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

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 OF ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT ALBERTA INC., GRANT FOREST PRODUCTS SALES INC. and GRANT U.S. HOLDINGS GP

FACTUM OF WEST FACE CAPITAL INC.

(on behalf of West Face Long Term Opportunities Limited Partnership, West Face Long Term Opportunities (USA) Limited Partnership, West Face Long Term Opportunities Master Fund L.P. and West Face Long Term Opportunities Global Master L.P.)

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PART I – OVERVIEW

1. The overview of the motion brought by Grant Forest Products Inc. ("**GFPI**") is set out in the Joint Statement of Facts and Law (motion returnable August 27, 2012) dated August 24, 2009 (the "**Joint Statement**"). This factum has been delivered by West Face Capital Inc., on behalf of the West Face Funds in response to the motion brought by GFPI and in support of the motion brought by the West Face Funds, by their advisor, West Face Capital Inc. (hereinafter referred to as the "**Second Lien Lenders**").

2. The Second Lien Lenders seek an Order lifting the stay of proceedings in respect of GFPI for the purpose of facilitating the issuance of a Bankruptcy Order in respect of GFPI forthwith. It is appropriate that a bankruptcy proceeding be put into place immediately, otherwise the priority secured interests of the Second Lien Lenders will be irrevocably prejudiced. In the absence of a bankruptcy proceeding, certain parties with an interest in advancing the claims of the pension beneficiaries have taken steps to re-position claims as priority claims or claims that

must be paid immediately. The factual and legal basis for those claims have been advanced during the CCAA proceedings, notwithstanding the stay of proceedings.

3. The issue of the ruling in *Re Indalex*, while academically interesting, misses the fundamental point that is of particular importance to the Second Lien Lenders and also relevant to the integrity of liquidations under the CCAA. The Supreme Court has Canada has been clear that the Court's discretion under the CCAA is sufficient to construct a bridge to liquidation under the BIA and that the Court must do so in a manner that does not subvert the scheme of distribution under the BIA. That scheme of distribution does not afford a priority to a deemed trust of the type being considered in the *Re Indalex* case.

4. The Second Lien Lenders respectfully submit that lifting the stay of proceedings to initiate a bankruptcy proceeding with respect to GFPI is appropriate. It is exactly what the Supreme Court of Canada has indicated will foster the harmonious transition between reorganization, liquidation and distribution. A bankruptcy will also be consistent with preserving the status quo in place during the CCAA process and the orders made in connection with the sale of assets during the CCAA proceeding.

PART II– THE FACTS

The CCAA Proceedings

5. On March 19, 2009 G.E. Canada Leasing Services Company ("**GE Canada**") issued an Application for Bankruptcy Order (the "**GE Canada Bankruptcy Application**") against GFPI.

Affidavit of Peter Fraser, sworn October 19, 2012, Exhibit "E" (the "Fraser Affidavit")

6. GFPI and certain affiliated companies applied for protection under the *Companies' Creditors Arrangement* Act (the "**CCAA**") and on June 25, 2009, the Honourable Mr. Justice Newbould made the Initial Order in the CCAA proceedings. The Initial Order (at paragraph 22) contains the standard stay of all proceedings against the CCAA applicants and, accordingly, the Application for Bankruptcy Order was stayed.

7. The Initial Order provides, at paragraph 22:

> [22] **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of any of the Applicants or the Monitor, or affecting the Business or the Property (including any right to submit a shotgun buy or sell offer with respect to GFPI's shares of Footner Forest Products Ltd. or GFPI's interest in the OSB facility at High Level, Alberta or related assets), are hereby stayed and suspended except with the written consent of the Applicants and the Monitor, or leave of this Court, provided that nothing in this Order shall: (a) empower the Applicants to carry on any business which the Applicants are not lawfully entitled to carry on; (b) exempt the Applicants from compliance with the statutory or regulatory provisions relating to health, safety or the environment; (c) prevent the filing of any registration to preserve or perfect a security interest; (d) prevent the registration of a claim for lien under the *Construction Lien Act* or the *Forestry Workers Lien for Wages Act* or any other applicable statute; or (e) prevent GE Canada Leasing Services Company from selling the 1992 Dassault Falcon 50 aircraft or the 1994 Dassault Falcon 900B aircraft and related engines and parts pursuant to its lease thereof to GFPI.

