Court File No.: CV-23-00703933-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N :

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 QUALITY RUGS OF CANADA LIMITED AND THE OTHER COMPANIES LISTED IN SCHEDULE "A" HERETO (THE "APPLICANTS")

FACTUM OF LIUNA LOCAL 183
(RE HOLDBACK)

PART I – OVERVIEW

1. This factum is filed on behalf of LIUNA Local 183 (the "**Union**" or "**Local 183**"). As of the CCAA filing, about 40 of the Union members were employees of the Applicants (collectively "**QSG**"). These employees continue to work for QSG throughout the CCAA restructuring process with the reasonable expectation that they will be paid and that the portion of their compensation held back by QSG as security for post-filing deficiencies and back charges will be returned to them as per the terms of the below described Collective Agreements.

2. Without employees, there can be no restructuring under the CCAA. If this Court does not protect the employees' money, their funds will effectively be taken by QSG and/or its creditors despite the fact that they continue to provide services and continue to have a reasonable expectation that their compensation for post-filing work will be paid.

3. Local 183 seeks directions relating to the below described "Holdback". The Union seeks to ensure that the Holdback funds, are held in trust, as is intended by the Collective Agreements, or are paid into Court and not form part of the estate of QSG, or *inter alia,* otherwise protected.

4. The Collective Agreements allow QSG to withhold an amount from the Pieceworkers from their earned compensation up to $2,000 for payment of any back charges or deficiencies (the aforementioned "**Holdback**"). The Holdback that QSG has deducted and withheld from their workers' pay, is $97,083.41. The Collective Agreements require the Holdback to be held in trust in a Holdback Account. The Collective Agreements further oblige QSG to keep detailed accounting of the amounts owed for each Pieceworker and send monthly reports of the exact amount that is in the Holdback Account. QSG has been keeping these accounting records and sending the monthly reports regarding the Holdback Account to the Union.

5. The Collective Agreements provide that, if not applied to deficiencies or back charges, the Holdback is to be returned to the Pieceworker 3 months after the Pieceworker finishes work, and in one case 2 years.

6. QSG seeks to sell its assets quickly. As such, once the assets are sold, without protection from this Court, QSG and/or its creditors will effectively take the Pieceworkers' money, which was never supposed to exist within the estate of QSG in the first place.

7. To each of these workers, $2000 is a significant sum. The Holdback funds belong to the Pieceworkers, was deducted from their pay, and is being used as security by the company for work being done by the Pieceworkers ***post*** CCAA filing. Courts have recognized that workers, unlike other participants in the proceeding, are not in a position to run the risks of a CCAA.[1]

8. In contrast, $97,000 is not a large amount of money to QSG or creditors who may otherwise have a claim to those funds. There would be a minimal amount of prejudice to QSG and/or competing creditors if those funds are protected and/or reserved pending the disposition of grievance arbitrations regarding the interpretation of the Holdback.

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[1] Local 183 Brief of Authorities, Tab 1 - Endorsement of Newbould J, dated October 2, 2013 in *Comstock CCAA*

PART II – THE FACTS

Background

9. QSG was bound to the Collective Agreement Between the Residential Tile Contractors Association and the Union, dated May 1, 2022 to April 30, 2025 (the "**Tile Collective Agreement**") with respect to low-rise residential units.[2]

10. The Union abandoned bargaining rights in May 2023. In response, QSG brought an application at the OLRB, which was resolved in Minutes of Settlement. This settlement confirms that the Union has abandoned bargaining rights but allows QSG to complete certain work without the Union enforcing the subcontracting provisions to the TRCLB, DRCLB or MTABA Agreements (which could result in the builder paying damages to the Union, or removing QSG, or both) in exchange for QSG applying the terms and conditions of the RTCA Agreement. Under s. 96(7) and 114(1) of the *Labour Relations Act*, the OLRB has exclusive jurisdiction to enforce this settlement and to determine any question of fact or law arising from them.[3]

11. QSG was also bound to a Collective Agreement between the Union and QSG relating to Residential Carpet, Hardwood, Laminate and Floor Coverings, dated May 1, 2019 and April 30, 2022 and as renewed thereafter (the "**Hardwood Collective Agreement**"). Around May 2022, the OLRB issued a decision that Local 183's bargaining rights regarding the Hardwood Collective Agreement were displaced by another Union (the Carpenters Union).[4]

12. The Union is bound to a house builders collective agreement with the Toronto Residential Construction Labour Bureau (the "**TRCLB**" and the "**TRCLB Agreement**") which applies in OLRB Geographic Areas 7, 8, 18 and 27. The Union is also bound to a housebuilders

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[2] Affidavit of Graham Williamson, affirmed September 19, 2023 ("**Williamson Affidavit**"), para. 7, Exhibit E - Tile Collective Agreement
[3] Williamson Affidavit, para. 8; Exhibit F – Minutes of Settlement
[4] Williamson Affidavit, para. 9; Exhibit G – Hardwood Collective Agreement

collective agreement with the Durham Residential Construction Labour Bureau (the "**DRCLB**" and the "**DRCLB Agreement**" which applies in OLRB Geographic Areas 9, 10, 11, 12 and 29. The Union is also bound to an apartment builders collective agreement with the Metropolitan Toronto Apartment Builders Association (the "**MTABA Collective Agreement**") which applies in OLRB Geographic Areas 7, 8, 9, 10, 11, 12, 18 and 27.[5]

13. The TRCLB and DRCLB Agreements contain Builder Freeze Funds provisions. Additionally, each of the TRCLB, DRCLB and MTABA collective agreements restrict the ability of builders / developers to subcontract work, including certain tile work, to contractors which are bound to the Tile Collective Agreement. [6]

Local 183 Workers are Employees for the Purposes of Insolvency Proceedings

14. The bargaining unit under the Tile and Hardwood Collective Agreements (collectively, the "**Collective Agreements**") include both Hourly Workers and Pieceworkers. Generally speaking, piecework pays workers a fixed piece rate for each unit produced or action performed regardless of time. Piece rate jobs are not uncommon in the unionized construction industry.[7]

15. The Collective Agreements provide that QSG determines the number or workers required at any operation; determines the times and locations of machines, tools and equipment to be used and the schedule of production; and hires, fires, discharges, promotes, demotes, layoffs, suspends, and disciplines both the Hourly Workers and the Pieceworkers (see Article 5 of the Tile Collective Agreement and Article 4.01 of the Hardwood Collective Agreement). Also, the Collective Agreements require both Hourly and Pieceworkers "as a condition of employment" to wear certain protective and safety gear (Article 14 of the Collective Agreements).[8]

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[5] Williamson Affidavit, para. 11
[6] Williamson Affidavit, para. 12
[7] Williamson Affidavit, para. 13
[8] Williamson Affidavit, paras. 14 and 15

