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 (the "Applicants")

FACTUM OF PETER J. GRANT SR.
(Re: Motion for Leave to Appeal the Order of Newbould J. dated October 13, 2009)

November 16, 2009

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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 section 13 of the *Companies' Creditors Arrangement Act* ("CCAA"), which seeks leave to appeal the Order of Mr. Justice Newbould, dated October 13, 2009.

2. The case for granting leave is not made out. The experienced Commercial List Judge, who has been supervising this CCAA proceeding, made strong findings of fact and law in favour of Peter Sr., all of which were amply supported by the evidence.

3. Newbould J. found that Peter Sr. was to be the beneficiary of a trust established under a Tax Refund Purchase and Sale Agreement (the "Agreement") between Grant Forest Products Inc. ("GFPI") and Peter Sr., and found that the trust should be recognized and given effect to. Moreover, Newbould J. found that the result flowing from his decision was exactly what TD, GFPI and Peter Sr. understood and intended at the time the Agreement was negotiated and executed, as revealed by internal TD memoranda.

4. TD's argument in this matter reduces to the assertion that GFPI, having received valuable consideration for the sale of the Sold 2009 Refund, should be permitted to breach the Agreement which establishes the trust and by so doing keep for itself the very trust property in respect of which it was and is the trustee. Notably, GFPI itself does not advance any such position. It has taken no position in relation to this matter.

5. In terms of the CCAA leave test, Newbould J.'s decision is particular to the factual matrix surrounding the negotiation, finalization and admitted breach by GFPI of the Agreement. The facts and issues are not of broad significance to the practice of insolvency law or to this CCAA proceeding more generally.

6. The *in terrorem* argument advanced by TD (for the first time on appeal), that the subject Agreement is some form of dangerous "blueprint" for other cases, does not withstand scrutiny. As found as a fact by Newbould J., TD itself was intimately involved in the development of this very Agreement, contributed key terms to it, and had its lawyers review and approve it. The TD was no doubt very pleased to see the infusion of the US$20 million purchase price into GFPI in March 2008. Newbould J. also found as a fact that TD influenced GFPI to breach the Agreement in January 2009 (when GFPI failed to deliver the 2009 transfer document ("2009 Transfer")). TD wanted GFPI not to deliver the 2009 Transfer, and then sought to rely on that very breach to argue that no trust in Peter Sr.'s favour came into being.

7. Moreover, and significantly, the core of TD's case was dependent on the assertion that since the 2009 Transfer had never been delivered to Peter Sr., the "2009 Closing" under the Agreement had not occurred and the express trust had not arisen under the Agreement. On October 28, 2009, with advance notice to TD, GFPI delivered the 2009 Transfer document to Peter Sr., foreclosing this argument. TD does not refer to this in its leave factum, nor does the Monitor. Even on TD's proposed interpretation

of the Agreement, GFPI is now contractually obligated to hold the Sold 2009 Refund pursuant to an express trust for Peter Sr.

8. It is submitted that the motion for leave to appeal should be dismissed.

PART II – THE FACTS

Background

9. The Grant family has been in the lumber business in Ontario for several generations, going back to the 1880s. Peter Sr. founded the predecessor to GFPI in 1980, and took the company into the oriented strand board ("OSB") market, which is an alternative to plywood and is commonly used in residential construction. The company grew to become one of the three largest OSB producers in North America. Peter Sr. and a Grant family trust known as Twin Lakes Trust are the ultimate shareholders of GFPI.

Endorsement of Justice Newbould, October 13, 2009 ("Endorsement of Newbould J."), para. 4.

10. GFPI filed for and obtained protection under the CCAA by Initial Order of this Court dated June 25, 2009. Ernst & Young Inc. was appointed as Monitor. By Order dated October 13, 2009, the initial stay was 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.

