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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT FOREST PRODUCTS SALES INC., GRANT ALBERTA INC., GRANT U.S. HOLDINGS GP, SOUTHEAST PROPERTIES LLC, GRANT CLARENDON LP, GRANT ALLENDALE LP, GRANT US SALES INC., GRANT NEWCO LLC AND GRANT EXCLUDED GP

Applicants

- and –

THE TORONTO-DOMINION BANK, in its capacity as agent for secured lenders holding first lien security and THE BANK OF NEW YORK MELLON, in its capacity as agent for secured lenders holding second lien security

Respondents

FACTUM OF GRANT FOREST PRODUCTS INC.

(motion for return of assets by Peter Grant Sr. and related entities and for determination of inter-company accounts, returnable on April 14, 2011)

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
ghall@mccarthy.ca

Lawyers for Grant Forest Products Inc. (on this motion)

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT FOREST PRODUCTS SALES INC., GRANT ALBERTA INC., GRANT U.S. HOLDINGS GP, SOUTHEAST PROPERTIES LLC, GRANT CLARENDON LP, GRANT ALLENDALE LP, GRANT US SALES INC., GRANT NEWCO LLC AND GRANT EXCLUDED GP

Applicants

- and –

THE TORONTO-DOMINION BANK, in its capacity as agent for secured lenders holding first lien security and THE BANK OF NEW YORK MELLON, in its capacity as agent for secured lenders holding second lien security

Respondents

FACTUM OF GRANT FOREST PRODUCTS INC.

(motion for return of assets by Peter Grant Sr. and related entities and for determination of inter-company accounts, returnable on April 14, 2011)

PART I—OVERVIEW

1. Grant Forest Products Inc. ("**GFPI**") is in protection under the *Companies' Creditors Arrangement Act* (the "**CCAA**"). It is not being restructured; instead, its assets are being liquidated. GFPI is well under water, with no prospect that even secured creditors will be paid in full. The company is therefore seeking to maximize the recovery on the liquidation of its assets in order to mitigate as much as possible the significant losses that its creditors will suffer. This motion is a part of that process.

2. GFPI is owned and was controlled by one person, Peter Grant Sr. (one of the responding parties on this motion). Mr. Grant Sr. owns or controls a number of companies, described below

as the "Twin Lakes Entities". There were extensive and complex dealings between GFPI and the Twin Lakes Entities.

3. GFPI has made efforts to untangle those financial dealings by obtaining the return from Mr. Grant Sr. and the Twin Lakes Entities of assets rightfully belonging to it, and by resolving the inter-company accounting balances between GFPI and the Twin Lakes Entities. Much has been resolved between the parties, but some issues remain. The remaining issues are the ones to be resolved in this motion.

4. In broad terms, GFPI requests three categories of relief:

(a) an order requiring the return of certain assets GFPI says rightfully belong to it;

(b) a determination of the correct inter-company balances between GFPI and the Twin Lakes Entities; and

(c) a determination of whether the Twin Lakes Entities have rights of set-off in respect of the net amount owing by them after the correct inter-company balances are ascertained.

(a) ***Return of assets***

5. With respect to the return of assets (issue (a)), the issues have been somewhat narrowed since this motion was brought and only two categories of assets remain in issue: (i) certain aircraft parts; and (ii) $81,225 in cash.

6. The evidence is clear and convincing that both the aircraft parts and the $81,225 in cash belong to GFPI. The court ought therefore order the return of these assets.

(b) ***Inter-company balances***

7. With respect to inter-company balances (issue (b)), the following determinations need to be made:

(a) Certain legal fees were paid by GFPI on account of litigation in which Mr. Grant Sr. was the main plaintiff. Does Mr. Grant Sr. have to repay GFPI for some of these expenses?

(b) Does GFPI have to reimburse the Twin Lakes Entities for certain golf course maintenance expenses historically paid by GFPI but incurred in this case after GFPI advised the Twin Lakes Entities that GFPI would not be paying them?

(c) When inter-company balances were settled between GFPI and the Twin Lakes Entities in October 2008, did the Twin Lakes Entities receive an overpayment of $428,048?

(d) When inter-company balances were settled between GFPI and the Twin Lakes Entities in October 2008, did the Twin Lakes Entities receive a further overpayment of $1.54 million?

8. These issues ought to be determined as follows:

(a) The litigation in question was primarily on account of the personal interests of Mr. Grant Sr., so he should be responsible for the bulk of the legal fees. The only available method for determining the extent to which the litigation was on account of Mr. Grant Sr.'s personal interests (as opposed to GFPI's interests) demonstrates that Mr. Grant Sr. should be responsible for 96.6% of the legal fees.

(b) GFPI should not be required to reimburse the Twin Lakes Entities for the golf course maintenance expenses.

(c) There was an overpayment of $428,048 to the Twin Lakes Entities in October 2008 that should now be accounted for.

(d) There was a further overpayment of $1.54 million to the Twin Lakes Entities in October 2008 that should now be accounted for.

