

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 22, 2023

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TO: THE SERVICE LIST

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PART I - OVERVIEW

1. This Motion is brought by the CCAA Applicants for the following relief
 - a. a declaration that QSG is in good standing with respect of its payments and remittances owing under the collective agreement between the RTPA and the Labourers International Union of North America Local 183 (“LiUNA”);
 - b. an order directing LiUNA to confirm to recipients of communications to which is suggested otherwise, that QSG is in good standing under its Collective Agreement with LiUNA.

PART II - FACTS

2. The facts are as set out in the Affidavit of John Pacione affirmed September 21, 2023 in support of the motion.

PART III – ISSUES

3. The only issue, apart from whether, on the facts, the situation warrants the relief requested, is the authority of the court to grant the relief sought.

PART IV – LAW AND ANALYSIS IN RESPECT OF INITIAL ORDER

4. It is respectfully submitted that QSG is in good standing in respect of its payments and remittances under the LiUNA Low Rise Tile Agreement. It is also honouring intaller holdback refunds when requested in accordance with the Low Rise Tile Agreement with LiUNA.
5. Customers of QSG need assurance that QSG is in compliance in order to remit their accounts receivable. Up to \$7.7 Million is currently at risk as a result of LiUNA’s actions, of which \$2 million is being withheld by Builders because of letters from LiUNA they received, and another \$2 million is likely being withheld in the estimation of QSG.
6. LiUNA has declined to provide that assurance although reasonably requested.
7. LiUNA’s letters of August 16, 2023 to builders and other similar communications it has sent to Builders associations, are enforcement steps taken in the face of the stay of proceedings in the August 4, 2023 interim order, and direct interferences in the contractual relationships between QSG and its customers. Leave of the court was required to send those letters. The stay ordered on October 4 provides as follows:

NO EXERCISE OF RIGHTS OR REMEDIES

5. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Debtors, or affecting the Business or the Property, are hereby stayed and suspended, provided that nothing in this Order shall (i) empower the Debtors to carry on any business which the Debtors are not lawfully entitled to carry on, (ii) prevent the filing of any registration to preserve or perfect a security interest, or (iii) prevent the registration of a claim for lien.

NO INTERFERENCE WITH RIGHTS

6. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the any of the Debtors.

8. The CCAA Applicants planned the proceeding and negotiated DIP Financing in reliance on the stay protecting their cash flows. LiUNA's conduct in sending those letters and then not clearly correcting the record, risks the success of the CCAA process and unnecessarily risks consequences to QSG under its DIP Financing terms.
9. Protecting the cash flows is in the interests of all Stakeholders. A declaration of right can provide assurance to builders so they can pay their accounts receivable to QSG. Directing LiUNA to provide a confirmatory letter to QSG customers and related builder associations which it contacted will reinforce that assurance and thereby further protect the cash flows of the companies. Any other relief in respect of this matter can await an evaluation of the success of those measures. .

A. Duty to Act in Good Faith

10. In 2019, the CCAA was amended to mandate that "any interested person" in a CCAA proceeding shall act in good faith "with respect to the proceeding."¹ If the court determines that such interested person has failed to do so, the court may make any order it thinks fit.
11. The good faith requirement relates to conduct within the proceedings, not that relating to past activities.²

¹ CCAA, s.18.6.1; 9354-9186 *Québec Inc. v. Callidus Capital Corp.*, 2020 SCC 10 (CanLII), [2020] 1 SCR 521, at paras 49-50.

² *Muscletech Research and Development Inc.*, Re, 2006 CanLII 3282 (ON SC), at para 4.

12. Given that the amendment is a recent one, caselaw in the creditor context is scarce. However, as demonstrated in analogous cases, there is a fine line between acting in one's own interests and undermining the proceedings. The courts have imposed sanctions on behaviour that, in the name of personal interest, completely disregards the interest of other stakeholders.³

B. The Power to Make Declarations

13. Section 97 of the Courts of Justice Act confers on this Honourable court the power to make binding declarations of right.

