Court File No.

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

MOTION RECORD
(Returnable October 27, 2009)

McCarthy Tétrault LLP
Suite 5300, Toronto Dominion Bank Tower
Toronto ON M5K 1E6

Geoff R. Hall LSUC# 34701O
Tel. 416 601-7856
Fax: 416 868-0673

Lawyers for The Toronto-Dominion Bank

TO: **Fraser Milner Casgrain LLP**
P.O. Box 100
1 First Canadian Place
100 King Street West
Toronto ON M5X 1B2

Jane Dietrich
Tel: 416 863-4511
Fax: 416 863-4592

Lawyers for the Applicants

AND TO:

Bennett Jones LLP
Suite 3400
One First Canadian Place
P.O. Box 130
Toronto ON M5X 1A4

Richard B. Swan
Tel: 416 777-7479
Fax: 416 863-1716

Lawyers for Peter Grant Sr.

AND TO:

Stikeman Elliott LLP
Commerce Court West
199 Bay Street
Suite 5300
Toronto ON M5L 1B9

Sean F. Dunphy
Tel: 416 869-5662
Fax: 416 947-0866

Lawyers for the Monitor

Index

Court File No.

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

INDEX

TAB 1

Court File No. CV-09-8247-00CL

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

NOTICE OF MOTION

(motion for stay pending motion for leave to appeal, returnable October 27, 2009)

THE TORONTO-DOMINION BANK ("TD") will make a motion to a single judge of the Court of Appeal on Tuesday, October 27, 2009, at 10:00 a.m., or as soon after that time as the motion can be heard, at Osgoode Hall, Toronto.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THE MOTION IS FOR:

1. if necessary, an order abridging the time for service of this notice of motion and the motion record, such that the motion is properly returnable on October 27, 2009;

2. an order staying the order of the Honourable Justice Newbould dated October 13, 2009 until the disposition of TD's motion for leave to appeal or, if leave to appeal is granted, until the disposition of the appeal;

3. an order:

   (i) directing that the motion for leave to appeal be heard orally and together with argument of the appeal itself should leave be granted, on a date to be fixed by the court but no later than November 30, 2009; or

   (ii) in the alternative, an order expediting TD's motion for leave to appeal and, if leave is granted, the appeal itself, along with an order setting a timetable for these steps;

4. costs of this motion; and

5. such further and other relief as this Honourable Court considers just.

THE GROUNDS FOR THE MOTION ARE:

GFPI and its CCAA proceedings

1. Grant Forest Products Inc. ("GFPI") is in the lumber business. It is ultimately owned by the responding party Peter Grant Sr. On June 25, 2009, GFPI filed for and obtained protection from its creditors under the *Companies' Creditors Arrangement Act* (the "CCAA"). The CCAA proceedings are ongoing.

2. At present, the stay of proceedings under the CCAA has been extended to December 1, 2009, primarily in order to allow a process for the marketing of GPFI's assets to be advanced.

Mr. Grant's motion

3. On October 5, 2009, Mr. Grant brought a motion before the Honourable Justice Newbould for an order in connection with an agreement (the "Tax Refund Agreement") under which he agreed to purchase from GFPI $20 million U.S. in tax refunds to become due from the Canada Revenue Agency (the "CRA") to GFPI in 2008 and 2009. The Toronto-Dominion Bank ("TD") opposed the motion. TD is agent for a lending syndicate which holds first ranking security over the assets of GFPI.

4. On October 13, 2009, Justice Newbould issued an endorsement granting Mr. Grant the relief that he was seeking. Specifically, Justice Newbould held that:

(a) pursuant to the Tax Refund Agreement, Mr. Grant has acquired full right, title and interest in the tax refunds which are owing by the CRA to GFPI in 2009; and

(b) if GFPI receives a 2009 tax refund, the first $10 million U.S. will be received in trust for Mr. Grant and GFPI will be obliged to pay it forthwith to Mr. Grant.

Procedural context

5. As an order made in a CCAA proceeding, pursuant to section 13 of the CCAA an appeal of Justice Newbould's order lies to this court but only with leave. There is no stay of Justice Newbould's order pending a motion for leave to appeal. Moreover, since Justice Newbould's

order is not an "order for the payment of money", there would be no automatic stay pursuant to Rule 63.01 of the *Rules of Civil Procedure* even if leave to appeal had already been granted and a notice of appeal had already been delivered.

Subsequent developments giving rise to the need for this motion

6. TD wishes to seek leave to appeal Justice Newbould's order to this court. It has served a notice of motion for leave to appeal.

7. On Friday, October 16, 2009 (three days after the issuance of Justice Newbould's endorsement) at 2:28 p.m., Kevin McElcheran of McCarthy Tétrault LLP, counsel for TD, received an e-mail from Sean Dunphy of Stikeman Elliott LLP, counsel for the Monitor. Mr. Dunphy advised as follows:

> "[W]e are advised that one of the tax refunds (approx $1.4mm) has arrived. The Company is in the process of endorsing over to P. Grant Sr. The Monitor has asked the company to hold off for 48hrs (till close on Tuesday) to give you a fair chance to seek a stay if so advised. We were not aware the receipt of refunds was this imminent, so there would appear to be less time to consider your course of action than you may have expected. Please let us know as soon as you can what your intentions are."

8. Accordingly, unless the order of Justice Newbould is stayed, GFPI will be obligated to pay to Mr. Grant the $1.4 million tax refund which it has received.

Serious issues

9. The issues raised in its notice of motion for leave to appeal raise serious issues for consideration by this court, for the reasons set out in that notice of motion.

Irreparable harm

10. There will be irreparable harm unless Justice Newbould's order is stayed.

11. GFPI is in dire financial straits and needs all the cash to which it is entitled. If Justice Newbould's order is not stayed, GFPI will be required immediately to pay over to Mr. Grant approximately $1.4 million which it needs for its restructuring and to pay to Mr. Grant additional tax refunds as they are received to a total of $10 million plus interest.

12. According to cash flow projections provided by GFPI to T-D as agent for the First Lien Lenders of GFPI, it needs the 2009 refunds in its operations and to continue its business.

13. Moreover, Mr. Grant is the ultimate shareholder of GFPI, along with a family trust. GFPI's financial distress may have caused financial distress to Mr. Grant personally, such that he may be unable to repay tax refunds which are paid over to him if this court ultimately determines that he is not entitled to them.

Balance of convenience

14. TD is willing to expedite this motion for leave to appeal, and the appeal itself if leave to appeal is granted. GFPI's current stay of proceedings is in place until December 1, 2009 in order to permit a process for the marketing of GFPI's assets to unfold. Subject to the availability of time in this court, the leave motion and, if leave is granted, the appeal itself can be dealt with prior to December 1, 2009, which means that the proceedings in this court will not interfere in any way with the ongoing restructuring.

Expediting the motion for leave to appeal and the appeal

15. In situations of urgency in insolvency proceedings, where a real-time disposition is required by this court, it is common practice either to order that a motion for leave to appeal be heard orally and together with the appeal itself if leave is granted, or to order that a motion for leave to appeal be expedited. Given the urgent nature of this motion and the implications for GFPI's restructuring if it is not dealt with expeditiously, such an order is appropriate in this case.

Rules and other grounds relied upon

16. TD relies on Rules 3.02, 61.03.1(14)(b) and 63.02 of the *Rules of Civil Procedure*.

17. TD also relies on such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE USED at the hearing of the motion:

1. the Affidavit of William O'Connor, sworn October 20, 2009; and

2. such further and other materials as counsel may advise and this Honourable Court may permit.

October 20, 2009

McCarthy Tétrault LLP
Suite 5300, Toronto Dominion Bank Tower
Toronto ON M5K 1E6

Geoff R. Hall LSUC# 34701O
Tel. 416 601-7856
Fax: 416 868-0673

Lawyers for The Toronto-Dominion Bank

TO: **Fraser Milner Casgrain LLP**
P.O. Box 100
1 First Canadian Place
100 King Street West
Toronto ON M5X 1B2

Jane Dietrich
Tel: 416 863-4511
Fax: 416 863-4592

Lawyers for the Applicants

AND TO: **Bennett Jones LLP**
Suite 3400
One First Canadian Place
P.O. Box 130
Toronto ON M5X 1A4

Richard B. Swan
Tel: 416 777-7479
Fax: 416 863-1716

Lawyers for Peter Grant Sr.

AND TO: **Stikeman Elliott LLP**
Commerce Court West
199 Bay Street
Suite 5300
Toronto ON M5L 1B9

Sean F. Dunphy
Tel: 416 869-5662
Fax: 416 947-0866

Lawyers for the Monitor

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.

Court File No.

COURT OF APPEAL FOR ONTARIO

NOTICE OF MOTION

McCarthy Tétrault LLP
Suite 5300, Toronto Dominion Bank Tower
Toronto ON M5K 1E6

Geoff R. Hall LSUC# 34701O
Tel. 416 601-7856
Fax: 416 868-0673

Lawyers for The Toronto-Dominion Bank

#749298 v.2

TAB 2

Court File No. CV-09-8247-00CL

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

AFFIDAVIT OF WILLIAM O'CONNOR

I, William O'Connor, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

Introduction

1. I am a Vice-President and Director of TD Securities, a division of The Toronto-Dominion Bank ("TD" or the "Agent"). As such, I have personal knowledge of the matters to which I depose in this affidavit. Where facts stated in this affidavit are not based on my personal knowledge, I have stated the source of my information and in all such cases, I verily believe such facts to be true.