(c) *Set-off*

9. With respect to set-off (issue (c)), if the inter-company balances reveal any amounts owing by the Twin Lakes Entities, the Twin Lakes Entities want to set off two amounts:

(a) a 2006 dividend in favour of the Twin Lakes Entities that was declared but never paid; and

(b) loans of $50 million advanced by 130 to GFPI.

10. The 2006 dividend raises two questions:

(a) Does the dividend constitute a debt of GFPI given that it has been unable to meet the solvency test under the Ontario *Business Corporations Act* (the "**OBCA**") for payment of a dividend since it was declared insolvent upon the making of the CCAA order on June 25, 2009?

(b) In any event even if the dividend were a debt, would it be time barred under the *Limitations Act, 2002*?

The court ought to determine that the 2006 dividend is not a debt, and would be time barred even if it were a debt.

11. The loans raise the question of whether set-off rights that otherwise would not exist but for an amalgamation in August 2010 should be taken into account in determining set-off. The court ought to determine that it would be oppressive to allow reliance on set-off rights that arise only because of the amalgamation.

PART II—THE FACTS

Background: the CCAA proceedings

12. GFPI is a privately owned corporation that carried on the business of manufacturing oriented strand board (commonly known as "OSB"), an engineered wood product used in the construction of buildings and residential housing. GPFI is wholly-owned, indirectly, by Mr. Grant Sr.

> **Reference:** Affidavit of Kyle Sinclair sworn October 29, 2010 (the "**Sinclair Affidavit**"), para. 3; Motion Record, Tab 2

13. GFPI got into financial trouble because of the economic downturn and reduced demand for OSB. In June 2009, it filed for and obtained creditor protection under the CCAA. Most of its assets have now been sold through the CCAA process.

> **Reference:** Sinclair Affidavit, paras. 6-7; Motion Record, Tab 2

14. This motion is part of the cleanup of the CCAA proceedings. GFPI is working to recover assets and liquidate its remaining assets in order to maximize distributions to creditors.

Reference: Sinclair Affidavit, para. 8; Motion Record, Tab 2

The players

15. The players relevant to this motion are as follows:

(a) **GFPI:** GFPI is the debtor under CCAA protection.

(b) **Grant Forest Products Sales Inc.** ("**GFP Sales**"): GFP Sales is a subsidiary of GFPI used for handling sales out of GFPI's Canadian mills.

(c) **Peter Grant Sr.**: Mr. Grant Sr. is the ultimate shareholder of 100% of GFPI. He controlled GFPI until the CCAA proceedings.

(d) **Twin Lakes Entities**: The Twin Lakes Entities are companies owned by, controlled by or affiliated with Mr. Grant Sr., consisting of:

(i) Grant Capital Corporation ("**Grant Capital**"): Grant Capital came into being on August 13, 2010 as a result of the amalgamation of:

A. 1308406 Ontario Inc. ("**130**");

B. Grant Forest Products Corp. ("**GFPC**");

C. GFP Newco Corp.;

D. 1827802 Ontario Limited.

(ii) Grant Farms Corp.;

(iii) 2033844 Ontario Inc.

Reference: Sinclair Affidavit, paras. 4-5; Motion Record, Tab 2

Affidavit of Hap Stephen ("**Stephen Affidavit**"), para. 9 and exhibit I; Supplementary Motion Record, Tabs 2 and 2I

The return of assets

Aircraft parts

16. The aircraft parts at issue are listed in Exhibit A to the Sinclair Affidavit (the "**Aircraft Parts**'). The Sinclair Affidavit sets out, in detail, the facts relevant to the claim for Aircraft Parts:

(a) GFPI formerly operated three aircraft.

(b) To facilitate their operation, GFPI purchased aircraft parts.

(c) Certain of the Aircraft Parts were moved from a hangar leased by GFPI to a locked facility controlled by Mr. Grant Sr. or Grant Capital, without GFPI's approval or consent.

(d) The CCAA Monitor requested a return of the Aircraft Parts, but they have not been returned.

(e) GFPI has records showing that it paid for the Aircraft Parts. There is no record that Grant Capital ever paid for the Aircraft Parts.

Reference: Sinclair Affidavit, paras. 10-17 and exhibit D; Motion Record, Tabs 2 and 2D

Reply Affidavit of Kyle Sinclair ("**Sinclair Reply Affidavit**"), para. 2; Further Supplementary Motion Record, Tab 1

17. In response to this evidence, the Twin Lakes Entities asserts that they own some of the Aircraft Parts, but they have adduced no evidence in support of this contention aside from a hearsay statement made in the affidavit of Rheo Hacquard, the Vice President, Corporate Business of Grant Capital: "Much of the equipment in question (ie. the lifts and shop equipment at the hangar) were [*sic*] purchased by GFPC and continue [*sic*] to be owned by Grant Capital. I am informed by Peter Grant that GFPC acquired this equipment early on when the first planes were acquired."

Reference: Affidavit of Rheo Hacquard ("**Hacquard Affidavit**"), para. 28; Responding Motion Record, Tab 1

18. On cross-examination, Mr. Hacquard admitted that he had no personal knowledge about the original acquisition of the equipment, and had not seen any documentation that it was actually acquired by GFPC as opposed to somebody else.

