d) Preparing tax filings; and
 - (e) Processing disbursements.
31. The successful conclusion of the Chinese Litigation allows the Receiver to take steps to advance the administration of the Receivership Proceedings. The Receiver, in consultation with its counsel, will report to this Court in the near term and seek directions on the proposed steps to carry out the Receiver's responsibilities and complete the administration of the Receivership Proceedings.

All of which is respectfully submitted this 18th day of May, 2021.

ERNST & YOUNG INC.
In its capacity as Receiver of
Hanfeng and not in its personal or corporate capacity

Per: 

Murray A. McDonald
Chairman

This is **Appendix “A”**
to the Sixth Report of the Receiver

**ONTARIO
SUPERIOR COURT OF JUSTICE
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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.

**FIFTH REPORT OF THE RECEIVER
July 11, 2017**

INTRODUCTION

1. On August 20, 2014, following an application by Hanfeng Evergreen Inc. ("**Hanfeng**" or the "**Company**"), the Ontario Superior Court of Justice (the "**Court**") issued an order (the "**Approval Order**") approving a share transfer agreement (the "**Share Transfer Agreement**") dated August 8, 2014 and the transaction contemplated therein (the "**Share Transfer Transaction**").
2. The Approval Order provided for vesting in HLJ Pengcheng (as defined below) all the shares of Hanfeng Slow-Release Fertilizer Co., Ltd. (the "**Chinese Subsidiary**"), the Company's wholly-owned subsidiary in China, upon the completion of the Share Transfer Transaction. A copy of the Approval Order is attached hereto as **Appendix "A"**.
3. Pursuant to an order (the "**Appointment Order**") issued by this Court on August 20, 2014 (the "**Filing Date**"), Ernst & Young Inc. ("**EY**") was appointed as receiver and manager (the "**Receiver**") of the assets, undertakings and properties (the "**Properties**") of the Company, pursuant to section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended. A copy of the Appointment Order is attached hereto as **Appendix "B"**.
4. The Appointment Order authorized the Receiver to, among other things:
 - (a) take any necessary steps required to complete the Share Transfer Transaction;

- (b) take possession of and exercise control over the Properties and any and all proceeds, receipts and disbursements arising out of, or from, the Properties;
 - (c) engage counsel and advisors from time to time to assist with the exercise of the Receiver's powers and duties; and
 - (d) seek Court approval of, and conduct a procedure for, the solicitation, determination and resolution of claims against the Company.
5. On July 24, 2015 and July 31, 2015, following motions by the Receiver, this Court issued two Orders (collectively, the "**Clarification Orders**"), which, among other things:
- (a) confirmed the Receiver's power and authority to exercise the shareholder rights of Hanfeng with respect to the Chinese Subsidiary, including the replacement of Mr. Yu Xinduo ("**Mr. Yu**") with Mr. Hong Rong-Kai ("**Mr. Hong**") as the legal representative and a director of the Chinese Subsidiary;
 - (b) authorized the Receiver to take any necessary steps to assert its ownership of and effect control over the Chinese Subsidiary;
 - (c) required Mr. Yu to provide unfettered access for Mr. Hong and his designates to the Chinese Subsidiary's offices and facilities and to the Chinese Subsidiary's books and financial records;
 - (d) required Mr. Yu to surrender the chop sets (which are company seals required for executing corporate documents and government registrations) and certain other business and legal documents of the Chinese Subsidiary to Mr. Hong and the Receiver;
 - (e) required Mr. Yu to provide full and timely cooperation to the Receiver with respect to the above tasks; and
 - (f) prohibited Mr. Yu, without the Receiver's approval, from executing any agreement with respect to the Chinese Subsidiary or causing it to make any payments.

Copies of the Clarification Orders are attached hereto collectively as **Appendix "C"**.

PURPOSE

6. The purpose of this fifth report of the Receiver (the “**Fifth Report**”) is to report to the Court in respect of:
 - (a) developments with respect to the ongoing Legal Proceedings (as defined below);
 - (b) the current financial status of the Company;
 - (c) the outstanding fees and disbursements for the Receiver and its counsel; and
 - (d) the Receiver’s motion for:
 - (i) approval of the Supplement to the First Report dated September 22, 2014 (the “**Supplement to the First Report**”), the Fourth Report (defined below), the Fifth Report and the activities described therein; and
 - (ii) approval of the fees and disbursements of the Receiver and its counsel.

7. The Fifth Report is organized as follows:
 - (a) Terms of Reference;
 - (b) General Background;
 - (c) Update on the Legal Proceedings;
 - (d) Current Financial Status of Company; and
 - (e) Fees and Disbursements.

TERMS OF REFERENCE

8. In preparing the Fifth Report and making the comments herein, the Receiver has been provided with, and has relied upon, certain unaudited, draft and/or internal financial information, prepared from the Company’s books and records, discussions with employees of the Company and information from other third-party sources (collectively, the “**Information**”). Except as described in the Fifth Report:

- (a) the Receiver has not audited, reviewed or otherwise attempted to verify the accuracy or completeness of the Information in a manner that would wholly or partially comply with the Generally Accepted Assurance Standards pursuant to the Canadian Institute of Chartered Accountants Handbook and, accordingly, the Receiver expresses no opinion or other form of assurance in respect of the Information; and
 - (b) the Receiver has prepared the Fifth Report in its capacity as a court-appointed officer solely for the use of this Court and the stakeholders in these proceedings and will make a copy of the Fifth Report available on the Receiver's website at www.ey.com/ca/hanfeng.
- 9. The Receiver has previously filed with the Court its first report dated September 12, 2014 (the "**First Report**"), the Supplement to the First Report, the second report dated July 17, 2015 (the "**Second Report**"), the supplement to the second report dated July 22, 2015 (the "**Supplement to the Second Report**"), its third report dated September 25, 2015 (the "**Third Report**") and its fourth report dated April 4, 2017 (the "**Fourth Report**"). Copies of each of these reports are posted on the Receiver's website. Copies of the First Report, the Supplement to the First Report, the Second Report (without appendices), the Supplement to the Second Report (without appendices), the Third Report (without appendices) and the Fourth Report (without appendices) are attached hereto as **Appendices "D", "E", "F", "G", "H" and "I"**, respectively. The First Report, Second Report and Supplement to the Second Report were approved by the Order of Justice Haaney dated July 31, 2015. The Third Report was approved by the Order of Justice Haaney dated October 5, 2015.
- 10. All monetary amounts contained herein are expressed in Canadian dollars, unless otherwise stated. Capitalized terms not defined herein have the meaning set out in the Fourth Report.

GENERAL BACKGROUND

Hanfeng and its Chinese Subsidiary

11. Hanfeng, through its wholly-owned subsidiaries, was a developer and producer of value-added fertilizers in China. Hanfeng is incorporated under the laws of Ontario with its registered head office in Toronto.
12. Hanfeng has no independent operations and exists solely as a holding company for certain entities that were incorporated in and, at the relevant times, operating in China. By mid-August 2014, the Company's principal remaining un-monetized asset was all the issued and outstanding shares of the Chinese Subsidiary (the "**Shares**").
13. The Chinese Subsidiary is managed by Mr. Yu and a team of individuals designated by him (collectively, the "**Local Management Team**"). The Local Management Team, by way of Mr. Yu's delegation of authority (as legal representative), controls the Chinese Subsidiary's business licence, chop sets and bank accounts.
14. The board of the Chinese Subsidiary (the "**Board**") currently consists of the three following directors:
 - Mr. Yu, chairman of the Board, the founder and former CEO of the Company, who owns and controls approximately 20.4% of Hanfeng's shares;
 - Qi Zhida, General Manager of the Chinese Subsidiary; and
 - Guan Liu, ("**Mr. Guan**") (a lawyer at Heilongjiang Honghui Law Firm, the Receiver's Chinese counsel).

Share Transfer Transaction

15. As noted above, the Appointment Order authorized the Receiver to sell the Shares.
16. As described in greater detail in the prior reports of the Receiver to the Court, immediately prior to the execution of the Share Transfer Agreement, the name of the counterparty to the Share Transfer Transaction was changed from "Heilongjian Pengcheng Fertilizer Co. Ltd." ("**HLJ Pengcheng**") to the Chinese language translation of "Harbin Pengcheng Fertilizer Co. Ltd." ("**New Pengcheng**").

17. HLJ Pengcheng is a well-established company active in Heilongjiang Province of China. By contrast, New Pengcheng appears to be a shell company with no operations that was only registered on August 4, 2014 (4 days before signing of the Share Transfer Agreement) and in respect of which very limited information is available to the public.
18. The Receiver has attempted to close the Share Transfer Transaction, but has not been successful, in part due to the actions of New Pengcheng and Mr. Yu. In light of New Pengcheng's continued failure to meet its contractual obligations and various other factors set out in the Forth Report, the Receiver no longer believes that New Pengcheng has the financial wherewithal or desire to close the Share Transfer Transaction.
19. During this process, the Receiver uncovered evidence of concealed loans, legal actions and other information that led to mounting concerns over the state of the Chinese Subsidiary, the potential linkage between Mr. Yu and New Pengcheng, as well as Mr. Yu's role in the entire transaction, all as detailed in the Fourth Report.

Control of the Chinese Subsidiary

20. In light of these concerns, the Receiver, with the assistance of its counsel and advisors, took various steps with a view to preserving the assets of the Chinese Subsidiary. However, the Receiver's efforts have not been successful due to Mr. Yu's failure to surrender control of the Chinese Subsidiary despite the Receiver's demands and the Court's previous orders. Mr. Yu has failed to provide the documents requested by the receiver or cooperate with the Receiver and its representatives in accordance with the Clarification Orders, in particular, Mr. Yu has not:
 - (a) executed certain documents necessary for the replacement of the legal representative as further discussed herein;
 - (b) granted access to the Chinese Subsidiary's offices and facilities and to its books and financial records; and
 - (c) responded to inquiries with respect to the concealed loans of the Chinese Subsidiary, legal actions by its lenders, and other operational and financial information.

21. As a result, the Receiver has been unable to complete an application to the Harbin Administration of Industry and Commerce (“**HAIC**”) to register the replacement of the legal representative.
22. As discussed in the Fourth Report, the Receiver attempted to obtain a local court order to assist with enforcing the shareholder rights on behalf of Hanfeng; however, the Harbin Intermediate People’s Court (the “**Harbin Court**”) advised that it was not prepared to hear the Receiver’s submission.

UPDATE ON THE LEGAL PROCEEDINGS

23. As a result of the issues discussed above with respect to the Share Transfer Transaction and control over the Chinese Subsidiary, and as described in the Fourth Report, the Receiver has become involved in two legal proceedings (the “**Legal Proceedings**”), both of which remain ongoing:
 - (a) the Receiver’s action against Mr. Yu and Ms. Lei Li¹ in Canada (the “**Receiver’s Action**”); and
 - (b) the proceeding brought in China by New Pengcheng against Hanfeng, the Chinese Subsidiary, Mr. Yu and EY (the “**New Pengcheng Proceeding**”).

Receiver’s Action

24. On March 22, 2016, the Receiver commenced a claim (the “**Receiver’s Action**”) in the Ontario Superior Court of Justice against Mr. Yu and Ms. Li. Among other things, the Statement of Claim alleges that Mr. Yu breached his fiduciary duties to Hanfeng and the Chinese Subsidiary by taking out a series of loans on behalf of the Chinese Subsidiary, which proceeds he converted for his own use or otherwise improperly dissipated from the Chinese Subsidiary and/or were received by Ms. Li. In addition, the Statement of Claim alleges that Mr. Yu and Ms. Li fraudulently represented the true identity and corporate history of New Pengcheng. Attached hereto as **Appendix “J”** is the Statement of Claim in the Receiver’s Action.

¹ Ms. Lei Li is the spouse of Mr. Yu and a former director and officer of Hanfeng.

25. In the Receiver's Action, the Receiver claims restitution or damages in the total amount of Canadian currency sufficient to purchase RMB 865,600,000 (approximately \$17.3 million²) for breach of fiduciary duty, fraud, conversion, unjust enrichment, knowing assistance and knowing receipt and fraudulent misrepresentation and seeks a declaration that all monies belonging to the Chinese Subsidiary and wrongfully obtained by Mr. Yu and/or Ms. Li are subject to a constructive trust in favor of the Receiver. The Receiver also asserts a claim for aggravated, exemplary and punitive damages in the amount of \$500,000 and special damages, in an amount to be determined in advance of trial, for costs associated with the Court approval and monitoring of the Share Transfer Agreement, delays to the Share Transfer Transaction and the costs to investigate Mr. Yu and Ms. Li's activities and to try to preserve the Chinese Subsidiary's assets.
26. After the Receiver delivered two responses to the defendants' Demand for Particulars, on January 5, 2017, Mr. Yu and Ms. Li delivered a defence to the action (the "**Statement of Defence**"). The Statement of Defence broadly denies the allegations of the Receiver and claims certain allegations fail to disclose a cause of action against Mr. Yu and Ms. Li. Attached hereto as **Appendix "K"** is the Statement of Defence.
27. Since the Fourth Report was prepared, the Receiver and Mr. Yu, through their counsel, have engaged in extensive correspondence regarding the Receiver's Action and these receivership proceedings. In particular, Mr. Yu's counsel disagreed with statements in the Fourth Report relating to Mr. Yu's failure to cooperate with the Receiver and its representatives in their attempts to investigate the business and financial affairs of the Chinese Subsidiary as well as to exercise control over it.
28. The application to HAIC for the replacement of the legal representative is required to include, among other things, the Board resolution, appointment letter, the Chinese Subsidiary's business license and various other documents that need to be executed by the directors and stamped with the Chinese Subsidiary's business chop. As discussed earlier, many of these documents are within the control of Mr. Yu and/or the Local Management Team by way of Mr. Yu's delegation of authority. In addition,

² Converted based on the exchange rate of CAD\$1.00 = RMB5.00

in light of certain lenders' claims and actions against the Chinese Subsidiary, the Receiver believed it was critically important to have immediate unfettered access to the Chinese Subsidiary's corporate and financial information in order to exercise control.

