Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:

QUALITY RUGS OF CANADA LIMITED

Applicant

and

WAYGAR CAPITAL INC., AS AGENT FOR NINEPOINT CANADIAN SENIOR DEBT MASTER FUND L.P.

Respondent

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF QUALITY RUGS OF CANADA LIMITED AND THE OTHER GROUP LISTED IN SCHEDULE "A" HERETO (THE "APPLICANTS")

FACTUM OF THE APPLICANTS

(APPLICANTS SEPT 22, 2023 MOTION CONCERNING LIUNA LETTERS TO BUILDERS)

September 27, 2023

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TO: THE SERVICE LIST

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PART I - OVERVIEW[1]

1. On September 22, 2023, LIUNA Local 183 (the "**Union**"), and the Carpenters Union Local 27 ("CU-27") each brought a motion (the "**Union Motions**") concerning holdbacks deducted by QSG pursuant to the LiUNA Low Rise Tile Agreement and the CU-27 Agreement. Specifically, the Unions requested that

> (i) a reserve be created and held by the Monitor separate from QSG's estate and
>
> (ii) that the stay be lifted to permit the Unions to proceed with grievances under the collective agreements against both QSG and its directors and officers, which grievances would seek to establish that: a) the collective agreements both required holdbacks deducted from installer payments to be held as a trust fund for the installers until either applied to rectify deficiencies, or refunded to them after specified periods; and b) that the directors and officers were in breach of trust.

2. The Applicants and their directors are presently protected by a stay of proceedings granted under the *Companies' Creditors Arrangements Act* ("*CCAA*") [2] by the Initial CCAA Order made August 25, 2023 as amended and restated as an ARIO September 5, 2023. QSG seeks the dismissal of the Union Motions as the relief sought is not lawful, appropriate, nor necessary, and too costly and impractical to implement.

3. It is clear on the face of both the the LiUNA Low Rise Tile Agreement and the CU-27 Agreement that the holdback provisions in those agreements do not refer to the creation of a trust. It is not a good use of estate resources to permit a collateral proceeding about a issue with a low likelihood of success and high process costs which could make the small amounts in question pointless. (both holdback amounts in issue are less than $100,000). Moreover no traceable trust fund exists so there is no remedy even if a determination about that question was made.

4. In relation to the request to lift the stay to proceed against the directors and officers, no cause of action against them is demonstrated, nor are they are not party to the collective agreement, nor is it practical or convenient to require them to expend resources defending themselves considering the small quantity of funds in dispute. In the alternative, should a reserve be created and any claims be permitted to

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[1] Definitions in this factum will track those used in the QSG Factum and Motion Record for the September 22, 2023 motion on union matters, except where otherwise noted.

[2] *Companies' Creditors Arrangement Act* (R.S.C., 1985, C. C-36)

be pursued against the directors and officer, such claims should be limited recourse solely to any reserves created and the directors and officers should not be required to be participate in the dispute. Any claim by LiUNA to the reserve would in essence be a priority dispute with other creditors and hence the real parties in interest should be the only participants.

PART II - FACTS

5. The facts are as set out in the Affidavit of John Pacione affirmed September 21, 2023, and the supplemental affidavit of John Pacione affirmed September 27, both in opposition to the Union Motion on the holdback issue. The Holdback provisions of :

1. The LiUNA LowRise Tile CA,
2. The CU27 Hardwood & Carpet CA
3. The former LiUNA Hardwood & Carpet CA

are set out in full in the affidavit of John Pacione dated Sept 21, 2023.. The key extracts from the holdback provisions of the LiUNA/GTRA Collective Agreement which is also discussed below is set out in the Supplemental Affidavit of John Pacione dated September 27, 2023.

6. LiUNA was at one time the bargaining agent for both QSG's hardwood and carpet installers as well as QSG's low rise tile installers. However, an installer vote displaced LiUNA as bargaining agent for the hardwood and carpet installers in favor of CU-27. In addition, LiUNA announced that it would abandon bargaining rights for low rise tile workers effective May 02nd, 2023. A settlement agreement of an unfair labour practice proceeding launched by QSG was reached in response. That settlement allows QSG to continue to perform low rise tile installations at certain builder sites that require installers covered by a LiUNA collective agreement until May 1st, 2024. **Hence LiUNA is no longer the bargaining agent for any installers performing flooring installations for QSG**. As a result, LiUNA does not have an interest in the future of the QSG business.

