Court File No. M38119

COURT OF APPEAL FOR ONTARIO

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT ALBERTA INC., GRANT FOREST PRODUCTS SALES INC. and GRANT U.S. HOLDINGS GP

Applicants

FACTUM OF THE MOVING PARTY THE TORONTO-DOMINION BANK

(motion for leave to appeal the order of Newbould J. dated October 13, 2009)

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PART I—THE MOVING PARTY AND THE COURT APPEALED FROM

1. The moving party, The Toronto-Dominion Bank ("TD"), is the agent for a syndicate of banks, referred to as the "first lien lenders", who constitute the senior secured lenders to Grant Forest Products Inc. ("GFPI"). GFPI is currently in proceedings under the *Companies' Creditors Arrangement Act* (the "CCAA").

2. TD seeks leave to appeal an order of the Honourable Justice Newbould of the Superior Court of Justice (Commercial List) dated October 13, 2009, in which Newbould J. ordered that GFPI holds certain tax refunds in trust for the responding party Peter Grant Sr., who is GFPI's shareholder. If it stands, the effect of Newbould J.'s order will be to take $10 million U.S. away from GFPI and give those funds to GFPI's shareholder, who will thereby recover 100 cents on

the dollar on an unsecured obligation of his company in circumstances in which other unsecured creditors will recover little or nothing.

PART II—THE FACTS

Overview

3. Is it possible to structure an unsecured obligation in such a way as to create a trust which is only deemed to exist in equity, and which entitles the creditor a guaranteed recovery of 100 cents on the dollar in the event of an insolvency as opposed to lining up with other unsecured creditors? This is the important issue raised by the proposed appeal.

4. As GFPI began to experience serious financial difficulties in 2008, it and its shareholder Mr. Grant entered into an agreement which was in substance (although not in form) an unsecured advance of funds by Mr. Grant to GFPI. In form it was a sale by GFPI to Mr. Grant of certain federal and Ontario tax refunds which GFPI expected to receive in 2008 and 2009.

5. Because of GFPI's existing credit agreements, which restricted sales of assets out of the ordinary course of business, the agreement with Mr. Grant was carefully structured. It provided that the sale of the 2009 refunds would not occur until 2009. It would take place by means of a closing on January 2, 2009, at which time a formal transfer document would be delivered. Until the formal transfer occurred, Mr. Grant would have no interest in the 2009 tax refunds and GFPI would not hold them in trust for him. After the formal transfer occurred, a trust would arise covering tax refunds actually received after the formal transfer had been delivered to Mr. Grant at a closing of the sale.

6. By January 2, 2009 GFPI's financial situation had significantly worsened. It decided not to proceed with the closing contemplated by the agreement with Mr. Grant, and did not deliver the formal transfer document. It did so partly in respect of the wishes of the lenders, who understandably were not happy with the fact that they were being asked to restructure GFPI's debt at the same time that GFPI was going to pay $10 million U.S. to its shareholder (indeed, it was quite clear to all concerned that if the funds were transferred the ongoing negotiations to restructure the debt would fail), and partly because of concerns about liquidity.

7. GPFI then filed for and obtained CCAA protection on June 25, 2009 without having delivered any transfer of the 2009 tax refund.

8. On a motion brought by Mr. Grant, Newbould J. granted a declaration that GFPI holds $10 million U.S. of 2009 tax refunds in trust for Mr. Grant. Newbould J. achieved this result by invoking the principle that "equity considers done what ought to be done". Relying on that maxim, he deemed the trust to have arisen even though on the face of the contract it clearly had not. The result flies in the face of the clear language of the relevant contract, which provides that a trust has not arisen because the 2009 closing never occurred. The result also flies in the face of principles of insolvency law because the effect is to allow an unsecured creditor to recover 100 cents on the dollar when other unsecured creditors will recover little or nothing.

