Court File No. M38120

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 (the "Applicants")

FACTUM OF PETER J. GRANT SR.
(Re: Motion to Stay)
(Returnable October 27, 2009)

October 26, 2009

BENNETT JONES LLP
Suite 3400
One First Canadian Place
P.O. Box 130
Toronto, ON M5X 1A4

Richard B. Swan (LSUC No. 32076A)
Telephone: 416 777 7479
Facsimile: 416 863 1716
E-Mail: swanr@bennettjones.com

Lawyers for Peter J. Grant Sr.

TO: **McCARTHYS LLP**
Suite 4700
Toronto Dominion Bank Tower
Toronto, ON M5K 1E6

Geoff R. Hall (LSUC No. 34701O)
Telephone: 416 601 7856
Facsimile: 416 868 0673
E-Mail: ghall@mccarthys.ca

Lawyers for the Toronto-Dominion Bank

AND TO: **FRASER MILNER CASGRAIN LLP**
1 First Canadian Place
100 King Street West
Toronto, ON M5X 1B2

Daniel R. Dowdall
Telephone: 416-863-4700
Facsimile: 416-863-4592
Email: dan.dowdall@fmc-law.com

Jane O. Dietrich
Telephone: 416 863 4467
Facsimile: 416 863 4592
E-Mail: jane.dietrich@fmc-law.com

Lawyers for the Applicants Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., and Grant U.S. Holdings GP

AND TO: **STIKEMAN ELLIOTT LLP**
5300 Commerce Court West
99 Bay Street
Toronto, ON M5L 1B9

Sean Dunphy
Telephone: 416 869 5662
Facsimile: 416 947 0866
E-Mail: sdunphy@stikeman.com

Kathy L. Mah
Telephone: 416 869 5652
Facsimile: 416 947 0866
E-Mail: kmah@stikeman.com

Lawyers for the Monitor

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PART I – OVERVIEW

1. This factum is filed by Peter Grant Sr. ("Peter Sr.") in response to a motion brought by Toronto-Dominion Bank ("TD") pursuant to Rule 63.02 of the *Rules of Civil Procedure* which seeks a stay of the Order of Justice Newbould, dated October 13, 2009, pending TD's motion for leave to appeal in the current proceeding under the *Companies' Creditors Arrangement Act* ("CCAA").

2. Peter Sr. opposes the motion for a stay. The experienced Commercial List Judge below made strong findings of fact and law in Peter Sr.'s favour. In particular, the Motions Judge found that Peter Sr. is a beneficiary of a trust established under a Tax Refund Purchase and Sale Agreement between Grant Forest Products Inc. ("GFPI" or the "Company") and Peter Sr. (the "Agreement"), in favour of Peter Sr. Moreover, the result reached by the Motions Judge was the very outcome which TD, GFPI and Peter Sr. expected from the outset of discussions surrounding

the Agreement in advance of its execution on March, 2008 (as revealed by internal correspondence of TD in evidence on the motion heard by Newbould J.).

3. The decision below concerned language of a specific agreement, and the exercise of equitable remedial authority by the Motions Judge, which is subject to the highest degree of deference on appeal. The motion for a stay in this case seeks to interfere with a beneficiary's entitlements under the trust created for his benefit.

4. The proposed appeal is not one where there are serious and arguable grounds, and in no way involves a question of jurisdiction. The issue on appeal is neither *prima facie* meritorious nor is it of significance to the practice or to this CCAA proceeding itself. In the circumstances, a stay should not be granted.

PART II – FACTS

5. Peter Sr. (and a Grant family trust known as Twin Lakes Trust) are the ultimate shareholders of GFPI, a major North American producer of oriented strand board.

> **Affidavit of Peter J. Grant Sr., sworn September 8, 2009 ("Grant September 8 Affidavit"), para. 3.**

6. On June 25, 2009, GFPI obtained protection under the CCAA. These proceedings are ongoing; the current stay of proceedings under the CCAA has been extended to December 1, 2009. Mr. Justice Newbould is the supervising CCAA judge.

> **Initial Order of Newbould J., dated June 25, 2009.**
>
> **Order of Newbould J., dated October 13, 2009 [TD Motion Record, Tab A].**

7. Peter Sr. was instrumental in taking steps to assist GFPI's cash-flow after its financial performance began to decline. In 2004, Peter Sr. caused a company he controlled to loan GFPI a

total of $50 million, an amount which has not been repaid and which has been subordinated to the first and second lien lenders. In June 2008, Peter Sr. caused an additional sum of $25 million to be loaned to GFPI. In addition, although Peter Sr. serves as chairman and CEO of GFPI, he has not received a salary in many months.

Grant September 8 Affidavit, paras. 6, 8-9.

8. The issue before Newbould J. concerned the Agreement between Peter Sr. and GFPI, pursuant to which Peter Sr. purchased approximately US $10 million of certain tax refunds which GFPI expected to receive in each of 2008 and 2009, for a total of US $20 million. The Agreement was designed to assist GFPI with its immediate cash-flow problems while complying with GFPI's first and second lien credit agreements and protecting Peter Sr.'s right to receive the refunds. Once GFPI received the relevant portions of the 2008 and 2009 tax refunds (the "Sold Refunds") from the government, it would be obliged to hold the Sold Refunds purchased by Peter Sr. in trust for him.