Reference: Cross-examination of Rheo Hacquard, Q2 to Q4

19. Mr. Grant Sr., the source of the hearsay conveyed by Mr. Hacquard, has not filed an affidavit.

20. In light of the state of the evidence, the court ought to make a finding that the Aircraft Parts belong to GFPI, and ought to order their return.

The $81,225 in cash

21. When this motion was launched there were three categories of cash at issue. As a result of the evidence adduced on the motion, GFPI is now only pursuing one category of cash.

22. The cash in question consists of $81,225 in bills sitting in a safe at Twin Lakes' premises. The Twin Lakes Entities claim that these funds were donated in 1999 to a charitable foundation that Mr. Grant Sr. runs, the Frog's Breath Foundation ("Frog's Breath"). However:

(a) The cash is recorded on the balance sheet *of GFPI* as an asset of GFPI.

(b) On cross-examination, Mr. Hacquard admitted:

(i) As a registered charity, Frog's Breath usually issues receipts for charitable donations, but he has not seen or looked for or asked if there was a receipt issued in this case.

(ii) While corporations can take tax deductions for charitable receipts, he does not know if GFPI took a deduction in 1999 in respect of the supposed donation to Frog's Breath.

(iii) As of 1999, when the donation was supposedly made, it was not on the balance sheet of Frog's Breath as an asset.

Reference: Sinclair Reply Affidavit, para. 4; Further Supplementary Motion Record, Tab 1 Cross-examination of Rheo Hacquard, Q18 to Q26 and Q114 to Q118

23. In light of the clear state of the evidence, the court ought to make a finding that the Frog's Breath cash of $81,225 belongs to GFPI, and ought to order its return.

Inter-company balances

24. There are four outstanding issues in respect of inter-company balances between GFPI and the Twin Lakes Entities:

(a) Should the Twin Lakes Entities have to pay a portion of legal fees paid by GFPI in connection with a defamation action against Torstar Corporation ("**Torstar**") in which Mr. Grant Sr. personally was the main plaintiff?

(b) Should GFPI be required to pay the Twin Lakes Entities for certain expenses which are related to a golf course owned by GFPI and which were incurred in the course of the CCAA proceedings?

(c) When inter-company balances were settled between GFPI and the Twin Lakes Entities in October 2008, did the Twin Lakes Entities receive an overpayment of $428,048?

(d) When inter-company balances were settled between GFPI and the Twin Lakes Entities in October 2008, did the Twin Lakes Entities receive a further overpayment of $1.54 million?

Torstar legal fees

25. Mr. Grant Sr. (personally) and GFPI sued Torstar for defamation. The litigation went through a trial, an appeal to the Ontario Court of Appeal, and an appeal to the Supreme Court of Canada. Mr. Grant Sr. and GFPI were successful at trial, but the judgment was overturned on appeal on legal grounds, with the Supreme Court of Canada recognizing a new defence in the law of defamation of "responsible communication on matters of public interest".

Reference: Sinclair Affidavit, paras. 38, 40 and exhibit O; Motion Record, Tabs 2 and 2O

Grant v. Torstar Corporation, 2008 ONCA 796, 92 O.R. (3d) 561; Brief of Authorities of GFPI, Tab 1

Grant v. Torstar Corporation, 2009 SCC 61, [2009] 3 S.C.R. 640; Brief of Authorities of GFPI, Tab 2

26. Throughout the litigation, GFPI paid the legal fees incurred in connection with the case (totalling more than $500,000). However, there was never any agreement between GFPI and the Twin Lakes Entities as to who would ultimately be responsible for them.

Reference: Sinclair Affidavit, para. 39-40; Motion Record, Tab 2

27. GFPI regards it as unfair to its creditors that they should be burdened with the entire expense of the litigation when Mr. Grant Sr. personally was the main plaintiff. In the absence of any actual agreement between the parties on the point, GFPI has sought to think of a way to determine the extent to which the litigation was on account of Mr. Grant Sr.'s personal interests and the extent to which it was on account of GFPI's interests.

Reference: Sinclair Affidavit, para. 40; Motion Record, Tab 2

28. The only mechanism that appears to be available to make such an assessment is the jury's award at trial, which quantified the damages suffered by Mr. Grant Sr. and by GFPI on the basis that there was liability. GFPI acknowledges that the jury's award has been overturned on appeal, but the appellate reversal occurred not because of any error by the jury in its assessment of damages but rather for unrelated legal reasons as to whether there was actually liability for defamation in light of the new defence of responsible communication on matters of public interest. The jury's award is the only time that anyone has made a determination of the extent to which the Torstar litigation was a personal matter for Mr. Grant Sr. as opposed to a corporate matter for GFPI.

Reference: Sinclair Affidavit, para. 40; Motion Record Tab 2

29. The jury awarded Mr. Grant Sr. $1.425 million, and awarded GFPI $50,000. Thus 96.6% of the total award went to Mr. Grant Sr., and 3.4% went to GFPI.