9. The correctness of Newbould J.'s order has significant implications both for commercial agreements generally and for insolvency practice. The order undermines certainty of contract by invoking an equitable principle to reverse the outcome otherwise mandated by contract law. The order also provides a judicially approved blueprint for structuring unsecured obligations so as to

recover 100 cents on the dollar in an insolvency. These are important matters warranting consideration of this court.

10. Thanks to an order made by MacPherson J.A. and this court's ability to function as a real-time court, an appeal in this matter will not interfere with the ongoing restructuring proceedings in the Superior Court.

11. Accordingly, leave to appeal ought to be granted.

GFPI and TD

12. GFPI is in the lumber business. It was founded by and is controlled by Mr. Grant, who is personally and through a family trust GFPI's shareholder. GFPI is now primarily a supplier of oriented strand board ("OSB"), which is an alternative to plywood commonly used in residential construction. TD is the agent for a syndicate of banks who are GFPI's senior secured lenders. On June 25, 2009, GFPI filed for and obtained protection from its creditors under the CCAA.

Reference: Endorsement of Newbould J., paras. 2, 4-5; Motion Record, Tab 3

GFPI's financial problems and the Tax Refund Agreement

13. Prior to its filing under the CCAA, GFPI began to experience financial problems, in part because of a decline in the OSB market, in part because of significant bank debt incurred to construct two OSB mills in South Carolina, and in part because of approximately $80 million being expended on investments in non-core assets such as a private golf course, a 65 foot yacht and an elaborate renovation of GFPI's head office in Haileybury, Ontario. As troubles mounted,

Mr. Grant became directly involved in attempts to stave off insolvency proceedings and assist GFPI's cash flow.

Reference: Endorsement of Newbould J., paras. 6-8; Motion Record, Tab 3

Affidavit of Benjamin Montgomery, paras. 6 and 15; Motion Record, Tab 8

14. One such step was to enter into the agreement which gives rise to this motion. As GFPI's financial performance declined in 2008, an agreement (the "Tax Refund Agreement") was entered into to allow Mr. Grant to assist GFPI's cash flow by purchasing a portion of certain Canadian and Ontario tax refunds which GFPI expected to receive in 2008 and 2009.

Reference: Endorsement of Newbould J., para. 9; Motion Record, Tab 3

15. The commercial context of the Tax Refund Agreement is important. The terms of the credit agreements between GFPI and its senior secured lenders contained two restrictions which the Tax Refund Agreement was carefully drafted so as not to breach:

(a) GFPI was permitted to sell assets outside the ordinary course of business without lender consent and without the proceeds being paid to the lenders, but only if the sales did not exceed $10 million U.S. in each calendar year; and

(b) GFPI was not permitted to grant any security to creditors.

Reference: Endorsement of Newbould J., para. 10; Motion Record, Tab 3

16. The concept underlying the Tax Transfer Agreement was that Mr. Grant would pay $20 million U.S. in March 2008 to purchase $10 million U.S. of GFPI's tax refunds in each of 2008 and 2009. In order to avoid defaulting under the credit agreements, which would have allowed the lenders to take pre-emptive measures, the Tax Refund Agreement was carefully structured so

that the tax refunds would be sold in two tranches, the first on March 31, 2008 and the second on January 2, 2009 (the first business day in 2009). No security was provided.

Reference: Endorsement of Newbould J., paras. 11-12; Motion Record, Tab 3

17. While the Tax Refund Agreement was in form an asset sale, in substance it was an unsecured advance of funds in the form of a deposit that GFPI was entited to use immediately in its business. Except as a mechanism to advance cash to a company that was desperate for it, the transaction would make no commercial sense. Who would pay cash to buy cash for delivery on future dates?

The key provisions of the Tax Refund Agreement

18. The key provisions of the Tax Refund Agreement are in clear, unambiguous language. The agreement was entered into by sophisticated parties, with the assistance of counsel.