Peter Sr.'s Past Efforts to Assist GFPI Financially

11. Peter Sr. has been instrumental in assisting GFPI's cash-flow since its financial performance began to decline in 2004, which was in part due to market conditions and part due to GFPI and its affiliates incurring significant bank debt to construct two new OSB mills in South Carolina.

Affidavit of Peter J. Grant, sworn September 8, 2009, ("Grant September 8 Affidavit"), para. 5.

12. In July 2004, Peter Sr. caused a company he controlled to loan $40 million on an unsecured basis to GFPI; in October 2004 he caused that company to loan GFPI a further $10 million, again on an unsecured basis. Neither of these amounts has been repaid. Peter Sr. has signed postponement and subordination agreements, subordinating these loans to the First Lien Credit Agreement and Second Lien Credit Agreement.

Endorsement of Newbould J., para. 7.

13. In 2006 GFPI declared preferred dividends in the amount of $6 million in favour of Grant Forest Products Corp., which Peter Sr. controls. These dividends have not been paid by GFPI.

Endorsement of Newbould J., para. 6.

14. In order to provide further financial assistance to GFPI, in June 2008 Peter Sr. caused additional funds in the amount of $25 million to be advanced to GFPI. This amount is recorded in GFPI's accounts as a capital contribution.

Endorsement of Newbould J., para. 8.

15. Although Peter Sr. serves as Chairman and CEO of GFPI, he has not received a salary from GFPI for many months. In addition, an Executive Retirement Plan established for Peter Sr.'s benefit by GFPI is underfunded to the extent that it would require a contribution of approximately $18 million for the Plan to provide Peter Sr. with the retirement income that he was to receive at age 70. No contributions have been made to the Plan for many months.

Grant September 8 Affidavit, paras. 9-10.

Endorsement of Newbould J., para. 6.

Tax Refund Purchase and Sale Agreement

16. As GFPI's financial performance continued to decline in 2008, it was proposed that Peter Sr. might assist the company's cash-flow by purchasing a portion of certain Canadian and Ontario tax refunds which GFPI expected to receive in 2008 and 2009.

Endorsement of Newbould J., para. 9,

17. The concept was that Peter Sr. would pay US$20 million to GFPI in March 2008 to purchase a portion of GFPI's 2008 and 2009 tax refunds, with the purchased portions of the tax refunds amounting to approximately US$10 million in each of 2008 and 2009. This would assist the company with immediate cash-flow but ensure that Peter Sr. would ultimately receive the purchased portions when the 2008 and 2009 tax refunds were paid by the government.

Endorsement of Newbould J., para. 11.

18. The arrangement was such that once GFPI received the 2008 and 2009 Tax Refunds from the government, it would be obliged to hold the portions of the refunds which Peter Sr. had purchased (approximately US$10 million each year) in trust for him and then pay them out to him or as he directed.

Endorsement of Newbould J., para. 12.

19. The Board of Directors of GFPI approved the tax refund purchase arrangement at a directors' meeting held on March 27, 2008. All of the independent directors of GFPI present at that meeting clearly understood and directed that GFPI was to execute and deliver an agreement of purchase and sale with Peter Sr. and that, according to the Summary of Proposed Sale reviewed by the directors, GFPI would as a result of entering into the Agreement be obliged "to hold in trust for [Peter Sr.], keep

segregated and pay to [Peter Sr.] any amount of the Sold Refunds received by GFPI". It was on that basis only that Peter. Sr. agreed to enter into the transaction.