Reference: Sinclair Affidavit, para. 40 and exhibit O; Motion Record, Tabs 2 and 2O

30. In fairness to GFPI's creditors, it is appropriate to allocate to Mr. Grant Sr. 96.6% of the Torstar legal expenses paid by GFPI in the determination of the inter-company accounts.[1]

Golf course expenses

31. The Twin Lakes Entities seek to include in the inter-company balances the sum of \$158,447.63 which GFPC charged GFPI for maintaining part of a golf course that is partly located on land owned by GFPC and partly on land owned by GFPI. This claim is based on the fact that "[h]istorically, GFPI has always been responsible for the maintenance of that portion of the golf course and any costs incurred by GFPC in that regard were always reimbursed by GFPI".

Reference: Sinclair Reply Affidavit, para. 11; Further Supplementary Motion Record, Tab 1

32. However, the claim omits some important facts.

33. Once GFPI went into CCAA protection, GFPI's lenders did not want GFPI to incur expenses in relation to the golf course, including expenses for maintenance, except for security. Accordingly, GFPI advised the responsible GFPC employee, Doug Blackburn, who at the time was in charge of property management for the golf course, that GFPI was not willing to pay for maintenance of the golf course because the lenders did not want the golf course maintained. Mr. Sinclair further advised Mr. Blackburn that if GFPC proceeded with maintenance, it would be spending its own money.

Reference: Sinclair Reply Affidavit, para. 12; Further Supplementary Motion Record, Tab 1

---

[1] The parties do not require the court to make a determination of quantum. The amount of legal fees paid is known and not in dispute, and the parties can do the appropriate arithmetic to allocate dollar amounts based on the court's determination of what percent should be allocated to each side.

34. The person who spoke to Mr. Blackburn in this regard was Kyle Sinclair, GFPI's Chief Financial Officer. Mr. Sinclair has sworn an affidavit attesting to the conversation with Mr. Blackburn. Mr. Blackburn has not sworn an affidavit. Mr. Sinclair's evidence of the conversation is uncontradicted.

Reference: Sinclair Reply Affidavit, para. 12; Further Supplementary Motion Record, Tab 1

35. It is entirely understandable that lenders to a company in CCAA protection would choose not to finance a non-core activity like maintenance of a golf course. If the Twin Lakes Entities ignored Mr. Sinclair's advice and nevertheless proceeded with the maintenance, it should be on their account. GFPI's creditors should not have to bear that expense.

36. In light of the clear state of the evidence, the court ought to make a finding that GFPC was advised that GFPI was not prepared to assume the golf course maintenance expenses. As a result of that finding, and in fairness to GFPI's creditors, the court ought to order that Grant Capital is not entitled to include the golf course expenses in the inter-company accounts.

Overpayment of $428,048 in October 2008 on account of an error in determining the inter-company account as at August 31, 2008

37. GFPI should be credited $428,048 in the reconciliation of the inter-company accounts because of an overpayment to GFPC in October 2008.

38. In October 2008, GFPI issued a cheque to GFPC intending to settle the inter-company balance (in other words, bring it to nil) between GFPI and GFPC as at August 31, 2008. The cheque that was issued was for $2,697,623. In fact, as at August 31, 2008 the inter-company balance was only $2,269,575, meaning that there was an overpayment of $428,048.

Reference: Sinclair Affidavit, para. 34; Motion Record, Tab 1

39. The parties thought they had the right number when the October 2008 cheque was issued, but that is of no moment. The issue is to get the inter-company balance right. An error in October 2008 should not prejudice GFPI's creditors now.

40. The correct inter-company balance as at August 31, 2008 ($2,269,575) is shown on the books of GFPI.

Reference: Affidavit of John Chisholm ("**Chisholm Affidavit**"), para. 4 and exhibit A; Further Supplementary Motion Record, Tabs 2 and 2A

41. The Twin Lakes Entities have come up with various theories to try to explain the $428,048 discrepancy, but none is credible. The Twin Lakes Entities surmise that the error results from ignoring an inter-company account, account 11612. However, that account in fact had a zero balance at the relevant time.

Reference: Chisholm Affidavit, para. 5 and exhibit B; Further Supplementary Motion Record, Tab 2 and 2B

42. The court should make a finding that the inter-company balances should include a credit of $428,048 in favour of GFPI to correct for the October 2008 overpayment.

Overpayment of $1.54 million in October 2008 on account of the erroneous inclusion of an amount for accrued dividends

43. GFPI should also be credited $1.54 million in the reconciliation of the inter-company accounts because of an overpayment to GFPC in October 2008 on account of the erroneous inclusion of an amount for accrued dividends.

44. The inter-company balance as at August 31, 2008 incorrectly included a credit to GFPC for $1.54 million on account of accrued dividends. It was not GFPI's historical practice to account for accrued dividends in the inter-company account, but for some reason in June 2006 a dividend of $1.54 million was posted to the inter-company account. This was inconsistent with GFPI's usual treatment of accrued dividends and simply appears to have been an error. When inter-company accounts were reconciled in December 2008, the error was detected and $1.54 million was reversed out of the account.