19. In order to comply with the covenant in the credit agreements, the Tax Refund Agreement made it clear that the acquisition of GFPI's 2009 tax refund was not to occur until a transfer of the 2009 tax refund was delivered by GFPI to Mr. Grant at the 2009 Closing (as defined in the Tax Refund Agreement). The 2009 Closing was scheduled to occur on January 2, 2009. If it had occurred any earlier, it would have breached the credit agreements and allowed the lenders to take pre-emptive action much earlier in a rapidly deteriorating situation. The agreement expressly provided that until the delivery of a transfer document in respect of the 2009 refund, *Mr. Grant would have no interest in that refund*:

"Section 2.01 <u>Agreement of Purchase and Sale</u>

Subject to the provisions of this Agreement, the Vendor hereby agrees to sell, assign and transfer to the Purchaser, and the Purchaser hereby agrees to purchase from the Vendor: …

(b) the Sold 2009 refund on January 2, 2009."

"Section 5.02 <u>No Interest of Purchaser in Sold 2009 Refund Until 2009 Closing</u>

The parties agree, notwithstanding any other provision of this Agreement or any other right or purported right of the Purchaser, that *the Purchaser does not acquire any right, title or interest in the Sold 2009 Refund*, and the Vendor does not sell, assign or transfer any right title or interest in the Sold 2009 Refund *until the Vendor delivers to the Purchaser at the 2009 Closing, the transfer referred to in Section 7.04(a)*." [Emphasis added.]

Reference: Endorsement of Newbould J., paras. 13-14; Motion Record, Tab 3

20. The Tax Refund Agreement expressly held that, *once the closing of the purchase of the 2009 tax refunds was completed*, GFPI would hold $10 million U.S. of its 2009 tax refund in trust for Mr. Grant:

"Section 5.06 <u>Sold 2009 Refund Held in Trust by Vendor</u>

The Vendor shall hold in trust for Purchaser, keep segregated from any other funds, accounts or assets of the Vendor and pay to Purchase any amount of the Sold 2009 Refund received by the Vendor *after the completion of the 2009 Closing*." [Emphasis added.]

"2009 Closing" was defined to mean "the closing of the purchase and sale of the Sold 2009 Refund on January 2, 2009".

Reference: Endorsement of Newbould J., paras. 16-17; Motion Record, Tab 3

The 2009 Closing did not happen

21. The 2008 Closing occurred in accordance with the terms of the Tax Refund Agreement. However, by the fall of 2008, GFPI's financial problems had significantly worsened and GFPI

was relatively certain it would be in default of its borrowing covenants by the end of the first fiscal quarter for 2009. It therefore did not proceed with the 2009 Closing.

Reference: Endorsement of Newbould J., paras. 23-26; Motion Record, Tab 3

22. In the proceedings before Newbould J., Mr. Grant made much of the lenders' role in GFPI's decision not to proceed with the 2009 Closing, and appears to have succeeded in convincing Newbould J. that there was something nefarious about this. Newbould J. commented that the position of the lenders "influenced" GFPI not to proceed with the 2009 Closing (note, however, that he did not say "induced"). Newbould J. also commented that as a condition of supporting a restructuring of GFPI's debt, the lenders would require the $10 million U.S. to be kept in the company rather than paid to its sole shareholder Mr. Grant.

Reference: Endorsement of Newbould J., paras. 26-27; Motion Record, Tab 3

23. These facts are not surprising, and should not be blown out of proportion. Of course the lenders to a troubled company were not happy with the prospect of $10 million U.S. being paid to the company's shareholder at the same time that they were being asked to restructure the company's debt. It is hard to imagine responsible lenders taking any other position.

Newbould J.'s ruling

24. Mr. Grant brought a motion to Newbould J. for a declaration that GPFI held $10 million U.S. in 2009 tax refunds in trust for him.