Grant September 8 Affidavit, paras. 11-13.

Endorsement of Newbould J., October 13, 2009 ("Endorsement of Newbould J."), paras. 10-12 [TD Motion Record, Tab C].

9. Peter Sr. paid approximately US$20 million to GFPI in March 2008 in respect of the purchase of the Sold 2008 and 2009 Refunds. In late 2008, Peter Sr. received approximately US$10 million in respect in his purchase of the Sold 2008 Refund. As detailed in the reasons of Newbould J., formal transfer of the Sold 2009 Refund was to take place on the first business day of the 2009 calendar year, as a mechanic under the Agreement to stay on-side the lending covenants. The Bank asked for this at the time the Agreement was drawn up. However, on January 2, 2009, GFPI breached the Agreement by failing to provide a one-page transfer

document in respect of the Sold 2009 Refund. Newbould J. found as a fact that TD influenced the Company to do so.

Grant September 8 Affidavit, paras. 19-21.

10. Peter Sr. demanded delivery of the transfer document, without success. On October 5, 2009, Peter Sr. brought a motion before Justice Newbould for an order that Peter Sr. was entitled to receive a transfer of the Sold 2009 Refund, and that GFPI was obliged to hold that Refund in trust for Peter Sr. upon receiving it.

Endorsement of Newbould J., para. 1.

11. On October 13, 2009, Justice Newbould issued a decision declaring that Peter Sr. had in equity full right, title and interest in the Sold 2009 Refund, and that GFPI was obliged to receive the Sold 2009 Refund in trust for Peter Sr. and pay it to him forthwith thereafter.

Endorsement of Newbould J., para. 48.

12. In his reasons, Justice Newbould held that the Sold 2009 Refund was an asset belonging to Peter Sr. and not GFPI, and that it was clear from TD's internal correspondence that TD understood that, under the Agreement, GFPI was to hold the Sold 2009 Refund in trust for Peter Sr. upon its receipt by the Company, and then to pay it over to Peter Sr.

Endorsement of Newbould J., paras. 20, 45.

13. Justice Newbould also found as a fact that GFPI will have a positive cash position for the present quarter (Q4 2009) amounting to US$26.491 million, even without the Sold 2009 Refund due to Peter Sr. Newbould J. found the Sold 2009 Refund is not necessary for GFPI's cash-flow for the fourth quarter of 2009.

Endorsement of Newbould J., para. 46.

PART III - ARGUMENT

14. Under Rule 63.02(1)(b), to obtain a stay of a final order pending a motion for leave to appeal, the moving party must show:

(a) that the proposed appeal raises serious issues to be tried;

(b) that the *moving party* suffer irreparable harm if the stay is not granted; and

(c) that the balance of convenience favours the granting of a stay of the order to be appealed.

> ***Ontario (Minister of Natural Resources) v. Mosher*** **(2003), 41 C.P.C. (5th) 66 at para. 7 (Ont. C.A.).**

1. The Proposed Appeal Does Not Raise Serious Issues

15. In determining whether a stay should be granted, regard must be had to the decision sought to be appealed, and a strong case in favour of granting a stay must be made out. The Court "must proceed on the assumption that the judgment is correct and that the relief ordered was properly granted".

> ***Ogden Entertainment Services v. Retail, Wholesale Canada, Canadian Service Sector, U.S.W.A., Local 440*** **(1998), 38 O.R. (3d) 448 at para. 5 (C.A.).**

16. In a case where leave to appeal is required, as here, the Court must consider the reasonable prospect of the moving party being granted leave to appeal. Where it is unlikely that leave will be granted, the first branch of the *RJR* test may not be satisfied.

> ***G.(N.) v. Upper Canada College*** **(2004), 70 O.R. (3d) 312 at para. 15 (C.A.).**

17. In the context of CCAA proceedings, the Court will only grant leave to appeal where there are "serious and arguable grounds that are of real and significant interest to the parties". In order to determine whether this threshold is met, the moving party must satisfy a four-pronged test:

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

(b) whether the point is of significance to the action;

(c) whether the appeal is *prima facie* meritorious or frivolous; and

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

> ***Re County Style Food Services Inc.*, [2002] O.J. No. 1377 at paras. 16-19 (C.A.).**
>
> ***Re Calpine Canada Energy Ltd.* (2007), 80 Alta. L.R. (4th) 60 at para. 13 (C.A.) [*Re Calpine*].**

a) The Point on Appeal is Not of Significance to the Practice

18. Where a proposed appeal is of no general importance and the point is unique to the particular circumstances in question, an application for leave will fail.

> ***Re Repap British Columbia Inc.* (1998), 9 C.B.R. (4th) 82 at para. 9 (B.C.C.A.) [*Re Repap*].**

19. The Agreement in issue in the present case is specific and unique to this case. It contains specific contractual language that was drawn up to satisfy the Company and the requirements of GFPI's first and second credit agreements. It has no broader significance to any other element of this *CCAA* proceeding, or any other case.