> **Grant September 8 Affidavit, para. 15.**
>
> **Grant Forest Products Inc. Board of Directors' Meeting Minutes, March 27, 2008, p. 5 [Exhibit "A" to the Grant September 8 Affidavit].**
>
> **Summary of Proposed Sale, Schedule "A" to Grant Forest Products Inc. Board of Directors' Meeting Minutes, March 27, 2008 [Exhibit "A" to the Grant September 8 Affidavit].**

20. GFPI's obligation to hold the Sold Refunds in trust for Peter Sr. was incorporated into the Agreement in two related trust provisions:

> Section 5.05 <u>Sold 2008 Refund Held in Trust by Vendor</u>
>
> The Vendor shall hold in trust for the Purchaser, keep segregated from any other funds, accounts or assets of the Vendor and pay to the Purchaser any amount of the Sold 2008 Refund received by the Vendor after the completion of the 2008 Closing.
>
> Section 5.06 <u>Sold 2009 Refund Held in Trust by Vendor</u>
>
> The Vendor shall hold in trust for the Purchaser, keep segregated from any other funds, accounts or assets of the Vendor and pay to the Purchaser any amount of the Sold 2009 Refund received by the Vendor after the completion of the 2009 Closing.
>
> **Tax Refund Purchase and Sale Agreement, ss. 5.05 and 5.06.**

21. As found by Newbould J., the sole reason that the tax refund arrangement was divided into two parts (March 2008 and January 2009) was to ensure that the 2009 tax refund sale could not be considered a disposition in calendar 2008, contrary to the Lien Credit Agreements, which prohibited sales of assets of more than $10 million per calendar year. Indeed, TD's witness acknowledged on cross-examination that this was simply a "mechanic" to fall within the asset disposition terms of the Lien Credit Agreements:

> Q. "And the reason that the second tranche was on January 2nd [2009], the first business day of 2009, was simply to have the mechanic of putting it in the second calendar year.
>
> A. Yes.

Q. Correct?

A. Yes."

Montgomery Cross-Examination, p. 48, ll. 3-20

Endorsement of Newbould J., para. 36.

TD's Direct Involvement in and Approval of the Agreement

22. TD, which acted as the Lien Lending Agents in respect of the First and Second Lien Credit Agreements at the relevant times, was fully aware of and approved the tax refund arrangement and the Agreement. On cross-examination of TD's witness (and in documents produced pursuant to that cross), it was made clear that TD and its solicitors were intimately involved in the process of finalizing and approving the transaction and Agreement. As found by Newbould J., TD or its solicitors were provided a transaction structure and draft copies of the proposed Agreement, commented upon them, provided a "checklist" of terms that TD viewed as essential elements to be incorporated in the Agreement, and ultimately had both their own solicitors and GFPI's confirm in writing that the Agreement complied with the Lien Credit Agreements.

Endorsement of Newbould J., para. 10.

Documents produced in response to the Cross-Examination of Ben Montgomery, held September 25, 2009 ("Montgomery Cross-Examination").

23. As found by Newbould J., at the time of transaction (specifically on March 28, 2008, three days before the 2008 closing), TD prepared a detailed internal credit memo in respect of the tax refund purchase arrangement, indicating that TD was well aware of the structure of the Agreement, and the fact that the received refunds would be held in trust for Peter Sr.:

The proposed structure is summarized as follows:

i) on [March 31, 2008] a related company outside the restricted group which we understand will be a holdco above our Borrower (the "Purchaser") will acquire US$20MM of the Borrower's 2008 and 2009 tax refunds;

ii) on [March 31, 2008] the Borrower will receive US$20MM from the Purchaser consisting of:

a) US $10MM on the sale of a portion of the Borrower's 2008 tax refunds received between Sept 1/08 – Dec 1/08;

b) US $10MM deposit against the sale of a portion of the Borrower's 2009 tax refunds;

iii) *on Jan 2/09 the Borrower will sell $10MM of its 2009 tax refund received between Sept 1/09 to Dec 31/09 to the Purchaser* (consideration coming from (ii) (b));

iv) the Agent (1st and 2nd lien) will provide the Purchaser with a partial discharge of its security with respect to (ii)(a) in March/08, and (ii)(b) in Jan/09;

v) the Purchaser will receive the proceeds of the monetized 2008 tax refunds in late 2008, and the proceeds of the monetized 2009 tax refunds in late 2009; the Borrower may direct CRA to pay the monetized 2008 and 2009 refunds directly to the Purchaser, or alternatively, *to the extent the Borrower receives the monetized tax refunds from CRA, the Borrower will agree to hold in trust and segregate the proceeds of the monetized refunds for the Purchaser.* [emphasis added]

Endorsement of Newbould J., para. 20.