29. To this end, the Receiver and its representatives made repeated requests to Mr. Yu for various documents and information. For over two years, Mr. Yu and various member of the Local Management Team provided numerous responses to these letters, none of which have resulted in any meaningful cooperation or positive action to comply with the Receiver's requests.
30. On May 12, 2017, counsel to Mr. Yu contacted the Receiver's counsel, requesting the documentation that must be executed by Mr. Yu, among others, to register the replacement of a legal representative and/or director of the Chinese Subsidiary (the "**May 12 Letter**"). The May 12 Letter was written without prejudice to Mr. Yu's position, as set out in the Statement of Defence. Attached hereto as **Appendix "L"** is the May 12 Letter.
31. On July 7, 2017, the Receiver, through its counsel, responded to the May 12 Letter (the "**July 7 Letter**"). The Receiver noted that Mr. Yu had a number of obligations under the Clarification Order which he had not complied with and demanded the Mr. Yu provide certain financial information pursuant to the Clarification Orders. The Receiver also provided a list of documents that must be signed and registered to effect a change of legal representative and/or director of the Chinese Subsidiary. Attached hereto as **Appendix "M"** is the July 7 Letter.
32. On May 19, 2017, Receiver's counsel received correspondence from counsel for Mr. Yu with respect to the Fourth Report (the "**May 19 Letter**"), requesting, among other things:
 - (a) that the Receiver post additional documents relating to the Legal Proceedings on the Receiver's website;
 - (b) further information regarding the New Pengcheng Proceeding; and

- (c) that the Receiver provide further documents and information with respect to the Receiver's allegations of Mr. Yu and Ms. Lei's failure to cooperate.
33. Receiver's counsel responded to these requests in a letter dated June 6, 2017 (the "**June 6 Letter**"). The May 19 Letter and the June 6 Letter are attached hereto as **Appendices "N" and "O"**. Attached to the June 6 Letter is a notice of disallowance in respect of the claim made by Mr. Yu in the Receivership (the "**Notice of Disallowance**").
34. On May 30, 2017, the Receiver served the parties to the Receiver's Action with its Reply to the Statement of Defence.
35. On June 26, 2017, Mr. Yu filed a notice of dispute in respect of the Notice of Disallowance. Attached hereto as **Appendix "P"** is the notice of dispute of Mr. Yu dated June 26, 2017.
36. On June 12, 2017, the defendants in the Receiver's Action served a notice of motion seeking to strike the claims against Ms. Li and certain aspect of the claim against Mr. Yu for failing to disclose a cause of action (the "**Motion to Strike**"). The motion has been scheduled for September 22, 2017. Attached hereto as **Appendix "Q"** is the notice of motion dated June 12, 2017.
37. The next steps in this proceeding are expected to be as follows:
- (a) the Motion to Strike will be heard on September 22, 2017; and
 - (b) once pleadings have closed, a timetable will be established for discovery.

New Pengcheng Proceeding

38. On or about August 3, 2015, New Pengcheng commenced an action against Hanfeng, the Chinese Subsidiary, Mr. Yu and EY in its personal capacity in the Harbin Court, seeking to terminate the Share Transfer Agreement and cause the return of the initial deposit in the amount of RMB 12.4 million (approximately \$2.48 million²) that New Pengcheng had previously paid (the "**Deposit**").
39. On February 15, 2017, the Harbin Court released its decision (backdated to December 29, 2016). Among other things, the decision included the following:

- (a) a finding that the Share Transfer Agreement was terminated;
 - (b) the requirement for Hanfeng to return the Deposit, plus interest, to the Purchaser; and
 - (c) a finding that EY, in its personal capacity, was not a party to the Share Transfer Agreement and not personally liable for the return of the Deposit.
40. For reasons set out in greater detail in the Fourth Report, the Receiver does not believe that the Harbin Court reached the appropriate result with respect to the termination of the Share Transfer Agreement and the requirement for Hanfeng to return the Deposit.
41. On March 20, 2017, the Receiver commenced an appeal of the Harbin Court decision by delivering a notice of appeal to the Harbin Court. The Harbin Court then transferred the appeal to the Heilongjiang Province Superior Court (the “**Heilongjiang Court**”).
42. The Heilongjiang Court heard the appeal on June 30, 2017. Prior to the hearing, the parties made written submissions to the judges. The Heilongjiang Court may request further written submissions.

THE COMPANY’S CURRENT FINANCIAL POSITION

43. As described in the Fourth Report, the Receiver has received 17 non-equity claims with a total face value of CA\$4,307,663 (including two claims filed by Mr. Yu and a company controlled by him for a total amount of \$2,451,613.83) and two late claims in a total amount of CA\$17,863 in the Claims Process. The claims have not yet been fully adjudicated by the Receiver due to the pending Legal Proceedings as well as the state of the Share Transfer Transaction and the Chinese Subsidiary.
44. A summary of the Receiver’s receipts and disbursements for the period from the Filing Date to September 20, 2015 is set out in Appendix I to the Third Report. Attached hereto as **Appendix “R”** is the Receiver’s statement of receipts and disbursements from September 21, 2015 to May 31, 2017. The Receiver currently holds funds in the

amount of CA\$2,015,925.29 and US\$9,945.62 in respect of the receivership of Hanfeng. These funds effectively include the remaining balance of the Deposit.

45. As described further below, at the time of this Fifth Report, outstanding professional fees and disbursements are estimated at approximately \$361,062 before Harmonized Sales Tax (“HST”).
46. It is the Receiver’s intention to continue to utilize the Company funds to administer the receivership, advance the Legal Proceedings, as well as evaluate and pursue other courses of action for the benefit of Hanfeng pursuant to the Appointment Order.

FEES AND DISBURSEMENTS

47. The Receiver, and its counsel, Stikeman Elliott LLP (“**Stikeman**”), Mayer Brown JSM (“**Mayer Brown**”) and Heilongjiang Honghui Law Firm (“**Honghui**”) maintained records of their professional time and costs.

48. The Receiver seeks approval of:

- (a) its fees and disbursements for the period of August 2, 2014 to April 28, 2017;
- (b) the fees and disbursements for Stikeman for the period of April 12, 2014 to May 5, 2017;
- (c) the fees and disbursements for Mayer Brown for the period of November 10, 2014 to August 27, 2015; and
- (d) the fees and disbursements for Honghui for the period of May 4, 2015 to May 31, 2017 as summarized in the table below:

In \$CAD	Fees			Disbursements			Tax			Total
	Paid	Outstanding	Total	Paid	Outstanding	Total	Paid	Outstanding	Total	
Receiver	439,543	201,524	641,067	8,917	6,415	15,332	58,190	27,141	85,332	741,730
Stikeman	256,342	151,609	407,952	7,613	1,514	9,127	34,265	19,880	54,145	471,224
Mayer Brown (1)	214,210	-	214,210	61	-	61	14,502	-	14,502	228,774
Honghui (1)	80,011	-	80,011	24,673	-	24,673	2,400	-	2,400	107,085
Total	990,107	353,133	1,343,240	41,265	7,929	49,193	92,455	47,021	139,476	1,548,812

*Additions may not sum to total due to rounding.

(1) U.S. dollar payments were converted based on the exchange rate of CAD\$1.30 = US\$1.00

49. The fees and disbursements of the Receiver for the period of August 2, 2014 to April 28, 2017 total \$741,729.82, including fees in the amount of \$641,066.50, disbursements in the amount of \$15,331.57, and HST in the amount of \$85,331.75, as more particularly described in the Affidavit of Brent Beekenkamp sworn June 30, 2017 (the "**Beekenkamp Affidavit**"), a copy of which is attached hereto as **Appendix "S"**.
50. The fees and disbursements of Stikeman from August 1, 2014 to May 5, 2017 total \$471,223.57, including fees in the amount of \$407,951.80, disbursements in the amount of \$9,127.12, and HST in the amount of \$54,144.65, as more particularly described in the Affidavit of Brian Pukier sworn July 6, 2017 (the "**Pukier Affidavit**"), a copy of which is attached hereto as **Appendix "T"**.
51. The fees and disbursements of Mayer Brown from November 10, 2014 to August 27, 2015 total RMB 1,078,387.55 (\$228,773.52), including fees in the amount of RMB 1,009,740.00 (approximately \$214,210.35), disbursements in the amount of 288.80 (approximately \$61.27), and Value Added Tax ("**VAT**") in the amount of RMB 68,358.75 (approximately \$14,501.90), as more particularly described in the Affidavit of Robert Terence Kwong Shien Tung sworn June 29, 2017 (the "**Tung Affidavit**"), a copy of which is attached hereto as **Appendix "U"**.
52. The fees and disbursements of Honghui from May 4, 2015 to May 31, 2017 total RMB 526,254.21 (approximately \$107,085), including fees in the amount of RMB 393,203.87 (approximately \$80,011.04), disbursements in the amount of RMB 121,254.21 (approximately \$24,673.40) and VAT in the amount of RMB 11,796.13 (approximately \$2,400.33), as more particularly described in the Affidavit of Mr. Guan sworn June 23, 2017 (the "**Guan Affidavit**", and together with the Beekenkamp Affidavit, Pukier Affidavit and Guan Affidavit, the "**Fee Affidavits**"), a copy of which is attached hereto as **Appendix "V"**.
53. The Receiver respectfully submits that the fees and disbursements incurred by the Receiver, Mayer Brown, Honghui and Stikeman, as set out in the Fee Affidavits, are reasonable in the circumstances and have been validly incurred in accordance with the provisions of the Orders issued in these receivership proceedings. Accordingly,

the Receiver respectfully requests the approval of the fees and disbursements of the Receiver, Stikeman, Mayer Brown and Honghui, as set out in the Fee Affidavits.

54. The activities undertaken and services provided by the Receiver in connection with these receivership proceedings:

(a) described in the Supplement to the First Report; and

(b) since the filing of the Third Report and described in the Fourth Report and in this Fifth Report

were prudent, reasonable and not arbitrary. Accordingly, the Receiver is requesting approval of (a) the Supplement to the First Report and the activities of the Receiver described herein (b) the Fourth Report and the activities of the Receiver described therein and (c) this Fifth Report and the activities of the Receiver described herein.

All of which is respectfully submitted this 11th day of July, 2017.

ERNST & YOUNG INC.
In its capacity as Receiver of
Hanfeng and not in its personal or corporate capacity

Per: 

Murray A. McDonald
President

Per: 

Brent Beekenkamp
Senior Vice President

**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.

**SUPPLEMENT TO FIFTH REPORT OF THE RECEIVER
DATED NOVEMBER 13, 2017**

PURPOSE

1. This supplement to the Fifth Report of the Receiver (the “**Supplemental Fifth Report**”) is provided in reference to the Fifth Report of the Receiver dated July 11, 2017 (the “**Fifth Report**”). Capitalized terms not defined in this Supplemental Fifth Report are as defined in the previous reports of the Receiver.
2. The purpose of the Supplemental Fifth Report is to provide this Court with information with respect to:
 - (a) A final judgment issued by the Heilongjiang Provincial Court granting the appeal filed by the Receiver for the retention of the Deposit previously paid by New Pengcheng;
 - (b) An update on the action commenced by the Receiver (the “**Receiver’s Action**”) against Mr. Yu Xinduo (“**Mr. Yu**”) and Ms. Li Lei (“**Ms. Li**”) in the Ontario Superior Court of Justice;
 - (c) the Receiver’s inquiries regarding the current financial status of the Chinese Subsidiary;

- (d) the replacement of Mr. Yu as legal representative of Hanfeng Evergreen Inc.'s ("**Hanfeng**" or the "**Company**") wholly owned subsidiary, Hanfeng Slow-Release Fertilizer Co., Ltd. (the "**Chinese Subsidiary**"); and
 - (e) the current status of the claims procedure as set out in the Claims Procedure Order dated September 23, 2014 (the "**Claims Procedure Order**").
3. The Supplemental Fifth Report is organized as follows:
- (a) Terms of Reference;
 - (b) Heilongjiang Provincial Court Decision;
 - (c) Receiver's Action;
 - (d) Status of the Chinese Subsidiary;
 - (e) Replacement of Mr. Yu as Legal Representative; and
 - (f) Claims Procedure Update.

TERMS OF REFERENCE

4. The Receiver has prepared the Supplemental Fifth Report in its capacity as a court-appointed officer solely for the use of this Court and the stakeholders in these proceedings and will make a copy of the Supplemental Fifth Report available on the Receiver's website at www.ey.com/ca/hanfeng (the "**Case Website**").
5. The Receiver has previously filed with the Court its first report dated September 12, 2014 (the "**First Report**"), the supplement to the First Report dated September 22, 2014 (the "**Supplement to the First Report**"), its second report dated July 17, 2015 (the "**Second Report**"), the supplement to the Second Report dated July 22, 2015 (the "**Supplement to the Second Report**"), its third report dated September 25, 2015 (the "**Third Report**"), its fourth report dated April 4, 2017 (the "**Fourth**

Report”) and the Fifth Report. This Court has previously approved the activities of the Receiver as set out in the First Report, the Second Report, the Supplement to the Second Report, and the Third Report. Copies of each of these reports, including the Supplemental Fifth Report as well as motion records and Orders in the receivership proceedings, are or will be available on the Case Website. The Receiver has also established a toll free phone number and e-mail address that are referenced on the Case Website so that parties may contact the Receiver if they have questions with respect to the receivership proceedings.

6. All monetary amounts contained herein are expressed in Canadian dollars, unless otherwise stated.

HEILONGJIANG PROVINCIAL COURT DECISION

7. As described in paragraphs 38 to 42 of the Fifth Report, on or about August 3, 2015, the purported purchaser under the Share Transfer Transaction, New Pengcheng, commenced an action against Hanfeng, the Chinese Subsidiary, Mr. Yu and EY in its personal capacity (the “**Chinese Litigation**”) in the City of Harbin Intermediate People’s Court (the “**Harbin Intermediate Court**”). In the Chinese Litigation, New Pengcheng sought, among other things, the return of the initial deposit in the amount of RMB 12.4 million (approximately \$2.48 million¹) that New Pengcheng had previously paid to the Receiver as part of the Share Transfer Transaction (the “**Deposit**”).
8. On February 15, 2017, the Harbin Intermediate Court released its decision (the “**Harbin Court Decision**”), which included, among other things, the following:
 - (a) a finding that the Share Transfer Agreement was terminated;

¹ Converted based on the exchange rate of CAD\$1.00 = RMB5.00

- (b) the requirement for Hanfeng to return the Deposit, plus interest, to the Purchaser; and
 - (c) a finding that EY, in its personal capacity, was not a party to the Share Transfer Agreement and not personally liable for the return of the Deposit.
9. On March 20, 2017, the Receiver commenced an appeal of the Harbin Court Decision to the Heilongjiang Provincial People’s High Court (the “**Heilongjiang Provincial Court**”).
10. The Heilongjiang Provincial Court has released its decision dated September 18, 2017 (the “**Heilongjiang Provincial Court Decision**”), granting the appeal by the Receiver and overturning certain parts of the Harbin Court decision. In summary, the Heilongjiang Provincial Court concluded that:
- (a) New Pengcheng had breached its contractual obligations under both the Share Transfer Agreement and escrow agreement, and as a result Hanfeng had the right to refuse to proceed with the regulatory approval steps;
 - (b) The Harbin Court Decision did not clearly determine the underlying facts, and contains errors in the application of law;
 - (c) Hanfeng is entitled to keep the Deposit, while New Pengcheng’s motion for, inter alia, the return of the Deposit, is dismissed;
 - (d) The Share Transfer Agreement is terminated; and
 - (e) Court fees of RMB 200,226.04 (approximately \$40,000) and an asset preservation fee of RMB 5,000 (approximately \$1,000) shall be paid by New Pengcheng.
11. Copies of the Heilongjiang Provincial Court Decision and an unofficial translation are attached as **Appendices “A”** and **“B”**, respectively.