Initial Order, para. 22

8. Paragraph 5 of the Initial Order provides:

> [5] **THIS COURT ORDERS** that the Applicants shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order;
>
> (a) all outstanding and future wages, salaries, employee benefits and pension contributions, vacation pay, bonuses, and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements, which, for greater certainty, shall not include any payments in respect of employee termination or severance; and
>
> (b) the fees and disbursements of any Assistants retained or employed by any of the Applicants as permitted herein in respect of these proceedings or the Applicants' proposed restructuring at their standard rates and charges.

Initial Order, para. 5

9. According to the affidavit filed on behalf of PricewaterhouseCoopers Inc. ("**PwC**"), the administrator of two defined pension plans sponsored by GFPI (the "**Administrator**"):

(i) "Both before and after this CCAA proceeding commenced, GFPI made all required contributions on account of current service. As noted above, current service accruals ceased under the Executive Plan on June 30, 2010 and current service accruals ceased under the Salaried Plan on March 30, 2011;

(ii) GFPI has continued to make special payments required based on the last regular valuations filed in respect of the Plans (i.e. not the special payments required under the wind-up reports, as discussed below), both before and after the date of the Initial Order. Monthly special payments in the amount of $7,608 were made to the Executive Plan up to and including June, 2012. Monthly special payments in the amount of $3,078 were made to the Salaried Plan up to and including June, 2012."

Affidavit of Charles Evans, sworn August 17, 2012 (the "Evans Affidavit"), para. 19 and 20

10. During the past three years in the CCAA, the Remaining Applicants (among others) have liquidated substantially all of their assets pursuant to sales approved by the Court. The only remaining asset to be disposed of is the "Timmins Ogden Landfill". The Timmins Ogden Landfill is the subject of an approved sale that has not yet closed.

Approval and Vesting Order (Timmins) of Campbell J. dated March 9, 2011

Approval and Vesting Order (Engine) of Campbell J. dated August 26, 2011

Approval and Vesting Order (Hangar Lease) of Campbell J. dated September 21, 2011

Approval and Vesting Order (Golf Course Lands) of Campbell J. dated September 21, 2011

Approval and Vesting Order (Boat House) of Campbell J. dated September 21, 2011

Approval and Vesting Order (Timmins Mill Lands) of Campbell J. dated September 21, 2011

Approval and Vesting Order (Ogden Landfill) of Campbell B. dated November 16, 2011

Approval and Vesting Order (Boat) of Campbell J. dated November 16, 2011

11. All of the above-noted Approval and Vesting Orders granted in this CCAA proceeding provide:

> **THIS COURT ORDERS** that, for the purposes of determining the nature and priority of Claims, the net proceeds from the sale of the Purchased Assets shall stand in the place and stead of the Purchased Assets, and that from and after the delivery of the Monitor's Certificate all Claims shall attach to the net proceeds from the sale of the Purchased Assets with the same priority as they had with respect to the Purchased Assets immediately prior to the sale, as if the Purchased Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

12. The stay of proceedings set out in the Initial Order bars any party from pursuing any rights or remedies against the Remaining Applicants. This would include any right or remedy of any Person to improve or reposition claims in respect of the pensions as secured claims or priority claims.

13. In August and September 2011, orders were made by the Court authorizing GFPI to take steps required in accordance with the *Pension Benefits Act* (the "**PBA**") to initiate a wind-up of the Timmins Salaried Plan and the Executive Plan.