C. The Inherent Jurisdiction under the CCAA Remedies for Breach of CCAA Stay

14. Section 11 of the CCAA confers broad powers on the court to make such orders as it sees fit in furtherance of a CCAA process.

15. Case law also confirms that a court has authority to remedy breaches of a CCAA stay including by refusing to allow the right of audience to parties which have breached the stay, and to require them to purge their contempt of the order⁴:

“The BANK, it is submitted, has violated the terms of the order made September 3, by applying twenty-five percent of each deposit against the COMPANY'S indebtedness, and accordingly ought not to be heard by the Court until it has purged itself of its contempt: HADKINSON v. HADKINSON [1952] 2 All E.R. 567 (C.A.) at p. 569. It is clear from the transcripts of tape recordings of the discussion between MURRAY FEIST, senior manager, special credit, of the BANK, and representatives of the COMPANY, on September 24, October 1, and October 4, 1991, that MR. FEIST was aware the BANK was contravening the order. MR. BREIVIK, who appeared with MR. EMSLIE for the BANK on November 27, 1991, argues the BANK has purged its contempt by making available the full amount of credit ordered by the Court, but in any event equitable doctrines do not apply to the interpretation and application of the COMPANIES' CREDITORS ARRANGEMENT ACT; and thus no legal result flows from the BANK'S conduct.,.,,

The BANK'S wilful disregard of this Court's order respecting maintenance of the line of credit and use of deposits is a matter of concern to the Court, and militates strongly against the BANK'S position. I am satisfied on the material that the BANK has substantially purged its contempt, albeit only after becoming aware of the existence of the transcripts. Had it been necessary for the BANK to reply on the Court's equitable jurisdiction alone I think it could not be heard. I am of the view, however, that the factors relevant to the disposition of the matters in issue here are broader than simply the BANK'S position.”

Re Philips Manufacturing (cited in Note 3 below) [Highlighting added]

“[27] The purpose of the CCAA has been characterized by many courts as involving a broad balancing of a plurality of stakeholder interests, recognizing that the interest of most parties will be best served by the survival of the applicant debtor corporation: see *Elan Corp. v. Comisky* (1991), [1990 CanLII 6979 \(ON CA\)](#), 1 O.R. (3d) 289 (CA) at pp. 306-7 (Doherty, J.A. dissenting on unrelated grounds). I see no reason why the Authority should not be held to the understanding and agreement which I have found it had with AC in this regard. Where an affected party is in breach of an initial order (which in this case remains intact as to the paragraphs in question and unappealed or otherwise dealt with on a comeback basis by the Authority in this regard), the court may order the breaching entity to comply with the initial order: see *Re Skydome Corp.*, [1999] O.J. No. 221 (Gen. Div.) at paras. 2 and 20. In that regard I order the Authority to live up to its commitment to provide AC with the fixed preferential use of the 14 bridge gates at the NT,

³ *Re 9282-8797 Québec Inc.*, [2020 QCCS 499 \(CanLII\)](#), at paras [131](#) and [159](#).

⁴ *Phillip's Manufacturing Ltd. Estate*, 1991 CanLII 674 (BC SC), <https://canlii.ca/t/1cr73>; *Air Canada, Re*, 2004 CanLII 13717 (ON SC), <https://canlii.ca/t/1glrw>

subject only to the provisos in the Protocol (and MOU). As offered by AC, the Protocol may be revisited after six months' experience.”