PART III – ISSUES

7. The issues are:

(a) Can the CCAA court determine the holdback question or is it required to be pursued by grievance to the labour board or a labour arbitration under the Labour Relations Act?

(b) Does the holdback wording in the collective agreements create a trust or a debt?

(c) Should leave be granted to permit the unions to institute, continue, or amend grievances to assert the holdback trust claim against QSG?

(d) Should leave be granted to commence grievances against QSG's directors and officers for breach of trust?

(d) Is it premature to create a reserve for any holdback claim by the Unions?

PART IV – LAW AND ANALYSIS

A. Courts Can Determine Priority Claims in *CCAA* Proceedings which flow from Collective Agreements

8. QSG is currently subject to a stay under section 11.02 of the *CCAA*. Absent *CCAA* proceedings, the Supreme Court has stated that it is for labour arbitrators and not the courts to determine grievances under collective agreements under the Ontario *Labour Relations Act* ("*LRA*") [3], [4].

> 67. I conclude that mandatory arbitration clauses such as s. 45(1) of the Ontario Labour Relations Act generally confer exclusive jurisdiction on labour tribunals to deal with all disputes between the parties arising from the collective agreement. The question in each case is whether the dispute, viewed with an eye to its essential character, arises from the collective agreement. This extends to Charter remedies, provided that the legislation empowers the arbitrator to hear the dispute and grant the remedies claimed. The exclusive jurisdiction of the arbitrator is subject to the residual discretionary power of courts of inherent jurisdiction to grant remedies not possessed by the statutory tribunal. Against this background, I turn to the facts in the case at bar.

9. It is useful to look closely at what *Weber* says and does not say:

a. It says exclusive jurisdiction relating pertains to disputes between the parties. That is not the case here. QSG is about to cease to exist as a business as it is facing the sale of all of its assets and business, or a receivership. The dispute the Union is raising in this context is not with QSG but with the secured creditor, as LiUNA is effectively trying to get priority over that creditor either over the sales proceeds in the event of a closing or over the QSG assets in the event of a receivership. The secured creditor is not a party to the Collective Agreement. LiUNA's issue is not a bilateral dispute but a question in rem.

b. Exclusive jurisdiction is subject to the inherent jurisdiction of the courts to grant remedies not possessed by a statutory tribunal. That is the case here. The remedy sought is to obtain priority over assets in an insolvency proceeding which is beyond the purview of the collective agreement grievance procedure.

c. *Weber* is not case decided in a CCAA context – i.e. not a case about Labour Board jurisdiction over issues which come up in CCAA proceedings. It's a non-insolvency case and is talking about the bilateral disputes over the collective agreement outside the insolvency context. Nothing in *Weber* says an insolvency court cannot decide a priorities dispute. And that makes sense, because a priorities issue in an insolvency process I not a bilateral question about a collective agreement, but a question in rem over the ranking of creditors in the estate assets.

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[3] *Labour Relations Act*, 1995, S.O. 1995, c. 1, Sched. A
[4] Weber v. Ontario Hydro, 1995 CanLII 108 (SCC), [1995] 2 SCR 929, https://canlii.ca/t/1frj9

> d. Weber says the issue turns on the determination of the "essential character" of the dispute. The essential character of the present dispute pertains to the CCAA proceedings, not to the application of the collective agreement. Applying the union's rationale would bifurcate the hearing – requiring a labour arbitrator to interpret the collective agreement and then remitting the matter back to the courts since the practical issue to be decided is priority arising from a factual matrix in the past, not going forward contractual performance.

10. Sections 11 and 11.02 of the *CCAA* grant the Court general powers to make orders in respect of a debtor company as well as allow the court to impose staying all proceedings, restraining further proceedings and prohibiting the commencement of any action, suit or proceeding against same. Courts have found that, to the extent that section 11 and 11.02 of the *CCAA* are inconsistent with portions of the *Labour Relations Act*, federal constitutional paramountcy can result in the CCAA taking precedence over labour legislation. for example, Courts may make orders impacting the collective agreement that give meaningful interpretation to the stay provisions in the *CCAA* [5].