12. The Receiver initially engaged Mr. Guan of Heilongjiang Honghui Law Firm (“**Honghui**”) on an hourly basis to assist with the Share Transfer Transaction. When the Chinese Litigation was commenced, it became apparent to the Receiver that it would require more significant services from Honghui in respect of legal proceedings and other matters in Harbin. In October 2015, the Receiver entered into a fee for service contract with Honghui to i) defend the Chinese Litigation, and ii) seek the court endorsement of the Receiver’s authority to replace the legal representative of the Chinese Subsidiary. The contract provides for RMB 500,000 (approximately \$100,000) in total fees, including:
- (a) an up-front payment of RMB 320,000 (approximately \$64,000) (the “**Up-front Payment**”);
 - (b) a success fee of RMB 30,000 (approximately \$6,000) payable when the legal representative replacement is completed; and
 - (c) a second another success fee of RMB150,000 (approximately \$30,000) conditional upon the outcome of the Chinese Litigation (the “**Litigation Success Fee**”).
13. The Receiver made the Up-front Payment on or about November 3, 2015. With the issuance of the Heilongjiang Provincial Court Decision, the Litigation Success Fee is now payable; however, it does not form a part of the fees the Receiver is seeking approval of in its motion returnable November 20, 2017.

Dentons Lawyer’s Letter

14. On October 18, 2017, the Receiver received a letter from Mr. David Moore, counsel to Mr. Yu, attaching a letter from Liu Wenchen (“**Ms. Liu**”), a lawyer at Dentons in the Shahekou District, City of Dalian of Liaoning Province, China regarding the status of the Chinese Litigation (the “**Dentons Lawyer’s Letter**”). Attached as **Appendix “C”** is the letter from Mr. Moore enclosing the Dentons Lawyer’s Letter.

15. With respect to the Dentons Lawyer's Letter, the Receiver notes the following:
- (a) Ms. Liu is not the lawyer at Dentons who represented New Pencheng in the Chinese Litigation. During the Chinese litigation New Pencheng was represented by Ms. Xinyi Li, also of Dentons in the Harbin office in Heilongjiang Province;
 - (b) Guan Liu ("**Mr. Guan**"), the Receiver's Chinese counsel with respect to the Chinese Litigation, has received no such correspondence in China;
 - (c) In the Denton's Lawyer's Letter, Ms. Liu takes the position that the Heilongjiang Provincial Court Decision contains an "obvious mistake" and advises that New Pencheng intends to submit an "application for re-trial and correction of the wrong judgment"; and
 - (d) The Chinese Litigation was tried in Heilongjiang Province, in which the Heilongjiang Provincial Court is the highest court. Ms. Liu appears to practice in a different province, Liaoning Province, which has its own regional judicial system.
16. The Receiver has spoken to its Chinese Counsel, Mr. Guan, who has advised that:
- (a) With respect to civil cases, courts in China follow a "two-trial system" under which the decisions of the second instance court are final. In the Chinese Litigation, the Heilongjiang Provincial Court is the court of the second instance, and accordingly, its judgment is final.
 - (b) New Pencheng does have a right to apply for a re-trial to the China Supreme People's Court within six months. The China Supreme People's Court may or may not grant leave for a retrial after its review; however, under Chinese law the effectiveness of the Heilongjiang Provincial Court Decision is not suspended.

Attached as **Appendix “D”** is a letter from Mr. Guan to the Receiver with respect to Chinese civil procedure.

17. The Receiver continues to retain Mr. Guan to represent it in the Chinese Litigation and to take any steps appropriate to respond to an application for re-trial made by New Pengcheng.

RECEIVER’S ACTION

18. The Fifth Report sets out an overview of:
 - (a) the Receiver’s Action; and
 - (b) relevant correspondence between the Receiver’s counsel and counsel to the defendants.
19. As set out in paragraph 36 of the Fifth Report, after the close of pleadings the defendants in the Receiver’s Action served a Motion to Strike certain claims against Mr. Yu and Ms. Li for failing to disclose a cause of action. Following the hearing of the Motion to Strike on September 22, 2017, Cavanagh J. of this Court issued an endorsement dated October 3, 2017 (the “**Motion to Strike Endorsement**”). The Motion to Strike Endorsement stated, among other things, the following:
 - (a) Certain claims as against Ms. Li related to the causes of action of knowing assistance and knowing receipt are struck;
 - (b) The defendants’ motion is otherwise dismissed; and
 - (c) The Receiver is granted leave to deliver an amended statement of claim within 30 days.

A copy of the Motion to Strike Endorsement is attached as **Appendix “E”**.

20. On November 2, 2017, the Receiver delivered an Amended Statement of Claim on Mr. Yu and Ms. Li (the “**Amended Claim**”). Attached as **Appendix “F”** is the Amended Claim.
21. On November 3, 2017, the Receiver’s counsel delivered a letter to Mr. Yu’s counsel responding to various issues relating to the Receiver’s Action and the receivership proceeding that had been raised in various correspondence delivered by Mr. Yu’s counsel on October 18, 2017. A copy of the November 3, 2017 letter from the Receiver’s counsel is attached as **Appendix “G”**.

STATUS OF CHINESE SUBSIDIARY

22. Mr. Yu and Ms. Li have served a motion record responding to the Receiver’s motion returnable November 20, 2017, (a) to approve the activities of the Receiver as set out in the Supplement to the First Report, the Fourth Report and the Fifth Report; and (b) to approve the fees and disbursements of the Receiver and its counsel. At paragraph 18 of the affidavit of Ms. Li sworn October 19, 2017 (the “**Li Affidavit**”), Ms. Li refers to a letter from Mr. Moore to the Receiver dated July 14, 2017 in which he enquired about the Receiver’s efforts to liquidate the assets of the Chinese Subsidiary.
23. As set out at paragraph 34 of the Third Report, after it became apparent the Share Transfer Transaction would not close, the Receiver’s representatives attempted to gain physical access to the Chinese Subsidiary’s facility on or around July 30, 2015. Subsequently, on or around June 6, 2016, the Receiver’s representatives attempted again to enter the Chinese Subsidiary’s facility. On both occasions, the Receiver’s representatives were denied access to the Chinese Subsidiary by security. Further, notwithstanding repeated requests to Mr. Yu and Local Management, the Receiver and its representatives have not received any financial information and records regarding the Chinese Subsidiary for nearly two and a half years.

24. As described at length in the Reports and the Amended Claim, the Receiver's investigations have uncovered information that while under Mr. Yu's control the Chinese Subsidiary has taken on significant loans. These loans appear to exceed the value of the Chinese Subsidiary's assets and remain unpaid as they fall due. Specifically, the Receiver has obtained the following information:

- (a) As described in a credit report from the Corporate Credit Information Centre of the People's Bank of China dated June 6, 2016 (the "**Credit Report**") the Chinese Subsidiary had a total indebtedness of over RMB 438 million (approximately \$87.6 million) as of March 2016, of which RMB 286.81 million (approximately \$57.4 million) was in default. As of June 30, 2015, Local Management reported that the Chinese Subsidiary's total available cash was RMB 74 million (approximately \$14.4 million).

The Credit Report shows the Chinese Subsidiary's bank loans fluctuated between RMB 438 million and RMB 694 million from June 2013 to March 2016, all of which had been concealed from Hanfeng and the Receiver. A summary of the indebtedness history of the Chinese Subsidiary extracted from the Credit Report is attached as **Appendix "H"**.

- (b) As noted at paragraph 11 of the Supplement to the Second and at paragraph 35(d) of the Fourth Report, the Chinese Subsidiary was involved in at least three lawsuits related to defaults under certain loan and financing arrangements. These resulted in court-approved settlements with the China Industrial Bank pursuant to which the Chinese Subsidiary is obliged to pay approximately RMB 161 million (approximately \$32 million) in principal and interest (the "**China Industrial Bank Settlements**").
- (c) As noted at paragraph 49 of the Fourth Report, the Chinese Subsidiary has defaulted under certain of its bank loans, resulting in various seizure and

recovery actions being brought by its Chinese lenders, including the China Industrial Bank and China Merchant Bank.

- (d) On the China Courts' Enforcement Information Website at <http://shixin.court.gov.cn> (the "**China Court Enforcement Website**"), the Receiver has found the Chinese Subsidiary and Mr. Yu in his capacity as a guarantor for these loans and/or the legal representative of the Chinese Subsidiary are subject to various court judgments and court-approved actions, including the China Industrial Bank Settlements. Attached as **Appendix "I"** are copies of relevant search results (with unofficial translation) from the China Court Enforcement Website.
25. As a result of these bank loans and legal actions, the Chinese Subsidiary is likely insolvent with no residual value for its shareholder, Hanfeng, in a liquidation. Accordingly, the Receiver believes it is critically important to obtain and evaluate full disclosure with respect to the current status of the Chinese Subsidiary in order to assess options.

REPLACEMENT OF MR. YU AS LEGAL REPRESENTATIVE

26. As described in the Reports, the Receiver has sought to, among other things, replace Mr. Yu as legal representative of the Chinese Subsidiary with a view to exercising control over and preserving its assets.
27. As noted at paragraphs 30 and 31 of the Fifth Report, on July 7, 2017, the Receiver wrote to Mr. Yu's counsel setting out its requirements for further information regarding the status of the Chinese Subsidiary and documents to effect the legal representative replacement (the "**July 7 Letter**"). The July 7 Letter is attached to the Fifth Report as Appendix "M".
28. In the July 7 Letter, the Receiver reiterated that pursuant to the Order of Justice Conway dated July 24, 2015 (the "**Cooperation Order**"), Mr. Yu was ordered to

- provide his full and timely cooperation to the Receiver including “providing unfettered access for [the Receiver’s advisor] and his company ... to the Chinese Subsidiary’s offices and facilities and books and financial records.”
29. In light of its investigative findings, the Receiver demanded that Mr. Yu provide certain information and documents regarding the status of the Chinese Subsidiary, including:
- (a) Copies of bank statements for all bank accounts of the Chinese Subsidiary for the period from July 2015 to June 2017;
 - (b) Copies of all agreements in connection with bank loans, credit facilities, factoring entered into and guarantees provided by the Chinese Subsidiary in the past five years;
 - (c) A list of all legal proceedings, settlements, creditor enforcement actions (regardless of the status of these proceedings) during the period from August 2014 to June 2017;
 - (d) Internal monthly financial statements and trial balances for the period from June 2015 to June 2017;
 - (e) A payment/cheque register for the period from August 2014 to June 2017;
and
 - (f) An accounts receivable sub-ledger including transaction details for the period from August 2014 to June 2017.
30. In addition, in the July 7 Letter, the Receiver requested Mr. Yu to provide written authorization permitting the Receiver and its representatives to obtain and confirm information directly with banks, courts and local authorities in respect of the Chinese Subsidiary.

31. Mr. Yu has provided neither the authorization nor any of the documents or information requested by the Receiver.
32. On September 13, 2017, Mr. Yu's counsel wrote to the Receiver offering to provide a signed consent from Mr. Yu to resign as legal representative of the Chinese Subsidiary (the "**Resignation and Consent**") but did not answer any of the questions set out in the July 7 Letter.
33. In a letter dated October 18, 2017 (the "**Resignation Letter**"), Mr. Yu's counsel attached the signed Resignation and Consent of Mr. Yu, a summary of the documents requested in the July 7 Letter and a legal opinion regarding the steps necessary to replace a legal representative in China (the "**Legal Rep Opinion**"). Attached as **Appendix "J"** is the Resignation Letter with attachments.
34. The Resignation Letter (a) states that the executed resignation is all that is required to remove Mr. Yu as legal representative and (b) fails to provide any of the information requested in the July 7 Letter regarding the status of the Chinese Subsidiary.
35. The Receiver notes that the counsel providing the legal opinion with respect to the removal/replacement of a legal representative is from the City of Dalian in Liaoning Province. This is a region distinct from the City of Harbin in Heilongjiang Province, where the Chinese Subsidiary is located. As noted in the Reports, the Chinese Subsidiary requires approval from, among other local agencies, the industry and commerce administration authority of the City of Harbin in Heilongjiang Province.
36. Attached as **Appendix "K"** is a letter from Mr. Guan responding to the Legal Rep Opinion. Mr. Guan notes, among other things, that the approving and registration authorities in the City of Harbin in Heilongjiang Province impose specific document requirements for an application to change a legal representative. These document requirements are detailed in the July 7 Letter. Mr. Guan has confirmed

that certain of the documents must be signed by Mr. Yu and/or stamped with the corporate chops for the Chinese Subsidiary as required by the local authorities.

37. Mr. Guan further notes that the process of replacing a legal representative is basically consistent with that followed by the Chinese Subsidiary to register Mr. Guan as a director of the Chinese Subsidiary in June 2015, as described in the Second Report and the Third Report. At that time, Mr. Yu and the Chinese Subsidiary provided cooperation to effect the director registration by signing and/or stamping all required documents.
38. For the reasons set out above the Receiver states that:
 - (a) Mr. Yu has failed to comply with the requirements to provide “unfettered access... to the books and financial records of the [Chinese Subsidiary]” under the Cooperation Order;
 - (b) The Receiver is precluded from assessing options with respect to the Chinese Subsidiary until Mr. Yu provides necessary disclosure regarding its current status; and
 - (c) Mr. Yu has not satisfied the requirements to be replaced as legal representative of the Chinese Subsidiary.