25. Despite the clear language of section 5.06 of the Tax Transfer Agreement that a trust in respect of 2009 tax refunds would not arise until "after the completion of the 2009 Closing", and despite the clear language of section 5.02 that "the Purchaser does not acquire any right, title or

interest in the Sold 2009 Refund ... until the Vendor delivers to the Purchaser at the 2009 Closing, the transfer referred to in Section 7.04(a)", Newbould J. found a trust. He did so by invoking "the principle that equity considers done what ought to be done" and, in effect, deemed that the 2009 Closing had taken place even though it clearly had not.

Reference: Endorsement of Newbould J., paras. 37-44; Motion Record, Tab 3

26. In a brief paragraph, Newbould J. dismissed TD's argument that giving Mr. Grant the 2009 refund would amount to a preference in favour of Mr. Grant: "It would not be providing Mr. Grant as an unsecured creditor with a payment from the company's assets ahead of other creditors. Rather it would be effecting delivery to him of an asset belong [*sic*] to him. It is not the company's asset." This logic, of course, is entirely dependent on the trust that Newbould J. deemed to have arisen on January 2, 2009, since sections 5.02 and 5.06 of the Tax Refund Agreement expressly provide otherwise – they make it clear that the 2009 refund was not Mr. Grant's asset and was not impressed with a trust in his favour until the 2009 Closing.

Reference: Endorsement of Newbould J., para. 45; Motion Record, Tab 3

An appeal will not interfere with the restructuring

27. GFPI's restructuring is ongoing. The current CCAA stay is set to expire on December 1, 2009, although it may well be extended. A marketing process is under way for GFPI's assets, and will not be completed by December 1, 2009. As a result, an appeal of Newbould J.'s order can proceed without interfering in any way with the restructuring.

28. This is particularly the case in light of the order of MacPherson J.A. of October 27, 2009. Upon being advised of the status of the restructuring proceedings in the Superior Court, MacPherson J.A. ordered, on consent of the parties, that the motion for leave to appeal be

expedited, with TD filing its factum in support of the motion on November 3, 2009 and Mr. Grant filing his responding factum on November 16, 2009. MacPherson J.A.'s order then provides that a panel of this court will seek to decide the leave motion by November 20, 2009, and that if leave to appeal is granted MacPherson J.A. will serve as case management judge with the goal of having the appeal heard as soon thereafter as possible. This will allow the appeal to be heard on its merits, if leave is granted, around the time of the expiry of the current stay on December 1, 2009 or shortly thereafter.

Reference: Order of MacPherson J.A.; Motion Record, Tab 4

29. Thus by functioning as a real-time court – as this court has repeatedly and very effectively done in insolvency proceedings – an appeal of Newbould J.'s order will not interfere with or delay the ongoing restructuring proceedings in the court below.

PART III—THE PROPOSED QUESTIONS TO BE DETERMINED ON APPEAL

30. The proposed appeal has significant implications both for the interpretation of commercial agreements generally and for the interpretation of such agreements within insolvency proceedings:

(a) **Significance for the interpretation of commercial agreements generally.** Is it correct that the equitable principle that equity considers done what ought to be done can override the express and unambiguous language of an agreement entered into by sophisticated commercial parties?

(b) **Significance for insolvency practice.** Were it not for the trust Newbould J. has recognized, Mr. Grant would be an unsecured creditor of GFPI for $10 million U.S. and would receive the same treatment as all other unsecured creditors. With the trust recognized, Mr. Grant will get 100 cents on the dollar even before GFPI's secured creditors receive anything. This reality gives rise to the following important question for insolvency practice in Ontario: can a structure like the Tax Refund Agreement be used to elevate the claim of an unsecured creditor to a trust claim guaranteeing recovery of 100 cents on the dollar?

PART IV—THE ISSUES AND ARGUMENT

The test for leave to appeal

31. The test on a motion for leave to appeal under section 13 of the CCAA is well established and is not controversial. It has four components:

(a) whether the point on appeal is of significance to the practice;

(b) whether the point raised is of significance to the proceeding itself;

(c) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and

(d) whether the appeal will unduly hinder the progress of the action.