Reference: Sinclair Affidavit, para. 35; Motion Record, Tab 2

Chisholm Affidavit, para. 8 and exhibits C, D, and E; Further Supplementary Motion Record, Tabs 2, 2C, 2D and 2E

45. Again the Twin Lakes Entities have come up with various theories to try to establish that there should not be an adjustment, but none is credible. The court should make a finding that the inter-company balances should include a credit of $1.54 million in favour of GFPI to correct for the incorrect credit on account of accrued dividends in the October 2008 payment.

The set-off issues

46. If the inter-company balances reveal any amounts owing by the Twin Lakes Entities, they want to set off two amounts:

(a) a 2006 dividend in favour of the Twin Lakes Entities that was declared but never paid; and

(b) loans of $50 million advanced by 130 to GFPI.

47. Whether these set-offs should be permitted raises the following questions:

(a) **2006 dividend**: The 2006 dividend raises two questions:

(i) Does the dividend constitute a debt of GFPI given that GFPI has been unable to meet the solvency test under the OBCA for payment of a dividend since it was declared insolvent upon the making of the CCAA order on June 25, 2009?

(ii) If the dividend is a debt, it is time barred under the *Limitations Act, 2002*?

(b) **Loans**: Can set-off rights that otherwise would not exist arise as a result of the August 2010 amalgamation that led to the creation of Grant Capital?

2006 dividend

48. It appears that the following facts relevant to the 2006 dividend are not in dispute:

(a) GFPI was declared insolvent in June 2009, it has not subsequently become solvent, and it will never become solvent again in the future because its main assets have been sold and its remaining assets are being liquidated.

(b) GFPC (now part of Grant Capital) has never commenced an action against GFPI to recover the 2006 dividend.

Reference: Sinclair Affidavit, paras. 44-45; Motion Record, Tab 2

Loans

49. It appears that the following facts relevant to the loans are not in dispute:[2]

(a) 130 advanced a total of $50 million to GFPI. The loans were evidenced by two promissory notes.

Reference: Stephen Affidavit, paras. 5-6 and exhibits F and G; Supplementary Motion Record, Tabs 2, 2F and 2G

(b) The amount owing by 130 to GFPI under GFPI's calculation of the inter-company accounts is only $16,641.80. In other words, absent the amalgamation referred to below, 130 could only set off $16,641.80 on account of the $50 million in loans.

Reference: Sinclair Affidavit, para. 27; Motion Record, Tab 2

(c) On August 13, 2010, 130, GFPC, GFP Newco Corp. and 1827802 Ontario Limited amalgamated to form Grant Capital.

Reference: Stephen Affidavit, para. 9 and exhibit I; Supplementary Motion Record, Tab 2 and 2I

(d) The issues raised in this motion had been the subject of discussion between the parties for some time before August 13, 2010. The relevant correspondence began in October 2009. The first chambers appointment in connection with this motion took place five days after the amalgamation, on August 18, 2010.

Reference: Stephen Affidavit, paras. 2-4; Supplementary Motion Record, Tab 2

---

[2] All of the evidence summarized in this paragraph was uncontradicted and not challenged in cross-examination. Mr. Stephen was not cross-examined. Mr. Hacquard was cross-examined, but not on the point mentioned in subparagraph (f).

(e) For some reason that has never been explained, GFPI was not advised of the amalgamation or of the set-off claim until November 2010.

Reference: Stephen Affidavit, para. 5; Supplementary Motion Record, Tab 2

(f) Mr. Hacquard's affidavit responding to the amalgamation issue set out several supposed business reasons for the amalgamation, but also admitted: "It was also recognized that there might be legal benefits and protections in consolidating claims and debts in a single entity."

Reference: Hacquard Affidavit, para. 12; Responding Motion Record, Tab 1

(g) Prior to the August 2010 amalgamation, in the ordinary course of accounting between the various corporations, inter-company balances were carried separately on the books, and 130's loans were not treated as part of the inter-company balances. Prior to GFPI's insolvency proceedings outstanding inter-company accounts were settled in cash (by cheques or wire transfers), with payments made on individual accounts (although never in full settlement of any balances).

Reference: Stephen Affidavit, para. 10; Supplementary Motion Record, Tab 1

PART III— THE ISSUES

50. What assets ought to be ordered returned to GFPI?

51. What is the correct determination of inter-company balances between GFPI and the Twin Lakes Entities?

52. What rights of set-off in respect of the net amount owing by them as a result of the determination of the correct inter-company balances, and issue that requires the determination of the following sub-issues:

(a) Does the 2006 dividend constitute a debt of GFPI given that it has been unable to meet the solvency test under the OBCA for payment of a dividend since it was declared insolvent on June 25, 2009 upon the making of the CCAA order?

(b) Even if the dividend were a debt of GFPI, would it be time barred under the *Limitations Act, 2002*?

(c) Can Grant Capital rely on set-off rights that otherwise would not exist arise but which allegedly arose as a result of the August 2010 amalgamation that led to the creation of Grant Capital?