> [75] The Jeffrey Mine decision is also relevant. In my view, the Jeffrey Mine case does not appear to support the argument that the Collective Agreement is to be treated as being completely unaffected by CCAA proceedings. It seems to me that it is contemplated that rights under a collective agreement may be suspended during the CCAA proceedings. At paragraphs 60 – 62, the court said under the heading Recapitulation (in translation):
>
> > i. The collective agreements continue to apply like any contract of successive performance not modified by mutual agreement after the initial order or not disclaimed (assuming that to be possible in the case of collective agreements). Neither the monitor nor the court can amend them unilaterally. That said, distinctions need to be made with regard to the prospect of the resulting debts.
> >
> > ii. Thus, unionized employees kept on or recalled are entitled to be paid immediately by the monitor for any service provided after the date of the order (s. 11.3), in accordance with the terms of the original version of the applicable collective agreement by the union concerned. However, the obligations not honoured by Jeffrey Mine Inc. with regard to services provided prior to the order constitute debts of Jeffrey Mine Inc. for which the monitor cannot be held liable (s. 11.8 CCAA) and which the employees cannot demand to be paid immediately (s. 11.3 CCAA).
> >
> > iii. Obligations that have not been met with regard to employees who were laid off permanently on October 7, 2002, or with regard to persons who were former employees of Jeffrey Mine Inc. on that date and that stem from the collective agreements or other commitments constitute debts of the debtor to be disposed of in the restructuring plan or, failing that, upon the bankruptcy of Jeffrey Mine Inc. [6]

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[5] Nortel Networks Corporation (Re), 2009 CanLII 31600 (ON SC), https://canlii.ca/t/24200 at paras 71,72,73, and 74
[6] *Ibid*

11. Court's have also said that even where the *Labour Relations Act* and the *CCAA* are not in direct conflict, the doctrine of paramountcy will ensure that the *CCAA* prevails over any law that frustrates its purpose [7]. Courts are not required to let the intent of the *CCAA* be thwarted by provincial legislation [8].

> [34] Moreover, even if there is not a direct conflict in the federal and provincial statutes in question, the doctrine of paramountcy will apply where complying with the provincial law will have the effect of frustrating the purpose of the federal law and therefore the intent of Parliament. See Alberta (Attorney General) v. Moloney, 2015 SCC 51 (CanLII), [2015] 3 S.C.R. 327; 29 C.B.R. (6th) 173 at para. 25; Nortel Networks Corp., Re (2009), 2009 ONCA 833 (CanLII), 59 C.B.R. (5th) 23 at paras 39-39.
>
> [35] In my view, apart from there being a direct conflict between the two statutes in so far as a stay being permitted under the CCAA, it would be very detrimental to the attempt at a successful restructuring in this case if the stay of the approximately 3000 grievance claims and a process for their speedy resolution were not granted. The view of the Monitor is compelling in this regard that that approval of the grievance claims procedure is important to the applicants' restructuring efforts. Thus in my view the doctrine of paramountcy on this ground leads to the paramountcy of sections 11 and 11.02 of the CCAA over sections 48 and 49 of the CCAA. [9]

12. Similarly the Labour Relations Board has declined to entertain a grievance where there is an insolvency stay[10] or where it is an end run around the claims process in insolvency proceedings[11],