GFPI's CCAA proceedings

2. Grant Forest Products Inc. ("GFPI") is in the lumber business. It is ultimately owned by the responding party Peter Grant Sr. On June 25, 2009, GFPI filed for and obtained protection

from its creditors under the *Companies' Creditors Arrangement Act* (the "CCAA"). The CCAA proceedings are ongoing.

3. At present, the stay of proceedings under the CCAA has been extended to December 1, 2009, primarily in order to allow a process for the marketing of GPFI's assets to be advanced. A copy of the order of Justice Newbould dated October 13, 2009 extending the stay to December 1, 2009 is attached as Exhibit "A". A copy of the most recent report of the monitor, Ernst & Young Inc. (the "Monitor"), which was used to obtain the stay extension order and which sets out the status of the CCAA proceedings, is attached as Exhibit "B".

The motion

4. On October 5, 2009, Mr. Grant brought the motion which now gives rise to these proceedings. He moved before the Honourable Justice Newbould for an order in connection with an agreement under which he agreed to purchase from GFPI $10 million U.S. in tax refunds due from the Canada Revenue Agency (the "CRA") to GFPI in 2009. TD opposed the motion. TD is agent for a lending syndicate which holds first ranking security over the assets of GFPI.

5. On October 13, 2009, Justice Newbould issued an endorsement granting Mr. Grant the relief that he was seeking. A copy of Justice Newbould's endorsement is attached as Exhibit "C".

6. Specifically, Justice Newbould held that pursuant to the relevant contract, Mr. Grant has acquired full right, title and interest in the tax refunds which are owing by the CRA to GFPI in 2009, and held that if GFPI receives the 2009 tax refund it will be received in trust for Mr. Grant

and GFPI will be obliged to pay it forthwith to Mr. Grant. TD asserts that the ruling of Justice Newbould is contrary to the express provisions of the Agreement under which Mr. Grant agreed to purchase the 2009 tax refunds.

Subsequent developments giving rise to the need for this motion

7. TD wishes to seek leave to appeal Justice Newbould's order to this court. It has served a notice of motion for leave to appeal. A copy is attached as Exhibit "D".

8. On Friday, October 16, 2009 (three days after the issuance of Justice Newbould's endorsement) at 2:28 p.m., Kevin McElcheran of McCarthy Tétrault LLP, counsel for TD, received an e-mail from Sean Dunphy of Stikeman Elliott LLP, counsel for the Monitor. Mr. Dunphy advised as follows:

> "[W]e are advised that one of the tax refunds (approx $1.4mm) has arrived. The Company is in the process of endorsing over to P. Grant Sr. The Monitor has asked the company to hold off for 48hrs (till close on Tuesday) to give you a fair chance to seek a stay if so advised. We were not aware the receipt of refunds was this imminent, so there would appear to be less time to consider your course of action than you may have expected. Please let us know as soon as you can what your intentions are."

A copy of Mr. Dunphy's e-mail is attached as Exhibit "E".

9. Accordingly, TD is bringing this motion, on an urgent basis, for a stay of Justice Newbould's order until the disposition of this motion for leave to appeal and, if leave is granted, until the disposition of the appeal in this court.

Serious issues

10. TD believes that the issues raised in its notice of motion for leave to appeal raise serious issues for consideration by this court.

Irreparable harm

11. GFPI is in dire financial straits and needs all the cash to which it is entitled. If Justice Newbould's order is not stayed, GFPI will be required to pay over to Mr. Grant approximately $1.4 million which it needs for its restructuring.

12. The cash flow forecasts provided to TD prior to the filing of CCAA proceedings by GFPI indicate that GFPI needs the 2009 tax returns to continue its operations and the payment to Mr. Grant of the 2009 tax refunds may jeopardize the restructuring of GFPI. If the 2009 refunds are paid to Mr. Grant, any delay in their return may jeopardize the restructuring of GFPI's business.

13. Moreover, I understand that Mr. Grant is the ultimate shareholder of GFPI, along with a family trust. TD is concerned that GFPI's financial distress may have caused financial distress to Mr. Grant personally, such that he may be unable to repay tax refunds which are paid over to him if this court ultimately determines that he is not entitled to them.

Balance of convenience

14. TD is willing to expedite this motion for leave to appeal, and the appeal itself if leave to appeal is granted. GFPI's current stay of proceedings is in place until December 1, 2009 in order to permit a process for the marketing of GFPI's assets to unfold. Subject to the availability of

time in this court, the leave motion and, if leave is granted, the appeal itself can be dealt with prior to December 1, 2009, which means that the proceedings in this court will not interfere in any way with the ongoing restructuring.

SWORN before me at the City of Toronto, in the Province of Ontario this 20th day of October, 2009.	)))))))	
A Commissioner/Notary Public		William O'Connor

TAB A

Court File No. CV-09-8247-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	TUESDAY, THE 13TH DAY OF
	)	
JUSTICE NEWBOULD	)	OCTOBER, 2009

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")

ORDER

THIS MOTION, made by the Applicants, for an order in the form attached as schedule "A" to the notice of motion of the Applicant dated October 6, 2009 (the "**Notice of Motion**") *inter alia*: (i) abridging and validating the timing and method of service of this Motion Record so that the Motion is properly returnable; (ii) extending until December 1, 2009 the Stay Period, as defined by the Order of the Honourable Mr. Justice Newbould in these proceedings made on June 25, 2009 (the "**Initial Order**"); and (iii) approving the fourth report of Ernst & Young Inc. dated October 8, 2009 (the "**Fourth Report**") in its capacity as court-appointed Monitor of the Applicants (the "**Monitor**"), was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Hap Stephen sworn October 6, 2009, the Fourth Report of the Monitor and the appendices thereto and on hearing the submissions of counsel for the Applicants, the Monitor, ~~The Toronto-Dominion Bank, as agent for the first lien lenders,~~ the independent directors of Grant Forest Products Inc., Peter Grant Sr., JWS

This is Exhibit "A" referred to in the affidavit of William O'Connor sworn before me, this 20th day of October 2009

A COMMISSIONER FOR TAKING AFFIDAVITS

7360499_5.DOC

and no one else appearing although duly served as appears from the affidavit of service of Stephanie Waugh sworn October 6, 2009;

Service

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged so that this motion is properly returnable today and hereby dispenses with further service thereof.

Approval of Monitor's Activities

2. **THIS COURT ORDERS** that the Fourth Report of the Monitor and the activities of the Monitor as set out therein, be and are hereby approved.

Extension of Stay of Proceedings

3. **THIS COURT ORDERS** that the "Stay Period" as defined in paragraph 21 of the Initial Order, be and is hereby extended to December 1, 2009, subject to the terms of this Order.

J.

ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO
LE / DANS LE REGISTRE NO

OCT 13 2009

PER / PAR

Court File No: CV-09-8247-00CL

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")

ONTARIO

SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

ORDER

(October 13, 2009)

FRASER MILNER CASGRAIN LLP
1 First Canadian Place
100 King Street West,
Toronto, Ontario
M5X 1B2

Lawyer: Daniel R. Dowdall / Jane Dietrich
LSUC: 16737D / 49302U
Email: dan.dowdall@fmc-law.com
jane.dietrich@fmc-law.com
Telephone: 416 863-4700 / 416-863-4467
Facsimile: 416 863-4592

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

7360499_5.DOC

TAB B

Court File No.: CV-09-824700CL

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

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

FOURTH REPORT OF THE MONITOR DATED OCTOBER 8, 2009

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

Sean Dunphy LSUC#: 24941J
Tel: (416) 869-5662
Kathy Mah LSUC#51077W
Tel: (416) 869-5652
Fax: (416) 947-0866

Solicitors for the Monitor, Ernst & Young Inc.

This is Exhibit "B" referred to in the affidavit of William O'Connor sworn before me, this 23rd day of October 20 09

A COMMISSIONER FOR TAKING AFFIDAVITS

5565862 v1

Court File No.: CV-09-824700CL

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

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

FOURTH REPORT OF THE MONITOR DATED OCTOBER 8, 2009

INTRODUCTION

1. On June 25, 2009, Grant Forest Products Inc. ("**GFPI**"), Grant Alberta Inc. ("**GAI**"), Grant Forest Products Sales Inc. ("**GFPSI**") and Grant U.S. Holdings GP ("**U.S. Holdings**") (collectively "**Grant**" or the "**Applicants**") filed for and obtained protection under the *Companies' Creditors Arrangement Act* ("**CCAA**") in order to restructure the business and affairs of the Applicants. Pursuant to the Order of this Honourable Court dated June 25, 2009 (the "**Initial Order**"), Ernst & Young Inc. ("**EYI**") was appointed as the Monitor of the Applicants (the "**Monitor**") in the CCAA proceeding. The Initial Order provided for a stay of proceedings through to July 24, 2009. The stay of proceedings was subsequently extended to October 15, 2009 (the "**Stay Period**") pursuant to an Order of this Honourable Court dated July 24, 2009.

PURPOSE

2. The purpose of this Fourth Report of the Monitor (the "**Fourth Report**") is to report to this Honourable Court with respect to:

a. the status of the marketing process as described in the Initial Order (the "**Marketing Process**");

b. actual receipts and disbursements of the Applicants from July 13, 2009 to September 27, 2009 as well as the Applicants' revised cash flow projection from September 28, 2009 to December 6, 2009;

c. the motion by the Applicants to extend the stay period to December 1, 2009; and

d. the Applicants' motion to approve this Fourth Report and the conduct and activities of the Monitor as presented in this Fourth Report

TERMS OF REFERENCE

3. In preparing this Report, the Monitor has been provided with and in making the comments herein relied upon unaudited financial information, the Applicants' books and records, financial information prepared by the Applicants and discussions with management of the Applicants. The Monitor has not audited, reviewed or otherwise attempted to verify the accuracy or completeness of such information and, accordingly, the Monitor expresses no opinion or other form of assurance in respect of such information contained in this Fourth Report. Some of the information referred to in this Fourth Report consists of forecasts and projections. An examination or review of the financial forecast and projections, as outlined in the Canadian Institute of Chartered Accountants (**"CICA"**) Handbook, has not been performed. Future oriented financial information referred to in this report was prepared based on management's estimates and assumptions. Readers are cautioned that since projections are based upon assumptions about future events and conditions that are not ascertainable, the actual results will vary from the projections, even if the assumptions materialize, and the variations could be significant.