CLAIMS PROCEDURE UPDATE

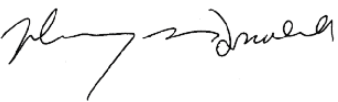
39. As described in paragraph 63 of the Fourth Report, the Receiver received 17 non-equity claims with a total face value of \$4,307,663 prior to the Claims Bar Date (as defined in the Claims Procedure Order) and one late non-equity claim in the amount of \$173.32. The Receiver has also received 68 equity claims.
40. The Receiver has reviewed each of the 17 non-equity claims filed prior to the Claims Bar Date. Of these claims:

- (a) four are undisputed by the Receiver;
 - (b) one has been disallowed with no response;
 - (c) eight have been disallowed by the Receiver and are subject to a notice of dispute by the claimant;
 - (d) three claims are subject to settlements between the parties; and
 - (e) one claim remains under review.
41. The Receiver has disallowed the late non-equity claim with no response from the claimant.
42. The Receiver is in discussions to engage the Honourable Frank Newbould to act as claims officer pursuant to paragraph 20 of the Claims Procedure Order (the “**Claims Officer**”). Mr. Newbould is a former judge of the Ontario Superior Court with extensive experience adjudicating claims between parties.
43. The Receiver anticipates commencing the adjudication of any disputed claims by the Claims Officer in December 2017 or early 2018. At that time, pursuant to paragraph 19(b) of the Claims Procedure Order, the Receiver will provide the Claims Officer with a package consisting of that Claimant's Proof of Claim, the Notice of Revision or Disallowance, the Notice of Dispute and any other materials which may be relevant for the determination of the dispute by the Claims Officer.
44. Pursuant to paragraph 21 and 23 of the Claims Procedure Order, the Claims Officer will determine:
- (a) the validity, amount and classification of any Disputed Claims;
 - (b) any procedural matters with respect to his determination with respect to the Disputed Claims; and

- (c) to whom and to what extent the costs of any hearing before the Claims Officer shall be paid.

All of which is respectfully submitted this 13th day of November, 2017.

ERNST & YOUNG INC.
In its capacity as Receiver of
Hanfeng and not in its personal or corporate capacity

Per: 

Murray A. McDonald
President

Per: 

Brent Beekenkamp
Senior Vice President

This is **Appendix “B”**
to the Sixth Report of the Receiver



黑龙江省高级人民法院

民事判决书

中华人民共和国
黑龙江省高级人民法院
民事判决书

(2017)黑民终270号

上诉人(一审被告):加拿大汉枫常绿有限公司(Hanfeng Evergreen Inc.),住所地加拿大安大略省多伦多市。

委托诉讼代理人:关刘,黑龙江宏琿律师事务所律师。

被上诉人(一审原告):哈尔滨鹏程肥业有限公司,住所地中华人民共和国黑龙江省尚志市尚志镇尚五路28号。

法定代表人:张敏,该公司总经理。

委托诉讼代理人:李欣怡,北京大成(哈尔滨)律师事务所律师。

委托诉讼代理人:盛玉涛,北京大成(哈尔滨)律师事务所律师。

一审被告:安永有限公司(Ernst & Young Inc.),住所地加拿大多伦多市海湾大街222号。

负责人:默理麦克当劳(murray A. McDonald),该公司主席。

委托诉讼代理人:焦开军,黑龙江宏琿律师事务所律师。

一审被告：汉枫缓释肥料有限公司，住所地中华人民共和国黑龙江省尚志市经济开发区汉枫路1号。

法定代表人：于薪铎，该公司董事长。

一审被告：于薪铎，男，1952年6月15日出生，汉族，汉枫缓释肥料有限公司董事长，住中华人民共和国辽宁省大连市中山区连庆巷38号3-6。

上诉人加拿大汉枫常绿有限公司（以下简称汉枫常绿公司）因与被上诉人哈尔滨鹏程肥业有限公司（以下简称鹏程肥业公司）、一审被告安永有限公司（以下简称安永公司）、汉枫缓释肥料有限公司（以下简称汉枫肥料公司）、于薪铎股权转让合同纠纷一案，不服哈尔滨市中级人民法院（2015）哈涉外商初字第7号民事判决，向本院提起上诉。本院于2017年5月15日立案后，依法组成合议庭，公开开庭进行了审理。上诉人汉枫常绿公司的委托诉讼代理人关刘，被上诉人鹏程肥业公司的委托诉讼代理人李欣怡、盛玉涛，一审被告安永公司的委托诉讼代理人焦开军到庭参加诉讼。一审被告汉枫肥料公司、于薪铎经本院合法传唤未到庭参加诉讼。本案现已审理终结。

汉枫常绿公司上诉请求：撤销一审判决第一、二项，依法改判鹏程肥业公司依据股权转让协议约定履行合同义务，向汉枫常绿公司支付股权交易价款，驳回鹏程肥业公司一审诉讼请求。事实与理由：1. 一审判决适用法律错误。一审判决关于“《股权转让协议书》依法成立，未生效，未生效的协议对签约双方均不具备

法律约束力”的认定错误，依《中华人民共和国合同法》（以下简称《合同法》）第八条规定，依法成立的合同，对当事人具有法律约束力，当事人应按照约定履行义务，不得擅自变更或解除，意思表示一致，合同即成立。2. 一审判决认定事实不清。第一，仅认定汉枫常绿公司未履行报批义务，却未认定鹏程肥业公司违约。一审判决错误引用《最高人民法院关于审理外商投资企业纠纷案件若干问题的规定》第五条的规定，事实上，鹏程肥业公司未依《股权转让协议书》约定向汉枫常绿公司支付交易总价款15%的付款义务，同时也未依《交易资金托管协议》的约定履行向托管行的托管账户内存入3720万元托管资金的义务，均属违约行为，因此汉枫常绿公司可依《合同法》第六十七条之规定，行使先履行抗辩权。第二，一审判决未全面引用《最高人民法院关于审理外商投资企业纠纷案件若干问题的规定》第一条，根据该条法律规定，合同因未经批准而被认定未生效的，不影响合同双方当事人履行报批义务条款及因该报批义务而设定的相关条款的效力。

鹏程肥业公司答辩称：一审判决认定事实清楚，适用法律正确。《股权转让协议书》经签订成立，即使转让合同未经批准，仍应认定“报批”义务在合同成立时即已产生，负有报批义务的一方在合同成立后即应履行报批义务，否则当事人可在获得转让款后通过不协助办理“报批”手续从而恶意阻止合同生效。最高人民法院对此有明确的规定，必须办理批准手续才生效的合同，在一审法庭辩论终结前已办理批准手续的，该合同认定有效。

安永公司发表意见称：依据加拿大安大略省高级法院于 2014 年 8 月 20 日作出的判令，安永公司作为汉枫常绿公司的接管人不产生任何责任或义务。安永公司并非《股权转让协议书》及《交易资金托管协议》的合同当事人，无需履行合同义务及承担责任。

鹏程肥业公司向一审法院提出诉讼请求：1. 解除其与汉枫常绿公司签订的《股权转让协议书》；2. 汉枫常绿公司、安永公司、汉枫肥料公司、于薪铎连带向鹏程肥业公司返还已支付的 5% 的转让款 1240 万元人民币，并自转款之日起至起诉日止按中国人民银行发布的同期贷款利率支付利息 652,170 元；并继续承担自起诉日起至给付日止的利息；3. 诉讼费用由汉枫常绿公司、安永公司、汉枫肥料公司、于薪铎承担。

一审法院认定事实：2014 年 8 月 8 日，鹏程肥业公司与汉枫常绿公司签订《股权转让协议书》，约定：鹏程肥业公司收购汉枫常绿公司全资子公司汉枫肥料公司 100% 股权，转让总价款为 2.48 亿元人民币。其中总价款的 80%，即 1.984 亿元人民币或等值美元应将现金通过汇款方式汇至汉枫常绿公司指定账户；其余的总价款 20%，即 4960 万元人民币应通过鹏程肥业公司开具的承诺付款函支付给汉枫常绿公司。协议签订之日起七个工作日内，鹏程肥业公司向汉枫常绿公司支付总价款的 5% 即 1240 万元人民币作为履约保证金；如果鹏程肥业公司未能按照协议的条款规定完成该交易，除相关法律规定汉枫常绿公司可享有的补救措施外，汉枫常绿公司有权保留履约保证金。鹏程肥业公司应于汉枫常绿公

司股东会批准或法庭批准本次股权交易后十个工作日内再支付总价款的 15%即 3720 万元人民币或等值美元。交易完成（协议 1.6 条约定，汉枫常绿公司在哈尔滨市工商行政管理局登记的协议标的变更到鹏程肥业公司或其指定的子公司名下时，视为交易完成）后十个工作日内，鹏程肥业公司应支付总价款的剩余 80%，其中 60%用现金支付至汉枫常绿公司指定账户，20%用协议所附承诺付款函支付。

合同签订后，2014 年 8 月 20 日，加拿大安大略省高级法院商业案件庭批准了上述股权转让协议。

2014 年 8 月 28 日，鹏程肥业公司委托案外人绿城恒基（集团）有限公司向汉枫常绿公司汇款 2,000,140 美元（双方均认可该款为案涉 1240 万元人民币履约保证金）。鹏程肥业公司称由于受到外汇管理规定的限制，此后未再向汉枫常绿公司支付款项。

2015 年 2 月 13 日，鹏程肥业公司与汉枫常绿公司授权代表人于薪铎、中国民生银行股份有限公司哈尔滨分行签订《交易资金托管协议》，鹏程肥业公司向托管银行存入托管资金 1000 万元。此笔资金未能汇给汉枫常绿公司，现已被鹏程肥业公司取回。

汉枫常绿公司系在加拿大合法注册并有效存续的股份有限公司；安永公司系在加拿大合法注册及有效存续的有限公司；鹏程肥业公司系在中华人民共和国合法注册并有效存续的有限责任公司。2014 年 8 月 20 日，加拿大安大略省高级法院作出判令（委任令），任命安永公司担任汉枫常绿公司经营的业务所收购或与该

业务相关所使用的所有资产、各项事业及财产的接管人和管理人。

一审法院认为，汉枫常绿公司及安永公司均是在加拿大合法注册并有效存续的公司，其与鹏程肥业公司因股权转让纠纷提起的诉讼属涉外民事诉讼。依照《中华人民共和国民事诉讼法》第二百五十九条之规定，在中华人民共和国领域内进行涉外民事诉讼，程序方面适用《中华人民共和国民事诉讼法》涉外编的规定。鹏程肥业公司、汉枫常绿公司没有就合同争议达成管辖协议，也没有协议选择处理合同争议所适用的准据法，但由于四被告之一的汉枫肥料公司住所地在中华人民共和国黑龙江省尚志市，依照《中华人民共和国民事诉讼法》第二十一条、《最高人民法院关于涉外民商事案件诉讼管辖若干问题的规定》第一条之规定，一审法院对本案享有管辖权。因本案合同履行地在中华人民共和国境内，依照《中华人民共和国民法通则》第一百四十五条第二款之最密切联系原则的规定，本案在实体方面适用中华人民共和国的法律。

归纳双方当事人的诉辩主张，本案争议焦点是：1. 鹏程肥业公司与汉枫常绿公司签订的《股权转让协议书》是否符合法定解除条件；2. 如解除条件成就，四被告应承担何种责任。鹏程肥业公司与汉枫常绿公司于2014年8月8日签订的《股权转让协议书》是双方真实意思表示，该协议依法成立。根据《最高人民法院关于审理外商投资企业纠纷案件若干问题的规定》第一条规定：“当事人在外商投资企业设立、变更等过程中订立的合同，依法律、

行政法规的规定应当经外商投资企业审批机关批准后才生效的，自批准之日起生效；未经批准的，人民法院应当认定该合同未生效。”汉枫肥料公司系外商投资企业，鹏程肥业公司与汉枫常绿公司就汉枫肥料公司股权转让所签订的协议，依法应当经审批机关批准后生效，现该协议未经审批机关批准，故未生效，未生效的协议对签约双方当事人均不具有法律约束力。根据规定，案涉股权转让方汉枫常绿公司与外商投资企业汉枫肥料公司负有报批义务，但至今其未向审批机关履行报批义务，根据《最高人民法院关于审理外商投资企业纠纷案件若干问题的规定》第五条规定，“外商投资企业股权转让合同成立后，转让方和外商投资企业不履行报批义务，经受让方催告后在合理的期限内仍未履行，受让方请求解除合同并由转让方返还其已支付的转让款、赔偿因未履行报批义务而造成的实际损失的，人民法院应予支持”，故对股权受让方鹏程肥业公司请求解除合同并由转让方汉枫常绿公司返还已支付的股权转让款及利息损失予以支持。关于利息起算时间问题，如前所述，案涉《股权转让协议书》未生效，汉枫常绿公司占有使用1240万元没有法律依据，由于此笔款项支付时间为2014年8月28日，故应从该日的次日起算利息。关于安永公司、汉枫肥料公司、于薪铎应否承担连带责任问题，因安永公司系汉枫常绿公司财产接管人和管理人、汉枫肥料公司系案涉股权转让的标的公司、于薪铎系案涉《股权转让协议书》汉枫常绿公司一方的授权签字人及汉枫肥料公司的法定代表人，该三方当事人均非案

涉合同的相对人及依法律规定和合同约定应承担相关责任的第三人，鹏程肥业公司主张由安永公司、汉枫肥料公司、于薪铎承担连带给付责任于法无据，不予支持。依据《合同法》第三十二条、《最高人民法院关于审理外商投资企业纠纷案件若干问题的规定》第一条和第五条、《中华人民共和国民事诉讼法》第二百五十九条规定，判决：一、解除鹏程肥业公司与汉枫常绿公司于2014年8月8日签订的《股权转让协议书》；二、汉枫常绿公司于判决生效之日起10日内向鹏程肥业公司返还股权转让款1240万元人民币及利息（以1240万元人民币为基数，按照中国人民银行发布的同期同类贷款基准利率计算，自2014年8月29日起至判决确定的自动履行期限内实际给付之日止）；三、驳回鹏程肥业公司其他诉讼请求。

本院二审期间，鹏程肥业公司向本院提交了汉枫肥料公司工商登记档案及哈尔滨市经济合作促进局哈经合审发（2006）26号批复文件。意在证明：汉枫肥料公司在股权转让时经过了哈尔滨市经济合作促进局的审批，故案涉股权转让亦应经过哈尔滨市经济合作促进局的批准才能生效。

汉枫常绿公司对该证据的质证意见为：对真实性无异议，但认为与本案无关，该文件所批复的对象并非本案当事人，审批内容系有关合营事项，而非本案争议的股权转让。

本院的认证意见为：鹏程肥业公司举证的该份证据能够证明汉枫肥料公司在向其他公司转让股权时经过了哈尔滨市经济合作

促进局的审批，但与本案争议的股权转让无关，与本案不具有关联性，本院不予采信。

汉枫常绿公司、安永公司均未向本院提交新证据。

二审另查明：2014年8月8日，汉枫常绿公司（甲方）与鹏程肥业公司（乙方）签订《股权转让协议书》，其中关于付款方式及时间的约定为：3.3.1 协议签订之日起七个工作日内，乙方向甲方支付总价款的5%，即1240万元人民币或等值美元（按付款之日中国人民银行公布的基准汇率折算）；3.3.2 协议3.3.1部分所述的付款，甲方将作为履约保证金，如果乙方未能按照本协议的条款规定完成该交易，除相关法律规定甲方可享有的补救措施外，甲方有权保留履约保证金；3.3.3 甲方股东会批准或法庭批准本次股权交易后十个工作日内，乙方再向甲方支付总价款的15%，即3720万元人民币或等值美元。交易完成后十个工作日内，乙方应支付甲方总价款的剩余80%，即1.984亿元人民币或等值美元。关于股权转让报批及办理手续的约定为：3.4.1 本协议签署之日起45到60日内，甲方应负责组织召开甲方股东会，以征求股东同意完成该交易，或者甲方寻求加拿大法庭批准完成该交易，甲方拟定于该协议签署后两周内寻求法庭对该交易的批准，乙方对此知情；3.4.3 在甲方股东批准完成本次交易之日或者法庭批准了本次交易之日起30个工作日内，甲方应尽商业合理之努力配合乙方完成目标公司董事会的改组，并配合签署股权转让的全部法律文件；3.4.4 在按照协议第3.4.3条约定完成本次股权