Order of Campbell J., dated August 26, 2011, para. 3
Order of Campbell J., dated September 21, 2011, para. 2

14. The Order dated August 26, 2011 provides the basis on which the Monitor is authorized and directed to hold back certain funds, on a without prejudice basis, in respect of the Timmins Salaried Plan:

> [3] **THIS COURT ORDERS** that the Monitor is hereby authorized and directed, until further Court Order, to hold back from any distribution to creditors of GFPI an amount of $191,245.00 which is estimated to be the amount necessary to satisfy the wind-up deficit of the Timmins Salaried Plan. For greater certainty nothing in this order affects or determines the priority or security of the claims against these funds.

15. The Order dated September 21, 2011 provides the basis on which the Monitor is authorized and directed to hold back certain funds, on a without prejudice basis, in respect of the Executive Plan:

> [3] **THIS COURT ORDERS** that the Monitor is hereby authorized and directed, until further Court Order, to hold back from any distribution to creditors of GFPI an amount of $2,185,000 which is estimated to be the amount necessary to satisfy the wind-up deficit of the Executive Plan. For greater certainty nothing in this order affects or determines the priority or security of the claims against these funds.

16. There are no remaining substantive issues to be dealt with in the CCAA proceedings relating to the Remaining Applicants. All that remains is the distribution of the remaining funds held by the Monitor and/or the Remaining Applicants and the termination of the CCAA proceedings.

Twenty-Fifth Report of the Monitor dated June 20, 2012, para. 19-22, 94

Order of Campbell J., dated June 25, 2012

Evans Affidavit, para. 10

The Second Lien Security

17. Pursuant to a Second Lien Credit Agreement made as of March 21, 2007 (the "**Second Lien Credit Agreement**") among, *inter alia,* Grant U.S. Holdings LLP as borrower, the Remaining Applicants (among others) as guarantors, The Toronto-Dominion Bank as Canadian Collateral Agent (the "**Second Lien Collateral Agent**") and the Financial Institutions from time to time parties thereto as "Lenders" (hereinafter referred to as the "**Second Lien Lenders**"), the Remaining Applicants are indebted to the Second Lien Lenders for all Obligations referred to therein.

Fraser Affidavit, para. 2

18. GFPI, the Second Lien Collateral Agent and The Toronto-Dominion Bank, in its capacity as Collateral Agent for the First Lien Obligations (as defined therein) entered into an Inter-Creditor Agreement dated as of March 20, 2007.

Fraser Affidavit, para. 3

19. WFCI is the investment adviser to the following Second Lien Lenders which are owed the following amounts by the Remaining Applicants pursuant to the Second Lien Credit Agreement:

Second Lien Lender	Amount Owing
West Face Long Term Opportunities Global Master L.P.	$17,553,863.00
West Face Long Term Opportunities Limited Partnership	$1,838,092.00
West Face Long Term Opportunities Master Fund L.P.	$7,310,545.00
West Face Long Term Opportunities (USA) Limited Partnership	$4,686,759.00

Fraser Affidavit, para. 4

20. The above-noted amounts have been confirmed as owing to the Second Lien Lenders by the Administrative Agent pursuant to the Second Lien Credit Agreement.

Fraser Affidavit, para. 5

21. The Remaining Applicants have granted certain security on all of their undertaking, property and assets pursuant to the terms of certain general security agreements, the particulars of which are as follows:

Debtor	**Security Agreement**
Grant Forest Products Inc.	Second Lien General Security Agreement made as of March 20, 2007
Grant Forest Products Sales Inc.	Second Lien General Security Agreement made as of March 20, 2007
Grant Alberta Inc.	Second Lien General Security Agreement made as of March 20, 2007

Fraser Affidavit, para. 6

22. The First Lien Lenders have been fully repaid. The Second Lien Security is good and valid security and has priority to all other security interests. The Twenty-Fourth Report of the Monitor dated February 17, 2012 (the **"Twenty-Fourth Report")** provides:

- that the Second Lien Lenders are owed the principal amount of approximately $150 million, plus interest pursuant to the Second Lien Credit Agreement (paragraph 29).