4. Unless otherwise stated all monetary amounts contained herein are expressed in U.S. Dollars.

5. Capitalized terms not defined in this Report are defined in the Initial Order or previous Reports of the Monitor.

BACKGROUND

6. GFPI and certain of its subsidiaries are privately owned corporations carrying on an Oriented Strand Board ("**OSB**") manufacturing business from facilities located in Canada and the U.S. OSB is an engineered, mat-formed panel product made of strands, flakes or wafers sliced from logs and bonded with an exterior-type binder under heat and pressure. The most common uses are sheathing in walls, floors and roofs in the construction of buildings and residential housing.

7. The Applicants and certain of their subsidiaries or other related parties, namely Southeast Properties LLC, Grant Newco LLC, Grant Clarendon LP, Grant Allendale LP, Grant Excluded FP, Grant U.S. Sales Inc. and Footner Forest Products Ltd. ("**Footner**") (collectively, the "**Subsidiaries**"), have a total annual capacity to produce 3.7 billion square feet of OSB, which makes them the third largest OSB manufacturer in North America.

8. The Applicants and the Subsidiaries have interests in three mills in Canada located at Englehart and Timmins in Ontario and High Level in Alberta. The Applicants and their Subsidiaries also have interests in the Allendale and Clarendon mills located in South Carolina in the United States. The mills located in Englehart and Timmins in Ontario are owned by GFPI and, as such, they are included in Grant's CCAA proceedings. GFPI also has a 50% interest in a mill located at High Level in Alberta. This mill is held by Footner as bare trustee and GFPI owns 50% of the shares of Footner. The Allendale and Clarendon mills in South Carolina are owned by Grant Allendale LP and Grant Clarendon LP respectively, which are 99.9% owned by Southeast Properties LLC, but these mills are indirectly owned by GFPI.

9. As a result of the present market conditions and the reduced demand for OSB and other wood products, only the OSB mills located in Englehart, Ontario and

Allendale, South Carolina, are presently operating. Both the mill in Timmins, Ontario and the mill in High Level, Alberta are idle. The mill in Clarendon, South Carolina is a new mill which is substantially complete but has not yet been put into production.

10. On June 25, 2009, this Honourable Court issued the Initial Order which, among other things, approved the continuation of the engagement of Stonecrest Capital Inc. ("**Stonecrest**") as Chief Restructuring Advisor (the "**CRA**") with services to be provided by Hap Stephen and Sandra Rosch.

STATUS OF THE MARKETING PROCESS

11. The Initial Order provided for the immediate commencement of the Marketing Process in accordance with the protocol attached as Appendix "A" to the Initial Order (the "**Investment Offering Protocol**") to provide interested parties with the opportunity to offer to purchase the business and operations of the Applicants and their Subsidiaries as a going concern or offer to sponsor a plan of arrangement of the Applicants, or any of them.

12. As set out in the Second Report, paragraph 18 of the Initial Order and the Investment Offering Protocol authorized and directed the Applicants to engage an investment offering advisor (the "**Investment Offering Advisor**"), subject to the approval of the Monitor and the Toronto-Dominion Bank, the Agent of the First Lien Lenders (the "**Agent**"), to assist in connection with the conduct of the Marketing Process. Subsequent to the issuance of the Initial Order, the Applicants requested that the Monitor undertake the role of the Investment Offering Advisor. The Agent was also in concurrence with the Monitor fulfilling the Investment Offering Advisor role.

13. As set out in the Second Report, further to the appointment of the Monitor as the Investment Offering Advisor, Grant, the CRA and the Monitor have collectively taken the following steps:

    a. Prepared a two page overview of the Applicants' business and operations (the "**Teaser**") and a non-disclosure agreement (the "**NDA**") to be executed by interested parties who plan to participate in the Marketing Process;

b. Set up a data room including materials relevant for assessing the business and operations of the Applicants;

c. Compiled a list of potential interested parties including parties that expressed an interest in Grant's operations prior to the CCAA proceedings and other parties whose interest is known to Grant, the Monitor or the Investment Offering Advisor. The Monitor also requested the Agent and the second lien agent for names to be added to the list of interested parties;

d. Contacted a significant number of potential interested parties by phone and distributed the Teaser and the NDA to these interested parties (or a waiver with respect to a condition in certain NDAs previously executed by interested parties);

e. Negotiated NDAs as required and finalized the bid protocol letter and the expression of interest letter; and

f. Updated Grant's management presentation and presented it to the interested parties who have executed NDAs.

14. At the end of Phase 1 on July 31, 2009, Grant received certain expressions of interest from interested parties. Pursuant to the Initial Order, these expressions of interest were evaluated by the Investment Offering Advisor, the CRA and the Monitor in consultation with an independent committee of the Board of Directors of Grant (the "**Independent Committee**"), and the Agent. Based on the evaluation, a short list of interested parties were invited to Phase II to conduct further due diligence. The Monitor also informed a member of the second lien lenders as to how many parties were being invited into Phase II.

15. During Phase II, interested parties were provided access to Grant's facilities and permitted to conduct further due diligence. The Investment Offering Advisor attended each facility visit and facilitated the due diligence process with the CRA and with the assistance of Grant's management. The Investment Offering Advisor and the CRA also facilitated one on one meetings with each potential bidder and Grant's management.

16. Interested parties initially had until August 30, 2009 to submit revised proposals to the Investment Offering Advisor. In accordance with the Initial Order, this date was subsequently extended to September 11, 2009 by Grant with the consent of the Monitor and the Agent.

17. In accordance with the Initial Order, Grant further extended the date for certain interested parties to complete their due diligence and submit revised proposals to October 2, 2009 and extended the date to file a plan of arrangement and submit the plan to affected creditors or complete an asset purchase agreement and submit the same to the Court for approval, to October 30, 2009. This amendment was consented to by the Monitor and the Agent.

18. The CRA and the Monitor are collectively evaluating the revised proposals received and will review the proposals with the Independent Committee, and in consultation with the Agent and the second lien agent, will select a bidder to proceed to Phase III. The analysis and results of the Marketing Process will be reported to this Honourable Court in the near future.

ACTUAL CASH RECEIPTS AND DISBURSEMENTS

19. A summary of the actual receipts and disbursements as compared to the projection set out in the Second Report, is attached as Appendix "A" to this Fourth Report.

20. The Applicants' actual consolidated net cash inflow for the period from July 13, 2009 to September 27, 2009 was $1.8 million. The actual net cash inflow was higher than projected by approximately $2.2 million primarily as a result of higher than anticipated sales and a stronger Canadian dollar as compared to the

exchange rate used in the projection. Grant has ramped up its production since the commencement of the CCAA proceedings to meet the higher demand for its product.

UPDATED CASH FLOW PROJECTION

21. Grant, with the assistance of the Monitor, had prepared a cash flow projection for the period from September 28, 2009 to December 6, 2009, (the "**Cash Flow Forecast**") a copy of which is attached as Appendix "B" to this Fourth Report.

22. The Cash Flow Forecast attached to this Fourth Report reflects receipts and disbursements to be received or paid over the projection period in U.S. dollars.

23. The Applicants are projecting a net cash outflow of approximately $2.4 million during the projection period prior to transfers of funds to Footner and Grant's U.S. affiliates.

24. During the projection period, Grant estimates that the Applicants will not be required to transfer funds to its U.S. affiliates and will be required to transfer approximately $0.3 million to Footner. Such transfers to these affiliates preserve Grant's interests in these operations.

25. The Cash Flow Forecast projects that the Applicants will have sufficient liquidity to operate during the proposed stay period as discussed further in this Fourth Report.

STAY EXTENSION

26. The current stay of proceedings under the Initial Order expires on October 15, 2009. The Applicants are seeking an extension of the stay period to December 1, 2009 in order to permit them time to undertake the Marketing Process as set out in the Investment Offering Protocol, undertake the Non-Core Asset Sale Process and continue discussions with their key stakeholders regarding its restructuring alternatives.

27. The updated cash flows described earlier in this Fourth Report which cover the period from September 28, 2009 to December 6, 2009 indicate that the Applicants will have sufficient liquidity to sustain ordinary course operations during the projection period.

28. It is the Monitor's view that the Applicants have acted in accordance with the Initial Order and are working on the Marketing Process diligently. Accordingly, the Monitor is satisfied that the Applicants are acting in good faith and with due diligence.

RECOMMENDATIONS

29. The Applicants are seeking this Honourable Court's authorization for the following:

   a. an extension of the stay of proceedings to December 1, 2009; and

   b. approving the Fourth Report and the conduct and activities of the Monitor as presented in the Fourth Report.

All of which is respectfully submitted this 8th day of October, 2009.

ERNST & YOUNG INC.
in its capacity as the Monitor of
Grant Forest Products Inc.,
Grant Alberta Inc.,
Grant Forest Products Sales Inc., and
Grant U.S. Holdings G.P.