Events Subsequent to the Execution of the Agreement

24. The 2008 Closing as defined in the Agreement took place on March 31, 2008. At that time Peter Sr. paid to GFPI US$10 million to purchase the Sold 2008 Refund and at the same time paid a further US$10 million to purchase the Sold 2009 Refund, as defined under the Agreement. The latter amount is described as the "2009 Purchase Price Deposit" under the Agreement. GFPI had immediate use and benefit of the US$20 million in funds paid by Peter Sr. to purchase the Sold 2008 and 2009 Refunds. In exchange, Peter Sr. received a transfer document in respect of the Sold 2008 Refund.

Endorsement of Newbould J., para. 23.

25. Later in 2008, after GFPI received its 2008 Tax Refund from the Canada Revenue Agency, Peter Sr. received from GFPI approximately US$10 million in respect of his purchase of the Sold 2008 Refund.

Endorsement of Newbould J., para. 24.

26. The "2009 Closing" was to occur on January 2, 2009, the first business day of the 2009 calendar year, in order to stay on-side the Lien Credit Agreements. However, GFPI breached its obligations under the Agreement by failing to deliver the required transfer document.

Endorsement of Newbould J., para. 25.

27. Newbould J. found that it was clear from the evidence that TD influenced GFPI to breach its obligation to effect the 2009 Closing. TD advised that it would not provide the partial discharges of the first and second lien lenders without the consent of a number of lenders in each syndicate – a position that was considerably different from the position TD took regarding the Sold 2008 Refund, when TD stated that the consent of members of the lending syndicates was not required. TD also indicated that it would not be supportive of the request for such discharges.

Endorsement of Newbould J., para. 26.

28. It appears that TD sought to pounce on the opportunity that they perceived as potentially arising from the simple "mechanic" of having the 2009 Closing occur in January 2009. A draft term sheet for a proposed restructuring of GFPI prepared by TD included a negative covenant preventing the Sold 2009 Refund from being paid out to Peter Sr. Indeed, on cross-examination, TD's witness made it clear that TD would not support GFPI in any further restructuring unless the Sold 2009 Refund remained in GFPI:

> "I do know from Bill [O'Connor, a vice-president of TD Securities] that this - - that this would have been our position.

. . .

> That as - - you know, in order to - - *in order to continue to support the company and, you know, put a structure in place that would allow it to continue to operate, that the lenders would look for the 10 million to remain in the company - - in order to induce the lenders to continue to fund, or continue to forebear,* I guess, or continue to re - - to restructure the credit facilities to allow it to continue to operate." [emphasis added]

Endorsement of Newbould J., paras. 27-28.

29. On June 19, 2009, Peter Sr. wrote to GFPI demanding delivery of the 2009 transfer document by no later than June 22, 2009. GFPI did not deliver the document as requested. Peter. Sr. brought a motion before Newbould J. 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., paras. 1, 29.

Justice Newbould's Ruling

30. On October 13, 2009, Newbould J. released a decision declaring that Peter Sr. had 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 after receiving it.

Endorsement of Newbould J., para. 48.

31. Newbould J. found that delivery of the 2009 Transfer, which was to complete the 2009 Closing on January 2, 2009, was a technical provision that was to be automatically carried out by GFPI. He held that it would be completely inequitable for GFPI to be able to take advantage of its own breach in failing to deliver the document by contending (or having TD contend) that this failure meant that GFPI's trust obligation to Peter Sr. did not arise.

Endorsement of Newbould J., paras. 36-37.