> "34. I do not doubt the Board general jurisprudence that pursuant to section 69 of the *LRA*, the successor steps into the shoes of the predecessor for all purposes – benefits and liabilities – good and bad. However, what is happening here is not a limitation or omission in the consequences of a successor declaration – but rather an intervening event, the bankruptcy, and an intervening statute, the *BIA* and section 69.3(1) of the *BIA*, and the impact of that intervening event and statute. What the Union seeks here is not just a declaration that the seniority earned working for the predecessor company also applies to the successor company (like *Emrick Plastics*, [1982] OLRB Rep. June 861 at para. 18), or even in a simple sale that the purchaser company is bound by a liability of the predecessor company (including a prior arbitration award like in *Seneca)* – which may very likely be governed by the general Board successor jurisprudence. Rather with its second declaration, the Union appears to seek, in my view, something precariously close to a "remedy against the debtor or the debtor's property", or "commenc[ing] any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy" – which is prohibited by section 69.3(1) of the *BIA* without the permission of the bankruptcy court. Unlike the representational claims of the Union in any successorship which is the exclusive jurisdiction of the Board, here this appears to be and "smells" too much like interference (if not an attempt to gain a priority outside of the bankruptcy) in the orderly and fair distribution of a bankrupt's property among the creditors of the bankrupt (of which there are

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[7] Essar Steel Algoma Inc. (Re), 2016 ONSC 1802 (CanLII), https://canlii.ca/t/gnr4g ("*Essar*") at paras. 34, and 35
[8] Sproule v. Nortel Networks Corporation, 2009 ONCA 833 (CanLII), https://canlii.ca/t/26t3z at para. 44
[9] *Essar*, supra note 6, at paras. 34, and 35
[10] *International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 v Superior Door & Gate Systems Inc. and/or Superior Door & Gate Systems Limited, 2015 CanLII 37785 (ON LRB*), https://canlii.ca/t/gjw56
[11] *United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 787 v Logue Mechanical Services Inc.,* 2016 CanLII 44016 (ON LRB), https://canlii.ca/t/gsj2z,

> likely more than just the Union) and which is both beyond the expertise and jurisdiction of the Board."

13. Although section 33 of the *CCAA* provides that collective agreements remain in force and may not be altered except as provided by section 33, that section does not give claims resulting from a collective agreement any special priority of treatment over other claimants [12].

> [32] Consistent with established law, section 33 of the CCAA does provide that a collective agreement remains in force and may not be altered except as provided by section 33 or under the laws of the jurisdiction governing collective bargaining. It does not provide for any priority of treatment though. The section maintains the terms and obligations contained in the collective agreement but does not alter priorities or status. The essential nature of severance pay is rooted in tenure of service most of which will have occurred in the pre-filing period. As established in the Re Nortel Networks Corp., Windsor Machine, and Mirant decisions, severance pay relates to prior service regardless of whether the source of the severance obligation is a collective agreement, an employment standards statute or an individual employment contract. As such, terminated employees are entitled to termination and severance but payment of that obligation is not immediate; rather it is stayed and is subject to compromise in a Plan. This conclusion is consistent with the case law and with the statute. As noted by the CMI Entities in their factum, the case law affirms that severance pay is the antithesis of a payment for current service. [13]

14. Courts have stated that it is the responsibility of Parliament through legislation to define the priority of parties in *CCAA* restructurings [14]. The essence of the Union requests is for priority over other creditors. There is no reason to displace the CCAA processes for the determination of the relative priority of creditors in the estate assets. Doing so is essential to the CCAA process, as it affects both distribution processes and voting processes in a CCAA, and the determination process a court sets for priority questions is subject to the court's discretion about the efficient way to do that given the inevitably limited resources of a debtor which has filed for CCAA protection and the need to harmonize any claims determination process with the other steps in the CCAA process.

B. Do the Holdback Clauses Create Trusts Cognizable in CCAA Proceedings?

15. The right of QSG to make deductions from payments to installers (holdbacks) is set out in Article 17 of the LIUNA Low Rise Tile Worker's collective agreement ("**LIUNA LRT CA**"), Articles 4 and 7 of the LIUNA Hardwood and Carpet collective agreement ("**LIUNA H&C CA**"), and article 23 of the CU-27 collective agreement ("**CU-27 CA**").

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[12] *Re: Canwest Global Communications Corp*., 2010 ONSC 1746 (CanLII), https://canlii.ca/t/2b56j at para 30,31, and 32
[13] *Ibid*
[14] *Textron Financial Canada Limited v. Beta Limitee/Beta Brands Limited*, 2007 CanLII 43908 (ON SC), https://canlii.ca/t/1tb3g at para 48

16. Article 17 of the LIUNA LRT CA, replicated below, allows QSG to withhold up to $2,000.00 for payment of any back charges or deficiencies for defined periods. Article 17 requires QSG to create a holdback account in the form of a ledger, accounting for all holdback funds deducted through Holdback Summary Notices, and makes no mention of QSG creating a fund or separate bank account, nor holding any of funds separate and apart or in trust. In short this agreement contains no evidence of intention to create a trust. QSG's obligation to refund the holdback in a specified time after an installer ceases working for QSG is simply a debt to the installer that arises when the relevant period expires.