16. Also, the rate of pay for both the Hourly and Pieceworkers are set out in the Collective Agreements. As part of the Union members' compensation, in addition to amounts owed for direct salary, various amounts are paid on their behalf and for their benefit to the Union/related Union Trust Funds (e.g. pension; health and benefit fund for eligibility in a health plan that provides medication, eyewear, disability; training fund, vacation pay fund, etc.). They are part of the workers' compensation package (regardless if they are an Hourly worker or a Pieceworker). They are earned by the worker, and are then required to be paid to the Union or the Trust Funds established under the Collective Agreement by the 15th day of the month following.[9]

17. As set out in Schedule B of Article 5 of the Tile Collective Agreement, a percentage of the piecework rate is to be remitted to the Union or a union-sponsored fund for the provision of various remittances and deductions as provided for in the Collective Agreement. This includes *inter alia* vacation and holiday pay, benefit plan contributions and pension benefit contributions. The current benefit contribution rate is 20.75%.[10]

18. The Hardwood Collective Agreement has similar provisions at Article 19.03 and Schedule C Article 6.04; and Schedule E Article 8.04. Work under the Hardwood Collective Agreement stopped around May 2023.[11]

19. It is the Union's position that these amounts (other than pension contributions) are entitled to super secured priority under sections 60(1.3), 81.3, and 81.4 of the *Bankruptcy and Insolvency Act (*the "**BIA**") and protection by section 6(5) of the *CCAA.* For example, Section 81.3 of the BIA provides:

[9] Williamson Affidavit, paras. 16 and 17
[10] Williamson Affidavit, para. 18
[11] Williamson Affidavit, para. 19

> Security for unpaid wages, etc. — bankruptcy
>
> 81.3 (1) The claim of a clerk, servant, travelling salesperson, **labourer** or **worker** who is owed **wages**, salaries, commissions **or compensation** by a bankrupt **for services rendered** during the period beginning on the day that is six months before the date of the initial bankruptcy event and ending on the date of the bankruptcy is secured, as of the date of the bankruptcy, to the extent of $2,000 — less any amount paid for those services by the trustee or by a receiver — by security on the bankrupt's current assets on the date of the bankruptcy.

20. In addition, the *Construction Act*, RSO 1990, c C.30, expressly provides that wages includes money earned by a piece worker, and all union benefits and contributions; and that workers thus includes pieceworkers.

> Definitions
>
> 1 (1) In this Act,
>
> "monetary supplementary benefit" includes any contribution, remittance, union dues, deduction, payment or other additional compensation of any kind; ("avantage pécuniaire supplémentaire")
>
> "wages" means the money earned by a worker for work done by time or as piece work, and includes all monetary supplementary benefits, whether provided for by statute, contract or collective bargaining agreement; ("salaire")
>
> "worker" means a person employed for wages in any kind of labour; ("ouvrier")
>
> "workers' trust fund" means any trust fund maintained in whole or in part on behalf of any worker on an improvement and into which any monetary supplementary benefit is payable as wages for work done by the worker in respect of the improvement; ("fonds en fiducie des ouvriers")

21. Further, the *Labour Relations Act*, 1995 RSO 1995, c 1, Sch A expressly provides that an employee includes a dependant contractor.

> Definitions
>
> 1 (1) In this Act,
>
> "dependent contractor" means a person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor; ("entrepreneur dépendant")
>
> "employee" includes a dependent contractor; ("employé")

22. Also, Courts have held that directors of Ontario Corporations are personally liable under section 131 of the *OBCA* for unpaid contributions owing to a union-sponsored benefit fund – see *Gardner v Vella*, 2016 ONSC 4146 (CanLII), https://canlii.ca/t/gs7gm (para. 14).

23. Paragraph 13 of the August 3, 2023 Affidavit of John A. Pacione in support of the QSG Application (the "**Pacione Affidavit**") indicates that Pieceworkers are "independent contractors", and does not refer to them as employees for the purposes of these insolvency proceedings. He states that "virtually all of the Ontario residential" installation work is done by pieceworkers.

24. The Union disagrees with QSG's characterization of Local 183 Pieceworkers.

25. Paragraph 13 of the Pacione Affidavit also does not refer to Local 183 workers. At the time of filing, there were about 40 active Local 183 members who work for QSQ (about 9 Hourly and 30 Pieceworkers).[12]

Monthly Pension and Benefit Contributions

26. Under the Collective Agreements, remittances and contributions for union dues, pension and benefits, are payable by no later than the 15th of every month for work performed in the previous month, and form part of the Union worker's compensation.[13]

27. The Tile Collective Agreement requires QSG to prepare monthly employer contribution and remittance reports for the Hourly Workers and the Pieceworkers for the prior month.[14]

28. There is approximately $2,083.40 of shortage owing by QSG with respect to various miscalculations of benefit contributions throughout 2022.[15]

[12] Williamson Affidavit, para. 26
[13] Williamson Affidavit, para. 32
[14] Williamson Affidavit, para. 33; Exhibits I and J – monthly contribution reports

The Outstanding Pieceworker Holdbacks

29. Article 17.08 of the Tile Collective Agreement allows QSG to withhold an amount from the Pieceworker from their earned compensation of up to $2,000 for payment of any back charges or deficiencies. These funds are **owned by the Pieceworker**, not the company. Moreover, these funds are to be held in trust in a separate holdback account. Also, every month, QSG is to provide any accounting as to the holdback amounts they are currently holding in trust (the aforementioned "**Holdback**").[16]

30. Article 17.08 of the Tile Collective Agreement provides:

> Holdback Account
>
> (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. [emphasis added]

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[15] Williamson Affidavit, para. 34; Exhibit K – Statement of Account from the pension fund
[16] Williamson Affidavit, para. 60

31. Notably:

(a) it is described as a "**Holdback Account**",

(b) they are created by QSG by "**withhold[ing] an amount from the Pieceworker**" – i.e. this is the Pieceworker's money that is taken by the Company to create the holdback;

(c) it expressly requires that the Company "**maintains a holdback account for any Pieceworker**"; and

(d) the Company is obliged to keep detailed accounting of the amounts owed for each Pieceworker and sends reports on a monthly basis.