PART IV— THE LAW AND ARGUMENT

The Aircraft Parts and the $81,225 in cash ought to be ordered returned to GFPI

53. For the reasons set out in Part II of this factum, the evidence is clear that the Aircraft Parts and the $81,225 in cash belong to GFPI. They ought to be ordered returned.

Correct determination of inter-company balances

54. For the reasons set out in Part II of this factum:

(a) Mr. Grant Sr. should be responsible for 96.6% of the Torstar legal fees.

(b) GFPI should not be responsible for the golf course maintenance expenses.

(c) There was an overpayment to the Twin Lakes Entities of $428,048 in October 2008 on account of an error in determining the inter-company account as at August 31, 2008.

(d) There was an overpayment to the Twin Lakes Entities of $1.54 million in October 2008 on account of the erroneous inclusion of an amount for accrued dividends

Set-off

The 2006 dividend does not constitute a debt

55. Under the OBCA, dividends may not be declared or paid when a corporation is insolvent:

> "38(3) The directors shall not declare and the corporation shall not pay a dividend if there are reasonable grounds for believing that,
>
> (a) the corporation is or, after the payment, would be unable to pay its liabilities as they become due; or
>
> (b) the realizable value of the corporation's assets would thereby be less than the aggregate of,
>
> (i) its liabilities, and
>
> (ii) its stated capital of all classes."

Reference: OBCA, s. 38(3)

56. The purpose of the solvency test is to ensure that shareholders do not recoup on their investment to the prejudice of creditors.

57. It is noteworthy that there are two times when the solvency test applies. It applies *both* when the dividend is *declared* and when the dividend is *paid*. This raises the question of the

legal status of a dividend that has been declared at a time when a corporation is solvent but may not be paid because the solvency test is no longer met. This is precisely the case for GFPI: it was solvent in 2006 when the dividends in question were declared but it has been insolvent at least since the CCAA order in June 2009, and there is no prospect that it will ever be able to meet the solvency test at any time in the future.

58. There is little judicial authority on point, but the consensus among scholars (supported by what little case law exists) is that a dividend is only a debt when it can be lawfully paid in accordance with applicable corporate law. In other words, shareholders do not have an enforceable claim for a declared but unpaid dividend as long as the corporation is insolvent, and only have an enforceable claim once the corporation has again met the solvency test and has failed to pay the dividend. Put another way, where a declared dividend cannot lawfully be paid because the solvency test is not met, the directors of the corporation must suspend payment until such time as the dividend can be paid without contravening the corporate statute. Once the directors suspend payment of a dividend, a shareholder cannot successfully bring an action for non-payment as long as the solvency test is not met.

Reference: Christopher C. Nicholls, *Corporate Finance and Canadian Law* (Toronto: Carswell, 2000) at 24; Brief of Authorities of GFPI, Tab 3

W.K. Fraser & J.L. Stewart, *Company Law of Canada*, 6th ed. (Scarborough: Carswell, 1993) at 226; Brief of Authorities of GFPI, Tab 4

59. These conclusions are supported by case law establishing that enforceability of an obligation is a key element of a debt claim, and by case law dealing with redemption rights in preferred shares. Where shareholders asserted claims with respect to a redemption obligation, the Ontario Court of Appeal held that the obligation of the corporation to pay for the shares was without effect to the extent that it conflicted with the obligations and restrictions under the

corporate statute. Until the solvency test could be met, there was no debt that could be enforced by action resulting in money judgment.

> **Reference:** *Royal Bank of Canada v. Central Capital Corp.* (1996), 27 O.R. (3d) 494 (C.A.); Brief of Authorities of GFPI, Tab 5

60. Thus the 2006 dividend is not a debt and should not be taken into account as a set-off. GFPI has not been legally able to pay it since at least June 2009, and will never in the future be legally able to pay it. GFPC cannot sue to enforce it, and should not be able to collect it indirectly (at the expense of GFPI's creditors) through set-off.

In any event, even if 2006 dividend were a debt, it would be time-barred

61. The relevant law is well known: under the *Limitations Act, 2002*, an action in respect of a debt claim must be brought within two years of when the plaintiff knew or ought to have known of the claim.

> **Reference:** *Limitations Act, 2002*, S.O. 2002, c. 24, Schedule B, ss. 4-5

62. There is no issue of discoverability in this case: GFPC clearly either knew or ought to have known since 2006 of its potential claim in respect of the dividend.

63. More than two years passed between 2006 and the CCAA filing in June 2009 without an action being instituted.[3] Thus even if the 2006 dividend were a debt, it is time barred.

---

[3] The relevant time period is before the CCAA filing because since the filing there has been a stay of proceedings. But there is no doubt that the limitation period expired before the CCAA filing so this nuance is of no moment.

Grant Capital should not be allowed to rely on set-off rights that otherwise would not exist but for the August 2010 amalgamation

(i) ***The governing legal principles***

64. Grant Capital should not be allowed to rely on set-off rights that would not exist but for the 2010 amalgamation that created Grant Capital, because such reliance would be oppressive to GFPI.