> "**17.08 <u>Holdback Account</u>**
>
> (a) The Company may at its option withhold an amount from the Pieceworker/Subcontractor not to exceed the sum of two thousand ($2,000.00) for payment of any back charges or deficiencies. The said amount may be withheld for a period not to exceed six (6) months from the date of commencement of work by the Pieceworker/Subcontractor for the Company or three (3) months from the time that the Pieceworker/Subcontractor no longer works for the Company, whichever is the greater.
>
> (b) It is understood that any holdback referred to in subparagraph (a) above consists of amounts owing to the Pieceworker/Subcontractor, subject to the provisions of Article 17.06 or subparagraph (a) above. When, for the purpose of establishing a holdback, amounts are deducted from the invoiced totals owing to Pieceworkers/Subcontractors, written notice shall thereafter be given to the Pieceworker/Subcontractor and the Union of the amounts designated for holdback. When amounts are deducted from holdback as a result of back charges or deficiencies, written notice shall thereafter be given to the Pieceworker/Subcontractor and the Union of the amount of such deduction.
>
> (c) By no later than the 15th day of each month each Company which maintains a holdback account for any Pieceworker/Subcontractor covered by this Collective Agreement shall provide a Holdback Summary Notice. The Holdback Summary Notice shall list the names of each Pieceworkers/Subcontractors for whom the Company has a holdback account; together with the balance of the holdback account as of the last day of the month. The Holdback Summary Notice shall stipulate a final total of the holdback amounts held back by the Company for all Pieceworkers/Subcontractors."

17. QSG hardwood and carpet installers voted to terminate the LIUNA HC CA and are now covered by the CU-27 CA. As such, QSG's obligation to hold funds and refund hardwood and carpet installers is now governed under the CU-27 CA which similarly contains no obligation to hold funds in specie nor in trust. Any amounts due to installers covered by the LiUNA H&C CA are treated by QSG as if they have been refunded and re-deducted under the CU-27 CA and hence governed by its terms. The CU-27 installers are aware of this and have not filed any grievance re same.

18. Article 23 of the CU-27 CA, replicated below, makes it so that holdbacks are a debt owed, as well as makes no provision for funds being held separately. As well, Article 23 makes no mention of QSG

creating a separate bank account, nor holding any of the funds separate and apart. It also contains no reference to the holdback funds being held in trust.

> **"Article 23 Holdback**
>
> 23.01 The parties agree that the Principal may holdback monies from each contractor on account of potential deficiencies. The holdback amount shall be $2,000.00.
>
> 23.02 Should the Principal receive notice of a deficiency on a project, the Principal shall notify the contractor who performed the work who shall correct the deficiency within twenty-four (24) hours of notice. Should the contractor not correct the deficiency within the time aforesaid, the Principal may correct the deficiency either with its own forces or with another contractor and deduct the cost of the deficiency repair plus a reasonable administration fee from any monies owing to the original contractor."

19. Ontario Courts have determined that findings of express trusts require three certainties, or certainty of intention, certainty of subject, and certainty of beneficiaries [15]. For unpaid contributions and wind up liabilities in Bankruptcy situations, Courts have also stated that satisfying these three certainties further requires that for a trust to survive an insolvency filing, the funds allegedly in trust have to have been clearly segregated from the debtor's general funds [16].

20. Of these four requirements for a trust cognizable in CCAA, three of them do not exist. There is no certainty of intention, no subject matter, and no segregated fund which pre-existed the insolvency.