转让的全部法律文件之日起3日内，甲方应向批准机关报批，并协助乙方按照中国法律、法规及时向有关机关办理股权转让登记。

2015年2月11日，中国民生银行股份有限公司哈尔滨分行作为托管方，与买方鹏程肥业公司、卖方汉枫常绿公司签订《交易资金托管协议》，主要内容为：买方在托管行开立人民币托管账户，卖方开立收款账户用于接收由托管账户划入的资金；协议签订后5个营业日内，买方应将人民币3720万元（第一笔托管资金）存入托管账户，更新的营业执照下发之日后10个营业日内，买方应将人民币14880万元（第二笔托管资金）存入托管账户；托管资金用于支付交易合同项下的转让价款，不得用于支付其它未经协议当事人一致同意的其他任何用途；在第一笔托管资金付至收款账户之前，卖方没有义务提交更新营业执照的申请，在第二笔托管资金付至收款账户之前，卖方有权保留全部股权转让批复和更新的营业执照原件。该协议签订后，鹏程肥业公司向托管账户汇入第一笔托管资金款1000万元，剩余2720万元未给付。

二审庭审中，鹏程肥业公司主张未足额支付第一笔托管资金的原因在于汉枫常绿公司未履行报批手续，其担心继续付款可能会造成鹏程肥业公司损失。

汉枫常绿公司在二审庭审中，明确表示同意鹏程肥业公司解除合同的诉讼请求，但认为根据合同约定，其有权保留鹏程肥业公司已交纳的1240万元履约保证金。

除此，本院二审查明的其他事实与一审判决认定的事实一

致。

本院认为，根据双方当事人的诉辩主张，本案争议的焦点问题在于汉枫常绿公司是否有权行使先履行抗辩权。

《合同法》第六十七条规定，当事人互负债务，有先后履行顺序，先履行一方未履行的，后履行一方有权拒绝其履行要求，先履行一方履行债务不符合约定的，后履行一方有权拒绝其相应的履行要求。案涉《股权转让协议书》约定，汉枫常绿公司申请法庭批准本次股权交易后十个工作日内，鹏程肥业公司应支付总价款的15%，即3720万元人民币；在法庭批准本次交易之日起30个工作日内，汉枫常绿公司应配合鹏程肥业公司完成目标公司董事会的改组，并配合签署股权转让的全部法律文件；完成本次股权转让的全部法律文件之日起3日内，汉枫常绿公司应向批准机关报批，并协助鹏程肥业公司按照中国法律、法规及时向有关机关办理股权转让登记。据此能够认定，双方约定的履行顺序为：汉枫常绿公司取得加拿大法庭对本次股权交易的批准—鹏程肥业公司向汉枫常绿公司支付3720万元的股权转让款—汉枫常绿公司配合鹏程肥业公司完成目标公司董事会的改组及股权转让法律文件的签署—汉枫常绿公司向批准机关申请批准该次股权交易行为。而鹏程肥业公司既未按《股权转让协议书》约定的时间支付15%的股权转让价款，亦未按资金托管协议约定的时间足额支付第一笔托管资金，其违约在先，汉枫常绿公司有权拒绝其关于向批准机关报批的履行要求。根据《股权转让协议书》的约定，如果

因鹏程肥业公司未按协议约定完成该交易，汉枫常绿公司有权保留 1240 万元的履约保证金，汉枫常绿公司要求鹏程肥业公司返还履约保证金的理由不能成立，本院不予支持。鹏程肥业公司关于因汉枫常绿公司未履行报批程序，其拒绝支付第一笔股权转让价款系履行不安抗辩权的主张，缺乏法律依据，本院不予支持。鉴于汉枫常绿公司在二审诉讼中同意鹏程肥业公司要求解除《股权转让协议书》的诉讼请求，本院对此予以支持。

2016 年 9 月，全国人大常委会作出《关于修改〈中华人民共和国外资企业法〉等四部法律的决定》，将不涉及国家规定实施准入特别管理措施的外商投资企业设立及变更事项，由审批改为备案管理。备案管理不同于行政许可，属于告知性备案，不是外商投资企业办理设立及变更手续的前置条件。根据商务部于 2016 年 10 月发布的《外商投资企业设立及变更备案管理暂行办法》的规定，对《外商投资产业指导目录》中非限制类和禁止类领域的外商投资企业的设立、变更，不再要求报审批机关批准。故案涉股权变更无需报审批机关批准，一审判决以未经审批机关批准而认定《股权转让协议书》无效，属适用法律错误。

综上，一审判决认定事实不清，适用法律错误，应予纠正。汉枫常绿公司的上诉理由成立，本院对其上诉主张予以支持。依照《中华人民共和国民事诉讼法》第一百七十条第一款第二项的规定，缺席判决如下：

一、维持哈尔滨市中级人民法院（2015）哈涉外商初字第 7

号民事判决第一项；

二、变更哈尔滨市中级人民法院（2015）哈涉外商初字第7号民事判决第二项、第三项为：驳回哈尔滨鹏程肥业有限公司的其他诉讼请求。

一、二审案件受理费200,226.04元，财产保全费5000元，由哈尔滨鹏程肥业有限公司负担。

本判决为终审判决。

审 判 长 马文静
审 判 员 包雪晶
审 判 员 李 锐



二〇一七年九月十八日

本件与原本核对无异

法官助理 付兴驰
书 记 员 吕金玲



Heilongjiang Higher People's Court

Civil Judgment

Heilongjiang Higher People's Court of the People's Republic of China

Civil Judgment

(2017) Heiminzhong No. 270

Appellant (the defendant in the first instance): Hanfeng Evergreen Inc., Canada, address: Toronto, Ontario, Canada.

Designated Agent Ad Litem: Guan Liu, lawyer from Heilongjiang Honghui Law Firm.

Appellee (the plaintiff in the first instance): Harbin Pengcheng Fertilizer Industry Co., Ltd., located at No. 28 Shangwu Road, Shangzhi Town, Shangzhi City, Heilongjiang Province, China.

Legal Representative: Zhang Min, General Manager of the company.

Designated Agent Ad Litem: Li Xinyi, lawyer from Beijing Dacheng (Harbin) Law Firm.

Designated Agent Ad Litem: Sheng Yutao, lawyer from Beijing Dacheng (Harbin) Law Firm.

Defendant in the First Instance: Ernst & Young Inc., located at No. 222, Bay Street, Toronto, Canada.

Person-in-Charge: Murray A. McDonald, Chairman of this company.

Designated Agent Ad Litem: Jiao Kaijun, lawyer from Heilongjiang Honghui Law Firm.

Defendant in the First Instance: Hanfeng Slow Release Fertilizer Co., Ltd., located at No.1 Hanfeng Road, Shangzhi Economic Development Zone, Heilongjiang Province, China.

Legal Representative: Yu Xinduo, Chairman of this company.

Defendant in the First Instance: Yu Xinduo, male, born on June 15, 1952, Han Nationality, Chairman of Hanfeng Slow Release Fertilizer Co., Ltd., address: 3-6, No. 38 Lianqing Lane, Zhongshan District, Dalian City, Liaoning Province, China.

The Appellant Hanfeng Evergreen Inc., Canada (hereinafter referred to as Hanfeng Evergreen Inc.), declines to accept the Civil Judgment with a number of (2015) Hashewaishangchuzi No. 7 passed by Harbin Intermediate People's Court in respect of the equity transfer contract dispute case involving the Appellee Harbin Pengcheng Fertilizer Industry Co., Ltd. (hereinafter referred to as Pengcheng Fertilizer Industry Co., Ltd.) and the defendants in the first instance, i.e. Ernst & Young Inc.(hereinafter referred to as Ernst & Young Inc.), Hanfeng Slow Release Fertilizer Co., Ltd. (hereinafter referred to as Hanfeng Fertilizer Co., Ltd.) and Yu Xinduo, and hereby files the appeal to the court. After case filing on May 15, 2017, the court formed collegial panel in accordance with the laws and tried the case in public session. Appearing at the court for debate were Guan Liu, designated agent ad litem of the Appellant Hanfeng Evergreen Inc., Li Xinyi and Sheng Yutao designated agents ad litem of the Appellee Pengcheng Fertilizer Industry Co., Ltd. and Jiao Kaijun, designated agent ad litem of Ernst & Young Inc. as the defendant in the first instance. The defendants in the first instance Hanfeng Fertilizer Co., Ltd. and Yu Xinduo failed to appear at the court for debate after being summoned by the court by law to appear. The case has now come to a close.

The appeal of Hanfeng Evergreen Inc.: to quash Items 1 and 2 in the first-instance judgment, amend the judgment by law to require Pengcheng Fertilizer Industry Co., Ltd. to fulfill its contractual obligations under the *Equity Transfer Agreement* and pay Hanfeng Evergreen Inc. the amount for the equity transaction, and to reject the claims laid by Pengcheng Fertilizer Co., Ltd. in the first instance. Facts and Reasons: 1. Law application mistake in the first instance, the fact finding mistake in the first-instance judgment concerning "the conclusion of *Equity Transfer Agreement*" by law and its failure to become effective, the agreement that failed to become effective not being legally binding on both parties to the agreement". According to the provisions of Article 8 of the *Contract Law of the People's Republic of China* (hereinafter referred to as the "*Contract Law*"), a contract concluded by law shall be legally binding on the parties to the contract, and the parties shall fulfill their obligations as agreed in the contract and shall not change or cancel the contract arbitrarily. The conclusion of a contract shall be based on the mutual agreement of parties to the contract. 2. Unclear fact-finding in the first instance. First, it is only found that Hanfeng Evergreen Inc. failed to perform approval obligations, but it is not found that Pengcheng Fertilizer Co., Ltd. breached the agreement. In the first-instance judgment, the provisions of Article 5 of the *Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Disputes Involving Foreign-Invested Enterprises* were misquoted. Actually, Pengcheng Fertilizer Co., Ltd. neither fulfilled its obligation of paying 15% of the total transaction amount to Hanfeng Evergreen Inc. as agreed in the *Equity Transfer Agreement* nor fulfilled its obligation of depositing a trust fund of 37.20 million Yuan in the custodian account in the custodian bank according to the *Transaction Funds Trusteeship Agreement*, constituting its violation, based on which Hanfeng Evergreen Inc. can exercise its counterargument right for security. Second, the provisions of Article 1 of the

Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Disputes Involving Foreign-Invested Enterprises were not fully quoted. According to the provisions of this article, the fact that a contract has been determined not to have entered into effect due to its not having been approved shall not affect the performance by the concerned parties of the provisions of the contract on their approval obligations or the validity of the provisions specified therein relating to their approval application obligations.

Pengcheng Fertilizer Co., Ltd. contends: clear fact finding in the first-instance judgment and correct law application. The *Equity Transfer Agreement* has signed and even though the transfer contract hasn't been approved, it should be deemed that the "Approval Application" obligation has been generated since the contract was concluded. The party with the approval application obligation should have perform such obligation immediately after the contract was concluded, or the parties concerned might maliciously prevent the contract from taking effect by not assisting in handing the "Approval Application" procedures after obtaining the transfer amount. According to the definite relevant provisions of the Supreme People's Court, for a contract that can become effective only after approval procedures are handled, if the approval procedures have been handled before the closing of arguments in the court of first instance, the contract shall be deemed to be effective.

Ernst & Young Inc. contends that according to the court order made by Ontario Supreme Court, Canada, Ernst & Young Inc., as the "Receiver" of Hanfeng Evergreen Inc., shall not have any responsibility or obligation. Ernst & Young Inc. is not a party to the *Equity Transfer Agreement* or the *Transaction Funds Trusteeship Agreement*, and it shall not fulfill any contractual obligations or assume any liability.

The claims laid by Pengcheng Fertilizer to the court of first instance: 1. to terminate the *Equity Transfer Agreement* signed between Pengcheng Fertilizer Co., Ltd. and Hanfeng Evergreen Inc.; 2. to require Hanfeng Evergreen Inc., Ernst & Young Inc., Hanfeng Fertilizer Company and Yu Xinduo to return the 5% of the transfer amount that has been paid, i.e. 12.4 million Yuan, pay interests of 652170 Yuan for the period from the date of account transfer to the date of litigation based on the loan interest rate released by the People's Bank of China for the corresponding period repayment and continue to pay the interests for the period from the date of litigation to the date of repayment; 3. the litigation costs should be borne by Hanfeng Evergreen Inc., Ernst & Young Inc., Hanfeng Fertilizer Company and Yu Xinduo.

Fact found by the court of first instance: on August 8, 2014, Pengcheng Fertilizer Co., Ltd. signed the *Equity Transfer Agreement* with Hanfeng Evergreen Inc., in which both parties agreed that Pengcheng Fertilizer Co., Ltd. shall acquire 100% of the equity of Hanfeng Fertilizer Company, a wholly-owned subsidiary of Hanfeng Evergreen Inc., with the total transfer price being 248 million Yuan, 198.4 million Yuan (80% of the total transfer price) of it to be paid by cash remittance to the account designated by Hanfeng Evergreen Inc., the remaining amount of 49.6 million Yuan (20% of the total transfer price) to be paid in the form of payment undertaking letter issued by Pengcheng Fertilizer Co., Ltd. Within 7 working days after the signing of this agreement, Pengcheng Fertilizer Co., Ltd. shall pay 5% of the total transfer price, i.e. 12.40 million Yuan to Hanfeng Evergreen Inc. as performance bond; if Pengcheng Fertilizer Co., Ltd. fails to complete this transaction according to the terms of this agreement, besides enjoying remedial measures according to relevant legal provisions, Hanfeng Evergreen Inc. shall have the right to remain the performance bond. As agreed in the agreement, Pengcheng Fertilizer Co., Ltd. shall pay another 15% of the total transfer price, i.e. 37.20 million Yuan or equivalent amount in US dollars within ten working days after this equity transaction being approved by the shareholders' meeting of Hanfeng Evergreen Inc. or by the court. Within ten working days after this transaction is completed (As agreed in Article 1.6 of this agreement, this transaction shall be deemed completed when Hanfeng Evergreen Inc. has changed the subject of this agreement that is registered in Harbin Municipal Administration for Industry and Commerce to registration under the name of Pengcheng Fertilizer Co., Ltd. or a subsidiary designated by Pengcheng Company), Pengcheng Fertilizer Co., Ltd. shall pay the rest 80% of the total price, of which 60% shall be paid in cash to the account designated by Hanfeng Evergreen Inc. and 20% shall be in the form of the payment undertaking letter attached to this agreement.