- The Monitor's counsel has conducted a security review of various security held by the Second Lien Lenders in Canada granted in their favour by each of the Remaining Applicants over each of their respective property and assets for the benefit of the Second Lien Lenders and rendered an opinion with respect to the validity and perfection thereof under the provincial laws of Ontario and Alberta and the federal laws of Canada (the "**Canadian Second Lien Security Opinion**") (paragraph 30).

- The Canadian Second Lien Security Opinion states that, subject to the assumptions and qualifications contained therein, including those relating to statutory and possessory liens and claims that have priority by operation of law, and subject to the priority of the First Lien Lenders, the Second Lien Lenders' security is valid and enforceable and ranks in priority to the other claims with respect to the personal properties secured, subject to certain registrations of secured parties made under the *Personal Property Security Act* of each of Ontario and Alberta prior to the registration of the security of the Second Lien Lenders' Agent (paragraph 31).

- Accordingly, based on the Monitor's counsel's review of the Second Lien Lenders' security, the cash held by the Remaining Applicants and the Monitor, subject to the qualifications noted above and the need to maintain reserves to fund certain post-filing obligations of the Remaining Applicants and the costs of the Remaining Applicants to complete the wind—up of the CCAA proceedings, may appropriately be paid to the Second Lien Lenders' Agent.

- Based on the analysis, the Remaining Applicants requested the Court's approval to distribute $6 million to the Second Lien Lenders (the "**Distribution**").

Order of Campbell J. dated December 29, 2011

Fraser Affidavit, para. 7

23. The Distribution was paid to the Second Lien Lenders' Agent for distribution to the Lenders. The Distribution was approved by Order of the Court dated February 23, 2012.

Fraser Affidavit, para. 8

Actions in relation to the Pensions during the CCAA proceedings

24. According to the Evans Affidavit, the following activities have been carried out in relation to the Pensions:

(i) Following its appointment as administrator, PwC recommended to the Superintendent that it order the wind up of the Plans. On February 27, 2012 the Superintendent ordered the wind-up of the Salaried Plan, effective March 31, 2011 and the wind-up of the Executive Plan effective June 30, 2010.

(ii) The Salaried Plan wind up report was approved by the Superintendent on July 6, 2012.

(iii) The Executive Plan wind up report was approved by the Superintendent on June 7, 2012.

Evans Affidavit, paragraphs 22, 27 - 28

25. It should be noted that section 57(4) of the PBA provides:

> Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

PBA, s. 57 (4).

26. In addition, in the context of discussing "liabilities of employers on wind up" it was noted by the Ontario Court of Appeal in *Re Indalex*:

> Accordingly, the deficiency in the Salaried Plan had accrued as of the date of wind up (December 31, 2006) and, pursuant to s. 57(4) of the PBA, was subject to a deemed trust.

***Re Indalex Ltd.* (2011), 104 O.R. (3d) 641, 89 C.C.P.B. 39, 331 D.L.R. (4th) 352, 17 P.P.S.A.C. (3d) 194 (Ont. C.A.), at para. 109**

The Motion brought by the Remaining Applicants

27. On June 25, 2012, GFPI brought a motion to the Court seeking certain relief, including relief in respect of the two defined benefit pension plans (the "**Pension Plans**") it sponsors, and of which it is the former administrator. One aspect of the relief sought by GFPI was a declaration that GFPI not be required to make further payments into the Pension Plans pending further Court Order and a corresponding declaration that none of GFPI, Stonecrest Capital Inc., in its capacity as a court-appointed Chief Restructuring Organization ("**CRO**") of GFPI or Ernst & Young Inc., in its capacity as court-appointed monitor (the "**Monitor**") of GFPI shall incur liability of any nature for the failure of GFPI to make payments when due under the PBA to the Pension Plans (the "**Payment Relief**").