Reference: *Re Cineplex Odeon Corp.* (2001), 24 C.B.R. (4th) 201 (Ont. C.A.) at para. 2; Brief of Authorities of TD, Tab 1

Re Country Style Food Services Inc. (2002), 158 O.A.C. 30 (C.A.) at para. 15; Brief of Authorities of TD, Tab 2

The point on appeal is of significance to the practice

Significance for interpretation of commercial agreements

32. This court has repeatedly held that certainty is an important goal of contract law.

Reference: *Bell Canada v. The Plan Group*, 2009 ONCA 548 at para. 31; Brief of Authorities of TD, Tab 3

33. Newbould J.'s ruling significantly undermines contract certainty. Clear and unambiguous contract language establishes that a trust was not to arise until the 2009 Closing took place. There were good commercial reasons for this: the structure was essential to avoid putting GFPI in default of its main credit agreements. As a matter of contractual interpretation, it is crystal clear when the trust ought to have arisen: only upon delivery of the transfer document at the 2009 Closing. The contract was entered into by sophisticated parties with the involvement of counsel, with no suggestion by anyone that there is any basis for invalidating the contract or rectifying its language.

34. Yet the result clearly dictated by contract law – no trust arose because the 2009 Closing never took place – was turned on its head by Newbould J.'s use of the principle that equity considers done what ought to be done.

35. The correctness of this outcome is extremely dubious, and warrants consideration by this court.

Significance for insolvency practice

36. When the insolvency context is added to the analysis, Newbould J.'s decision becomes even more dubious and the issue becomes even more important.

37. As previously noted, the Tax Refund Agreement was in substance an unsecured advance by Mr. Grant to GFPI. If the form of the Tax Refund Agreement conformed to its substance and the transaction had been structured as an unsecured loan, or if the terms of the Tax Refund Agreement were enforced in accordance with the contract language, Mr. Grant would be lining up with all of GFPI's other unsecured creditors and would be treated equally with them now that GPFI is in insolvency proceedings. The lot of an unsecured creditor is never a happy one in any insolvency, and in this one it is particularly unhappy.[1] However, with the deemed happening of the 2009 Closing, Mr. Grant's position is considerably rosier than that of other unsecured creditors. He recovers 100 cents on the dollar – better than even than secured creditors are likely to recover in this case.

38. If GPFI's CCAA filing had occurred prior to January 2, 2009, Mr. Grant clearly could not have been paid $10 million U.S. on that date without creating a preference, and GFPI would have been perfectly entitled (indeed required) to rely on the CCAA stay as a reason not to pay Mr. Grant. The situation is no different now that the CCAA stay is in place, even though it was put in place after January 2, 2009. Mr. Grant has a claim for damages for a prefiling breach of contract. He should recover the same as all other creditors with unsecured prefiling claims. To pay him 100 cents on the dollar in priority to other unsecured creditors would be to grant him a preference.

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[1] "[T]he secured creditors will likely incur substantial shortfalls and … there likely will be no recovery for the unsecured creditors": see endorsement of Newbould J., para. 46; Motion Record, Tab •.

39. Newbould J. has provided a judicially approved blueprint for transforming an unsecured obligation (entitling the creditor to equal treatment with all other unsecured creditors) into a trust obligation (entitling the creditor to receive 100 cents on the dollar in preference to other unsecured creditors), by the invocation of the maxim that equity deems to have happened what ought to have happened. It is not difficult to imagine that creative insolvency lawyers will find a way to use this blueprint to structure unsecured loans to entities which are at risk of becoming insolvent.

40. The blueprint offered by Newbould J. is likely even applicable to the more common context of delivery of goods or services to the debtor prior to an insolvency filing. The logic of insolvency law is that the claims of suppliers are stayed upon an insolvency filing and then compromised in the insolvency process, with all creditors of the same class treated equally in the compromise. The blueprint offers a way to upset this logic by providing for a trust to arise and then relying on the maxim that equity considers done what ought to have been done to enforce the trust in an insolvency even if the trust has not actually arisen.