After the signing of agreement, on August 20, 2014, the Commercial Case Court of Ontario Superior Court, Canada approved the abovementioned *Equity Transfer Agreement*.

On August 28, 2014, Pengcheng Fertilizer Co., Ltd. entrusted Greentown Henderson (Group) Co., Ltd., which is outside the case, to remit 2,000,140 US dollars (both parties recognized that this sum was the 12.4 million Yuan performance bond involved in this case) to Hanfeng Evergreen Inc. After that, due to the restrictions by the provisions of foreign exchange control, Pengcheng Fertilizer didn't pay any amount to Hanfeng Evergreen Inc.

On February 13, 2015, Pengcheng Fertilizer Co., Ltd. signed the *Transaction Funds Trusteeship Agreement* with Yu Xinduo, authorized representative of Hanfeng Evergreen Inc. and Harbin Branch of China Minsheng Banking Corp. Ltd., and Pengcheng Fertilizer Co., Ltd. deposited trust funds of 10 million Yuan in the custodian bank. This sum hasn't been remitted to Hanfeng Evergreen Inc. and has been recovered by Pengcheng Fertilizer Co., Ltd.

Hanfeng Evergreen Inc. is a legally registered and validly existing company in Canada; Ernst & Young Inc. is a legally registered and validly existing company in Canada; Pengcheng Fertilizer Co., Ltd. is a legally registered and validly existing limited liability company in the People's Republic of China. On August 20, 2014, Ontario Supreme Court, Canada, made a court order (appointment order) appointing Ernst & Young Inc. as the receiver and custodian (referred to as the "Receiver") of all assets, undertakings or properties acquired by the business operated by Hanfeng Evergreen Inc. or used relating to this business.

The court of the first instance is of the opinion that Hanfeng Evergreen Inc. and Ernst & Young Inc. are both legally registered and validly existing companies in Canada and their litigation against Pengcheng Fertilizer Co., Ltd. has arisen from the equity transfer dispute is a foreign-related civil litigation. According to the provisions of Article 259 of the *Civil Procedure Law of the People's Republic of China*, the provisions of the foreign-related civil procedures in the *Civil Procedure Law of the People's Republic of China* shall apply to a foreign-related civil litigation in the territory of the People's Republic of China in terms of procedures. Pengcheng Fertilizer Co., Ltd. and Hanfeng Evergreen Inc. have neither reached a jurisdiction agreement concerning the contract dispute nor chosen a law applicable to the contract dispute through consultation. However, as the residence of Hanfeng Fertilizer Company, one of the four defendants, is in Shangzhi City, Heilongjiang Province, the People's Republic of China, according to Article 21 of the *Civil Procedure Law of the People's Republic of China* and Article 1 of the Provisions of the *Supreme People's Court on Several Issues Concerning the Trial of Disputes Involving Foreign-Invested Enterprises*, the court of the first instance has jurisdiction over this case. As the contract involved in this case is performed in the territory of the People's Republic of China, according to the provisions in the closest connection principle in Item 2 of Article 145 of the *General Rules of the Civil Law of the People's Republic of China*, Chinese laws are applicable to this case in terms of entity.

Based on the summarized plea claims of both sides, the dispute focuses are as follows: 1. whether the *Equity Transfer Agreement* signed between Pengcheng Fertilizer Co., Ltd. and Hanfeng Evergreen Inc. meet the statutory conditions for termination; 2. if the termination conditions are met, what liabilities these four defendants should bear. The *Equity Transfer Agreement* signed between Pengcheng Fertilizer Co., Ltd. and Hanfeng Evergreen Inc. on August 8, 2014 is the expression of the true intention of both sides, so this agreement was established by law. According to the provisions in Article 1 of the Provisions of the *Supreme People's Court on Several Issues Concerning the Trial of Disputes Involving Foreign-Invested Enterprises*, "Contracts entered into by the parties to an FIE during the course of its establishment, or upon later changes to the FIE or at any other such time, which, in accordance with applicable laws and administrative regulations, shall become effective only approval by the FIE examination and approval authority (the FIE Approval Authority), shall come into effect on the date of such approval; where approval has not been obtained, the people's court shall determine that the contract has not yet become valid." Hanfeng Fertilizer Company is a foreign-invested company, and the agreement signed between Pengcheng Fertilizer and Hanfeng Evergreen Inc. concerning the transfer of the equity of Hanfeng Fertilizer Company shall become effective after approval is obtained from the examination and approval authorities by law. Currently, as this agreement hasn't been approved by the examination and approval authorities yet, it hasn't become effective, so this agreement which is not in force is not legally binding on either party to the agreement. According to the provisions, Hanfeng Evergreen Inc., as the equity transferor, and the foreign-invested enterprise Hanfeng Fertilizer Company involved in this case, shall have the obligation to submit for approval, but they haven't performed their obligations to submit to the examination and approval authorities for approval. According to Article 5 of the *Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Disputes Involving Foreign-Invested Enterprises*, "After the conclusion of a foreign-invested enterprise equity transfer contract, if the transferor and the foreign-invested enterprise fail to fulfill the obligation of obtaining the approval or fail to do so within a reasonable time limit after receiving an exigent notice from the transferee, and the transferee files a request with the court to resolve the contract and requires the transferor to return the transfer price paid or compensate for the actual losses caused thereto due to its failure to fulfill the obligation of obtaining the approval, the people's court shall uphold such request," the court shall uphold the equity transferee Pengcheng Company's request to terminate the contract and require the transferor Hanfeng Evergreen Inc. to return the paid equity transfer amount and compensate for the interest losses incurred from this. As for the issue concerning the starting time for interest calculation, as mentioned above, the *Equity Transfer Agreement* hasn't become effective yet, Hanfeng Evergreen Inc. has no legal basis for occupation and use of the 12.4 million Yuan involved in this case. As this amount was paid on August 28, 2014, the interest shall be calculated starting from the day after this date. As for the issue whether Ernst & Young Inc., Hanfeng Fertilizer Company and Yu Xinduo should bear joint and several liabilities, as Ernst & Young Inc. is the receiver and custodian of the properties of Hanfeng Evergreen Inc., Hanfeng Fertilizer Company is the target company of the equity transfer involved in this case, and Yu Xinduo is the authorized signatory of Hanfeng Evergreen Inc., one party to the *Equity Transfer Agreement* involved in this case and the legal representative of Hanfeng Fertilizer Company, these three parties are not relative persons of the contract involved in this case or the third persons that should assume relevant liabilities according to legal provisions and contract provisions, there is no basis for Pengcheng Fertilizer Co., Ltd.'s claim

that Ernst & Young Inc., Hanfeng Fertilizer Company and Yu Xinduo should bear joint and several repayment liabilities. Therefore, the court shall not uphold it. According to Article 32 of the *Contract Law of the People's Republic of China*, Articles 1 and Article 5 of the *Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Disputes Involving Foreign-Invested Enterprises* and Article 259 of *Civil Procedure Law of the People's Republic of China*, the judgment is as follows: 1. The *Equity Transfer Agreement* signed on August 8, 2014 between the plaintiff Harbin Pengcheng Fertilizer Industry Co., Ltd. and the defendant Hanfeng Evergreen Inc., Canada, shall be terminated; 2. Hanfeng Evergreen Inc., Canada, shall return the equity transfer amount of 12.4 million Yuan and interest (based on the 12.4 million Yuan, calculated on the basis of the benchmark interest rate for the loan of the same kind over the same period that was released by the People's Bank of China, starting from August 29, 2014 to the actual repayment date within the automatic fulfillment period determined by this judgment); 3. The other claims of Pengcheng Fertilizer Co., Ltd. shall be rejected.

During the second trial of the court, Pengcheng Fertilizer Co., Ltd. submitted the industrial and commercial registration file of Hanfeng Fertilizer Company and the approval document (hajingheshenfa (2006) No. 26) of Harbin Economic Cooperation and Promotion Bureau, with the aim to prove that Hanfeng Fertilizer Company's equity transfer was approved by Harbin Economic Cooperation and Promotion Bureau, so the equity transfer involved in the case shall also become effective after being approved by Harbin Economic Cooperation and Promotion Bureau.

The cross-examination opinion of Hanfeng Evergreen Inc. on the evidence: no objection to the authenticity of the evidence, but it has nothing to do with this case. The object involved in the approved document is not a party involved in this case, and the approval content is relating to joint-venture -related matters, but not the equity transfer involved in this case.

The court's certification opinion: The evidence presented by Pengcheng Fertilizer Co., Ltd. can prove that Hanfeng Fertilizer Company obtained the approval of Harbin Economic Cooperation and Promotion Bureau for equity transfer to other companies, but that it has nothing to do with the equity transfer involved in this case. As it lacks relevance to this case, the court shall not adopt it.

Hanfeng Evergreen Inc. and Ernst & Young Inc. didn't submit new evidence to the court.

It is found in the second instance that on August 8, 2014, Hanfeng Evergreen Inc. (Party A) signed the *Equity Transfer Agreement* with Pengcheng Fertilizer Co., Ltd. (Party B), based on which the payment method and time are agreed as follows: Article 3.3.1: Within 7 working days after the signing of this agreement, Party B shall pay Party A 5% of the total transfer price, i.e. 12.40 million Yuan or equivalent amount in US dollars (calculated on the basis of the benchmark interest rate released by the People's Bank of China on the date of payment); Article 3.3.2: According to the parts relating to payment in Articles 3.3.1, Party A shall use it as performance bond. if Party B fails to complete this transaction according to the terms of this agreement, besides enjoying remedial measures according to relevant legal provisions, Party A shall have the right to remain the performance bond; Article 3.3.3: Party B shall pay Party A another 15% of the total transfer price, i.e. 37.20 million Yuan or equivalent amount in US dollars within ten working days after this equity transaction being approved by Party A's shareholder meetings or by the court. Within ten working days after this transaction is completed, Party B shall pay Party A the rest 80% of total transfer price, i.e. 198.4 million Yuan or equivalent amount in US dollars. The equity transfer approval application and procedures to go through are agreed as follows: Article 3.4.1: Within 45-60 days after agreement signing, Party A shall be responsible for organizing the convening of Party A's shareholders' meeting to seek the shareholders' consent to complete this transaction or Party A shall seek approval from a Canadian court to complete this transaction. Party A was schedule to seek approval from a Canadian court to complete this transaction within two weeks after signing the agreement and Party B is aware of it; Article 3.4.3: within 30 working days after this transaction is approved by Party A's shareholders' or by the court, Party A shall make commercially reasonable efforts to assist Party B in completing the reorganization of the board of the directors of the target company and signing all legal documents for equity transfer; Article 3.4.4: Within 3 days after completing all legal documents for the equity transfer as agreed in Article 3.4.3, Party A shall submit to the examination and approval authorities for approval and assist Party B in handling equity transfer registration with relevant authorities in a timely manner according to Chinese laws and regulations.

On February 11, 2015, Harbin Branch of China Minsheng Banking Corp. Ltd., as the trustee, signed the *Transaction Funds Trusteeship Agreement* with the Buyer Pengcheng Fertilizer Co., Ltd. and the Seller Hanfeng Evergreen Inc., with the main contents as follows: the Buyer shall open a RMB custodian bank in the custodian bank and the Seller shall open a receiving account to receive the fund paid from the custodian account; within 5 business days after signing of the agreement, the Buyer shall deposit 37.20 million (the first sum of trust fund) Yuan in the custodian account and within 10 business days after the updated business license is issued, the Buyer shall deposit 148.8 million Yuan (the second sum of trust fund) in the custodian account; the custodian bank shall be used to pay the transfer account under the transaction contract and shall not be used to make payment for other

purposes with the unanimous consent of the parties to the agreement; before the first sum of trust fund is paid to the receiving account, the Seller shall have no obligation to submit application for updating the business license, and before the second sum of trust fund is paid to the receiving bank, the Seller shall have the right to retain all equity transfer approvals and the original of the updated business license. After agreement signing, Pengcheng Fertilizer Co., Ltd. paid 10 million Yuan to the custodian account and failed to pay the remaining 27.20 million Yuan.

In the second trial, Pengcheng Fertilizer Co., Ltd. asserted that the reason that it failed to pay the first sum of trust fund in full amount was that Hanfeng Evergreen Inc. didn't fulfill the approval application procedures and Pengcheng Fertilizer Co., Ltd. was worried that continuing to make payment might cause loss to itself.

In the second trial, Hanfeng Evergreen Inc. clearly agreed to Pengcheng Fertilizer Co., Ltd.'s claim to terminate the contract but thought that it had right to remain the performance bond of 12.4 million Yuan paid by Pengcheng Fertilizer Co., Ltd. as agreed in the contract.

In addition, the other facts found by the court in the second instance are consistent with the facts affirmed in the first-instance judgment.

The court is of the opinion that based on the plea claims of both sides, the focus issue disputed in this case lies in whether Hanfeng Evergreen Inc. has the right to exercise the counterargument right for security.