Per: Alex Morrison

Alex Morrison
Senior Vice President

APPENDIX A

Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., and Grant U.S. Holdings GP. ("Applicants")
Cumulative Combined Receipts and Disbursements
For The Period From July 13 to September 27, 2009
(In Thousands of US Dollars)

	Actual	Projection	Variance	Notes
Opening Bank Balance	28,474	28,474	-	
Receipts				
OSB Sales	29,776	25,459	4,317	1
Wood Sales	1,542	194	1,348	2
GST Collected & Refunds	414	1,249	(835)	3
Interest Income	-	12	(12)	
Other Receipts	752	32	720	4
Total Receipts	32,484	26,946	5,538	
Disbursements				
Payables-Wood	(7,867)	(6,063)	(1,804)	5
Freight	(3,703)	(3,999)	296	6
Other Payables	(9,324)	(7,539)	(1,785)	7
Payroll	(5,538)	(3,968)	(1,570)	8
Utilities & Fuel	(997)	(1,259)	262	9
GST Remittance	(759)	(542)	(217)	10
SG&A	(1,016)	(1,008)	(8)	
Restructuring Costs	(2,369)	(2,509)	141	
Bank Charges	-	(4)	4	
Capex	(4)	(50)	46	
Foreign Exchange Impact	867	(414)	1,281	11
Total Disbursements	(30,710)	(27,355)	(3,355)	
Net Cash Flows	1,775	(409)	2,184	
Inter-Company Transfers:				
Transfer from (to) US Companies	(500)	-	(500)	
Transfers from (to) Footner	(184)	(573)	390	
Total Inter-Company Transfers	(684)	(573)	(110)	
Ending Bank Balance	29,564	27,491	2,073	
Deduct: Restricted Cash	(427)	(388)	(39)	
Ending Cash excluding Restricted Cash	29,137	27,104	2,034	

Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., and Grant U.S. Holdings GP. ("Applicants") Combined Actual Receipts and Disbursements For Period July 13 to September 27, 2009 Variance Analysis

The actual receipts and disbursements are denominated in US dollars. Canadian dollars are converted to US dollars every week at Thursday's closing exchange rate as published by the Bank of Canada. In the projection, Canadian dollars are converted to U.S. dollars at the exchange rate of CDN$1.20=US$1.00.

1. **OSB Sales** – The positive variance is primarily due to a) higher than expected sales volume; b) the translation of CDN$ sales into U.S. currency at lower CDN$/US$ exchange rates; c) the collection of overdue June accounts receivables; and d) a change in classification of GST collected. Actual OSB sales include GST collected, which was reflected in the projection under the GST Collected and Refunds line item. Accordingly, this portion of variance reflects a change in classification.

2. **Wood Sales** – The Applicants sold higher than anticipated volumes of certain wood species that are not used in production at Englehart.

3. **GST Collected and Refunds** – The negative variance is as a result of a timing difference related to the Applicants' outstanding August GST refund; a lower than expected June GST refund and the classification of GST collected into the OSB sales line item as described in Note 1.

   The Applicants are awaiting the receipt of its August GST refund that was forecast in this period. Accordingly, this portion of the variance is caused by timing and is expected to reverse in the future. The Canada Revenue Agency re-assessed the Applicants' June GST liability and adjusted the refund for invoices that were stayed as a result of the CCAA.

4. **Other Receipts** – A portion of the favorable variance is related to the classification of payroll reimbursements. Actual receipts include reimbursements of US$380k for payroll and other costs paid by the Applicants on behalf of its affiliates, whereas the projection offset a certain portion of such payroll expense against SG&A. The remainder of the variance represents miscellaneous receipts that were not contemplated in the projection.

5. **Payables Wood** – The Applicants incurred higher costs for purchases of certain wood for the ramp up of production at the Englehart mill, which has been operating at full capacity since July. The increased supply of wood contributed to higher wood sales in the current period as described in Note 2. The unfavourable variance was also increased by an adverse usage variance.

   Further, the lower CDN$/US$ exchange rates contributed to the unfavourable variance as CDN$ disbursements were translated to U.S. currency. Such translation is done for presentation purposes only.

6. **Freight** – This favorable variance is as a result of lower than expected freight costs and timing differences. Actual freight per unit of wood is lower than projected largely because the Applicant's sales to their Canadian customers who are located at closer distance relative to their U.S. customers. The portion of variance that is related to timing is expected to reverse in the future.

7. **Other Payables** – The unfavourable variance reflects a combination of higher production related costs due to higher production volume and the translation of CDN$ disbursements into U.S. currency at the lower CDN$/US$ exchange rates.

8. **Payroll** – The unfavourable variance is primarily due to the employee incentive payments that were not contemplated in the projection. In addition, the Applicants discontinued a significant portion of payroll processing conducted on behalf of their affiliates. A large portion of the unfavourable variance is related to such discontinuation being done later than projected. These costs were reimbursed by the affiliates and therefore there is no cash impact. The remainder of the variance is primarily related to foreign exchange translation and higher than anticipated overtime pay as a result of increased production.

9. **Utilities & Fuel** – The favorable variance is primarily as a result of timing differences and is expected to reverse in the future.

10. **GST Remittance** – The Applicants submitted its August GST remittance that was projected to be paid in the following week. Accordingly, the variance represents a timing difference and is expected to reverse in the future.

11. **Foreign Exchange Impact** –The variance is primarily due to the conversion of the opening Canadian dollar balance to US currency using Thursday's closing rate as published by the Bank of Canada. This balance reflects a holding foreign exchange difference on the opening Canadian dollar cash balance as of July 13, 2009.

APPENDIX B

Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., and Grant U.S. Holdings GP. ("Applicants") Consolidated Cash Flow Projection
For The Period From September 28, 2009 to December 6, 2009
(In Thousands of US Dollars)

Week Ending	Notes	4-Oct	11-Oct	18-Oct	25-Oct	1-Nov	8-Nov	15-Nov	22-Nov	29-Nov	6-Dec	Total
Opening Bank Balance	1	29,564	29,393	29,546	29,167	28,033	27,960	24,445	25,312	24,223	24,144	29,564
Receipts												
OSB Sales	2	3,071	2,196	2,428	1,596	1,995	1,995	1,995	1,545	1,545	1,159	19,524
Wood Sales	3	226	-	-	-	-	44	-	22	-	22	313
GST Refunds	4	352	-	-	-	235	-	-	-	235	-	822
Interest Income	5	-	-	-	-	-	6	-	-	-	5	11
Other Receipts	6	58	7	27	7	7	7	27	7	7	7	161
Corporate Tax Refund	7	-	-	-	-	-	-	-	-	-	14,444	14,444
Total Receipts		3,708	2,203	2,455	1,603	2,237	2,051	2,021	1,574	1,788	15,638	35,276
Disbursements												
Payables-Wood	8	(2,093)	-	(1,601)	-	-	(2,673)	-	(1,004)	-	(1,069)	(8,440)
Freight	9	(99)	(528)	(120)	(418)	(120)	(478)	(120)	(358)	(120)	(239)	(2,600)
Other Payables	10	(752)	(634)	(731)	(742)	(703)	(550)	(711)	(594)	(536)	(582)	(6,534)
Payroll	11	(31)	(600)	(14)	(623)	(14)	(1,638)	(14)	(619)	(14)	(777)	(4,344)
Utilities & Fuel	12	(599)	(70)	89	(628)	(220)	142	(64)	321	(692)	46	(1,677)
GST Remittance	13	-	-	(197)	-	-	-	-	(141)	-	-	(338)
SG&A	14	(53)	(66)	(103)	(114)	(786)	(186)	(68)	(110)	(150)	(78)	(1,714)
Restructuring Costs	15	(206)	(151)	(151)	(157)	(302)	(132)	(132)	(133)	(254)	(86)	(1,704)
Bank Charges	16	-	-	-	-	(144)	(13)	-	-	-	(13)	(171)
Capex	17	-	-	-	-	-	(25)	(25)	(25)	(25)	(50)	(150)
Transfer to Escrow with respect to the tax refund	7										(10,000)	(10,000)
Foreign Exchange Impact	18	25	-	-	-	-	-	-	-	-	-	25
Total Disbursements		(3,808)	(2,049)	(2,827)	(2,681)	(2,289)	(5,554)	(1,134)	(2,663)	(1,791)	(12,848)	(37,644)
Net Weekly Cash Flows		(100)	153	(372)	(1,079)	(52)	(3,503)	887	(1,089)	(4)	2,790	(2,368)
Inter-Company Transfers:												
Transfer from (to) US Companies	19	-	-	-	-	-	-	-	-	-	-	-
Transfers from (to) Footner	20	(71)	-	(6)	(56)	(20)	(13)	(20)	-	(76)	(13)	(275)
Total Inter-Company Transfers		(71)	-	(6)	(56)	(20)	(13)	(20)	-	(76)	(13)	(275)
Ending Bank Balance		29,393	29,546	29,167	28,033	27,960	24,445	25,312	24,223	24,144	26,921	26,921
Deduct: Restricted Cash	21	(431)	(431)	(431)	(431)	(431)	(431)	(431)	(431)	(431)	(431)	(431)
Ending Cash excluding Restricted Cash		28,962	29,115	28,737	27,602	27,530	24,014	24,881	23,793	23,713	26,491	26,491
Funds in Escrow with respect to the tax refund	7										10,000	10,000

In the Matter of the CCAA of Grant Forest Products Inc. Grant Alberta Inc., Grant Forest Products Sales Inc., and Grant U.S. Holdings GP. ("Grant" or the "Applicants")
Notes to the Unaudited Cash Flows Projection

Disclaimer:

In preparing this cash flow projection (the "Cash Flow Forecast"), the Applicants have relied upon unaudited financial information and the Applicants have not attempted to further verify the accuracy or completeness of such information. The Cash Flow Forecast includes estimates concerning the operations of the mills and additional assumptions discussed below with respect to the requirements. Since the Cash Flow Forecast is based on assumptions about future events and conditions that are not ascertainable, the actual results achieved during the Cash Flow Forecast period will vary from the Cash Flow Forecast, even if the assumptions materialize, and such variation may be material. There is no representation, warranty or other assurance that any of the estimates, forecasts or projections will be realized.