Joint Statement, para. 1

28. PwC, in its capacity as the Administrator opposed the Payment Relief and the hearing of that portion of the motion was adjourned. The terms of the adjournment provided that GFPI was not required to make any payments to the Pension Plan pending the return of the Payment Relief portion of the motion which was to be made on notice to the Second Lien Lenders and others.

Joint Statement, para. 2

29. The Pension Plans are in the process of being wound up, and their assets distributed. Based on the wind up reports approved by the Superintendent of Financial Services (the "**Superintendent**"), both Pension Plans will have wind up deficiencies.

Joint Statement, para. 3

30. GFPI seeks the Payment Relief and proposes to wait until the Supreme Court of Canada (the "**SCC**") delivers its decision on *Re Indalex* before it makes further payments to the Pension Plans, including the special payments. The Administrator opposes the Payment Relief and submits that no proper basis has been shown to excuse GFPI from complying with its obligations under the PBA.

Joint Statement, para. 4

31. The Joint Statement of Facts and Law has not addressed the fact that the deemed trust claim asserted would no longer be available in the event of a bankruptcy of GFPI. In effect, what is happening is that the entitlement to the funds is being considered in the current CCAA regime without adequate regard for the interests of the Second Lien Lenders.

The Motion brought by the Second Lien Lenders

32. The Second Lien Lenders have brought a motion to lift the stay of proceedings to have a Bankruptcy Order issued immediately against GFPI. The motion is brought in the interest of the Second Lien Lenders but also in the interest of confirming that the appropriate process for distributing funds in an insolvency proceeding must be in the context of the priorities applicable under the *Bankruptcy and Insolvency Act* (the "**BIA**").

PART III– THE ISSUES

33. Should the Court exercise its discretion to lift the stay of proceedings in the current circumstances to permit a Bankruptcy Order to be issued forthwith?

PART IV– THE LAW

The Court ought to Substitute the Second Lien Lenders into the GE Canada Bankruptcy Application

34. The GE Canada Bankruptcy Application has not been withdrawn or dismissed. It has also not been prosecuted during the period of the stay of proceedings.

35. Section 43(13) of the BIA provides:

> If proceedings on an application have been stayed or have not been prosecuted with due diligence and effect, the Court may, if by reason of the delay or for any other cause it is considered just, substitute or add as applicant any other creditor to whom the debtor may be indebted in the amount required by this Act and make a bankruptcy order on the application of the other creditor, and shall, immediately after making the order, dismiss on any terms that it may consider just the application in the stayed or non-prosecuted proceedings.

Section 43(13), BIA

36. Section 43(13) of the BIA provides that where proceedings on a bankruptcy application have been stayed or have not been prosecuted with due diligence, the Court may substitute or add as an applicant any other creditor to whom the debtor is indebted. In order to be substituted as an applicant, the applicant does not need to be a creditor when the original application was filed; however, it must be a creditor at the time the application for substitution or addition was made.

Re Bilollo **(2010), 62 C.B.R. (5th) 223 (S.C.J.)**

37. Where the facts have established a strong case for substitution because of the delay that has occurred in the prosecution of the Application for Bankruptcy Order, it is just to substitute another applicant.

Re H.N. Simpson Ltd. **(1989), 77 C.B.R. (N.S.) 28 (P.E.I.S.C. – Appeal Division)**

The Stay should be Lifted

38. The Courts have established a number of criteria for the Court to consider in connection with determining whether to lift a stay of proceedings. These include:

(a) when the plan is likely to fail;

(b) the applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor);

(c) the applicant shows necessity of payment (where the creditors' financial problems are created by the order or whether failure to pay the creditor would cause it to close and jeopardize the debtor's company's existence);

(d) the applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors;

(e) it is necessary to permit the applicant to take steps to protect the right which could be lost by the passing of time;

(f) after the lapse of the significant time period, the insolvent is no closer to a proposal than after the commencement of the stay period;

(g) there is a real risk that a creditor's loan will become unsecured during the stay period;

(h) it is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period; and

(i) it is in the interest of justice to do so.