32. QSG has been preparing and sending Holdback Summary reports on a monthly basis. The July 15, 2023 report confirms the total amount in the Holdback Account is $95,083.41. This should be the amount currently being held in trust (or supposed to be held in trust).[17]

33. Like the Tile Collective Agreement, the Hardwood Collective Agreement also creates a Holdback for the Pieceworkers. Schedule C, Article 4 and Schedule E, Article 7 provide:

> ARTICLE 7 – HOLDBACK ACCOUNTS
> …
> 7.02 The Company is entitled to create a holdback fund, not to exceed $2000, for each piecework/subcontractor crew. The holdback account may be established by the Company as soon as pieceworker/subcontractor commences work for the Company. **The Company shall be entitled to deduct money owing to the pieceworker/subcontractor to fund the holdback account and shall clearly indicate such deductions on the pieceworker invoice**. However, in no circumstance shall the Company deduct more than ten (10%) of any invoice for holdback and/or back charges.
>
> 7.03 If a pieceworker/subcontractor is no longer performing work for the Company, the Company may deduct money from the holdback account to satisfy a back charge, provided that it has followed the procedure set out in Article 18 of the master portion of this collective agreement, and in which case the Deficiency Notice shall be hand delivered to pieceworker/subcontractor or sent to him by Registered Mail at the last address provided to the Company.

[17] Williamson Affidavit, para. 63; Exhibit U – July 15, 2023 monthly Holdback Summary Notice prepared by QSG regarding the Tile Collective Agreement.

> 7.04 **The Company acknowledges that the holdback accounts belong to the pieceworkers/subcontractors and that any such monies are held in trust by the Company**. **The Company will keep all holdback monies in a designated holdback account**. 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 to the Union**. 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
>
> 7.05 It is agreed that a pieceworker/subcontractor may request that some or all of the holdback account be returned to the pieceworker/subcontractor in situations of hardship or demonstrated need. The Company will consider all such requests and will not unreasonably withhold its agreement. It is understood, however, that the Company may thereafter take steps to replenish the holdback account, subject to the provisions of Article 7.02 above.
>
> 7.06 All holdback monies will be returned to the pieceworker/subcontractor twenty four (24) months after they last performed work for the Company. With respect to any deficiency notices issued under Article 18.02(a) of the master portion of the Collective Agreement which may lead to a deduction from a holdback account being held in trust, the Company shall provide a copy of that notice to the Union at the same time it is issued to the pieceworker/subcontractor.
>
> 7.07 On the signing of this agreement, and thereafter on January 15th of each year, the Company will advise each pieceworker for whom it maintains a holdback account **of the amount being held in that holdback account**. The notice shall be in writing and a copy shall be provided to the Union.

34. As per the last Holdback report provided by QSG to the Union regarding the Hardwood Collective Agreement, $2,000 is owed to Radisa, identified as "MRAD".[18]

35. Around September 7, 2023, Radisa contacted the Union about his Holdback claim of $2,000 under the Hardwood Collective Agreement. He stopped working for QSG around May 2023. He has not yet received a return of his Holdback. Under the Hardwood Collective Agreement, it appears the Company may be able to delay the return for up to 24 months. Around early September 2023, Radisa submitted a request to QSG for a return of his $2,000 Holdback.[19]

[18] Williamson Affidavit, para. 66; Exhibit V – Holdback Report of QSG re: the Hardwood Collective Agreement.
[19] Williamson Affidavit, para. 67; Exhibit W- Radisa's request to QSG for a return of his $2,000 Holdback

36. On September 7, 2023, the Union alerted QSG's counsel to Radisa's additional $2,000 Holdback claim, and provided a copy of the Hardwood Collective Agreement.[20]

37. Over the past month, the Union has had several without prejudice discussions and exchanged without prejudice communications with counsel for QSG, Ironbridge and the Monitor relating to the Holdback. The Holdback was raised immediately after the Union had notice of these proceedings and is set out in the Affidavit of Maheen Merchant, sworn August 17, 2023.[21]

Grievances

38. On April 29, 2022, the Union grieved with respect to *inter alia* the interpretation of Article 17 of the Tile Collective Agreement, and the Holdback. There are numerous contractors bound to the Tile Collective Agreement in addition to QSG. As such, the Union sent out virtually identical grievances to approximately 14 contractors.[22]

39. On May 5, 2022, the Residential Tile Contractors Association (the "**RTCA**") responded to the grievances. As set out in that letter, the RTCA is authorized to represent QSG and the other contractors in those grievances.[23]

40. On May 16, 2022, the Union responded. Since that time, the 14 grievances have been referred to arbitration to be heard together before Arbitrator Jim Hayes.[24]

41. There are similar grievances relating to the interpretation of Holdback provisions filed under the Union's collective agreement with the Greater Toronto Railings Association as well as with contractors bound to the Union's Carpet and Hardwood Collective Agreements (which

[20] Williamson Affidavit, para. 69
[21] Williamson Affidavit, para. 70-71
[22] Williamson Affidavit, para. 76; Exhibit X – April 29, 2022 grievance to QSG
[23] Williamson Affidavit, para. 77; Exhibit Y – May 5, 2022 response to the grievances
[24] Williamson Affidavit, para. 78; Exhibit Z – May 16, 2022 letter from the Union to the RTCA

includes a Grievance filed against QSG under the Hardwood Collective Agreement). In order to avoid a multiplicity of proceedings and for an orderly and expeditious litigation of these issues, it has been agreed that the grievance under the Railings Association agreement proceed first with the others deferred awaiting its outcome.[25]

42. The arbitration regarding the Railings Association was heard on May 9, 2023 and the arbitrator ruled that a trust was created regarding the Holdback provision in that collective agreement. The arbitration award provides:

> Re: Holdback Grievances
> …
>
> Award
>
> 1. Having regard to the language in the Collective Agreement, I **conclude that a Trust has been created** under Article 16.07.
>
> 2. In terms of remedy, I remit the matter back to the parties but remain seized should there be any issue.[26]

43. The grievance regarding the interpretation of the Holdback provision in the Tile Collective Agreement has not yet been scheduled. It may take several months or so for same to be scheduled and argued.[27]

PART III – ISSUES AND THE LAW

44. The issue on this application is whether this Court should protect the Pieceworker's Holdback; and if so, how?

45. Local 183 seeks confirmation from QSG and/or the Monitor as to whether funds are being held separate and apart with respect to the Holdback and to provide particulars with respect to same. To date, despite request, the Union has not received a "with prejudice" response.

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[25] Williamson Affidavit, para. 79
[26] Williamson Affidavit, para. 80; Exhibit AA – May 9, 2023 Award
[27] Williamson Affidavit, para. 81

46. If the funds are being held separate and apart, Local 183 then seeks an order that the Holdback funds continue to be held separate and apart and do not form part of the assets of QSG's estate; and be distributed and used only as set out in the Collective Agreements, and that this Order survives the termination of these CCAA proceedings and/or any future insolvency.