41. These matters are of great significance to insolvency law in Ontario, and warrant consideration by this court.

The point raised is of significance to the proceeding itself

42. The proposed appeal is of significance to the proceeding. At stake is $10 million U.S., which is a considerable sum of money, particularly for an insolvent corporation needing as many resources as possible to attempt to achieve a restructuring and to pay as much as possible to creditors in accordance with their legal rights.

43. Moreover, the proposed appeal is clearly a significant issue for the parties themselves.

The appeal is *prima facie* meritorious and is not frivolous

Standard of review

44. On the motion before MacPherson J.A., Mr. Grant took the position that TD has little chance of success on the appeal because Newbould J.'s decision is primarily fact-driven and as such would only be reviewable on the palpable and overriding error standard. Presumably Mr. Grant will renew those submissions on this motion.

45. Those submissions are not correct. The appropriate standard of review is correctness, or something very close to it. As such, this court will have full scope to review Newbould J.'s order. It will not withstand scrutiny on the correctness standard.

46. An appeal in this case would require the court (i) to consider Newbould J.'s interpretation of the Tax Refund Agreement; and (ii) to consider Newbould J.'s application of the principle that equity considers done what ought to be done to upset the result that would otherwise obtain under a pure contract interpretation analysis and under the application of principles of insolvency law. Neither aspect of the appeal attracts a deferential standard of review.

47. In *Bell Canada v. The Plan Group*, this court recently considered (and divided on) the appropriate standard of review in contract interpretation cases. The majority (Blair J.A., writing for himself and Goudge J.A.) accepted that questions of contract interpretation involve mixed questions of fact and law, but rejected the argument that such questions always attract the

palpable and overriding error standard of review. Rather, the standard of review lies on a spectrum, depending on the degree to which questions of law and fact are intertwined:

> "In determining the proper standard of review, however, it is important to keep in mind the distinction between the nature of the question addressed by the trial court (i.e. a question of fact, a question of law, or a question of mixed fact and law) and the standard of appellant review of the trial court's disposition of that question. The distinction does not matter if the trial court was answering a question of fact (where the standard of appellant review is palpable and overriding error) or a question of law (where it is correctness). But the distinction *is* important where the question addressed was one of mixed fact and law. To say that a matter raises a question of mixed fact and law, by itself, does not mean that the standard of appellate review is necessarily one of palpable and overriding error. As *Housen* tells us, at para. 36, 'matters of mixed fact and law lie along a spectrum.' Thus, where the question at issue is determined to be one of mixed fact and law, the appellate court must take a further step and go on to locate the precise question at the proper point on the *Housen* spectrum in order to determine the applicable standard of appellate review.
>
> Where the matter referred to is more a matter of legal principle and sits towards the error of law end of the spectrum, the standard is correctness. Where the matter is one in which the legal principle and the facts are inextricably intertwined – where the facts dominate, as it were – it falls more towards the factual end of the spectrum, and significant deference must be accorded. *Contractual interpretation, in my opinion, is generally the type of case that falls within the former category, negligence one that generally falls into the latter.*
>
> ...
>
> *The exercise of interpreting a contract is not essentially a fact-finding exercise, however.* As the authorities cited above have noted, there may be questions involving the determination of the factual context in which the contract was negotiated, or considerations of extrinsic evidence, that evoke the fact-finding functions. Those decisions are to be addressed from the palpable and overriding error perspective. *In substance, though, the exercise of interpreting a contract is a legal exercise, calling upon the learning and training that judges and lawyers acquire over years of experience. Apart from the truly factual aspects that may underlie the task, trial judges have no particular advantage over appellate judges in the art of contractual interpretation.*
>
> In my view, certainty in contract is an important policy value underlying the construction of contracts. This factor alone is sufficient to push the standard of review in such cases towards correctness and away from deference. At the very least, contractual interpretation is an exercise that generally falls much more towards the error of law end of the *Housen* spectrum, once the factual issues

> referred to above have been resolved or if – as is the case here – they are not in dispute." [Emphasis added.]