***Re Canwest Global Communications Corp.* (2009), 61 C.B.R. (5th) 200 (S.C.J.)**

39. Courts will consider a number of factors in assessing whether it is appropriate to lift a stay but those factors can generally be grouped under three headings: (a) relative prejudice to parties; (b) the balance of convenience; and (c) where relevant, the merits.

Re Canwest Global Communications, supra

40. Addressing each of these points in turn:

(a) there will not be a plan of arrangement presented to the creditors in this proceeding;

(b) the stay of proceedings is the only impediment to initiating a bankruptcy proceeding in respect of GFPI. The fact that a bankruptcy has not been put in place prevents the application of the scheme of distribution intended by Parliament under the BIA to be applied. As noted below, there ought not to be a different scheme of distribution under the CCAA than under the BIA and the process being advanced under the CCAA is contrary to the interests of the primary secured creditor – the Second Lien Lenders;

(c) [not applicable];

(d) the Second Lien Lenders will be significantly prejudiced by refusal to lift the stay. There would be no resulting prejudice to the Remaining Applicants. The fact that there may be prejudice to any other creditor is part of the balance to be considered in light of the scheme of distribution provided by Parliament under the BIA. It is understood that there are not sufficient funds to pay the claims of the Second Lien Lenders and any deficiency under the Pension Plans previously administered by GFPI. Priorities should not be altered by a re-positioning of claims during the CCAA proceeding.

(e) it is necessary to permit the Second Lien Lenders to initiate the bankruptcy proceedings in respect of GFPI. If funds are released to the administrator of the pensions, the Second Lien Lenders will have no recourse to recover the funds.

(f) there will be no plan of arrangement. The preceding three years were utilized to effect sales of the various assets of the Remaining Applicants (among others). However, the CCAA proceeding will terminate without a plan being advanced and there is no further "restructuring" to complete.

(g) the security of the Second Lien Lenders, which is acknowledged as being in a priority position, will be depleted with respect to any funds paid out to third parties.

(h) [not applicable]; and

(i) it is in the interest of justice to have a bankruptcy proceeding put in place with respect to GFPI. As noted below, the policy objectives of the BIA and the intended interplay between the CCAA and the BIA dictate that distributions be made in accordance with the scheme of distribution under the BIA. That scheme of distribution should not be altered, to the prejudice of the Second Lien Lenders, by any attempts by particular creditors to re-position themselves and the nature of their claims during the CCAA proceeding and seek to maintain their enhanced position by avoiding the legislated scheme of distribution under the BIA. To allow such a process during the CCAA and use it as a basis for objecting to a bankruptcy proceeding would be both a miscarriage of justice and undermine the objective of maintaining the status quo during the stay of proceedings.

A Bankruptcy Order ought to be issued

41. One or more creditors may file an application for a bankruptcy order if it is alleged that the debt or debts of the debtor to the applicant creditor are at least $1,000 and the debtor committed an act of bankruptcy within the six months preceding the filing of the bankruptcy application.

Section 43(1), BIA

42. Section 43(7) permits the court to dismiss an application for a bankruptcy order if it concludes "that for other sufficient cause no order ought to be made". Section 43(7) provides:

> (7) If the court is not satisfied with the proof of the facts alleged in the application or of the service of the application, or is satisfied by the debtor that the debtor is able to pay their debts, or that for other sufficient cause no order ought to be made, it shall dismiss the application.

Section 43(7), BIA

43. Section 43(7) confers a discretion: the exercise of that discretion must be founded on sound judicial reasoning based on credible evidence and must be exercised judicially according to common sense and justice and in a manner that does not occasion a miscarriage of justice.