47. If the funds are not being held in trust and pursuant to the Collective Agreements, then:

(a) The issue of interpretation of the Holdback provisions should be allowed to be dealt with by way of the pending grievance and/or grievance arbitration; and/or new or amended grievances (the "**Grievances**");

(b) The Union requests a lift stay to allow it to proceed against the directors and officers for breach of trust, breach of fiduciary duty and breach of the Collective Agreements, by way of fresh and/or amended grievances so it be dealt with alongside the pending grievance arbitrations;

(c) A reserve of $97,083.41 (the "**Reserve**") be set aside and held separate and apart from the assets of QSG pending the final disposition of the Grievances;

(d) The Reserve does not form part of the assets of QSG's estate and is distributed upon further order of this Court after the conclusion of the Grievances;

(e) The Reserve be funded from any and all accounts receivable collected during these proceedings and/or from any sales proceeds, and/or from the Deferred Purchase Price and the A/R Collections in excess of the Specified Amount (as those terms are defined at paragraph 17 of the Monitor's August 25, 2023 Second Supplemental Pre-Filing Report); and,

(f) Any purchaser of QSG's assets not be absolved of the liability for the Holdback.

48. If there is a dispute between QSG and Local 183 about the Holdbacks, those must be dealt with in the grievance and arbitration process set out in the Collective Agreement, and as required by the *Labour Relations Act*. This includes all disputes about when the Piecework Holdbacks accessed by the employer under the Collective Agreement; the legitimacy of any

backcharges; how the Piecework Holdbacks are held and maintained; and when they are required to be returned to the workers etc. Respectfully, if the Court does not protect the Holdback Funds it will be improperly intruding on the jurisdiction of the grievance arbitrator and/or taking steps to frustrate the ability of the arbitrator to render meaningful decisions. This would improperly punish the employees, while rewarding QSG for its breach of trust and fiduciary duty.

Employees Must be Paid

49. At all material times, the terms of the Collective Agreements were in effect between QSG and the employees. As held in *TCT Logistics,* collective agreements continue to apply in insolvency proceedings. To not protect the employees' wages is inconsistent with *TCT Logistics.* It is tantamount to saying that the Collective Agreements apply but for the most fundamental part of the employment relationship – the payment of compensation earned; and in this case, even worse, the return of compensation being held back as security for post-filing deficiencies. [28]

50. In *Comstock,* Newbould J. even held that employee compensation was to be paid over the rights of a DIP Lender.

> "The same cannot be said to labour. These people provided work and expected to be paid for it. They are not individually in the business of running CCAA risks. I am not prepared to freeze the payroll due before Friday."[29]

51. Any distribution under the CCAA, whether by way of a disposition of assets or by way of a plan of compromise or arrangement must ensure that employee compensation has first been paid.[30] Further, any order made under the *CCAA,* is pursuant to section 11, thereof, expressly "subject to the restrictions set out in this Act [the CCAA]".

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[28] *GMAC Commercial Credit Corporation - Canada v. T.C.T. Logistics Inc., 2006 SCC 35 (CanLII), [2006] 2 SCR 123,* https://canlii.ca/t/1p0ml , at paras. 5 and 79
[29] Local 183 Brief of Authorities, Tab 1 - Endorsement of Newbould J, dated October 2, 2013 in *Comstock CCAA*
[30] See section 6(5) and (6) of the CCAA

52. In fact, dispositions of assets outside the ordinary course of business, may be made "**only if**" compensation owed to employees has first been paid. Sections 36(1) and 36(7) provide:

> Restriction on disposition of business assets
>
> 36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.
>
> Restriction — employers
>
> (7) The court may grant the authorization **only if** the court is satisfied that **the company can and will make the payments** that would have been **required under paragraphs 6(5)(a) and (6)(a)** if the court had sanctioned the compromise or arrangement.

53. S. 6(5)(a) of the CCAA requires the payment of employee "wages, salaries, commissions or compensation for services rendered after proceedings commenced under this Act."

> Restriction — employees, etc.
>
> (5) The court may sanction a compromise or an arrangement only if
>
> (a) the compromise or arrangement **provides for payment to the employees and former employees of the company**, immediately after the court's sanction, of
>
> > (i) **amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(d)** of the Bankruptcy and Insolvency Act if the company had become bankrupt on the day on which proceedings commenced under this Act, and
> >
> > (ii) **wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act** and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company's business during the same period; and
>
> (b) the court is satisfied that the company can and will make the payments as required under paragraph (a). [emphasis added]

54. In US Steel, this Court ordered that the company under CCAA protection be required to pay lump sum retention bonuses to employees because they are properly characterized as compensation for post-filing services, they will not affect the ability of the company to propose a plan of arrangement or compromise, and it is fair and equitable to do so.

> [25] Implicit in this dispute is the issue of the proper characterization of the lump sum retention bonuses at issue. USSC characterizes these lump sum payments as "termination or severance payments", which they say were contingent liabilities or obligations at the date of the Initial Order. The Applicants characterize the lump sum retention bonuses as additional compensation for post-filing services. On balance, I think **these payments are properly characterized as compensation for post-filing services** which are not subject to the stay in paragraph 13(a) of the Initial Order for the following reasons.
>
> …
>
> [32] Accordingly, I conclude that paragraph 13(a) of the Initial Order does not mandate a stay of payment of the lump sum retention bonuses due under the Severance Agreements. In these circumstances, paragraph 9(a) of the Initial Order permits USSC to make such payments. As USSC has chosen not to make such payments, however, the Applicants seek an order of the **Court requiring USSC to make such payments on the grounds that it would be fair and equitable to do so.**
>
> …
>
> [35] The Applicants argue that it would be unfair to treat them differently from the other terminated employees of USSC merely because they opted for a lump-sum retention bonus while the other employees are being paid in respect of working notice arrangements. I am not persuaded that this fact alone would justify an order in their favour. However, I think that **it would be fair to grant the order requested** for such reason together with the additional facts that: (1) as of the date of hearing of these motions, there does not appear to be any issue of an unfair priority in favour of the Applicants if such an order were granted; and (2) the **amounts are de minimus** and accordingly payment **will not affect the ability of USSC to propose a plan of arrangement or compromise**.[31]

55. Repayment of the Holdback to the workers is a post-filing obligation. They are moneys earned by the Pieceworkers, for which they have paid taxes and which have been withheld by QSG, and held by the Company with respect to security for deficiencies that arise for post-filing work. QSG has simply not released these wages because it may have a potential claim against which it could process under the Collective Agreement. Its time for making such claims will soon expire as it will cease to exist and cease to be bound to apply any Collective Agreement. But the earned compensation should be paid out to the employees before any disposition of the assets, or at the very least protected for the employees pending any claims which can be dealt with by a grievance arbitrator.

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[31] *U.S. Steel Canada Inc. (Re)*, 2015 ONSC 5990 (CanLII), https://canlii.ca/t/gll8b

56. Also, $97,000 is relatively modest compared to the operations of QSG, and payment of these funds will not affect the ability of QSG to propose a plan of arrangement or compromise. It is fair and equitable for these workers to have their compensation returned to them.