Overview:

The Cash Flow Forecast reflects cash flows from Grant's operations including inter-company transfers to and from the mill at Footner and Grant's U.S. operations. The Applicants with the assistance of the Monitor have prepared the Cash Flow Forecast based primarily on historical results and Grant's current business plan. Receipts and disbursements are denominated in both Canadian and US dollars; however the consolidated cash flow is presented in U.S. dollars. Canadian dollars are converted to US dollars at the exchange rate of CDN$1.08 = US$1.00.

The Cash Flow Forecast assumes that three of Grant's mills, specifically, Timmins, Footner and Clarendon continue to remain closed during the Cash Flow Forecast period. The Cash Flow Forecast also assumes that no interest will be paid to the lenders during the projection period.

Assumptions:

1) **Opening Balance:**
This is the anticipated opening cash balance of the Applicants at the commencement of the stay extension period and includes funds held in Canadian dollars and U.S. dollars that were converted into U.S. dollars at the exchange rate noted above.

2) **Sales Receipts:**
OSB Sales are calculated as the product of the projected volume and the projected price per unit. The projected volume is estimated based on Grant's historical volumes with a discount for the decline in sales as a result of the slower U.S. housing market as compared to previous years. The projected sales price per unit is

estimated using historical pricing data by Grant's sales department and market forecasts published by independent services. Further amounts estimated for freight and GST (for sales in Canada) are added to the unit price to arrive at the gross price per unit. Grant assumes that sales are collected in two weeks, based on recent historical run rates.

3) **Wood Sales Receipts:**
Wood sales receipts represent receipts from sales of wood not utilized in the production process. It is anticipated that such sales and the corresponding receipts will not be significant during the projection period.

4) **GST Refunds:**
Grant is typically in a net refund position as GST remittances are offset by potential input tax credits.

5) **Interest Income:**
Interest income is estimated at 0.25% of the previous month's bank balance and is projected to be received in the first week of each month.

6) **Other Receipts:**
Other Receipts include certain intercompany reimbursements and other miscellaneous receipts.

7) **Corporate Tax Refund :**
Grant anticipates receiving a tax refund of approximately $14.44 million based on its income tax return filed with the Canada Revenue Agency. Approximately $10.0 million of this anticipated tax refund is required to be held in escrow further to an endorsement of Justice Newbold on October 5, 2009, pending a Court decision on the motion of Mr. Peter Grant Sr. with respect to such amount.

8) **Payables – Wood:**
The cost of wood is estimated based on recent historical run rates and current production levels. In addition to the cost of wood, the company pays freight, which fluctuates slightly on a weekly basis.

9) **Freight:**
Freight costs are recovered from customers, however, Grant pays freight costs approximately a week after the sales are made and recovers these amounts from customers in two weeks, at the same time as payment for product as described in note 2 above.

10) **Other Payables:**
Other payables represent suppliers not included in other specific line items. Payables primarily include payments to suppliers for resin, wax, repairs & maintenance, packaging, and contract labour.

11) Payroll:

Payroll represents bonus and payroll costs including deductions for all executives and employees and is forecast based on historical run rates. Both salaried and hourly employees are paid bi-weekly through direct deposits. Grant has outsourced its payroll services to ADP. ADP is usually funded a few days prior to the payroll date. Included in the payroll line item are costs for benefits and pension.

12) Utilities & Fuel:

Utilities represent costs for electricity and natural gas. These costs are estimated based on recent historical run rates and production levels.

Fuel represents costs of refuelling both Grant owned vehicles and independent truckers that deliver wood to Englehart and finished goods to customers. The Cash Flow Forecast includes recoveries of fuel costs from freight transport companies who use Grant's fuel pump at Englehart and the highway card lock system.

13) GST Remittance:

GST Remittance represents anticipated GST remittances of GFPSI based on projected sales. Typically, Grant on a net consolidated basis is in a GST refund position; however, the sales company is in a payable position as it has no input tax credits.

14) SG&A:

SG&A represents costs for rent, property tax, equipment rentals, general repairs and maintenance, office supplies, travel and insurance.

15) Restructuring Costs:

Restructuring costs include costs related to Grant's advisors and their counsel and the Monitor and its counsel.

16) Bank Charges:

No interest is projected to be paid to the lenders during the projection period. This line item includes agency fees for the first lien lenders.

17) Capex:

Capex costs represent payments for anticipated capital expenditures.

18) Foreign Exchange Impact:

Foreign Exchange Impact represents the difference in the exchange rate between the opening cash balance in which Canadian dollars are converted to U.S. dollars at the exchange rate of CDN$1.089 = US$1.00 and the Cash Flow Forecast exchange rate of CDN$1.08 = US$1.00.

19) Transfer from (to) US Companies:

Represents intercompany funding between Allendale and Clarendon and the Applicants. During the projection period, it is currently projected that Allendale and Clarendon will not require funding from the Applicants.

20) Transfers from (to) Footner:

Represents intercompany funding between Footner and the Applicants. During the projection period, it is currently projected that Footner will require approximately $275,000 in funding from the Applicants.

21) Restricted Cash:

Represents approximately $431,000 of restricted cash held as a reserve for certain letters of credit issued by the Applicants.

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

Court File No. CV-09-824700CL

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

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding commenced at Toronto

FOURTH REPORT OF THE MONITOR, ERNST & YOUNG INC.
(Dated OCTOBER 8, 2009)

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

Sean Dunphy LSUC # 24941J
Tel: (416) 869-5662
Kathy Mah LSUC# 51077W
Tel: (416) 869-5652
Fax: (416) 947-0866

Solicitors for the Monitor, Ernst & Young Inc.

5565862 v1

TAB C

COURT FILE NO.: CV-09-8247-00CL
DATE: 20091013

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

RE: 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

BEFORE: Justice Newbould

COUNSEL: Richard B. Swan, for Peter Grant Sr.

Kevin P. McElcheran, for Toronto-Dominion Bank, agent for 1st lien lenders

Katherine Mah, for the Monitor Ernst & Young Inc.

Jane O. Dietrich, for Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., and Grant U.S. Holdings GP

DATE HEARD: October 5, 2009

ENDORSEMENT

[1] This is a motion by Peter Grant Sr. for an order, declaration or directions as appropriate in connection with an agreement under which Mr. Grant purchased for US $20 million from Grant Forest Products Inc. ("GFPI") US $10 million worth of income tax refunds due from the Canada Revenue Agency ("CRA") to GFPI in each of 2008 and 2009. His purchase of these expected tax refunds was to assist the cash flow of GFPI. He received the refund for 2008 but has not been provided with the necessary transfer document from GFPI under the agreement in

This is Exhibit "C" *referred to in the affidavit of* William C Grant
sworn before me, this 20th
day of October 2009

A COMMISSIONER FOR TAKING AFFIDAVITS

order to receive the 2009 refund that is expected in the near future. He claims that GFPI is in breach of its agreement in not providing him with the transfer document and that the expected tax refund is to be received by GFPI in trust for him and is not an asset of GFPI.

[2] The Toronto-Dominion Bank ("TD") is the agent for the first lien lenders[1]. It opposes the application on the grounds that while GFPI has admittedly broken the agreement with Mr. Grant by not delivering to Mr. Grant a transfer document for the 2009 tax refund, to require the transfer document to now be given would accord preferential treatment to Mr. Grant over other creditors. TD claims that because the transfer has not been given, the tax refund when received by GFPI will not be an asset received and held in trust for Mr. Grant but will be an asset of the company.

[3] In my view it is clear that Mr. Grant is entitled to the relief he seeks to protect his right to the 2009 tax refund.

Background facts

[4] The Grant family has been in the lumber business in Ontario for several generations, going back to the 1880s. Mr. Grant founded the predecessor to GFPI in 1980, and took the company into the oriented strand board ("OSB") market with the opening of the company's first OSB mill in Englehart, Ontario in 1981. OSB 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. Mr. Grant (and a Grant family trust known as Twin Lakes Trust) are the ultimate shareholders of GFPI.

[5] GFPI and the other applicants 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 July 24, 2009, the initial stay was extended to October 15, 2009.

[6] As GFPI's financial performance began to decline in the OSB market, and particularly after GFPI and affiliates incurred significant bank debt to construct the two new South Carolina OSB mills, Mr. Grant became directly involved in steps to assist GFPI's cash-flow. Apart from

[1] At all material times, TD was the agent for both the first and second lien lenders. Now it is the agent only for the first lien lenders. The second lien lenders have not appeared on this motion or taken any position on it.

not being paid his salary for some time and not receiving preferred dividends of $6 million declared in 2006, and his retirement fund being under funded by $18 million, he has provided cash to GFPI.

[7] In July 2004, Mr. Grant caused a company controlled by him to loan $40 million on an unsecured basis to GFPI, and in October 2004 he caused that company to loan GFPI a further $10 million, again on an unsecured basis. These amounts have not been repaid. On behalf of that company, Mr. Grant signed postponement and subordination agreements subordinating these loans to the first and second lien lenders.

[8] In June 2008 Mr. Grant 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.

Tax Refund Agreement

[9] As GFPI's financial performance declined in 2008, it was proposed that Mr. Grant 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.