32. Newbould J. also found as a fact that TD understood at the outset that the Sold 2009 Refund, when received by GFPI, was to be held in trust for Peter Sr. and that TD would provide a discharge of its security at that time. As such, an order directing GFPI to deliver a transfer of the Sold 2009 Refund to Peter Sr. would not amount to a preference. It would simply effect delivery to Peter Sr. of an asset which rightfully belonged to him, not the company, all of which was known to and approved by TD at the outset.

Endorsement of Newbould J., paras. 34, 45.

33. Under Newbould J.'s decision, Peter Sr. was deemed to have received and entitled to receive a transfer document from GFPI under s. 5.02 of the Agreement effective January 2, 2009.

Endorsement of Newbould J., para. 48.

Events Subsequent to Justice Newbould's Ruling

34. On October 27, 2009, TD brought a motion before MacPherson J.A. seeking a stay of Newbould J.'s Order pending the current motion for leave to appeal. TD did not seek to stay the delivery of the 2009 Transfer. MacPherson J.A. dismissed the motion, holding that irreparable harm had not been demonstrated.

Endorsement of Justice MacPherson, October 27, 2009.

35. On October 28, 2009, following advance notice to TD and its solicitors, GFPI delivered the 2009 Transfer to Peter Sr., foreclosing any possible argument that the express trust under the Agreement had not yet arisen.

Affidavit of Heather Lynn Giesler, sworn November 16, 2009.

PART III - ARGUMENT

Test for Leave to Appeal in CCAA Proceedings

36. Canadian Courts have consistently held that, in the context of CCAA proceedings, leave to appeal should be granted sparingly, and only where the reviewing Court is satisfied that 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 seeking leave 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 Country Style Food Services Inc. **(2002), 158 O.A.C. 30 at paras. 16-19.**

Re Calpine Canada Energy Ltd. **(2007), 80 Alta. L.R. (4th) 60 at para. 13 (C.A.) [*Re Calpine*].**

37. In light of MacPherson J.A.'s order expediting the motion for leave to appeal, it cannot be said that the appeal will unduly hinder the progress of the CCAA proceeding. However, the proposed appeal fails to satisfy any of the other three elements of the CCAA leave to appeal test.

Endorsement of Justice MacPherson, October 27, 2009.

The Point on Appeal is Not of Significance to the Practice

38. Where a proposed appeal is of no general importance and the issue is particular to the 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*].**

39. The Agreement that is the subject of the proposed appeal is very particular to the facts of this case. It was drafted to assist GFPI with immediate cash-flow while ensuring that Peter Sr. was entitled to receive the purchased portions when the 2008 and 2009 tax refunds were paid by the government. The Agreement was structured with specific contractual language (some of which was proposed and insisted upon by TD) in order to comply with the requirements of GFPI's Lien Credit Agreements.

40. The Agreement provided for the creation of an express trust in Peter Sr.'s favour in respect of both the Sold 2008 and 2009 Refunds:

> Section 5.05 <u>Sold 2008 Refund Held in Trust by Vendor</u>
>
> The Vendor shall hold in trust for the Purchaser, keep segregated from any other funds, accounts or assets of the Vendor and pay to the Purchaser any amount of the Sold 2008 Refund received by the Vendor after the completion of the 2008 Closing.
>
> Section 5.06 <u>Sold 2009 Refund Held in Trust by Vendor</u>
>
> The Vendor shall hold in trust for the Purchaser, keep segregated from any other funds, accounts or assets of the Vendor and pay to the Purchaser any amount of the Sold 2009 Refund received by the Vendor after the completion of the 2009 Closing.

41. The only difference between the two provisions is the date of closing; the reason for that difference was the Lien Credit Agreements. Had these agreements not limited GFPI to asset sales of US$10 million per calendar year, it would have been necessary to include two closing dates. As expressly found as a fact by Newbould J., the inclusion of two closing dates was a simple mechanism to address the particular structure of the Lien Credit Agreements.

Agreement, Sections 5.05, 5.06.