Legislative intent in restructurings and insolvencies is that employees be paid

57. In addition to the CCAA, super priority status is afforded to employees in receiverships, bankruptcies and proposals in bankruptcies. In receiverships and bankruptcies, employee compensation is afforded super priority status pursuant to sections 81.3 to 81.6 of the *BIA.* Further, section 60 of the BIA establishes that no Proposal in bankruptcy can be approved by the court unless employee compensation has been provided for.

Collective Agreements are to be enforced during CCAAs

58. The CCAA protects collective agreements and obligations arising thereunder. Section 33 of the CCAA plainly provides that collective agreements are to remain in force.

> 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.

59. Further, sections 11.3(2)(c) and 32(9)(b) of the CCAA expressly do not allow a Court to assign or disclaim a Collective Agreement.

60. The Collective Agreements require QSG to maintain these Holdback accounts and pay them to the employees if not otherwise used for deficiencies or back charges. A CCAA proceeding does not extinguish that obligation, particularly where the workers continue to work during the CCAA and the Holdback is there as security for post-filing work.

61. Any disputes about the interpretation of a collective agreement, including any claims which arise expressly or inferentially from the collective agreement, are within the exclusive jurisdiction of a labour arbitrator.[32]

62. The CCAA Court should ensure that its decisions allow meaningful adjudication of such disputes, including any claims made by QSG about its right to backcharge against any part of the Holdback, and claims by the Union about when to return such monies. To do otherwise is to have allowed QSG to claim all of the holdback as its own without following the Collective Agreement and rendering moot any claim that the Union may bring to protect its members.

Additionally, or alternatively, Rule 45.02 allows the Court to Preserve Property

63. Rule 45.02 of the *Rules of Civil Procedure* refers to the interim preservation of a fund:

> Specific Fund
> 45.02 Where the right of a party to a specific fund is in question, the court may order the fund to be paid into court or otherwise secured on such terms that are just.

64. In *News Canada Marketing Inc v TD Evergreen*[33], Justice Nordheimer outlined the appropriate test for relief under rule 45.02:

> I conclude therefore that the appropriate test for relief under rule 45.02 should require the plaintiff to establish that:
>
> a) the plaintiff claims a right to a specific fund;
>
> b) there is a serious issue to be tried regarding the plaintiff's claim to that fund;
>
> c) the balance of convenience favours granting the relief sought by the plaintiff.[34]

65. This test was later endorsed by the Ontario Court of Appeal in *Sadie Moranis Realty Corporation v 1667038 Ontario Inc.*[35] In that decision, the Court of Appeal elaborated the requirements under each section of the test:

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[32] *Weber v. Ontario Hydro*, 1995 CanLII 108 (SCC), [1995] 2 SCR 929, https://canlii.ca/t/1frj9
[33] Local 183 Brief of Authorities, Tab 2 – *News Canada Marketing Inc v TD Evergreen* [2000] OJ No 3705, 100 ACWS (3d) 145 (ONSC).
[34] *Ibid* at para 14.

> [19] The first of these requirements, the one under special scrutiny in this appeal, faithfully reflects the language of rule 45.02. **It requires that there be a specific fund readily identifiable when the order is sought. It also requires that the plaintiff assert a legal right to the specific fund as a claim in the litigation**. While I do not find it to be a helpful descriptor, I think it is in this sense that past jurisprudence has sometimes described the specific fund as "earmarked to the litigation".
>
> [20] The second and third requirements, though not centrally in issue in this case, **are** equally important in manifesting the policy behind the rule. They ensure that interference with the defendant's disposition of assets is limited to cases where the plaintiff has a serious prospect of ultimate success, and there is something compelling on the plaintiff's side of the scales**, such as a real concern that the defendant will dissipate the specific fund, that is sufficient to outweigh the defendant's freedom to deal with his or her property.**
>
> …
>
> [22] **Where the test is met, the order secures the specific fund claimed by the plaintiff pending the outcome of the litigation**. The order is distinguishable from a Mareva injunction (with its even stricter test), where the defendant is restrained from dealing with its own assets pending trial even though the plaintiff is not asserting a legal right to any of those assets.[36] [emphasis added]

66. The Ontario Court of Appeal was clear that Rule 45.02 does not require that the legal right to the specific fund claimed by a litigant be a proprietary right.

> [26] **Put another way, if the refinement (i.e., that the plaintiff's claim be to a proprietary right to the specific fund) is seen to confine the plaintiff to only a certain sort of legal right, it would unjustifiably narrow the subrule to something less than the subrule provides for.** If, on the other hand, the refinement is seen as not affecting the test as stated in the subrule, it adds nothing. **Moreover, it risks diverting the proper inquiry into an analysis of whether the legal right claimed has a "proprietary dimension" or is "proprietary in nature" as several of the cases have described. Either way, the refinement is not justified.**
>
> [27] **In short, I do not think that rule 45.02 requires that the legal right to the specific fund claimed by the plaintiff be a proprietary right.**
> [28] What remains is to examine whether the appellant meets the test for a rule 45.02 order as I have framed it.[37] [emphasis added]

67. In this matter, the Pieceworkers claim the amounts earmarked by QSG every month for the Holdback. Alternatively, the Pieceworkers claim the accounts receivables, which are generated as a result of the employees' work and/or any sale proceeds and/or the Deferred

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[35] 2012 ONCA 475 at para 18 [*Sadie Moranis ONCA*].
[36] *Ibid* at paras 19-22.
[37] *Ibid* at paras 26-28.

Purchase Price and the A/R Collections in excess of the Specified Amount (as those terms are defined at paragraph 17 of the Monitor's August 25, 2023 Second Supplemental Pre-Filing Report). These amounts were contributed to and/or generated by the employees' work.

Local 183 has a Serious Issue to be tried that the Holdbacks are Trust Funds

68. A classic definition of the trust concept is as follows:

> "A trust is an equitable obligation, binding a person (called a trustee) to deal with property owned by him (called trust property) as a separate fund, distinct from his own private property, for the benefit of persons (called beneficiaries or, in old cases, cestuis que trust), of whom he may himself be one, and any one of whom may enforce the obligation."[38]

69. The Hardwood Collective Agreement expressly provide that such monies be held "in trust" (Sc. C, Arts. 4.04 & 4.06; Sc. E, Arts. 7.04 & 7.06). However, a trust can in any event be created without any specific language so long as "three certainties" are met: the certainty of intention, the certainty of subject matter, and the certainty of object.[39]

70. **Certainty of intention**: To create a trust, the settlor "must employ language which clearly shows his intention that the recipient should hold on trust."[40]

71. No specific words or expressions are required to establish certainty of intention, and it is not required that the trust instrument state that the property is to be held in "trust".[41] The test is whether there was an "intention to create a trust"; provided this is established, a trust is constituted. Where a trust is constituted by words, rather than conduct, "the words employed to

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[38] Local 183 Brief of Authorities, Tab 3 - Donovan Waters et al., *Waters' Law of Trusts in Canada*, 4th ed., (Toronto: Carswell, 2012) at 4 (***"Waters")***
[39] Waters at 140-141
[40] Ibid.
[41] Waters, pp. 141, 144.

set up a trust, therefore, must show that the transferee is to take the property not beneficially, but for objects which the transferor describes".[42]

72. In the Collective Agreements, QSG acknowledges that they hold all funds in the holdback accounts for the pieceworkers, and that the funds belong to the workers. The Hardwood Collective Agreement (see Schedule C, Art. 4.05 & Schedule E, Art. 7.05) also permits pieceworkers facing personal hardship to request early access to their holdback accounts, which underscores that the accounts are for the workers' benefit.