[10] The terms of the first and second lien credit agreements permitted asset sales each year by GFPI out of the ordinary course of business, without the consent of the lenders and without the proceeds being paid to the lenders, on certain conditions, one being that the total amount sold each year could not exceed US$10 million. As well, no security could be given by the company. The tax refund agreement was carefully drawn so that it would comply with the requirements of these credit agreements. Whether the lenders agreed to the terms of the agreement is a matter of some debate, but it is clear that the lenders and their solicitors were quite involved in its drafting. It is common ground that the tax refund complied with the credit agreements and thus there was no need for the lien agents to canvass the lending syndicates for any consent. Mr. Montgomery, a vice-president and director of TD, confirmed that on his cross-examination.

[11] The concept was that Mr. Grant 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 US$10 million in each of 2008 and 2009. This would assist the company

with its immediate cash-flow but ensure that Mr. Grant would ultimately receive the purchased portions when the 2008 and 2009 tax refunds were paid by the government. The agreement was structured so that while the entire US $20 million was paid in 2008, no more than US $10 million of the tax refund asset was sold in 2008 and the balance sold was to be in 2009.

[12] From Mr. Grant's perspective, the agreement provided that once GFPI received the 2008 and 2009 tax refunds from the government, GFPI would be obliged to hold the portions of the refunds which he had purchased in trust for him and then pay them out to him or as he directed. Whether this trust arrangement was effected for the 2009 tax refund is the central issue on this motion.

[13] The tax refund agreement provided for the sale of the tax refunds in two tranches, the first on March 31, 2008 and the second on January 2, 2009. It provided for the payment of the entire purchase price on March 31, 2008, with the payment for the 2009 tax refund being by way of deposit. The agreement provides:

> Section 2.01 Agreement of Purchase and Sale
>
> 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:
>
> (a) the Sold 2008 Refund on March 31, 2008; and
>
> (b) the Sold 2009 Refund on January 2, 2009
>
> Section 3.02 Payment of Purchase Price
>
> The Purchaser shall pay the purchase prices to the Vendor by certified cheque, bank draft or wire transfer of immediately available funds to an account specified by the Vendor as follows:
>
> (a) The Purchaser shall pay the 2008 Purchase Price to the Vendor on March 31, 2008 at the 2008 Closing; and
>
> (b) The Purchaser shall pay the 2009 Purchase Price Deposit to the Vendor on March 31, 2008 at the 2008 Closing.

[14] The agreement provides that Mr. Grant receives no interest in the 2009 tax refund until the company delivered to him a transfer of the 2009 refund. It provided:

> 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).
>
> Section 7.04 <u>Deliveries or Payments on 2009 Closing by the Vendor</u>
>
> The Vendor shall deliver or pay to the Purchaser at the 2009 Closing, in form and substance satisfactory to the Purchaser, acting reasonably:
>
> (a) a transfer by the Vendor to the Purchaser of the Sold 2009 Refund.

[15] The provision in section 5.02 that Mr. Grant was not to have any interest in the 2009 tax refund until the company delivered the transfer to him on January 2, 2009 was to make clear that the 2009 tax refund sale could not be considered a disposition in 2008 contrary to the lien credit agreements. Such a provision was said by the TD solicitor who was dealing with the draft agreement to be "critical".

[16] The trust provisions that are relevant to this motion differentiate between the years 2008 and 2009. They provide:

> 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 Purchaser, keep segregated from any other funds, accounts or assets of the Vendor and pay to Purchaser any amount of the Sold 2009 Refund received by the Vendor after the completion of the 2009 Closing.

[17] It is to be noted that the trust for 2009 is to attach to the tax refund received by the company from CRA "after the completion of the 2009 Closing". The "2009 Closing" is defined:

> "2009 Closing" means the closing of the purchase and sale of the Sold 2009 Refund on January 2, 2009.

[18] The agreement also provided that on each of the 2008 and 2009 closings, a partial discharge of the security held by the first and second lien agents and a release of any interest they may have in the sold refunds would be provided to Mr. Grant. This would appear to have been a bootstrap measure to give Mr. Grant some comfort. If the tax refunds were to be received by GFPI in trust for Mr. Grant, as was clearly the intent of the agreement, they would not be assets of the company subject to the lenders security. Moreover, the lenders security permitted these asset sales free of the security without the proceeds being paid to the lenders.

[19] Thus scheme of the tax refund agreement was quite straightforward. On January 2, 2009 a transfer was to be delivered to Mr. Grant delivering him his interest in the 2009 tax refund to be received by GFPI up to the amount of US $10 million. When the refund was received by GFPI, it was to be received and held by GFPI in trust for him. It was not to be an asset of GFPI or subject to the security of the company's lenders.

[20] This scheme of the agreement was well-known by TD, the agent for the first and second lien lenders as is evident from an internal TD credit memorandum prepared by Mr. Montgomery on March 28, 2008, three days before the 2008 closing. That memorandum included the following:

> The capital will be injected in a manner that does not require any consents from the lenders.
>
> The proposed structure is summarized as follows:
>
> > i) on [March 31/08] a related company outside our 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 31/08] 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 31/08;

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 the 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.

[21] While TD was not a party to the tax refund agreement, it is quite evident that it understood that it would provide a partial discharge of its security in March 2008 and in January 2009.

[22] The argument now made on behalf of TD is that the 2009 closing has not taken place because the company failed to deliver the transfer document it was required to deliver to Mr. Grant on January 2, 2009 and therefore the tax refund once received will not be subject to a trust in favour of Mr. Grant.

Post-agreement events

[23] The 2008 Closing as defined in the tax refund agreement took place on March 31, 2008. At that time Mr. Grant paid to GFPI US$10 million to purchase the 2008 tax refund and at the same time paid a further US$10 million to purchase the 2009 tax refund. The latter amount was paid as a deposit under the section 3.02(b) of the agreement. GFPI had immediate use and benefit of the US$20 million in funds paid to it. In exchange, Mr. Grant received a transfer

acknowledgment and partial discharges from the first and second lien agents in respect of the 2008 refund. Mr. Montgomery of TD said on his cross-examination that the discharges were freely given because the lenders were asked to give them, and that there was no need to canvass the lending syndicates to do so.

[24] Later in 2008, after GFPI received its 2008 tax refund from CRA, Mr. Grant received from GFPI approximately US$10 million in respect of his purchase of the 2008 tax refund.

[25] The 2009 closing was to take place on January 2, 2009. However GFPI failed to deliver the transfer required under s. 7.04(a). It is common ground that GFPI is in breach of its agreement for failing to do so.

[26] It is quite apparent from the evidence that it was the position of the lenders that influenced the company to take the position that it did, and that the company felt it was between a rock and a hard place. GFPI was running into financial problems and anticipated being in default of its borrowing covenants by the end of the first fiscal quarter for 2009. There is some evidence in an e-mail sent by Mr. Peter Lynch of GFPI to Mr. Grant's solicitors and others, (i) that TD, which was the agent at the time for both the first and second lien lenders, advised that it would not provide discharges of their security without the consent of the requisite number of lenders in each syndicate, which was different from the position taken by TD regarding the 2008 tax refund that the consent of the members of lending syndicate was not required, and (ii) that TD indicated to Mr. Lynch that it would not be supportive of the request for a discharge of its security.

[27] Mr. Montgomery on his cross-examination made it clear that the position of TD was that in order that GFPI would have the support of TD in a restructuring, the US$10 million should not be paid to Mr. Grant. He said on his cross-examination:

> "A. I do know from Bill [O'Connor, a V-P at TD] that this – that this would have been our position.
> Q. What did Bill tell you in this regard?
> A. 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 --

> Q. Okay.
> A. -- in order to induce the lenders to continue to fund, or to continue to forebear, I guess, or continue to re -- to restructure the credit facilities to allow it to continue to operate."

[28] When Mr. Montgomery was involved in the drafting of a term sheet for a proposed refinancing of GFPI he made sure that there was included in the term sheet a negative covenant that the 2009 tax refund not be paid to Mr. Grant. He stated in an internal e-mail at TD "if we restructure we would want to make sure that shareholders do not take payment on this "deposit". Mr. Grant never agreed to this.

[29] On June 19, 2009 Mr. Grant's solicitors wrote to GFPI demanding that GFPI deliver the transfer document required for the 2009 tax refund no later than 5:00 p.m. on June 22, 2009. The letter further demanded that the partial discharges and releases from the first and second lien agents be sought by GFPI from the lenders and provided to Mr. Grant no later than 5:00 p.m. on June 22, 2009. The letter stated that if these discharges and releases from the first and second lien agents were not provided, Mr. Grant might waive these conditions that were inserted in the agreement for his benefit. Section 6.03 of the agreement provided that conditions in favour of Mr. Grant could be waived by him in his sole discretion. The obvious reason for the urgency of the letter and for the demand that these documents be delivered by June 22, 2009 was that it was known that GFPI was about to file for protection under the CCAA, which protection was obtained in the Initial Order made on June 25, 2009.

Issues

[30] TD takes the position that under section 5.02 of the tax refund agreement, Mr. Grant did not acquire any right or interest in the 2009 tax refund as that section provided he would not receive such a right until GFPI delivered a transfer document to Mr. Grant at the 2009 closing that was to take place on January 2, 2009. As that transfer was not delivered, the position of TD is that Mr. Grant therefore has not acquired any interest in the 2009 tax refund.