21. The burden of proof for the establishment of a trust is on those alleging its existence [17].

22. Evidence of intention can be found if a party has acted as if under a trust obligation[18]. There is no evidence of QSG having an intention to create a holdback fund under either collective agreement or to hold such funds in trust. Nor is there any evidence of QSG using language that may indicate the existence of a trust, nor that any funds were placed in a separate account. QSG acted throughout as if the holdback obligation was a debt. The collective agreements do not say otherwise.

23. There is also no evidence of certainty of subject matter as no trust corpus, or object held in trust, exists. No funds were held separate and apart. In any event, QSG's liquid assets were swept by its lender,

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[15] *Hepburn v. Jannock Limited*, 2008 CanLII 429 (ON SC), https://canlii.ca/t/1vdhm ("*Hepburn*") at para 101; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 (CanLII), [2010] 3 SCR 379, https://canlii.ca/t/2dz21 at para. 83

[16] *Ivaco Inc., Re*, 2005 CanLII 27605 (ON SC), https://canlii.ca/t/1lbdn at para 11*; British Columbia v. Henfrey Samson Belair Ltd*., 1989 CanLII 43 (SCC), [1989] 2 SCR 24, https://canlii.ca/t/1ft4t

[17] *Hepburn*, supra Note 11, at para 101

[18] *Ibid*, at 106.

Waygar Capital Inc, on August 3rd, or one day before QSG's CCAA Filing. Hence QSG entered the CCAA process with no cash, and hence when the CCAA commenced there was no possibility that a trust fund existed because QSG had no funds left at all.

24. Rather than create a trust, the holdback provisions of both agreements create a debt owed to an installer once the holdback is deducted from the installer's payment.

25. Under the LIUNA CA, said debt becomes due 6 months after from the date of commencement of work. Industry practice, which the Union has not disputed, is for corporations to hold an installer's holdbacks until 6 months after the last installation for QSG is completed by an Installer, so that funds do not have to be continually paid out and re-deducted, which would be pointlessly inefficient and complex. The holdback account referenced in Article 17 is simply a reference to accounting procedures not the creation of a fund.

26. The CU-27 Agreement contains no indicia of a trust either.

C. No Basis to Lift Stay to Pursue Grievances Against QSG

27. The unions have not met the threshold for lifting the stay.

28. They have not tabled a proceeding proposed to be pursued, and hence the request is premature. They should be required to file a claim in the impending claims process in this matter, and then the issue of the process to determine the claim can be addressed in the context of an actual claim which is properly articulated and supported.

29. They have not so far provided evidence of a prima facie valid claim. Rather all that has been presented is a bald claim that a trust exists, based on documents which do not contain words nor evidence of intention to create a trust.

30. The Greater Toronto Railing Association collective Agreement with LiUNA (GTRA CA) illustrates what wording of the agreement would look like if a trust existed. Unlike that agreement, the Agreements in issue here:

(a) do not say a fund is created;
(b) do not say a holdback account is funded with money;
(c) do not say the money is to be held in a separate bank account;

(d) do not say the account so funded belongs to the Pieceworker; and

(e) do not say such moneys are in trust.[19]

31. In contrast, the GTRA CA has specific language creating all of those features[20]. The September 19 Williamson Affidavit filed by LiUNA notes that an arbitrator found the holdback language in the GTRA CA created a trust. The Union cites this as evidence in favour of the LiUNA Low Rise Tile Agreement creates a trust.[21] But it does the reverse, because the Low Rise Tile agreement lacks every one of those features.

32. In addition, using the grievance process as the claims procedure for this claim as proposed the Unions is not practical. They propose to initiate a grievance against QSG. But QSG will not exist to respond to the grievance. Either its business will be sold next month, or it will be put into Receivership. And nothing is proposed to harmonize the grievance process with the rest of the CCAA process. It would wander off on its own timeline without any harmonization with the CCAA claims and distribution process, and would proceed without any guarantee of efficient cost control. The only practical way to deal with the Union claims is in the claims process like every other claim.

33. It should also be noted that the grievance, that LiUNA says was commenced in April 2022 and which it wants to "continue", is not really about the issue now being raised. That grievance is focused on a claim by LiUNA for interest etc on holdback deductions. LiUNA is attempting to graft onto that grievance a separate issue about whether QSG is obliged to hold put holdbacks it deducts into trust. What is proposed is de facto a new grievance proceeding – one for which there is no need and which is not consistent with the rest of the CCAA process.