***Re Churchill Forest Industrial (Manitoba) Ltd.* (1971), 16 C.B.R (N.S.) 158 (Man. Q.B.)**

44. A court may dismiss a bankruptcy application "for other sufficient cause". However, it is accepted by Canadian courts that a creditor may seek a bankruptcy order, among other things:

(a) to seek remedies only available in bankruptcy, such as to investigate questionable transactions involving an alleged preference or transfer at under value; and

(b) as a legitimate way to alter priorities under the BIA.

***Re Ivaco Inc.* (2005), 12 C.B.R. (5th) 213 (S.C.J.), appeal dismissed, (2006), 83 O.R. 108 (Ont. C.A.)**

45. At this stage in the CCAA proceedings relating to the Remaining Applicants, no sufficient cause can be shown that a Bankruptcy Order ought not to be made. There is no juristic basis to suggest that a bankruptcy order should not be made in order to preserve some right or claim that would not exist if a bankruptcy occurred. The Supreme Court of Canada in *Re Century Services* and the Ontario Superior Court of Justice in *Bank of Nova Scotia v. Huronia Precision Plastics* (noted below) have established principles to the contrary – seeking to install the scheme of distribution established by Parliament under the BIA is a valid reason to make a bankruptcy order.

The bankruptcy of GFPI is appropriate and consistent with established principles

46. The fundamental principles applicable to a bankruptcy proceeding and the transition from the CCAA to the BIA have been clearly laid out by the Supreme Court of Canada in the *Re Ted Leroy Trucking [Century Services]Ltd.* case:

> Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankruptcy debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J. A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interest at the conclusion of *CCAA* proceedings that would be lost in bankruptcy *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108 (Ont. C.A.), at paras. 62-63). …
>
> Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the Court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The Court must do so in a manner

> that does not subvert the scheme of distribution under the *BIA*. Transition to liquidation requires partially lifting the *CCCA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.
>
> ***Re Ted Leroy Trucking* [Century Services] Ltd. (2010), 3 S.C.R. 379, 72 C.B.R. (5th) 170 (S.C.C.), at para. 78, 80.**

47. The Supreme Court of Canada also commented on the objective of the stay to maintain the status quo during the CCAA:

> The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the *CCAA*'s objectives to the extent that it allowed a bridge between the *CCAA* and the *BIA* proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the *CCAA*. That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament ... that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.
>
> The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst shareholders for a reorganization that is fair to all. Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation. In the case at bar, the order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that is common to both statutes.
>
> ***Re Ted Leroy Trucking [Century Services] Ltd., supra*, at para. 76-7.**

48. The intention of a party to use the BIA to alter priority is a legitimate reason to seek a bankruptcy and the timing of the request to initiate the BIA proceeding has no bearing on the validity of the request.

> ***Bank of Nova Scotia v. Huronia Precision Plastics Inc.* (2009), 50 C.B.R. (5th) 58 (S.C.J.)**

49. In the context of evaluating the important policy considerations of maintaining a stay of proceedings under a liquidating CCAA, it is important for the Court to consider the appropriate time for the CCAA proceeding to either come to an end or to lift the stay of proceedings to provide for an orderly transition from the CCAA process to the BIA. These proceedings are a good example. Initially, GE Canada initiated bankruptcy proceedings against GFPI. The

response of GFPI was to seek protection under the CCAA and carry out an orderly liquidation of its assets. No plan of arrangement has been under consideration for years. However, the Court permitted the orderly liquidation of the assets in the context of the CCAA.

50. Now, the usefulness of the CCAA proceedings has come to an end. It is appropriate for the Court to allow the Second Lien Lenders to institute bankruptcy proceedings and for the Court to forthwith issue a Bankruptcy Order in respect of GFPI. The regime that will be in place as a result of the Bankruptcy Order will be that contemplated by Parliament in the context of a liquidation and distribution of a bankrupt's assets. The process carried out for the transition from the CCAA proceedings to the BIA will be as intended by Parliament and consistent with the principles established by the Supreme Court of Canada in the *Re Century Services* case.