[31] Further, TD takes the position that the trust provision requiring GFPI to hold the 2009 tax refund in trust once received from CRA has not come into force because that section provides for such a trust for a 2009 tax refund that is received after the completion of the 2009 closing. TD

asserts that because the 2009 closing did not take place as there was no delivery of a transfer from GFPI to Mr. Grant, the trust provision does not yet arise. It is common ground that the 2009 tax refund to come from CRA has not yet been received by GFPI.

[32] The position of Mr. Grant is that GFPI has a trust obligation to hold the 2009 tax refund in trust for Mr. Grant and that it cannot rely upon its own failure to deliver a transfer document to Mr. Grant on January 2, 2009 to argue otherwise. Mr. Grant relies upon the equitable doctrine that equity considers done what ought to be done.

[33] Mr. Grant further contends that it is open to a court to now compel GFPI to deliver the transfer document that was to have been delivered on January 2, 2009, thus giving Mr. Grant his right to the 2009 tax refund under section 5.02. He takes the position that delivery of the transfer now by GFPI would mean that once the 2009 tax refund is received from CRA, it will be impressed with a trust in his favour. TD takes the position that making an order requiring GFPI to now deliver a transfer to Mr. Grant would amount to a preference in favour of Mr. Grant over other creditors of GFPI.

Analysis

[34] There is no question but that GFPI has breached its obligation to deliver the transfer to Mr. Grant on January 2, 2009. It is also clear that while TD understood at the outset that the 2009 tax refund when received by the company would be held in trust for Mr. Grant and that TD would provide a discharge of its security at that time, TD has made clear that it will not deliver any discharge of its security. The fact that TD contends that it was not asked by GFPI to deliver a discharge of its security is, in my view, neither here nor there. It was made quite clear by TD to GFPI that if there was to be a restructuring, the US $10 million should stay in the company.

[35] The issue is what right Mr. Grant has, if any, to receive the 2009 tax refund.

[36] There was no condition in the tax refund agreement that was required to be fulfilled before the transfer was to be delivered to Mr. Grant on January 2, 2009, nor any test or judgment call of any kind to be made by GFPI. The only purpose in having half of the US $20 million tax refund being purchased by Mr. Grant to be a purchase in 2009 was to stay onside the lending

agreements which permitted only US $10 million in assets to be sold in any year out of the ordinary course of business. The 2009 closing to take place on January 2, 2009 was thus a technical, albeit important, provision that was to be automatically carried out by GFPI. Nor was the obligation of GFPI to deliver the transfer in any way conditional on the lenders providing a release of their security.

[37] It would be completely inequitable, in my view, for GFPI to take advantage of its own breach in failing to deliver the transfer to Mr. Grant and then contend that because of that failure, its requirement to hold the funds received from CRA in trust under s. 5.02 does not arise because the 2009 closing has not taken place, i.e., for GFPI to contend that as it is only funds received from CRA "after the completion of the 2009 Closing" that are to be held in trust, and if the funds are received before the closing has taken place they are not subject to the trust in favour of Mr. Grant. That was not at all the intent of the agreement. GFPI does not argue this, as it takes no position on the motion by Mr. Grant. TD however does. Mr. McElcheran said in argument that TD is taking this position on behalf of GFPI.

[38] In my view, the principle that equity considers done what ought to be done is applicable and the transfer by GFPI of the 2009 tax refund to Mr. Grant that was to occur on January 2, 2009 is to be treated as if it did take place.

[39] The principle is well known and of some antiquity. It was explained in *Bliss v. Doyle* (1983), 44 O.R. (2d) 129 by Krever J. (as he then was) by the following:

> In Snell's Principles of Equity, 27th ed. (1973), one finds the following explanation of the maxim at p. 40:
>
>> This maxim has its most frequent application in the case of contracts. Equity treats a contract to do a thing as if the thing were already done, though only in favour of persons entitled to enforce the contract specifically and not in favour of volunteers. Agreements for value are thus often treated as if they had been performed at the time when they ought to have been performed, with the same consequences as if they had then been completely performed. For example, a person who enters into possession of land under a specifically enforceable agreement for a lease is regarded in any court which has jurisdiction to enforce the agreement as being in the same position as between himself and the other party to the agreement as if the lease had actually been granted to him.

> Other examples of the maxim will be found in the enforcement of an imperfect trust made for value, the qualified trust for a purchaser imposed by equity upon the vendor, the rule in *Howe v. Earl of Dartmouth*, and the doctrine of conversion.

[40] The maxim was applied in *Wood v. Guarantee Co. of North America* (1975), 10 O.R. (2d) 661. In that case an insurer failed to issue a policy that its agent had committed it to issue. The insurer sought to avoid an obligation under the Judicature Act to pay interest by way of damages on an insurance policy by contending that the policy had not been issued. Southey J. rejected the argument and stated:

> The present action is not an action on a policy of insurance, because no policy was in fact issued by the insurer. The insurer, however, was under an obligation to issue a policy of insurance in accordance with the agreement made with the plaintiff and it would be a strange result, indeed, if the insurer could avoid liability for interest in the nature of damages under the Judicature Act because of its failure to issue a policy. The plaintiff could have sued for specific performance of the contract of insurance and thereby forced the Guarantee Company to issue a policy. I think I am entitled under s. 18(1) of the Judicature Act to apply the equitable principle that equity looks on that as done which ought to be done (14 Hals., 3rd ed., p. 532), and proceed in this case as though a policy had been issued.

[41] It was contended on behalf of TD that to apply this equitable maxim flies in the face of s. 5.02 of the tax refund agreement that provides that Mr. Grant obtains no interest in the 2009 tax refund before the vendor delivers the transfer at the closing on January 2, 2009 and, that as the transfer was not delivered, it would be effectively re-writing the agreement to provide for it now. I do not agree. The application of the maxim does not mean that Mr. Grant will have received his interest in the second half of the tax refund in 2008. The application of the maxim results in the court proceeding as if the transfer took place on January 2, 2009, which is what the agreement contemplated.

[42] As the transfer is thus taken to have occurred on January 2, 2009, the trust obligation imposed on GFPI under s. 5.06 of the agreement is effective and requires GFPI to hold for Mr. Grant US $10 million of the tax refund for 2009 when it is received from CRA. Moreover, under s. 5.04 of agreement, Mr. Grant is entitled to direct the CRA to deliver that amount to him rather than to GFPI. S. 5.04 provides in part:

> Either party may, after the delivery to the Purchaser of the transfer of the Sold 2009 Refund referred to in Section 7.04(a), direct CRA, the Finance Minister and any other appropriate person to pay the Sold 2009 Refund to the Purchaser.

[43] I do not think that the lack of discharges from TD of the first and second lien lenders affects the substance of the rights of Mr. Grant to the 2009 tax refund. The obligation in the tax refund agreement to deliver the discharges on the 2009 closing was that of GFPI, and thus GFPI was required under the agreement to do what was necessary to acquire those discharges from TD. Under s. 5.02 of the agreement, Mr. Grant was to acquire his title or ownership to the 2009 tax refund on January 2, 2009 solely by the transfer being delivered to him. The failure of GFPI to obtain the discharges from TD could not affect that delivery of title from GFPI to Mr. Grant. At most, if the lenders had security over the 2009 tax refund, it would mean that Mr. Grant's ownership of that asset was subject to the lenders' security. I do not see how the failure of GFPI to obtain discharges from the lenders for delivery to Mr. Grant could affect the trust provision in s. 5.06. It would amount to GFPI taking advantage of its own breach of agreement to argue there was no closing because it did not provide the discharges from the lenders to Mr. Grant.[2]

[44] In my view, and I so find, as the transfer from GFPI to Mr. Grant is deemed at equity to have been delivered on January 2, 2009, the trust provisions of s. 5.06 mean that if the tax refund due to Mr. Grant is received by GFPI, it is to be held in trust for him and the first and second lien lenders do not have any security over it.

[45] I do not agree with the assertion by TD that to now order GFPI to deliver a transfer of the 2009 tax 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 to him. It is not the company's asset.

[46] Moreover, while Mr. McElcheran contends that the tax recovery is not something that TD is asking for itself, but something TD is asking for GFPI, and that TD as agent for the first lien

[2] TD does not argue that the lack of discharges from the first and second lien holders prevents the trust provisions of s. 5.06 from being applicable. It relies on the failure of GFPI to deliver the transfer on January 2, 2009 for its contention that the 2009 closing did not take place.

lenders is not trying to scoop the tax refund, this appears inconsistent with the position taken by TD in August of this year on the motion regarding the validity of the KERP payment for Mr. Lynch, which TD supported. TD relied on marketing information provided by the Monitor and Mr. Stephen to the Court on a confidential basis that the secured creditors will likely incur substantial shortfalls and that there likely will be no recovery for the unsecured creditors. If that is the case, the result of TD being successful in its position on this motion would be a benefit to its position as agent for the first lien lenders.[3] This would be quite inconsistent with the lending agreements which expressly permitted the sale of these tax refunds free of the security of the lenders.

[47] Whether the result in favour of Mr. Grant is by reason of the application of the equitable maxim that equity considers done what ought to be done or by reason of an order that GFPI now deliver a transfer to Mr. Grant, in substance the result would be the same. I do not think that the equities of the situation should be affected by the form of the relief granted. If requested, I would order the transfer to Mr. Grant by GFPI to be now made under s. 5.02 of the agreement, but I do not see the need for that to be done.

Conclusion

[48] I declare:

(a) The transfer to Mr. Grant of the 2009 tax refund due to him under s. 5.02 of the tax refund agreement has in equity taken place as of January 2, 2009 and that Mr. Grant has acquired full right, title and interest in the tax refund as of that date. Mr. Grant is entitled if he wishes to receive a transfer document from GFPI under s. 5.02 effective January 2, 2009.