73. Further, QSG commits to “keep all holdback monies in a designated holdback account”, and to "maintain a holdback account for any Pieceworker/Subcontractor" - i.e. separate from their own bank accounts. In *R v. Lowden*, the Alberta Court of Appeal wrote:

> Undoubtedly, a direction that moneys are to be kept separate and apart is a strong indication of a trust relationship being created.[43]

74. It is clear that QSG intended and had agreed that the Holdback Accounts would form trusts. Moreover, QSG is required to and has kept detailed records of the Holdback.

75. The Collective Agreements also permit the companies to keep part of the trust property (that is, deduct funds from the holdback accounts) if pieceworkers are responsible for deficiencies. This is a condition precedent that does not invalidate the trust. The pieceworkers are only entitled to the holdback funds on the condition that they are not responsible for any deficiencies in some specified time period following the completion of the work. Other than

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[42] Waters, p. 144.
[43] R. v. Lowden, 1981 ABCA 79 (CanLII), https://canlii.ca/t/fp6mp at para. 28, aff'd 1982 CanLII 194 (SCC), [1982] 2 SCR 60, https://canlii.ca/t/1z1cm

conditions against public policy and certain other exceptions that do not apply in the case at hand, conditions precedent do not invalidate trusts.[44]

76. **Certainty of subject matter**: The second requirement of a valid trust is that it must "be possible to identify clearly the property which is to be subject to the trust".[45] That is, the trust must either explicitly state its subject matter, or must provide sufficient context to permit the trustee or the court to determine the subject matter.

77. The trust in the case at hand clearly covers the monies in the holdback account – i.e. the up to $2,000 per pieceworker. The amount in each holdback fund is ascertainable by looking through QSG's records and is expressly stated in the Collective Agreements. Regardless, QSG sends monthly reports with detailed accounting.

78. If the Holdback funds were comingled with other funds, Waters confirms that this is not determinative.

> A requirement to keep funds identifiable is an important factor to be considered in determining the existence of a trust but it is not determinative. A clear intention to create a trust without a requirement to keep funds separate may suffice for a finding of a trust relationship.[46]

79. The jurisprudence also confirms that comingling is not determinative. In *Air Canada v. M & L Travel Ltd.*, Air Canada and a travel agency were parties to an agreement whereby the agency would issue Air Canada tickets directly to the public and hold the proceeds of the ticket sales, until paying them on a bi-monthly basis to Air Canada. The funds owing to Air Canada were held in the agency's general operating account, along with funds from other sources. From this account, the company paid out expenses including general operating expenses, interest on its

[44] Local 183 Brief of Authorities, Tab 4 - Halsbury's Laws of Canada (online), Trusts "Conditions attached to trusts" (VI.3(3)) at HTR-86.
[45] Waters at 159
[46] Waters, p. 61.

line of credit, personal loan payments, and salaries. At one point, one of the directors instructed a staff member to prepare cheques to Air Canada for the amount owing to it at that time, which was $25,079.67. The cheques were prepared and arranged to be delivered. However, a dispute arose and one of the directors issued a stop payment order to the bank, such that Air Canada never received the funds. Subsequently, the bank sent a demand notice with respect to a loan it had made to the company, and withdrew $15,184.11 from the company account, such that there was only $1,000.00 left in the account to pay the company's remaining debts, including the $25,079.67 owed to Air Canada.

80. Air Canada brought an action against the company and both directors, alleged that the funds had been held in trust, and that the directors of the agency were accordingly personally liable for the breach of trust. The defendants initially argued that the relationship was one of debtor and creditor, relying on the fact that the agreement did not require the agency to keep the ticket sales "in a separate account or trust fund".[47] However, before the Supreme Court, the agency "**properly conceded**" that the relationship was one of trust.[48] Accordingly, the Supreme Court held that there was a trust. In considering the issue, the Court noted that while comingling was a factor to be considered, it was not determinative:

> 25 While the presence or absence of a prohibition on the commingling of funds is a factor to be considered in favour of a debt relationship, it is not necessarily determinative. …In Lowden, supra, McGillivray C.J.A. stated as follows at pp. 101-102:
>
> > Undoubtedly a direction that moneys are to be kept separate and apart is a strong indication of a trust relationship being created. It does not appear to me, however, that the converse is necessarily so. In the case of a travel agent, how he handled the funds handed to him for the purchase of a ticket would, as far as the public is concerned, be something that they would not have reason to think about. It would be a matter of internal

[47] A*ir Canada v. M & L Travel Ltd.*, 1993 CanLII 33 (SCC), [1993] 3 SCR 787, https://canlii.ca/t/1fs01 para. 22
[48] A*ir Canada v. M & L Travel Ltd.*, 1993 CanLII 33 (SCC), [1993] 3 SCR 787, https://canlii.ca/t/1fs01 para. 21

> management. The fact that there is no specific discussion about moneys being kept separate and apart from other moneys does not detract from the fact that the money is paid for a particular purpose, namely the obtaining of tickets for specific flights or reservations at named accommodation for a particular period.[49]

81. Ultimately, the Court held that "it is well established that the nature of the relationship between the parties is a matter of intention", and, that as there was "clear evidence of intention to create a trust in the agreement", the "absence of a prohibition on the commingling of funds is not determinative".[50]

82. **Certainty of object**: Finally, valid trusts must be created for ascertainable beneficiaries. First, is it possible to determine, if the beneficiaries are not referred to by name but by a class description, whether any person is a member of that class, and second, that the totality of the membership of that class is known.[51]

83. The Collective Agreements expressly state that QSG create a holdback fund for each Pieceworker. The names of the Pieceworkers are ascertainable by consulting QSG's and the Union's records; and in fact, a list is required to be sent and is in fact regularly sent by QSG.

84. All three essential characteristics are present in the Holdback Accounts.

Balance of Convenience, Prejudice, and Interests of Justice

85. On August 22, 2023, the company filed a responding Affidavit from John Paccione. That affidavit addresses the Holdback as follows:

> 19. The Collective Agreement permits up to $2000 per installer to be held back as security for warranty work to address installation errors and deficiencies. The total holdback is approximately $95,000.