Re Air Canada (2004) (cited in Note 3 below) [Highlighting added]

16. Rule 60.05 of the Rules of Civil Procedure confers upon the court authority to use the contempt power to enforce orders which require a person to do an act or refrain from doing an act. Rule 60.11 sets out the power to make a contempt order.
17. The Applicants are not seeking a contempt order or other such draconian relief at this time, but rather an order in the nature of the *Philips Manufacturing* and *Air Canada* orders, in reliance on the Court’s declaratory power, and its inherent and CCAA Section 11 jurisdiction to fashion a remedy for a breach of the stay, and a remedy in the interests of the CCAA process as a whole. The remedies sought are the declaration that QSG is in good standing under the LiUNA low Rise Tile Agreement, and an Order directing LiUNA to send a letter to correct the contrary impression its previous communications have created, because that impression is unnecessarily impeding QSG receivables collections, and thereby undermining the interests of all of the stakeholders, including LiUNA’s installers.
18. As *Philips Manufacturing* illustrates, the court also has the power to dismiss or stay LiUNA’s motion concerning holdbacks pending its purging of its breach of the stay.

PART VI – ORDER SOUGHT

19. For all of the foregoing reasons, the QSG Group requests an Order substantially in the form of the draft Order circulated to the Service List in advance of this Motion, a copy of which has been provided to this Honourable Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of September, 2023.

C Besant

Schedule “A” – List of Authorities

1. 9354-9186 *Québec Inc. v. Callidus Capital Corp.*, [2020 SCC 10 \(CanLII\)](#), [2020] 1 SCR 521
2. *Muscletech Research and Development Inc.*, Re, [2006 CanLII 3282 \(ON SC\)](#)
3. *Re 9282-8797 Québec Inc.*, [2020 QCCS 499 \(CanLII\)](#)
4. Phillip's Manufacturing ltd. Estate, 1991 CanLII 674 (BC SC), <https://canlii.ca/t/1cr73>
5. Air Canada, Re, 2004 CanLII 13717 (ON SC), <https://canlii.ca/t/1glrw>

Schedule “B” – Text of Statutes

Courts of Justice Act, Section 97

Declaratory orders

97 The Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may make binding declarations of right, whether or not any consequential relief is or could be claimed.

https://www.canlii.org/en/on/laws/stat/rso-1990-c-c43/latest/rso-1990-c-c43.html#Common_Law_and_Equity_245424

Companies Creditors Arrangements Act (“CCAA”), Sections 11 and 18.6

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.

https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-36/latest/rsc-1985-c-c-36.html#PART_II_Jurisdiction_of_Courts_39901

CCAA Section 18.6

Duty of Good Faith

Good faith

18.6 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

Good faith — powers of court

(2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194 Rules 60.05, 60.06 and 60.11**Enforcement of Order to Do or Abstain from Doing any Act**

60.05 An order requiring a person to do an act, other than the payment of money, or to abstain from doing an act, may be enforced against the person refusing or neglecting to obey the order by a contempt order under [rule 60.11](#). R.R.O. 1990, Reg. 194, r. 60.05.

Enforcement by or against a Person not a Party

60.06 (1) An order that is made for the benefit of a person who is not a party may be enforced by that person in the same manner as if the person were a party. R.R.O. 1990, Reg. 194, r. 60.06 [\(1\)](#).

(2) An order that may be enforced against a person who is not a party may be enforced against that person in the same manner as if the person were a party. R.R.O. 1990, Reg. 194, r. 60.06 [\(2\)](#).

Contempt Order

Motion for Contempt Order

60.11 (1) A contempt order to enforce an order requiring a person to do an act, other than the payment of money, or to abstain from doing an act, may be obtained only on motion to a judge in the proceeding in which the order to be enforced was made. R.R.O. 1990, Reg. 194, r. 60.11 [\(1\)](#).

(2) The notice of motion shall be served personally on the person against whom a contempt order is sought, and not by an alternative to personal service, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 60.11 [\(2\)](#).

(3) An affidavit in support of a motion for a contempt order may contain statements of the deponent's information and belief only with respect to facts that are not contentious, and the source of the information and the fact of the belief shall be specified in the affidavit. R.R.O. 1990, Reg. 194, r. 60.11 [\(3\)](#).