[3] The fourth report of the Monitor dated October 8, 2009 contains a cash flow projection from September 28, 2009 to December 6, 2009 which the Monitor states indicates that the applicants will have sufficient liquidity to sustain ordinary course operations during the projection period. This statement projects US 14,444 million being received as a corporate tax refund in the week ending December 6, 2009 and US $10 million of that being transferred to an escrow in accordance with my interim ruling at the conclusion of the argument on this motion. That is, the refund due to Mr. Grant is not necessary for the applicants' cash flow for the period, at the end of which the projected cash position of the applicants will be a positive US $26,491 million.

(b) Mr. Grant is also entitled if he wishes to direct CRA, the Finance Minister or any other appropriate person under s. 5.04 of the tax refund agreement to pay the tax refund due to him directly to him.

(c) If the 2009 tax refund due Mr. Grant is received by GFPI, it will be received by GFPI in trust for Mr. Grant and GFPI shall be obliged to forthwith pay it to Mr. Grant.

[49] Mr. Grant is entitled to his costs from TD. If not agreed, brief submissions in writing with a draft bill of costs may be made on his behalf within 10 days and TD shall have 10 days to reply.

NEWBOULD J.

DATE: October 13, 2009

TAB D

Court File No. CV-09-8247-00CL

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

NOTICE OF MOTION

(motion for leave to appeal)

THE TORONTO-DOMINION BANK ("TD") will make a motion which will be heard by the court in writing 36 days after service of TD's motion record, factum and transcripts, if any, or on the filing of TD's reply factum, if any, whichever is earlier (unless otherwise directed by order of a judge of this court).

PROPOSED METHOD OF HEARING: The motion is to be heard in writing (unless otherwise directed by order of a judge of this court).

THE MOTION IS FOR:

1. an order granting leave to appeal the order of the Honourable Justice Newbould dated October 13, 2009;

2. costs of this motion; and

This is Exhibit "D" referred to in the affidavit of William O'Connor sworn before me, this 20th day of October 2009

A COMMISSIONER FOR TAKING AFFIDAVITS

3. such further and other relief as this Honourable Court considers just.

THE GROUNDS FOR THE MOTION ARE:

GFPI and its CCAA proceedings

1. Grant Forest Products Inc. ("GFPI") is in the lumber business. It was founded by and is controlled by the responding party Peter Grant Sr. On June 25, 2009, GFPI filed for and obtained protection from its creditors under the *Companies' Creditors Arrangement Act* (the "CCAA"). The CCAA proceedings are ongoing.

2. At present, the stay of proceedings under the CCAA has been extended to December 1, 2009, primarily in order to allow a process for the marketing of GPFI's assets to be advanced.

Mr. Grant's motion

3. On October 5, 2009, Mr. Grant brought a motion before the Honourable Justice Newbould for an order in connection with an agreement (the "Tax Refund Agreement") under which he purchased from GFPI $20 million U.S. in tax refunds to become due from the Canada Revenue Agency (the "CRA") to GFPI in 2008 and 2009. The Toronto-Dominion Bank ("TD") opposed the motion. TD is agent for a lending syndicate which holds first ranking security over the assets of GFPI.

4. On October 13, 2009, Justice Newbould issued an endorsement granting Mr. Grant the relief that he was seeking. Specifically, Justice Newbould held that:

(a) pursuant to the Tax Refund Agreement, Mr. Grant has acquired full right, title and interest in the tax refunds which are owing by the CRA to GFPI in 2009; and

(b) if GFPI receives a 2009 tax refund, the first $10 million U.S. will be received in trust for Mr. Grant and GFPI will be obliged to pay it forthwith to Mr. Grant.

Justice Newbould's holding

5. In 2008, GFPI was experiencing financial problems. It was proposed the Mr. Grant assist GFPI's cash flow by purchasing certain federal and Ontario tax refunds which GFPI expected to receive in 2008 and 2009.

6. Pursuant to the terms of GPFI's agreements with its lenders, referred to as the first and second lien credit agreements, GPFI was permitted to sell assets outside the ordinary course of business without lender consent and without paying the proceeds to the lenders, but only on the condition that dispositions (as broadly defined in the Credit Agreements) of the Tax Refunds not exceed $10 million U.S. per year. The Tax Refund Agreement was carefully drawn as to comply with this covenant.

7. Pursuant to the Tax Refund Agreement, Mr. Grant paid GFPI $20 million U.S. in March 2008, in exchange for the promise of GFPI to convey $10 million U.S. of GFPI's 2008 tax refund at the 2008 closing and $10 million of its 2009 tax refund to be transferred at the 2009 closing.

8. 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 at tranfer of the 2009 tax refund was delivered at the 2009 Closing which as scheduled to occur on

January 2, 2009, and that until the transfer of the 2009 refund was delivered, Mr. Grant had no interest in GFPI's 2009 tax refund:

> "Section 2.01 Agreement of Purchase and Sale
>
> 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 No Interest of Purchaser in Sold 2009 Refund Until 2009 Closing
>
> 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.]

9. 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 Sold 2009 Refund Held in Trust by Vendor
>
> 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".

10. By December, 2008, GFPI was in serious financial difficulty and anticipated being in default of its borrowing covenants by the end of the first quarter of 2009. In order to secure the

support of its lenders for a restructuring, GFPI decided not to close the sale of the 2009 tax refunds to Mr. Grant.

11. Despite the clear language of the Tax Refund Agreement that a trust did not arise until the 2009 Closing had been completed, and despite the undisputed fact that the 2009 Closing had not occurred, Justice Newbould found that the trust obligation under Section 5.06 was effective. He so found by applying "the principle that equity considers done what ought to be done". He used that "principle" to treat the 2009 Closing as if it did take place, even though it had not.

12. Justice Newbould's holding has significant implications both for the interpretation of commercial agreements generally and for the interpretation of such agreements within insolvency proceedings:

(a) **Importance 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) **Importance for insolvency practice.** Were it not for the trust Justice Newbould 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?

13. In addition to being of significance to insolvency practice in Ontario and to commercial law generally, the issue is of significance to the proceeding itself. 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.

14. The appeal is *prima facie* meritorious. Justice Newbould's ruling undermines the certainty of commercial agreements and grants a preference to an unsecured creditor. The correctness of this ruling is doubtful and ought to be reviewed by this court.

15. The appeal will not unduly hinder the progress of the proceeding. TD is willing to expedite this motion for leave to appeal, and the appeal itself if leave to appeal is granted. GFPI's current stay of proceedings is in place until December 1, 2009 in order to permit a process for the marketing of GFPI's assets to unfold. Subject to the availability of time in this court, the leave motion and, if leave is granted, the appeal itself can be dealt with prior to December 1, 2009, which means that the proceedings in this court will not interfere in any way with the ongoing restructuring.

16. TD relies on section 14 of the CCAA and Rule 61.03.1 of the *Rules of Civil Procedure*.

17. TD also relies on such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE USED at the hearing of the motion:

1. the record before Justice Newbould; and

2. such further and other materials as counsel may advise and this Honourable Court may permit.

October 20, 2009

McCarthy Tétrault LLP
Suite 5300, Toronto Dominion Bank Tower
Toronto, ON M5K 1E6

Kevin P. McElcheran LSUC#: 22119H
Tel: (416) 601-7730
Fax: (416) 868-0673

Lawyers for The Toronto-Dominion Bank

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.

Court File No. CV-09-8247-00CL

COURT OF APPEAL FOR ONTARIO

NOTICE OF MOTION

McCarthy Tétrault LLP
Suite 5300, P.O. Box 48
Toronto Dominion Bank Tower
Toronto ON M5K 1E6

Kevin P. McElcheran LSUC#: 22119H
Tel: (416) 601-7730
Fax: (416) 868-0673

Lawyers for The Toronto-Dominion Bank

#749296 v. 1

TAB E

Antonellis, Sonia

From: Sean Dunphy [SDunphy@stikeman.com]
Sent: Friday, October, 16, 2009 2:28 PM
To: McElcheran, Kevin
Cc: 'alex.f.morrison@ca.ey.com'; 'ross.walker@fmc-law.com'
Subject: Appeal re Grant Tax Refunds

Kevin - we are advised that one of the tax refunds (approx $1.4mm) has arrived. The Company is in the process of endorsing over to P. Grant Sr. The Monitor has asked the company to hold off for 48hrs (till close on Tuesday) to give you a fair chance to seek a stay if so advised. We were not aware the receipt of refunds was this imminent, so there would appear to be less time to consider your course of action than you may have expected. Please let us know as soon as you can what your intentions are.

Sean Dunphy
Tel.: (416) 869-5662
Cel.: (647) 988-4029
Fax: (416) 947-0866
sdunphy@stikeman.com

STIKEMAN ELLIOTT LLP Barristers & Solicitors 5300 Commerce Court West
199 Bay Street
Toronto, ON, Canada M5L 1B9
Tel: (416) 869-5500
www.stikeman.com

TORONTO MONTRÉAL OTTAWA CALGARY VANCOUVER NEW YORK LONDON SYDNEY

This is Exhibit "F" referred to in the affidavit of William O'Connor sworn before me, this 20th day of October 2009

A COMMISSIONER FOR TAKING AFFIDAVITS

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.

Court File No.

COURT OF APPEAL FOR ONTARIO

MOTION RECORD
(Returnable October 27, 2009)

McCarthy Tétrault LLP
Suite 5300, Toronto Dominion Bank Tower
Toronto ON M5K 1E6

Geoff R. Hall LSUC# 34701O
Tel. 416 601-7856
Fax: 416 868-0673

Lawyers for The Toronto-Dominion Bank

#756446