42. TD contends that the Agreement was in substance an unsecured loan by Peter Sr. to GFPI. However, as noted above, Newbould J. found as a fact that internal TD correspondence revealed that TD was fully aware that the structure of the Agreement was a purchase and sale transaction giving rise to an express trust in favour of Peter Sr. To now contend otherwise with a view to including the Sold 2009 Refund in the pool of assets available to secured creditors (including TD) belies the evidence and the findings of fact of Newbould J.

Endorsement of Newbould J., paras. 20-21, 34.

43. The relevant parties (including TD) knew from the outset that the Agreement was not an unsecured loan, but rather a purchase and sale agreement giving rise to an obligation on GFPI's part to hold the Sold 2008 and 2009 Refunds in trust for Peter Sr. This is not a case in which the Court has provided a "blueprint" for future cases. The Agreement is clear on its face and TD, given its intimate involvement in the development of the Agreement, can hardly complain that the Court gave effect to the express trust in the Agreement.

44. There is nothing novel about this case. The point on appeal is not of any significance to the practice, nor is it of general importance.

The Proposed Appeal is not *Prima Facie* Meritorious

A. The 2009 Transfer has now been Delivered

45. The central thrust of TD's position before Newbould J., and now before this Court, was that the express trust in favour of Peter Sr. did not arise under the Agreement until the 2009 Transfer was delivered, and that in the absence of such delivery there was no trust. The 2009 Transfer was delivered by GFPI to Peter Sr. on October 28, 2009. Even on TD's proposed interpretation of the Agreement, the

2009 Closing occurred upon that delivery, and GFPI was from that point obliged under the Agreement to hold the Sold 2009 Refund in trust for Peter Sr.

46. Given that the principal substratum of the proposed appeal has now disappeared, the appeal cannot be viewed as *prima facie* meritorious. Events have essentially overtaken the appeal.

***Re Canadian Airlines Corp.* (2000), 84 Alta. L.R. (3d) 52 at paras. 31-32 (C.A.).**

B. The Standard of Review is Palpable and Overriding Error

47. In any event, having regard to the decision of Newbould J., which is heavily fact-based and very specific to the particular circumstances, it is submitted that the proposed appeal is not *prima facie* meritorious.

48. In considering this issue, it is necessary to consider the standard of review the Court would apply if leave were granted. Appellate courts must accord a high degree of deference to the decisions made by the supervising judge, and should exercise their powers sparingly when asked to interfere with the exercise of discretion of a CCAA court. This is all the more true when the proposed appellant would have to overcome significant findings of fact or mixed fact and law.

***Re Calpine, supra* at paras. 14 and 15.**

49. The factual matrix surrounding the Agreement was very important in this case, and Newbould J. made a number of significant findings in this regard. As noted above, the sole reason that the tax refund arrangement was divided into two parts (March 2008 and January 2009) was, at the insistence of TD itself, to ensure that the Agreement was on-side the Lien Credit Agreements, which prohibited sales of assets of more than $10 million per calendar year. Were it not for that, both the Sold 2008 and

2009 Refunds would have been purchased by Peter Sr. on March 31, 2008, and there would have never been a dispute as to whether the trust arose and Peter Sr. was entitled to receive the Sold 2009 Refund.

50. TD submits that the standard of review in this case should be correctness. That is not the case, however. Newbould J.'s decision is principally based on findings of fact. Moreover, even those aspects of the decision that could be characterized as matters of mixed fact and law fall toward the more particular end of the spectrum where facts dominate and the palpable and overriding error standard applies:

> "*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.*"
>
> ***Bell Canada v. The Plan Group*, 2009 ONCA 548 at paras. 26-27.**

51. The matter before the Court is one in which the facts are inextricably intertwined with the legal principles. It is submitted that the proposed appellant has failed to establish that Newbould J.'s decision is clearly wrong or that it has worked a substantial injustice. The proposed appeal is not *prima facie* meritorious.