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[49] A*ir Canada v. M & L Travel Ltd.*, 1993 CanLII 33 (SCC), [1993] 3 SCR 787, https://canlii.ca/t/1fs01, para. 25.
[50] A*ir Canada v. M & L Travel Ltd.*, 1993 CanLII 33 (SCC), [1993] 3 SCR 787, https://canlii.ca/t/1fs01, para. 31.
[51] *Waters* at 167.

> 20. If that amount is paid out to the Installers, when the purchaser takes over the business, the installers would have to pay it back in. QSG proposes to have an amount equal to the holdback set aside and held for the Installers, to be transferred to the Newco once purchaser.

86. QSG's proposal to have an amount equal to the Pieceworker Holdback set aside and held for the Installers makes sense since it was their money being held in trust. However, the Court should do so now and either direct that it be paid out to the installers, be held by the Court or the Monitor and disbursed as per the Collective Agreement and/or pending the outcome of the Grievances, or be directed to the grievance arbitration arbitrator.

87. Furthermore, the Pieceworker Holdback only arises under a Collective Agreement. Local 183 has not signed any collective agreement with any purchaser and there is no basis to assert that any such Newco is entitled to maintain such a holdback. Simply put, QSG's solution set out in Mr. Paccione's affidavit will very likely not occur.

88. Accordingly, the Union seeks to ensure that those Holdback funds, are held in trust, as is intended by the Collective Agreements, or paid into Court and do not form part of the estate of the Debtors or otherwise protected.

89. As indicated above, repayment of the Holdback to the workers is a post-filing obligation. They are moneys earned by the Pieceworkers, for which they have paid taxes and withheld by QSG, and held by the Company with respect to security for deficiencies that arise for post-filing work. $97,000 is relatively modest compared to the operations of QSG, and payment of these funds will not affect the ability of QSG to propose a plan of arrangement or compromise. It is fair and equitable for these workers to have their compensation returned to them.

90. Moreover, the Collective Agreement requires QSG to maintain these Holdback Accounts. The Collective Agreements provide that, if not applied to deficiencies or back charges, the Holdback is to be returned to the Pieceworkers in the time specified in the Collective Agreement. The prospective purchaser in this proceeding is not bound to a Collective Agreement with Local 183 that would permit them to create a Pieceworker Holdback Account, or to process backcharges under such Collective Agreement. The sale in this proceeding will trigger the requirement that the Pieceworker Holdbacks be returned to the beneficiaries.

91. Failing to create a Reserve would be tantamount to allowing QSG and/or other creditors to take the Pieceworkers' money. This is particularly troubling given that the Holdback belongs to the Pieceworkers, was deducted from their pay, and is being used as security by QSG for post-filing work.

92. If a Reserve is not created, then the Union is very concerned that it will not have a remedy to pursue for its members if it succeeds in the Grievances. This would be tantamount to the Court deciding that there is no Trust created by the Holdback provisions of the Collective Agreements for these workers, which is something that is to be decided in the Grievances.

93. Further, $2,000 to these workers is a significant sum to the Pieceworkers. In contrast, $97,000 is not a large amount of money compared to the operations of QSG. Regardless, QSG seeks to sell itself quickly. Accordingly, there would be a minimal amount of prejudice to QSG and competing creditors if those funds are Reserved pending the disposition of the Grievances.

94. As set out above, the Union has a meritorious proceeding with respect to whether a Trust is created by the Holdback provisions.

This Court has Discretion to Lift the Stay of Proceedings against the Directors and Officers

95. Section 25 of the CCAA Order provides for a stay of proceedings against the directors or officers. The CCAA does not outline when to terminate or lift a stay against a creditor.[52]

96. However, case law and legal texts have enumerated the circumstances under which a court will lift a stay order. In the seminal text *Canadian Commercial Reorganization: Preventing Bankruptcy*, Professor Richard McLaren stated,

> Generally, the courts will lift a stay order where:
>
> 1. The plan is likely to fail.
> 2. 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).
> 3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor company's existence).
> 4. **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 the creditors.
> 5. **It is necessary to permit the applicant to take steps to protect a right which could be lost by the passing of time.**
> 6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.
> 7. There is a real risk that a creditor's loan will become unsecured during the stay period.
> 8. It is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period.
> 9. **It is in the interests of justice to do so**.[53]

97. The list of nine factors enumerated by Professor McLaren was later cited with approval by Justice Pepall in *Canwest Global Communications Corp., Re.* In addition to the nine factors, Justice Pepall noted, that the lifting of a stay is discretionary; and that the Court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA,

[52] Local 183 Brief of Authorities, Tab 5 – Richard McLaren, Canadian Commercial Reorganization: Preventing Bankruptcy (Consulted on 18 September 2023), (Toronto: Thomson Reuters), ch 3 at 14 (Thomson Reuters eLooseleaf Library).
[53] *Ibid*.

including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant the merits of the proposed action.

98. A motion seeking to lift a stay of proceedings is more likely to be granted when a claimant seeks a holdback amount if: the balance of convenience favours the claimant and where the CCAA proceeding has the earmarks of a liquidation. Here, QSG is selling itself quickly.

99. In *Puratone Corp., Re*, a group of three commercial hog production companies filed for protection under the CCAA. Shortly thereafter, the then-Manitoba Court of the Queen's Bench approved the sale of virtually all of the companies' assets. Pending the completion of the CCAA proceeding, the Monitor retained $6.75 million ($5 million as a general holdback).

100. Subsequently, a group of farmers, who supplied grains to the hog companies and remained unpaid, requested about $903,250 of the holdback. The farmers brought a motion to lift the stay of proceedings order to seek leave to commence an action against the hog companies and their directors and officers for damages for fraudulent misrepresentation and a declaration of a constructive trust on the basis of unjust enrichment. The major secured creditors objected and argued the claim did not justify delaying the distribution of the holdback amount.

101. Justice Dewar granted the motion and ruled the stay of proceedings should be lifted:

> [15] In my respectful view, these considerations are all to be viewed together and in the context of the nature and timing of the CCAA process before the court. The same request may very well receive a different reception in the case of an application for the lifting of a stay early in a CCAA proceeding that contemplates a true restructuring than in the case of an application brought late in a CCAA proceeding that involves only the sale of assets. In the former situation, the existence of a contemporaneous action might jeopardize the ability of the company to restructure as intended. In the latter case, the restructuring, such as it is, has been accomplished and the only issue being left to sort through is who is entitled to the money. In my view, a court would be more receptive to lifting the stay in the latter case than in the former.
> …

[54] *Canwest Global Communications Corp. (Re)*, 2009 CanLII 70508 (ON SC), https://canlii.ca/t/2735n at paras 32.