It is stipulated in Article 67 of the *Contract Law of the People's Republic of China*, "Where both parties have obligations toward each other and there is an order of priority in respect of the performance, and the party who is to perform first fails to perform, the party who is to perform later has the right to reject the other party's demand for performance. If the performance of the obligations of the party who is to perform first is not in conformity with the agreement, the party who is to perform later has the right to reject the other party's demand for corresponding performance." As agreed in the *Equity Transfer Agreement*, Pengcheng Fertilizer Co., Ltd. shall pay 15% of the total price, i.e. 37.20 million Yuan within ten working days after Hanfeng Evergreen Inc.'s application to court for equity transaction approval; within 30 days after this transaction is approved by court, Hanfeng Evergreen Inc. shall assist Pengcheng Fertilizer Co., Ltd. in completing the reorganization of the board of the directors of the target company and signing all legal documents for equity transfer; within 3 days after completing all legal documents for the equity transfer, Hanfeng Evergreen Inc. shall submit to the examination and approval authorities for approval and assist Pengcheng Fertilizer Co., Ltd. in handling equity transfer registration with relevant authorities in a timely manner according to Chinese laws and regulations. Based on which it can be concluded that the performance order as agreed by two sides is as follows: Hanfeng Evergreen Inc. to obtain the Canadian court's approval of this equity transaction - Pengcheng Fertilizer Co., Ltd. to pay Hanfeng Evergreen Inc. a transfer amount of 37.2 million Yuan - Hanfeng Evergreen Inc. to assist Pengcheng Fertilizer Co., Ltd. in completing the reorganization of the board of the directors of the target company and signing all legal documents for equity transfer - Hanfeng Evergreen Inc. to apply to the approval authorities for approval of this equity transaction act. However, Pengcheng Fertilizer Co., Ltd. neither paid 15% of the equity transfer amount at the time as agreed in the *Equity Transfer Agreement* nor paid the first sum of trust fund in full amount at the time as agreed in the *Transaction Funds Trusteeship Agreement*, failing to perform its obligations as agreed first, so Hanfeng Evergreen Inc. shall have the right to refuse to fulfill its obligation to apply to the approval authorities for approval as required by Pengcheng Fertilizer Co., Ltd. As agreed in the *Equity Transfer Agreement*, if Pengcheng Fertilizer Co., Ltd. fails to complete the transaction as agreed in the agreement, Hanfeng Evergreen Inc. shall have the right to retain the performance bond of 12.4 million Yuan. Therefore, Pengcheng Fertilizer Co., Ltd. [Translator note: - the court decision appears to have mixed these two entities in this place] has no rational reason to require Hanfeng Evergreen Inc. to return the performance bond and the court shall not uphold it. Pengcheng Fertilizer Co., Ltd.'s refuse to pay its first sum of equity transfer amount due to Hanfeng Evergreen Inc.'s failure to go through application approval procedures is the claim of unsafe right of defense, and the court shall not uphold it due to the lack of legal basis. In view of the fact that Hanfeng Evergreen Inc. agreed to Pengcheng Fertilizer Co., Ltd.'s claim to terminate the *Equity Transfer Agreement* in the litigation of second instance, the court shall uphold it.

In September 2016, the Standing Committee of the National People's Congress (NPC) made the *Decision on Amending Four Laws including the Law of the People's Republic of China on Foreign-Capital Enterprises*, subjecting the formation or modification of foreign-funded enterprise which doesn't involve the implementation of special access management measures as prescribed by the state to recordation administration in lieu of approval. The recordation administration is different from administrative license, and it is informative recordation, not a prerequisite for foreign-funded enterprises handling establishment and modification procedures. According to the provisions of the *Interim Measures of the Administration of Establishment and Modification Registration of Foreign-Funded Enterprises* released by Commerce Department on October 2016, the establishment and modification of the foreign-funded enterprises not involved in restricted or prohibited industries specified in the

Catalogue for the *Guidance of Foreign Investment Industries* shall not be submitted to the examination and approval authorities for approval again. Therefore, the equity modification involved in this case does not require the approval from the examination and approval authorities. That the *Equity Transfer Agreement* was affirmed to be invalid in the first-instance judgment due to not being approved by the examination and approval authorities is a law application error.

To sum up, the fact of unclear fact-finding and wrong law application in the first-instance judgment shall be correct. Hanfeng Evergreen Inc.'s reason for appeal is tenable, so the court shall uphold its appeal. According to the provisions of Item 2, Section 1, Article 170 of the *Civil Procedure Law of the People's Republic of China*, the default judgment is as follows:

1. To maintain Item 1 of the Civil Judgment (2015) Hashewaishangchuzi No. 7 of Harbin Intermediate People's Court;
2. To modify Items 2 and 3 of the Civil Judgment (2015) Hashewaishangchuzi No. 7 of Harbin Intermediate People's Court as reject the other claims of Harbin Pengcheng Fertilizer Co., Ltd.

The fees of 200,226.04 Yuan for accepting the case in the first instance and second instance and the property preservation fees of 5,000 Yuan shall be borne by Harbin Pengcheng Fertilizer Co., Ltd.

This judgment shall be final judgment.

Presiding Judge: Ma Wenjing

Judge: Bao Xuejing

Judge: Li Rui

Heilongjiang Higher People's Court

September 18, 2017

Judgment Assistant: Fu Xingchi

Court Clerk: Lv Jinling

This copy is the same as the original.

This is **Appendix “C”**
to the Sixth Report of the Receiver

中华人民共和国最高人民检察院
复查决定书

高检民复查〔2019〕243号

哈尔滨鹏程肥业有限公司因与加拿大汉枫常绿有限公司、安永有限公司、汉枫理释肥料有限公司、于薪铎股权转让纠纷一案，不服黑龙江省人民检察院黑检民（行）监〔2018〕23000000146号不支持监督申请决定，向本院申请复查。经审查，本院认为该不支持监督申请决定正确，决定予以维持。



Translation

The Supreme People's Procuratorate of The People's Republic of China
Review Decision

Supreme Procuratorate Civil Review (2019) No. 243

The People's Procuratorate of Heilongjiang Province rendered a decision (Civil Supervision No. (2018) 23000000146) (the "**Decision**") that dismissed an application by Harbin Pengcheng Fertilizer Co., Ltd for trial supervision in respect of share transfer disputes with Hanfeng Evergreen Inc., Ernst & Yong Inc., Hanfeng Slow-Release Fertilizer Co., Ltd. and Yu, Xinduo. Harbin Pengcheng Fertilizer Co., Ltd refused to accept this Decision and filed a complaint with this Procuratorate for a review. Based on its review, this Procuratorate has determined that the Decision to dismiss the trial supervision application is correct and will uphold the Decision.

The Supreme People's Procuratorate of The People's Republic of China
February 17, 2020
(Stamp)

This is **Appendix “D”**
to the Sixth Report of the Receiver

CITATION: Hanfeng Evergreen Inc., (Re), 2017 ONSC 7161
COURT FILE NO.: CV-14-10667-00CL
DATE: 20171130

**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.

Applicant

BEFORE: F.L. Myers J.

COUNSEL: *Daniel S. Murdoch and Haddon Murray*, counsel for Ernst & Young Inc., receiver
David C. Moore and Karen M. Mitchell, counsel for the Lei Lo and Xinduo Yu

HEARD: November 20, 2017

ENDORSEMENT

[1] Ernst & Young Inc. moves for approval of its activities as receiver and manager of Hanfeng Evergreen Inc. as described in the Supplement to its First Report, its Fourth Report, and its Fifth Report. It also seeks approval of its fees and disbursements including the fees and disbursements of its counsel here and abroad.

[2] Xinduo Yu, the founder and former CEO of Henfeng Evergreen Inc. and his spouse Lei Li oppose the approval of the receiver's reports at this time. They seek, at minimum, the imposition of conditions to protect their positions in separate litigation that the receiver has brought against them. They also argue that the receiver has failed or refused to deliver sufficient evidence to support its claim for approval of its fees and disbursements. They invite the court to require the receiver to engage in a document disclosure process so as to create a sufficient factual record on which they can make submissions and the court can meaningfully assess the fees and disbursements of the receiver and its counsel.

[3] For the reasons that follow the receiver's motion is granted on the terms set out below.

Brief Background

[4] Hanfeng Evergreen Inc. is an Ontario public corporation. Henfeng was a financing vehicle to raise money from investors who were interested in investing in the fertilizer business operated by a subsidiary in the People's Republic of China. By 2014, Henfeng's sole operations were limited to the fertilizer business.

[5] When this proceeding began, Mr. Yu was a member of the board of directors of Henfeng. He was a principal contact for the receiver. He controlled Chinese management of the business.

[6] The receiver advises that in 2011, Henfeng's biggest customer was a company run by the state in China. It sought to buy 30% of the fertilizer business to ensure its control over its supply. By February, 2013, an agreement had been prepared whereby Henfeng would sell its shares in the fertilizer subsidiary to a company controlled by Mr. Yu. Mr. Yu agreed to sell 30% of that company's shares to the state actor. The transactions were expected to close in April, 2013.

[7] The deal did not close as expected. Eventually Henfeng established a special committee representing shareholders independent of management. Acrimony developed between the special committee and Mr. Yu. In December, 2013, the purchaser terminated the transaction. The board of directors proceeded to fire Mr. Yu.

[8] A proxy battle ensued. During the proxy battle, Henfeng's auditor KPMG resigned. Thereupon, the rest of the board of directors resigned. Ultimately, Mr. Yu regained control of the public corporation.

[9] In April, 2014, Mr. Yu brought forward a transaction to sell the operating subsidiary to an established third party business in China for a price of approximately \$40 million. The transaction would have provided meaningful recovery to shareholders. The transaction required shareholder approval. However, without an auditor, Henfeng could not produce the material required to call a shareholders' meeting under Ontario securities laws. Therefore, this receivership was proposed as a way to convey title in a solvent transaction.

[10] Negotiations with the buyer proved difficult. The receiver retained the Mayer Brown law firm to help it obtain a deposit of approximately \$2.4 million required by the agreement and to deal with some Chinese regulatory matters that arose. The purchaser was also supposed to put funds in escrow. With Mayer Brown's assistance some funds were escrowed. But then they were released back to the purchaser by the escrow agent ostensibly with Mr. Yu's cooperation. In addition, the receiver says that the buyer's name seems to have changed subtly in the documents over time. While initially Mr. Yu represented that the buyer was an established third party, the ultimate buyer may have been a company with a similar name that is actually a shell controlled by Mr. Yu. Further, the receiver alleges that while the transaction was playing out, Mr. Yu obtained very substantial loans in China on the credit of the subsidiary so that they he has effectively taken the value of the business leaving the other shareholders with nothing.

[11] The receiver has sued Mr. Yu and Ms. Li for damages exceeding \$100 million.

[12] In addition, the ostensible purchaser has sued the receiver in China for the return of the \$2.4 million deposit. Mr. Yu is a defendant in that case as he is a guarantor under the terms of the relevant agreement. Whether he is also behind the plaintiff/purchaser remains to be proven.

[13] The purchaser succeeded against the receiver at first instance in China. But an appellate court overruled the first decision. As of this moment therefore, the deposit has been forfeited and is properly counted among the funds realized by the receiver. The purchaser has appealed from that decision however and the further appeal is pending.

[14] In this receivership proceeding, Mr. Yu is concerned to ensure that the receiver does not consume the deposit on its own fees and disbursements in case it is required to return the deposit to the purchaser by the ultimate appeal court in China. If the purchaser succeeds in China, there may be a priorities dispute between the purchaser and the receiver over which has a better claim to the deposit funds in the receiver's hands. In any event, Mr. Yu argues that as guarantor of the return of the deposit, he has an interest in protecting the deposit in the receiver's hands and in minimizing or delaying the receiver's use of the deposit to pay its fees and disbursements until the Chinese litigation ends.

Approval of the Receiver's Activities

[15] In *Target Canada Co. (Re)*, 2015 ONSC 7574 (CanLII), Morawetz RSJ discussed the process for approval of the reports of a court officer. In that case the court dealt with a Monitor under the CCAA. The same principles apply in a receivership in my view.

[16] In *Target*, Morawetz RSJ recognized that the effect of the approval of the reports of a court officer varies with the context. Where a report is delivered for a specific purpose, such as a sale transaction, express findings of fact may be required to support the relief being sought. An affidavit may be delivered to support the findings or not. In either case, the court is called up to address squarely specific facts and to make specific findings that will be binding in future.

[17] However, the context of a general approval of activities, such as the motion that is currently before me, is different. As discussed by Morawetz RSJ:

[20] The Monitor has in its various reports provided commentary, some based on its own observations and work product and some based on information provided to it by the Applicant or other stakeholders. Certain aspects of the information provided by the Monitor has not been scrutinized or challenged in any formal sense. In addition, for the most part, no fact-finding process has been undertaken by the court.

[21] In circumstances where the Monitor is requesting approval of its reports and activities in a general sense, it seems to me that caution should be exercised so as to avoid a broad application of *res judicata* and related doctrines. The benefit of any such approval of the Monitor's reports and its activities should be limited to the Monitor itself. To the extent that approvals are provided, the effect of such approvals should not extend to the Applicant or other third parties.

[22] I recognized there are good policy and practical reasons for the court to approve of Monitor's activities and providing a level of protection for Monitors during the CCAA process. These reasons are set out in paragraph [12] above. However, in my view, the protection should be limited to the Monitor in the manner suggested by counsel to Rio Can and KingSett.

[23] By proceeding in this manner, Court approval serves the purposes set out by the Monitor above. Specifically, Court approval:

- (a) allows the Monitor to move forward with the next steps in the CCAA proceedings;
- (b) brings the Monitor's activities before the Court;
- (c) allows an opportunity for the concerns of the stakeholders to be addressed, and any problems to be rectified,
- (d) enables the Court to satisfy itself that the Monitor's activities have been conducted in prudent and diligent manners;
- (e) provides protection for the Monitor not otherwise provided by the CCAA; and
- (f) protects the creditors from the delay and distribution that would be caused by:
 - (i) re-litigation of steps taken to date, and
 - (ii) potential indemnity claims by the Monitor.

[24] By limiting the effect of the approval, the concerns of the objecting parties are addressed as the approval of Monitor's activities do not constitute approval of the activities of parties other than the Monitor.

[18] In this case, Mr. Yu and Ms. Li do not want the approval of the receiver's activities to impact on their litigation with the receiver including their desire to counterclaim against the receiver in that litigation. Apparently they have sought directions regarding a possible counterclaim although no motion for leave to proceed has been heard as yet. Regional Senior Justice Morawetz held that the general approval of a court officer's activities should not affect third party dealings generally. He accepted however that the approval of the receiver's activities does affect the court officer's own status. For example, there is case law suggesting that a stronger showing on the merits is required to obtain leave to sue a receiver in respect of activities that have been approved than for unapproved activities.¹

¹ Compare and contrast for example, *Bank of America Canada v Wilann Investments Ltd.* (1993), 23 CBR (3d) 98 (Ont. Gen. Div) with *GMAC Commercial Credit Corporation - Canada v. T.C.T. Logistics Inc.*, 2006 SCC 35 (CanLII). See also: Houlden, Morawetz & Sarra, *The 2007*

[19] Mr. Yu and Ms. Li argue that if they are prejudiced by the approval of the receiver's activities, then they would be required to contest in this motion the substance of their concerns in order to protect themselves in their other litigation. I agree that it is not the purpose of this summary proceeding to engage in fact finding that might prejudice or affect the fact finding process in other litigation. As such, there is no need to delve deeply into the concerns raised by the objectors with the receiver's characterization of their behaviour or the other details of specific issues of fact that may become the subject matter of proceedings later. There will be no findings of contested facts that might bind Mr. Yu or Ms. Li elsewhere.

[20] The receiver argues that it seeks broad, general approval for its decisions to bring litigation against Mr. Yu and Ms. Li and to defend the litigation in China. It notes that its prior activities have already been approved in relation to the approval of its earlier reports.