51. It is clear that there are insufficient proceeds to pay the claims of all of the creditors of GFPI. It has repeatedly been found that reversing priorities is a legitimate purpose for the institution of bankruptcy proceedings. Lifting the stay provided for in the Initial Order at this time is the logical extension of that legitimate purpose. Accordingly, it is appropriate in the circumstances of this case that the stay be lifted and that a Bankruptcy Order be issued by the Court in respect of GFPI forthwith.

PART IV - ORDER REQUESTED

52. With respect to the motion brought by GFPI, the Second Lien Lenders support the position of GFPI and requests that no further distributions be made by GFPI or the Monitor to any creditor until a Bankruptcy Order is made in respect of GFPI. After that time, any distribution should be made only if approved by Court order.

53. With respect to its motion, the Second Lien Lenders request an order:

(a) abridging and validating the timing and method of service of this Notice of Motion and the Motion Record;

(b) substituting the West Face Funds in the place of G.E. Canada as the Applicant Creditor(s) in the Application for Bankruptcy Order issued against GFPI on March

19, 2009 (the "**First Bankruptcy Application**"), with such further amendments to the Application for Bankruptcy Order as are appropriate in the circumstances;

(c) in the alternative to paragraph (b), lifting the stay of proceedings set out in the Initial Order, as extended from time to time, to permit one or more of the West Face Funds to issue an Application for Bankruptcy Order in respect of GFPI (the "**Alternative Bankruptcy Application**") substantially in the form attached as Schedule "A" to the Notice of Motion;

(d) lifting the Stay for the purpose of issuing forthwith a Bankruptcy Order substantially in the form attached as Schedule "B" to the Notice of Motion (the "**Bankruptcy Order")** with respect to the First Bankruptcy Application or the Alternative Bankruptcy Application, as the case may be;

(e) that GE Canada and Grant Thornton Limited shall have no liability in respect of the issuance of the First Bankruptcy Application or the Bankruptcy Order;

(f) an Order for the payment of the costs of the WFCI in connection with this motion on a full indemnification basis by the Monitor and/or the Remaining Applicants from funds in their possession; and

(g) such further and other relief as counsel may advise and this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of October, 2012.

Craig J. Hill

Roger Jaipargas

Lawyers for West Face Capital Inc.

Schedule "A"

List of Authorities

1. ***Re Bilollo*** **(2010), 62 C.B.R. (5th) 223 (SCJ)**
2. ***Re H.N. Simpson Ltd.*** **(1989), 77 C.B.R. (N.S.) 28 (PEISC – Appeal Division)**
3. ***Re Canwest Global Communications Corp.*** **(2009), 61 C.B.R. (5th) 200 (SCJ)**
4. ***Re Churchill Forest Industrial (Manitoba) Ltd.*** **(1971), 16 C.B.R (N.S.) 158 (Man. Q.B.)**
5. ***Re Ivaco Inc.*** **(2005), 12 C.B.R. (5th) 213, 2005, *at para.* 14 (S.CJ.) appeal dismissed, (2006), 83 O.R. 108 (Ont. C.A.)**
6. ***Re Ted Leroy Trucking*** **[Century Services Ltd.) (2010), 3 S.C. 379, 72 C.B.R. (5th) 170 (SCC)**
7. ***Bank of Nova Scotia v. Huronia Precision Plastics Inc.*** **(2009), 50 C.B.R. (5th) 58 (SCJ)**

Schedule "B"

<u>Statutory References</u>

1. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, as amended, ss.43(1), 43(7), 43(13)
2. *Pensions Benefits Act,* R.S.O. 1990 c.P-8, as amended, s. 57(4)

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., et al

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDINGS COMMENCED AT TORONTO

FACTUM OF WEST FACE CAPITAL INC.
(on behalf of West Face Long Term Opportunities Limited Partnership, West Face Long Term Opportunities (USA) Limited Partnership, West Face Long Term Opportunities Master Fund L.P. and West Face Long Term Opportunities Global Master L.P.)

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