D. The Proposed Grievances Against The D&Os for Breach of Trust Are Misconceived

34. The Divisional Court of the Ontario Superior Court of Justice ruled that it was reasonable to conclude that grievances do not confer the power to make remedial orders against non-parties to collective agreements, and that grievances can't be used to impose liabilities on directors as that is a matter for the civil courts. What the Unions are trying to do in this case is find a director liable for breach of trust. That is an equitable remedy that arises from the inherent equitable jurisdiction of the court, not a remedy under the *Labour Relations Act*.[22]

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[19] Supplemental Affidavit of John Pacione Sworn September 27, 2023 paragraphs 3-6 and Exhibit A thereto (LiUNA/GRTA Agreement, Article 16 on Holdbacks)

[20] Ibid.

[21] Williamson Affidavit 0919 pars. 79-80 and Exhibit AA.

[22] *United Food and Commercial Workers Union of Canada, Local 175 v. Silverstein's Bakery Ltd.*

> 37 The problem with this argument is that the Court of Appeal did not directly address the liability of directors in *Caetano*. It characterized the dispute as one concerning wrongful dismissal and unpaid severance, matters that come within the exclusive jurisdiction of an arbitrator. Similarly, the dispute in the present case is a claim for unpaid severance that is within the jurisdiction of an arbitrator. However, neither *Weber* nor *Caetano* extend the authority of an arbitrator to make a remedial order against a non-party to the collective agreement.
>
> 38 The arbitrator's decision does not conflict with the *Weber* line of cases. He concluded that he had no jurisdiction to apply s. 131 of the *OBCA* to individuals who were not parties to the dispute before him. That was a reasonable conclusion, given that his task was to resolve disputes between parties to the collective agreement — the Union and Bakery — and given that s. 131 provides a remedy to hold directors liable through a civil process in the courts. In particular, s. 131(2) sets out conditions and a process that must be followed in order to hold directors liable for debts for services provided to a corporation. Notably, that process requires a civil action in the courts.
>
> 39 The arbitrator's reasoning was clear and logical and consistent with the language of the applicable statutes. As the Union has not demonstrated that his decision was unreasonable, I see no basis for judicial intervention.

35. Quite apart from that which is fatal to the leave request, no cause of action against the directors has been set out in the motion to lift the stay. Nor is it practical or convenient to require directors and officers to expend resources defending they considering the small amount of funds in dispute.

36. Accordingly, leave should not be granted to the Unions to commence grievance or other proceedings against the directors and officers.

E. Establishment of a Reserve for the Union Claims is Premature

37. The is no prima facie case for a trust on the face of the collective agreements, nor evidence of intention to create one anywhere in the evidence. The Unions can submit claims in the usual claims process that will be established in the CCAA process, which in this case will require the submission of by any party asserting priority over the fulcrum secured creditor. Any request for a reserve can be considered in the context of the actual claim submitted, and the evidence in support, and in the context of

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2020 CarswellOnt 13473, 2020 ONSC 5649, 333 A.C.W.S. (3d) 636 (Ont SCJ – Div Ct)
https://nextcanada.westlaw.com/Document/Ib003694d2b1e55b3e0540010e03eefe0/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0

whatever claims process is ordered by the court. The Unions are in essence asking for their own claims process, which is neither necessary nor efficient nor affordable.

38. Should however this Honourable Court determine that a reserve should be created and that claims should be permitted to be pursued against the directors and officers by the Union, such claims should be limited recourse - solely to any reserves created in this proceeding for the holdback claim. And the directors and officers should not be required to be participate or respond to the dispute. Any claim by LiUNA to the reserve would in essence be a priority dispute with other creditors and hence the real parties in interest should be the only participants.

PART VI – ORDER SOUGHT

39. For all of the foregoing reasons, the QSG requests that the Union Motions be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of September, 2023.