[21] Under the terms of its appointment order, the receiver is already authorized to litigate on behalf of the debtor generally. As such, Mr. Yu and Ms. Li argue that it does not need any further approval of its litigation activities. But, I agree with Morawetz RSJ that there are additional proposals to a court officer's reporting and the court's approval functions such as those listed in para. 23 of *Target* above. In this case for example, concerns of stakeholders can be considered and addressed in real time rather than waiting until matters are concluded some years hence. Moreover, stakeholders are given an opportunity to bring to the fore any concerns with the receiver's prudence and diligence in the issues under consideration. Here, for example, no one – not even Mr. Yu or Ms. Li - contest the prudence of the receiver's decisions to defend the deposit in China or to commence the litigation here against Mr. Yu and Ms. Li.

[22] The receiver also argues that it wants its activities approved so as to protect it from personal liability for costs in the event that it is later determined that the deposit must be returned to the purchaser with the result that the receiver may not have any assets left in the estate to fund any costs liability that it may incur. The receiver refers to the decision of Pattillo J. in *Essery Estate (Trustee of) v Essery*, 2016 ONSC 321. At para. 72 of that decision, Pattillo J. wrote:

[72] In receiverships, the general rule is that costs are awarded against a receiver personally in rare cases. Where a receiver engages in litigation in its capacity as receiver in the normal course of the receivership, it is subject to the costs in accordance with s. 131 of the CJA and Rule 57.01. To the extent that costs are awarded against a receiver they are normally covered by receivership funds or by an indemnity agreement with a

Annotated Bankruptcy and Insolvency Act, (Thomson Reuters, Toronto) at L§26. Whether *Wilann* remains good law after *TCT* is an issue that is not before the court today.

secured creditor. It is only when the receiver embarks on a course of action extraneous to the credit-driven relationship which effectively undermines its neutral position as an officer of the court and turn itself into a “real litigant” [*sic*] that a receiver exposes itself to costs personally: see *Akagi v Synergy Group (2000)*, 2015 ONCA 771 (Ont. C.A.), at para. 18.

[23] In my view, the receiver reads too much into this quotation. I do not read *Essery* as altering the receiver’s risk of personal liability for costs. Rather, Pattillo J. explains the court’s historic hesitation to award costs against receivers because they can bear personal liability for costs. In my view *Essery* does not create any special protection for receivers’ costs liability. Neither does the approval of a receiver’s activities provide it with any special protection in relation to costs awards in subsequent litigation. That is the reason that Pattillo J. noted that before undertaking litigation, receivers typically will consider the sufficiency of the assets under their charge to meet a costs award or obtain an indemnity from a creditor to protect themselves from the risk of adverse costs.

[24] It is clear therefore that in approving the receiver’s general activities broadly and summarily in this motion, I am not finding any facts beyond expressing satisfaction with the general scope and direction of the receiver’s activities as set out in the three reports that are before me. However, if the law post-*TCT* still provides that the approval of a receiver’s conduct raises the bar for those who seek to sue a receiver, as referenced in the footnote above, that is indeed a consequence of approval and nothing I say or do not say should affect that outcome. The fact that approval may have some effect is not a basis to withhold or deny approval. Rather it reflects the intention of the law as it applies in circumstances where the court is satisfied with the activities undertaken by its officer and with the protections that the law affords court officers in such circumstances as discussed by Morawetz RSJ above.

[25] I also do not see the existence of an outstanding appeal in China as a basis to defer or withhold approval of the receiver’s activities, especially its activities in defending and participating fully in that case. Approval does not affect the ongoing litigation in China. Neither does it affect the priorities in the deposit or authorize or embolden the receiver to distribute to itself or to its counsel funds that it currently holds. If the court in China rules that the funds are a deposit that are to be returned to the purchaser, legal results flow. As noted above, if that creates a priority issue here, that issue may have to be determined.

[26] As argument of this aspect of the motion was drawing to a close, it appeared that counsel might be able to agree upon language to resolve the issues in dispute. I invited them to advise me within 48 hours if they reached agreement. On November 22, 2017, counsel advised that while they had not agreed to resolve the objections of Mr Yu and Ms. Li, they had agreed upon some language to limit the relief granted should I determine to approve the receiver’s activities.

[27] The term agreed upon by counsel reflects the limitations that I have discussed above as follows:

THIS COURT ORDERS that the approval of the Fourth Report and the Fifth Report shall be without prejudice to any of the procedural or substantive rights of the Receiver, Xinduo Lu and Lei Li in respect of Action No. CV-16-11325-00CL, and, without limiting

the generality of the foregoing, shall be deemed not to constitute any finding or determination of any kind whatsoever in respect of any allegations, issues or defences in said Action.

[28] While this term does not satisfy all of the concerns of Mr. Yu and Ms. Li, it does satisfy mine. Accordingly, it is appropriate to approve the activities of the receiver as set out in the three reports that are before the court on the term set out in the immediately preceding paragraph.

Receiver's Fees

[29] In accordance with the principles set out in *Confectionately Yours Inc. (Re)*, 2002 CanLII 45059 (ON CA), the receiver delivered affidavits supporting its fees and disbursements including those of its counsel. Cross-examinations ensued. Mr. Yu and Ms. Li argue that there is insufficient disclosure of information to enable the court to determine the reasonableness of the receiver's fees and disbursements. They say they have delivered letter after letter for months seeking production of documents relating to matters set out in the receiver's invoices so as to be able to understand the work performed by the receiver and to make proper submissions on the fees and disbursements sought in relation to the work. In addition, the receiver delivered dockets (belatedly in some cases) that are heavily redacted to prevent disclosure of the subject matter of much of the work that is the subject of the docket entries.

[30] The receiver argues that the scope of its discussions with its counsel and the work being performed by its counsel on its behalf are privileged – both under lawyer client privilege and litigation privilege. I agree. Disclosing the subject matter of a meeting is essentially disclosing the communication from client to lawyer (or vice versa) concerning the topic on which advice was being sought or given. That does not mean however that the receiver is entitled to approval of its fees or disbursements without providing proper supporting evidence. If the claims of privilege prevent the court from making the assessment required, then the motion will not succeed until sufficient evidence is duly adduced to meet the required standard.

[31] In *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851 (CanLII), the Court of Appeal discussed the test for assessment of a receiver's fees as follows:

[32] In *Bakemates*, this court described the purpose of the passing of a receiver's accounts and also discussed the applicable procedure. Borins J.A. stated, at para. 31, that there is an onus on the receiver to prove that the compensation for which it seeks approval is fair and reasonable. This includes the compensation claimed on behalf of its counsel. At para. 37, he observed that the accounts must disclose the total charges for each of the categories of services rendered. In addition:

The accounts should be in a form that can be easily understood by those affected by the receivership (or by the judicial officer required to assess the accounts) so that such person can determine the amount of time spent by the receiver's employees (and others that the receiver may have hired) in respect to the various discrete aspects of the receivership.

[33] The court endorsed the factors applicable to receiver's compensation described by the New Brunswick Court of Appeal in *Belyea: Bakemates*, at para. 51. In *Belyea*, at para. 9, Stratton J.A. listed the following factors:

- the nature, extent and value of the assets;
- the complications and difficulties encountered;
- the degree of assistance provided by the debtor;
- the time spent;
- the receiver's knowledge, experience and skill;
- the diligence and thoroughness displayed;
- the responsibilities assumed;
- the results of the receiver's efforts; and
- the cost of comparable services when performed in a prudent and economical manner.

These factors constitute a useful guideline but are not exhaustive: *Bakemates*, at para. 51.

[32] The Court of Appeal also noted in *Diemers* that while the calculation of billable hours times hourly rates is not the most desirable metric for conducting this review, it is the predominant methodology in the case law. Moreover, while counsel for Mr. Yu and Ms. Li submitted that this is not to be a mathematical exercise, the bulk of their complaints are essentially directed to the question of whether there has been duplication in the dockets or, more specifically, whether the claims of privilege prevent them and the court from determining with any degree of precision whether there is duplication in the dockets that ought to be excluded from the value calculus. While I certainly do not dismiss the risk of duplication in an assessment of the reasonableness of the fees, it is but one factor and not an especially important one in my view. Duplication might suggest a lack of value-added but not necessarily so in a holistic review. If an issue takes time to resolve, there may be several docket entries that look similar. That does not make them duplicative. More than one person may be involved providing different services and docket to the same issue – either at different levels of seniority or different subject matters. Reading brief docket descriptions years after complex work is performed is a poor method to learn precisely what was accomplished by any single person on any given day. A full assessment of the file accompanied by oral narrative is required to assess professional accounts. That is what assessment officers routinely do in formal cost assessment hearings. But that is not what is anticipated or even desirable in fee approval hearings of this type.

[33] It is not lost on me that what was also at play on Mr. Yu's side of the table is possibly a desire for discovery in the other litigation or at least opening up a threat to the receiver's remuneration as a strategy to provide bargaining leverage. Thus, rather than responding to the receiver's request for the specifics of documents required or bringing their own motion (or 9:30 appointment) seeking production of documents that they actually need, Mr. Yu and Ms. Li were

content to make request after request and then graciously offer to allow the receiver an adjournment to give it time to make yet further production. I have little doubt that were any further documents produced, Mr. Yu and Ms. Li would just ask for more. After all, if you want to assess what every person acting for counsel and the receiver have done every day, then every draft of every document and communication is ostensibly relevant. The eight, non-exhaustive *Belyea* factors do not require or anticipate a full fee assessment process. Mr. Yu and Ms. Li's digging for more and ever more documents ostensibly to allow them to review in minute detail the receiver's fees was misdirected from the outset.

[34] Mr. Yu and Ms. Li make much of the fact that the receiver's Ontario counsel had 27 billers on the file over a period of three years. Counsel for the receiver took me through each biller's name and role. Apart from a few students, there was one partner and an associate in each relevant area at each time. The associate generally performed the bulk of the work. As the project evolved from a consensual corporate transaction to contested litigation, the identities and focus of the partners involved changed. There is nothing untoward or even suspicious in the identification of the lawyers engaged despite the effort to evoke an emotional reaction to the overall number of billers. I am perfectly satisfied that given the complexity and evolution of the matter over time, staffing raises no significant concerns. Given the limited numbers of people involved in each specialty area, and the swing from corporate to contested litigation, duplication is not a significant issue in my view.

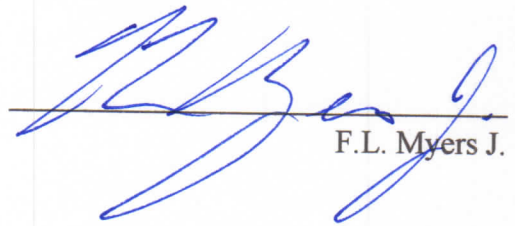
[35] The receiver has not provided docket level evidence of activities from its litigation counsel in China. However that lawyer was retained on a fixed fee of \$100,000. The litigation involved securing the receiver's right to keep the deposit of approximately \$2.4 million. A fee of 4% of the fund whose preservation is in issue strikes me as quite reasonable. Dockets would not assist the understanding of the flat fee account in this circumstance.

[36] Other counsel were retained for other specific purposes. Each had to be briefed so, once again, it is not surprising to see docket entries where people discuss similar things. They are instructing or reporting back to each other. Mr. Yu and Ms. Li pointed to docket entries in which telephone inter-firm communications are set out but only by one firm. The unstated implication is that unless both sides docketed the call, then the docket that was recorded is suspect and may be fraudulent. I do not know a more innocent word to characterize a docket of a call that did not happen. But Mr. Yu and Ms. Li forgot to account for the International Date Line. When one looks to see if telephone calls from this side of the globe were docketed in China on the next day, many of the calls were indeed recorded. I cannot draw an inference of fraud, or even suspicion from noting that a firm did not record every single telephone call it ostensibly received or made. Docketing practices can differ. I did not look to see if the calls that were not recorded by both sides were recorded as being short or long duration for example. In any event, I do not see how a few calls has much impact on the assessment of the *Belyea* factors.

[37] The receiver's counsel has provided a lengthy assessment of the *Belyea* factors in para. 60 of its factum. Again, without making findings of fact on the level of cooperation or the lack thereof by Mr. Yu and Ms. Li, in my view in para. 60 the receiver provided a very fair analysis of the relevant factors and I adopt it in full.

[38] In all, I am satisfied that the fees and disbursement of the receiver, including those of its counsel, are fair, reasonable and ought to be approved as sought.

[39] Costs should be agreed upon. Barring exceptional circumstances, I would expect them to follow the event on a partial indemnity basis. If counsel cannot agree on costs then they should exchange Costs Outlines and schedule a telephone case conference through my Assistant for oral argument of costs.



F.L. Myers J.

Date: November 30, 2017

This is **Appendix “E”**
to the Sixth Report of the Receiver

COUNSEL SLIP

COURT FILE NO CV-14-10667-0001

DATE November 4th, 2019

NO ON LIST 8

TITLE OF
PROCEEDING

Hanfeng Evergreen Inc. v. Harbin Pengcheng Fertilizer Co. Ltd.

COUNSEL FOR:

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416 364 8761

PLAINTIFF(S)

APPLICANT(S)

PETITIONER(S)

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Court File Number: CV-14-10667-002

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

IN THE MATTER OF HANFENG EVERGREEN INC.
Plaintiff(s)

AND

Defendant(s)

Case Management Yes No by Judge: _____

Counsel	Telephone No:	Facsimile No:

- Order Direction for Registrar (No formal order need be taken out)
 Above action transferred to the Commercial List at Toronto (No formal order need be taken out)

- Adjourned to: _____
 Time Table approved (as follows):

① I agree with Ms. Konyukhova
That this dispute over a
\$2 Million deposit has
dragged on longer than
it should have. The

Date

Judge's Signature

Additional Pages _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

reason for this is the ongoing litigations in China that seems to never end.

② Despite the previous undertakings given on behalf of Harbin Pengcheng Fertilizer Co Ltd, the dispute over the deposit is still before the Court in China. The

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Superior Court of Justice
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FILE/DIRECTION/ORDER

Judges Endorsment Continued

reply from The Supreme

People's Procuratorate

dated October 21, 2019

confirming that this court

has reviewed the "protest

materials" and determined

that the issue raised by

Hosbin Lengcheng is

within the court's

jurisdiction and will be

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Superior Court of Justice
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Judges Endorsment Continued

"proceeded according to law"

③ It is therefore possible that the lower court's decision in favour of the Receiver could be reversed and a finding that the Receiver is not entitled to the deposit could be made.

④ In these circumstances

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Judges Endorsment Continued

I have concluded that
it is preferable to maintain
the status quo until
the Supreme People's
Procuratorate has
rendered its decision.

⑤ However, if that
court's decision is in
favour of the Receiver,
it may use the

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Judges Endorsment Continued

deposit funds to pay its
fees and its legal
counsel's fees without
any further order from
this court.

Hainey J.

November 4, 2019

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.

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

SIXTH REPORT OF THE RECEIVER

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