Reference: *Bell Canada v. The Plan Group*, *supra* at paras. 26-27 and 30-31; Brief of Authorities of TD, Tab 3

48. This case is exactly the type of case Blair J.A. was describing. The issues of contractual interpretation which arise are essentially legal questions. The standard of review is at or near the correctness end of the spectrum.

49. Similarly, the issue of the applicability of the legal principle that equity considers done what ought to be done is a question of law reviewable on the correctness standard. The logic of *Bell Canada v. The Plan Group* is equally applicable to this aspect of the appeal. It will require this court to undertake a legal exercise in which this court will have no disadvantage over Newbould J.

Applying the correctness standard of review, the proposed appeal is *prima facie* meritorious and far from frivolous

50. A frivolous appeal is one that is manifestly devoid of merit. In the context of a motion to quash an appeal under s. 134(3) of the *Courts of Justice Act*, this court has held that it is very difficult to establish that an appeal sinks to that level:

> "The court may also quash an appeal where it is manifestly devoid of merit: *Lesyork Holdings Ltd. v. Munden Acres Ltd.* (1976), 13 O.R. (2d) 430 (C.A.). The Bank invokes this jurisdiction on its motion to quash. The very nature of this power, however, dictates that it will seldom be exercised. It is very difficult, in most cases, to reach the conclusion that an appeal is devoid of merit without first hearing the entire appeal. Where, as here, the ultimate merits of the appeal require a consideration of a lengthy trial record, numerous issues, and detailed reasons for judgment, it is virtually inevitable that an inquiry into the question of whether the appeal has any merit will involve extensive written submissions and

considerable oral argument."

Reference: *Schmidt v. The Toronto-Dominion Bank* (1995), 24 O.R. (3d) 1 (C.A.) at p. 3; Brief of Authorities of TD, Tab 4

51. The proposed appeal rises far above this low standard. The result of Newbould J.'s order is at odds with principles of contract law, and results in a preference which is at odds with the principles of insolvency law. These issues are very arguable and *prima facie* meritorious.

The appeal will not unduly hinder the progress of the action

52. Because of the order of MacPherson J.A. and the capacity of this court to function as a real-time court, an appeal of Newbould J.'s order will not interfere with the restructuring. Moreover, it will also no divert resources away from the restructuring, because it is a contest between two parties who are not centrally involved in the restructuring.

Conclusion

53. TD therefore requests an order granting it leave to appeal. It also seeks its costs of the motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 3RD DAY OF NOVEMBER, 2009.

Geoff R. Hall per:

Geoff R. Hall

McCarthy Tétrault LLP
Counsel to The Toronto-Dominion Bank

SCHEDULE "A" – AUTHORITIES REFERRED TO

1. *Re Cineplex Odeon Corp.* (2001), 24 C.B.R. (4^{th}) 201 (Ont. C.A.)

2. *Re Country Style Food Services Inc.* (2002), 158 O.A.C. 30 (C.A.)

3. *Bell Canada v. The Plan Group*, 2009 ONCA 548

4. *Schmidt v. The Toronto-Dominion Bank* (1995), 24 O.R. (3d) 1 (C.A.)

SCHEDULE "B" – TEXT OF RELEVANT STATUTES, REGULATIONS AND BY-LAWS

***Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, s. 13**

13. Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

13. Sauf au Yukon, toute personne mécontente d'une ordonnance ou décision rendue en application de la présente loi peut en appeler après avoir obtenu la permission du juge dont la décision fait l'objet d'un appel ou après avoir obtenu la permission du tribunal ou d'un juge du tribunal auquel l'appel est porté et aux conditions que prescrit ce juge ou tribunal concernant le cautionnement et à d'autres égards.

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

IN THE MATTER OF THE A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC. et al.

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COURT OF APPEAL FOR ONTARIO

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