65. The principles governing the oppression remedy are well established and were summarized by the Supreme Court of Canada in *BCE Inc. v. 1976 Debentureholders*:

(a) One should look first to the principles underlying the oppression remedy, and in particular the concept of reasonable expectations. If a breach of a reasonable expectation is established, one must go on to consider whether the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard".

(b) Put another way, there are two related inquiries: (1) Does the evidence support the reasonable expectation asserted by the claimant? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

(c) Oppression is an equitable remedy. It seeks to ensure fairness — what is "just and equitable". It gives a court broad, equitable jurisdiction to enforce not just what is legal but what is fair. Thus courts considering claims for oppression should look at business realities, not merely narrow legalities.

(d) Like many equitable remedies, oppression is fact-specific. What is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play. Conduct that may be oppressive in one situation may not be in another.

(e) As denoted by "reasonable", the concept of reasonable expectations is objective and contextual. The actual expectation of a particular stakeholder is not conclusive. In the context of whether it would be "just and equitable" to grant a remedy, the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations.

Reference: *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560 at paras. 56-68; Commercial List Authorities Book, Tab 1

N*aneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481 (C.A.); Commercial List Authorities Book, Tab 2

66. In order to bring an oppression proceeding, one must be a "complainant" as defined by section 245 of the OBCA. Creditors are not necessarily complainants simply by virtue of the existence of a debtor/creditor relationship with a corporation, but a creditor may be a proper person to make an application for an oppression remedy in the discretion of the court. This discretion has been exercised in a wide variety of circumstances in which corporate behaviour has prejudiced a creditor's position. While the oppression remedy cannot be routinely used as a mechanism to enforce debt obligations, the courts have had little hesitation in allowing creditors access to the oppression remedy when corporate acts affect debt obligations adversely.

Reference: *1413910 Ontario Inc. (Bulls Eye Steakhouse & Grill) v. McLennan* (2009), 309 D.L.R. (4th) 756 (Div. Ct.) at 23-24; Brief of Authorities of GFPI, Tab 6

Peoples Department Stores Inc. (Trustee of) v. Wise (2004), 244 D.L.R. (4th) 564

(S.C.C.) at paras. 48- 51; Brief of Authorities of GFPI, Tab 7

Downtown Eatery (1993) Ltd. v. Ontario (2001), 200 D.L.R. (4th) 289 (Ont. C.A.) at para. 57; Brief of Authorities of GFPI, Tab 8

Piller Sausages & Delicatessens Limited v. Cobb International Corporation (2003), 35 B.L.R. (3d) 193 (Ont. S.C.J.) at para. 14, affd. 179 O.A.C. 290 (C.A.); Brief of Authorities of GFPI, Tab 9

(ii) *Application to the facts*

67. GFPI is a creditor of Grant Capital (assuming of course that the inter-company balances are in GFPI's favour; if they are not, the entire oppression discussion is moot). The amalgamation that created Grant Capital has affected GFPI in a way transcending the ordinary debtor-creditor relationship. It is quite appropriate for GFPI to seek to use the oppression remedy to address the adverse effects to it – and more importantly to its creditors – that are created by the amalgamation. GFPI should therefore be accepted as a proper complainant.

68. In response to the question of whether the evidence supports the reasonable expectations asserted by the claimant, the uncontested and unchallenged evidence set out in paragraph 49 of this factum establishes that for many years until this motion was launched, the $50 million in loans from 130 were treated separately from inter-company balances. Inter-company balances were settled from time to time without regard for the existence of the loans, and without any effort to set them off. GFPI therefore had a reasonable expectation that the loans from 130 would not be used to set-off amounts it otherwise would be entitled to collect on account of the inter-company balances. It is contrary to GFPI's reasonable expectations for set-off rights belonging only to 130 to now become rights belonging to all of the entities that now make up Grant Capital, and for 130's loans to be set-off against all inter-company balances involving the Twin Lakes Entities.

69. In response to the question of whether GFPI's reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest, the August 2010 amalgamation was undertaken at least in part to secure "legal benefits and protections in consolidating claims and debts in a single entity". It was a unilateral and unannounced corporate act by Grant Capital (and by its directing mind Mr. Grant Sr.) that the Twin Lakes Entities now hope will serve to totally upset the way the parties did business for many years. Mr. Grant Sr. chose to operate with a web of personal companies and treated the $50 million in loans from 130 as totally separate from other inter-company dealings. With the amalgamation, undertaken on the eve of the launch of this motion and at a time when Mr. Grant Sr. knew that this motion was coming, Mr. Grant Sr. seeks to change the landscape and effectively ignore the different corporate entities through which he transacted business. This effort unfairly disregards and prejudices GFPI's interests – and more importantly the interests of GFPI's creditors, who are the ones who will lose if Mr. Grant's stratagem succeeds.