> [20] **When I scrutinize the proposed claim of the ITB Claimants against Puratone, I conclude that its dismissal is not a foregone conclusion. The ITB Claimants raise a point which so far as I am aware has not been addressed by this court. Here, the court is faced with a CCAA proceeding which has had from the outset all of the earmarks of a liquidation proceeding.** The affidavit of Raymond Hildebrand, sworn September 12, 2012 underlying the request for the Initial Order as well as the Pre-Filing Monitor's Report outlined the financial difficulties being experienced by Puratone, the reasons for those difficulties, as well as the efforts that had been made by Puratone and its restructuring professionals to deal with them. Some of the efforts had included a Sales and Solicitation Process ("SISP"), a process designed to find people who were willing to inject money into Puratone either through a going concern sale of assets or in equity injection. Those efforts failed.
>
> …
>
> [37] Again, evidence of the actual knowledge of the directors and/or the officers is not readily apparent without the ability to inquire into the records of the company through the discovery process. For the same reasons that I expressed as regards the two banks, requiring the ITB Claimants to adduce evidence on this motion of the directors' and officers' knowledge is too high a threshold to impose. A reasonable inference is that at least some of the directors and officers would have known that a CCAA proceeding was being prepared within the two week period prior to the CCAA filing, and at least some of the directors and officers would have had intimate knowledge of the financial constraints of the company and the efforts which the company was employing to solve them during the two week period prior to the filing of the CCAA proceeding. **That reasonable inference in my view is sufficient to conclude that the proposed claim against the directors and/or officers is not necessarily doomed to fail.** This case, as with many, will depend on facts not currently available to the court.
>
> [38] **Additionally, the balance of convenience favors the ITB Claimants**, and **I see no prejudice to the directors and officers facing the ITB claim sooner rather than late**r.
>
> [39] In my view there are sound reasons to justify lifting the stay to permit the ITB Claimants to issue the proposed claim against the officers and are directors, providing it is issued within 40 days after the date of signing of the Order that evidences this decision. It will however be necessary for the claimants to name the particular individuals who they propose to sue, recognizing that they may expose themselves to costs, possibly on a solicitor and own client basis, for every person that they unsuccessfully sue.[55] [emphasis added]

102. The Union repeats and relies on the submissions set out at paragraphs 85 to 94 above.

103. The CCAA stay against officers and directors is based upon the premise of good faith exercise of their rights and obligations. In this case, Local 183 requests that the stay be lifted as against QSG's officers and directs for the limited purpose of being able to bring forward a claim

[55] *Puratone Corp., Re,* 2013 MBQB 171 at paras 14-15, 20 & 37-39.

for breach of trust and/or breach of fiduciary duty. If the Court has not protected the Pieceworker Holdback Accounts such a proceeding may be the only way to secure damages equal to the Pieceworker Holdback, plus such punitive damages as are appropriate, so as to ensure that Local 183 and its members do not have their rights frustrated by lack of legal remedies. The Court should not allow the CCAA proceeding to be used as a sword to allow officers and directors to benefit from their breach of trust and/or breach of fiduciary duties.

104. Further, if a lift stay is granted regarding the directors and officers, then those claims would be heard together with the Grievances. This would avoid a multiplicity of proceedings, provide for an orderly and expeditious resolution of these issues, and avoid inconsistent results. Moreover, in this case, QSG seeks to sell its assets in short order and will no longer operate.

105. As set out above, the Union has a meritorious proceeding with respect to whether a Trust is created by the Holdback provisions; and therefore, if the Holdback funds have not been held separate and apart as required by the Collective Agreements, the Union would also have a meritorious claim against the directors and officers of QSG for breach trust, breach of fiduciary duty, and breach of the Collective Agreements.

PART IV - ORDER REQUESTED

106. Local 183 respectfully requests the Orders set out at paragraphs 45 to 47 above.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of September, 2023

Demetrios Yiokaris and James Harnum
Koskie Minsky LLP
Lawyers for LIUNA Local 183

SCHEDULE "A"
LIST OF AUTHORITIES

1. Endorsement of Newbould J, dated October 2, 2013 in *Comstock CCAA*

2. *Gardner v Vella*, 2016 ONSC 4146 (CanLII), https://canlii.ca/t/gs7gm

3. *GMAC Commercial Credit Corporation - Canada v. T.C.T. Logistics Inc.*, 2006 SCC 35 (CanLII), [2006] 2 SCR 123, https://canlii.ca/t/1p0ml

4. *U.S. Steel Canada Inc. (Re)*, 2015 ONSC 5990 (CanLII), https://canlii.ca/t/gll8b

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

6. *News Canada Marketing Inc v TD Evergreen* [2000] OJ No 3705, 100 ACWS (3d) 145 (ONSC)

7. *Sadie Moranis Realty Corporation v. 1667038 Ontario Inc.*, 2012 ONCA 475 (CanLII), https://canlii.ca/t/frxtj

8. Donovan Waters et al., *Waters' Law of Trusts in Canada*, 4th ed., (Toronto: Carswell, 2012)

9. *R. v. Lowden*, 1981 ABCA 79 (CanLII), https://canlii.ca/t/fp6mp at para. 28, aff'd 1982 CanLII 194 (SCC), [1982] 2 SCR 60, https://canlii.ca/t/1z1cm

10. Halsbury's Laws of Canada (online), Trusts "Conditions attached to trusts" (VI.3(3)) at HTR-86.

11. *Air Canada v. M & L Travel Ltd.*, 1993 CanLII 33 (SCC), [1993] 3 SCR 787, *https://canlii.ca/t/1fs01* para. 22

12. Richard McLaren, Canadian Commercial Reorganization: Preventing Bankruptcy (Consulted on 18 September 2023), (Toronto: Thomson Reuters), ch 3 at 14 (Thomson Reuters eLooseleaf Library).

13. *Canwest Global Communications Corp. (Re)*, 2009 CanLII 70508 (ON SC), https://canlii.ca/t/2735n

14. *Puratone Corp., Re*, 2013 MBQB 171

Schedule "A" – Other Applicants

A.1 QSG Opcos (in addition to QRCL)
1. Timeline Floors Inc.
2. Ontario Flooring Ltd
3. Weston Hardwood Design Centre Inc
4. Malvern Contract Interiors Limited

A.2 Holding Companies
5. Quality Commercial Carpet Corporation;
6. Joseph Douglas Pacione Holdings Ltd.;
7. John Anthony Pacione Holdings Ltd.;
8. Jopac Enterprises Limited;
9. Patjo Holdings Inc.

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 QUALITY RUGS OF CANADA LIMITED AND THE OTHER COMPANIES LISTED IN SCHEDULE "A"

Court File No.: CV-23-00703292-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at TORONTO

FACTUM OF LIUNA LOCAL 183
(RE: HOLDBACK)

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