> **Endorsement of Justice Newbould, October 13, 2009, paras. 10-11 [TD Motion Record, Tab C].**

20. The Motions Judge's decision is particular to its facts. The point on appeal is not of any significance to the practice, nor is it of general importance.

b) The Appeal is Not Prima Facie Meritorious

21. In considering whether an appeal is *prima facie* meritorious, it is necessary to consider the standard of review the Court would apply if leave were granted. Given the dynamic nature of CCAA proceedings, appellate courts have expressed a reluctance to interfere with decisions of the supervising judge except in the clearest of cases.

> ***Re Calpine, supra* at para. 14.**
>
> ***Re San Francisco Gifts Ltd.* (2004), 42 Alta. L.R. (4th) 371 at para. 8 (C.A.).**

22. Justice Newbould's finding that GFPI is obliged to hold the Sold 2009 Refund in trust for Peter Sr. is a finding of fact based on his findings of other primary facts and his appreciation of the language of the Agreement. A proposed appeal would be subject to a standard of review of palpable and overriding error. TD has failed to establish that the Motions Judge's decision is clearly wrong or that it has worked a substantial injustice. The proposed appeal is not *prima facie* meritorious.

> ***Re Calpine, supra* at para. 15.**
>
> ***Re Repap, supra* at para. 10.**

c) The Application for Leave to Appeal Is Very Likely to Fail

23. The proposed appeal is neither of any general significance to the practice nor is it *prima facie* meritorious. TD has not established that there are serious and arguable grounds for granting leave to appeal. Given that it is very unlikely that leave to appeal will be granted, it cannot be said that TD can satisfy the first branch of the stay test.

Re Calpine, supra **at paras. 40-41 (C.A.).**

2. TD Will Not Suffer Irreparable Harm

24. TD is the only proposed appellant. GFPI took no position below (other than admitting it was in breach of the Agreement) and Peter Sr. does not believe that the Company takes any position on this motion. TD must demonstrate as the moving party that *it* will suffer irreparable harm that is not compensable in damages. It has led no evidence on this issue.

TD Notice of Motion for Stay Pending Motion for Leave to Appeal, paras. 10-11 [TD Motion Record, Tab 1].

25. Moreover, the evidence does not demonstrate irreparable harm as regards GFPI. The Motions Judge specifically found as fact that the Sold 2009 Refund due to Peter Sr. is not necessary in order to allow GFPI to remain in a positive cash flow position.

Endorsement of Justice Newbould, October 13, 2009, para. 46 [TD Motion Record, Tab C].

Fourth Report of the Monitor, October 8, 2009, Appendix B [TD Motion Record, Tab B].

3. The Balance of Convenience Does Not Favour Granting a Stay

26. The Motions Judge found as fact that Sold 2009 Refund was an asset belonging to Peter Sr. and not GFPI. His decision is to be presumed correct, and his exercise of equitable authority is subject to a very high degree of deference. As noted above, TD has led no evidence of possible irreparable harm to it, and the Commercial List judge supervising this *CCAA* proceeding found as a fact that the Sold 2009 Refund is not necessary for GFPI to remain in a positive cash flow position. On the other hand, staying the Motion Judge's order would further deny Peter Sr., as beneficiary of the trust established under the Agreement, the asset that he purchased and fully paid for in March 2008.

PART IV - RELIEF SOUGHT

27. Peter Sr. respectfully requests that the Court make:

    (1) An order dismissing TD's motion for a stay of Justice Newbould's order;

    (2) An order for costs of this motion in favour of Peter Sr. on an appropriate scale;

    (3) Such further or other order as may appear just or appropriate to this Honourable Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 26th day of October, 2009.

Richard B. Swan
(Bennett Jones LLP)
Lawyers for Peter J. Grant Sr.

TAB A

Schedule A
List of Authorities

1. *Ontario (Minister of Natural Resources) v. Mosher* (2003), 41 C.P.C. (5th) 66 (Ont. C.A.).

2. *Ogden Entertainment Services v. Retail, Wholesale Canada, Canadian Service Sector, U.S.W.A., Local 440* (1998), 38 O.R. (3d) 448 (C.A.).

3. *G.(N.) v. Upper Canada College* (2004), 70 O.R. (3d) 312 (C.A.).

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

5. *Re Calpine Canada Energy Ltd.* (2007), 80 Alta. L.R. (4th) 60 (C.A.).

6. *Re Repap British Columbia Inc.* (1998), 9 C.B.R. (4th) 82 (B.C.C.A.).

7. *Re San Francisco Gifts Ltd.* (2004), 42 Alta. L.R. (4th) 371 (C.A.).

TAB B

Schedule B
Relevant Provisions of Statutes, Regulations and By-laws

***Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 63.02(1)(b)**

RULE 63 – STAY PENDING APPEAL

STAY BY ORDER

By Trial Court or Appeal Court

63.02 (1) An interlocutory or final order may be stayed on such terms as are just,

(b) by an order of a judge of the court to which a motion for leave to appeal has been made or to which an appeal has been taken.

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

13. Leave to appeal – 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.