70. In the exercise of the court's discretion, it is an important factor that the remedy sought by GFPI is a narrow one. GFPI is not seeking to set aside the amalgamation. Rather it is merely asking that the issue of set-off be determined without regard for the amalgamation. Such a remedy will not interfere with Grant Capital's new corporate structure while treating GFPI – and more importantly its creditors – in accordance with the expectations that were in place for many years prior to the August 2010 amalgamation.

71. GFPI's creditors do not deserve to have their interests defeated by a corporate amalgamation. The oppression remedy ought to be used to avoid this outcome.

PART V—RELIEF REQUESTED

72. GFPI therefore requests the following orders:

(a) with respect to the return of assets, an order requiring return of the Aircraft Parts and the Frog's Breath cash of $81,225 to GFPI;

(b) with respect to inter-company accounts, determinations that:

(i) Mr. Grant Sr. is responsible for 96.6% of the Torstar legal fees;

(ii) GFPI is not responsible for the golf course maintenance expenses;

(iii) there was an overpayment to the Twin Lakes Entities of $428,048 in October 2008 on account of an error in determining the inter-company account as at August 31, 2008; and

(iv) there was an overpayment to the Twin Lakes Entities of $1.54 million in October 2008 on account of the erroneous inclusion of an amount for accrued dividends;

(c) with respect to set-off rights:

(i) an order declaring that Grant Capital does not have set-off rights arising from the 2006 dividend; and

(ii) an order declaring that the August 2010 amalgamation leading to Grant Capital was oppressive to GFPI, and directing, as a remedy under section 248 of the OBCA, that Grant Capital pay the inter-company balances without set-off or deduction, except for rights of set-off that existed prior to the amalgamation.

73. GFPI also seeks its costs of this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 11TH DAY OF APRIL, 2011.

Geoff R. Hall

McCarthy Tétrault LLP
Counsel to Grant Forest Products Inc.
(on this motion)

SCHEDULE "A" – LIST OF AUTHORITIES REFERRED TO

1. *Grant v. Torstar Corporation*, 2008 ONCA 796, 92 O.R. (3d) 561

2. *Grant v. Torstar Corporation*, 2009 SCC 61, [2009] 3 S.C.R. 640

3. Christopher C. Nicholls, *Corporate Finance and Canadian Law* (Toronto: Carswell, 2000) at 24

4. W.K. Fraser & J.L. Stewart, *Company Law of Canada*, 6th ed. (Scarborough: Carswell, 1993) at 226

5. *Royal Bank of Canada v. Central Capital Corp.* (1996), 27 O.R. (3d) 494 (C.A.)

6. *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560

7. N*aneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481 (C.A.)

8. *1413910 Ontario Inc. (Bulls Eye Steakhouse & Grill) v. McLennan* (2009), 309 D.L.R. (4th) 756 (Div. Ct.)

9. *Peoples Department Stores Inc. (Trustee of) v. Wise* (2004), 244 D.L.R. (4th) 564 (S.C.C.)

10. *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 200 D.L.R. (4th) 289 (Ont. C.A.)

11. *Piller Sausages & Delicatessens Limited v. Cobb International Corporation* (2003), 35 B.L.R. (3d) 193 (Ont. S.C.J.), affd. 179 O.A.C. 290 (C.A.)

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

***Ontario Business Corporations Act*, R.S.O. 1990, c. B.16**

38.(3) The directors shall not declare and the corporation shall not pay a dividend if there are reasonable grounds for believing that,

(a) the corporation is or, after the payment, would be unable to pay its liabilities as they become due; or

(b) the realizable value of the corporation's assets would thereby be less than the aggregate of,

(i) its liabilities, and

(ii) its stated capital of all classes.

245. In this Part,

"action" means an action under this Act; ("action")

"complainant" means,

(a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,

(b) a director or an officer or a former director or officer of a corporation or of any of its affiliates,

(c) any other person who, in the discretion of the court, is a proper person to make an application under this Part. ("plaignant")

248.(1) A complainant and, in the case of an offering corporation, the Commission may apply to the court for an order under this section.

(2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,

(a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;

(b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or

(c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of.

(3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,

(a) an order restraining the conduct complained of;

(b) an order appointing a receiver or receiver-manager;

(c) an order to regulate a corporation's affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;

(d) an order directing an issue or exchange of securities;

(e) an order appointing directors in place of or in addition to all or any of the directors then in office;

(f) an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;

(g) an order directing a corporation, subject to subsection (6), or any other person, to pay to a security holder any part of the money paid by the security holder for securities;

(h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;

(i) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 154 or an accounting in such other form as the court may determine;

(j) an order compensating an aggrieved person;

(k) an order directing rectification of the registers or other records of a corporation under section 250;

(l) an order winding up the corporation under section 207;

(m) an order directing an investigation under Part XIII be made; and

(n) an order requiring the trial of any issue.

***Limitations Act, 2002*, S.O. 2002, c. 24, Schedule B**

4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

5.(1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

(ii) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

Downloaded from www.e-laws.gov.on.ca.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

FACTUM

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
ghall@mccarthy.ca

Lawyers for Grant Forest Products Inc. (on this motion)

#10093067 v. 2