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

The Appeal is Not of Significance to this CCAA Proceeding

52. As Newbould J. found, TD knew from the outset (March 2008) that the Sold Refunds would be held in trust for Peter Sr. and not form part of GFPI's assets. TD's own internal documents reflect this, and the Agreement itself so provides. The asset is not part of the restructuring.

> **Endorsement of Newbould J., para. 46 and footnote 3.**

53. Moreover, the asset in question (the Sold 2009 Refund) would represent a tiny fraction of the assets in issue in the restructuring and almost certainly would have no material impact on the

restructuring. As noted by Newbould J., GFPI has significant available cash in the bank. As Newbould J. also found, TD and other members of the first and second banking syndicate would likely lay claim to the asset if it were in the hands of GFPI, to satisfy the first and second lien loans, and there will likely be no recovery for unsecured creditors in any event.

Endorsement of Newbould J., para. 46 and footnote 3.

The Monitor's Intervention is Inappropriate

54. GFPI has taken no position on the motion below or on this leave motion. This is notable, as GFPI and not TD is the signatory to the Agreement. On the motion before Newbould J., the Monitor did not file material or a factum, and when asked by Newbould J. if it was taking a position, the Monitor indicated (to the surprise of Peter Sr.) that it "slightly supported" the position of TD. Now, on the leave motion, the Monitor has filed a factum supporting leave being granted.

55. The dispute before Newbould J. was a dispute between Peter Sr. and TD. Although served, no other creditor or stakeholder filed material or appeared before Newbould J. to take a position. The Monitor equally should have refrained from injecting itself into a dispute between two represented parties. Canadian Courts have consistently held that the monitor is an impartial officer of the court. One commentator has noted that: "even if the monitor retains legal expertise, its role is not to become the advocate of the debtor corporation or any other party."

***Re Laidlaw Inc.* (2002), 34 C.B.R. (4th) 72 at para. 2 (Ont. S.C.J.).**

Janis Sarra, *Rescue: The Companies' Creditors Arrangement Act* (Toronto: Thomson Carswell, 2007) at 266.

56. As an impartial officer of the court, the Monitor's intervention in this dispute between TD and Peter Sr. is inappropriate.

57. In any event, the Monitor's position appears to be centred on whether the transaction might be reviewable under the *BIA*, a question which is plainly not in issue.

Summary

58. It is submitted that TD has not satisfied the test for granting leave to appeal in a CCAA proceeding. The point on appeal is neither of any significance to the practice nor of general importance, and is not of significance to this CCAA proceeding. Moreover, as a result of the delivery of the 2009 Transfer from GFPI to Peter Sr., events have largely overtaken the proposed appeal. In any event, TD has failed to establish that Newbould J.'s decision is based upon any palpable and overriding error.

PART IV - RELIEF SOUGHT

59. Peter Sr. therefore respectfully requests that the Court make:

(1) An order dismissing the motion for leave to appeal 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 16th day of November, 2009.

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

Schedule A
List of Authorities

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

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

3. *Re Repap British Columbia Inc.* (1998), 9 C.B.R. (4^{th}) 82 (B.C.C.A.)

4. *Re Canadian Airlines Corp.* (2000), 84 Alta. L.R. (3d) 52 (C.A.)

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

6. *Re Laidlaw Inc.* (2002), 34 C.B.R. (4^{th}) 72 (Ont. S.C.J.)

7. Janis Sarra, *Rescue: The Companies' Creditors Arrangement Act* (Toronto: Thomson Carswell, 2007)

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

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.

IN THE MATTER OF THE *COMPANIES CREDITORS ARRANGEMENT ACT*, R.S.C. 1986, 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")

Court File No. M38119

COURT OF APPEAL FOR ONTARIO

FACTUM
OF PETER J. GRANT SR.
(Re: Motion for Leave to Appeal the Order of Newbould J. dated October 13, 2009)

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