CBesant

Schedule "A" – List of Authorities

1. *British Columbia v. Henfrey Samson Belair Ltd*., 1989 CanLII 43 (SCC), [1989] 2 SCR 24, https://canlii.ca/t/1ft4t

2. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 (CanLII), [2010] 3 SCR 379, https://canlii.ca/t/2dz21

3. *Essar Steel Algoma Inc. (Re)*, 2016 ONSC 1802 (CanLII), https://canlii.ca/t/gnr4g

4. *Hepburn v. Jannock Limited*, 2008 CanLII 429 (ON SC), https://canlii.ca/t/1vdhm

5. *Ivaco Inc., Re*, 2005 CanLII 27605 (ON SC), https://canlii.ca/t/1lbdn

6. *Nortel Networks Corporation (Re)*, 2009 CanLII 31600 (ON SC), https://canlii.ca/t/24200

7. *Re: Canwest Global Communications Corp*., 2010 ONSC 1746 (CanLII), https://canlii.ca/t/2b56j

8. *Sproule v. Nortel Networks Corporation*, 2009 ONCA 833 (CanLII), https://canlii.ca/t/26t3z

9. *Textron Financial Canada Limited v. Beta Limitee/Beta Brands Limited*, 2007 CanLII 43908 (ON SC), https://canlii.ca/t/1tb3g

10. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 787 v Logue Mechanical Services Inc., 2016 CanLII 44016 (ON LRB), <https://canlii.ca/t/gsj2z>,

11. *United Food and Commercial Workers Union of Canada, Local 175 v. Silverstein's Bakery Ltd.* 2020 CarswellOnt 13473, 2020 ONSC 5649, 333 A.C.W.S. (3d) 636 (Ont SCJ – Div Ct) https://nextcanada.westlaw.com/Document/Ib003694d2b1e55b3e0540010e03eefe0/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0

12. *Weber v. Ontario Hydro*, 1995 CanLII 108 (SCC), [1995] 2 SCR 929, https://canlii.ca/t/1frj9

Schedule "B" – Text of Statutes

COMPANIES' CREDITORS ARRANGEMENT ACT **(R.S.C., 1985, C. C-36)**

General power of court

> 11 Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.
>
> R.S., 1985, c. C-36, s. 111992, c. 27, s. 901996, c. 6, s. 1671997, c. 12, s. 1242005, c. 47, s. 128

Relief reasonably necessary

11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

2019, c. 29, s. 136

Rights of suppliers

11.01 No order made under section 11 or 11.02 has the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

(b) requiring the further advance of money or credit.

2005, c. 47, s. 128

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

Collective agreements

33 (1) If proceedings under this Act have been commenced in respect of a debtor company, any collective agreement that the company has entered into as the employer remains in force, and may not be altered except as provided in this section or under the laws of the jurisdiction governing collective bargaining between the company and the bargaining agent.

(8) For greater certainty, any collective agreement that the company and the bargaining agent have not agreed to revise remains in force, and the court shall not alter its terms.

***LABOUR RELATIONS ACT*, 1995, S.O. 1995, c. 1, Sched. A**

Arbitration

48 (1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable. 1995, c. 1, Sched. A, s. 48 (1).

Same

(2) If a collective agreement does not contain a provision that is mentioned in subsection (1), it shall be deemed to contain a provision to the following effect:

Where a difference arises between the parties relating to the interpretation, application or administration of this agreement, including any question as to whether a matter is arbitrable, or where an allegation is made that this agreement has been violated, either of the parties may after exhausting any grievance procedure established by this agreement, notify the other party in writing of its desire to submit the difference or allegation to arbitration and the notice shall contain the name of the first party's appointee to an arbitration board. The recipient of the notice shall within five days inform the other party of the name of its appointee to the arbitration board. The two appointees so selected shall, within five days of the appointment of the second of them, appoint a third person who shall be the chair. If the recipient of the notice fails to appoint an arbitrator, or if the two

appointees fail to agree upon a chair within the time limited, the appointment shall be made by the Minister of Labour for Ontario upon the request of either party. The arbitration board shall hear and determine the difference or allegation and shall issue a decision and the decision is final and binding upon the parties and upon any employee or employer affected by it. The decision of a majority is the decision of the arbitration board, but if there is no majority the decision of the chair governs.

1995, c. 1, Sched. A, s. 48 (2).