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

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**COMMERCIAL LIST**

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| THE HONOURABLE | ) | FRIDAY, THE 24TH |
| MR JUSTICE PENNY | ) | DAY OF NOVEMBER, 2023 |

**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**

(collectively, the "**Applicants**")

**ORDER**

THIS MOTION, made by RSM Canada Limited in its capacity as Court-appointed Monitor of the Applicants (in such capacity, the "**Monitor**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), was heard this day by videoconference.

**ON READING** the Notice of Motion dated November 17, 2023, the Monitor's Motion Record, including the Fourth Report of the Monitor dated November 17, 2023 (the "**Fourth Report**") and the affidavits sworn in support of the approval of the fees and disbursements of the Monitor and its counsel, and on hearing the submissions of counsel for the Monitor and such

other counsel as were present and wished to be heard, and on reading the affidavit of service, filed,

**SERVICE AND DEFINITIONS**

1. **THIS COURT ORDERS** that the time for and manner of service of the Monitor's Motion Record is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS AND DECLARES** that all terms not otherwise defined herein shall have the meaning ascribed to them in the Amended and Restated Initial Order dated September 5, 2023 or the Fourth Report, as applicable.

**APPROVAL OF MONITOR'S ACTIVITIES**

3. **THIS COURT ORDERS** that the Pre-Filing Report of the Proposed Monitor dated August 3, 2023, the Supplemental Pre-Filing Report of the Proposed Monitor dated August 17, 2023, the Second Supplemental Pre-Filing Report of the Proposed Monitor dated August 25, 2023, the First Report of the Monitor dated September 1, 2023, the Second Report of the Monitor dated September 21, 2023, the Third Report of the Monitor dated October 30, 2023, the Fourth Report of the Monitor, and the activities and conduct of the Monitor set out in such reports, are hereby ratified and approved.

**APPROVAL OF FEES AND DISBURSEMENTS OF THE MONITOR**

4. **THIS COURT ORDER**S that the fees and disbursements of the Monitor for the period from August 4, 2023 to November 12, 2023, in the total amount of $249,230.25 (inclusive of taxes), all as set out in the Affidavit of Arif Dhanani sworn November 17, 2023, are hereby approved.

5. **THIS COURT ORDERS** that the fees and disbursements of Goodmans LLP, in its capacity as counsel to the Monitor, for the period from August 18, 2023 to November 15, 2023,

in the total amount of $644,922.73 (inclusive of taxes), all as set out in affidavit of Robert J. Chadwick sworn November 17, 2023, are hereby approved.

**HOLDBACK FUNDS**

**6. THIS COURT ORDERS AND DIRECTS** the Monitor to transfer the sum of $95,083.41 (the "**LiUNA 183 Reserve**") and the sum of $95,028.00 (the "**Carpenters' Reserve**", together with the "**LiUNA 183 Reserve**", the "**Reserve Amounts**"), both of which have been held segregated and separate from other funds held by the Monitor pursuant to the October 5th Endorsement (a copy of which is attached hereto as Schedule "B"), to the Fuller Landau Group Inc. (the "**Receiver**"), in its capacity as receiver and manager of the assets of the Applicants appointed in Court File No. CV-23-00703874-00CL (the "**Receivership Proceedings**").

**7. THIS COURT ORDERS AND DIRECTS** that the Receiver shall hold the Reserve Amounts segregated and separate from other funds held by the Receiver, and in accordance with the terms of the October 5th Endorsement, until further Order of this Court in the Receivership Proceedings.

**8. THIS COURT ORDERS** that, notwithstanding any other Order of this Court made on this date terminating the Stay Period pursuant to the Amended and Restated Initial Order made September 5, 2023 in these proceedings, the Stay Period shall remain in place and is hereby extended until further Order of this Court, solely with respect to (i) the Monitor and (ii) the former, current or future directors and officers of the Applicants.

**9. THIS COURT ORDERS** that, notwithstanding any provision of this Order or any orders issued in the Receivership Proceedings, nothing herein or therein shall affect, vary, derogate from, limit or amend, and the Monitor shall continue to have the benefit of, any of the rights, approvals and protections in favour of the Monitor at law or pursuant to the CCAA, the Initial Order, any other Order of this Court in these proceedings or otherwise.

**GENERAL**

10. **THIS COURT ORDERS** that the Monitor may apply to the Court as necessary to seek further orders and directions to give effect to this Order, or to seek its discharge or any related relief.

11. **THIS COURT ORDERS** that this Order shall have full force and effect in all provinces and territories in Canada.

12. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States, or in any other foreign jurisdiction, to give effect to this Order and the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Monitor and their respective agents as may be necessary or desirable to give effect to this Order, or to the Monitor and their respective agents in carrying out the terms of this Order.

13. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard/Daylight Time on the date of this Order.

## 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.

## Schedule "B" – October 5th Endorsement

SUPERIOR COURT OF JUSTICE

# COUNSEL SLIP

**COURT FILE NO.:** CV-23-00703933-00CL **DATE:** October 5, 2023

**REGISTRAR:** Teodoro Olaso

**NO. ON LIST:** 1

**TITLE OF PROCEEDING:** Quality Rugs of Canada Ltd. Vs. Waygar Capital Inc. et al

**BEFORE JUSTICE:** Justice Penny

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**PARTICIPANT INFORMATION**

**For Plaintiff, Applicant, Moving Party, Crown:**

| Name of Person Appearing | Name of Party | Contact Info |
|---|---|---|
| Christopher Besant | Quality Rugs of Canada Ltd. | CBesant@GRLLP.com |
| | | |

**For Defendant, Respondent, Responding Party, Defence:**

| Name of Person Appearing | Name of Party | Contact Info |
|---|---|---|
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| James Harnum | LiUna Local 183 | jharnum@kmlaw.ca |
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**For Other, Self-Represented:**

| Name of Person Appearing | Name of Party | Contact Info |
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**ENDORSEMENT OF JUSTICE PENNY (Released on October 10, 2023):**

On September 28 three matters were put over to be dealt with today: 1) the lien regularization order; 2) the motions of GG Eight and Housing One; and, 3) the Unions' holdback motions.

As matters have evolved, useful negotiations are still ongoing regarding the LRO issue and the work is proceeding on the GG Eight and Housing One sites. Accordingly, it is proposed, and I accept, that these matters be adjourned as follows. The LRO motion shall be heard by me on Friday October 13, 2023 at 10:00 AM by video conference. The builders' motions are adjourned to October 18, which is a date already reserved for the sale approval motion (also at 10:00 AM by videoconference).

The Unions' Holdback Issue

Both LIUNA Local 183 and the Carpenters' Union brought motions concerning the preservation of certain holdback funds. I encouraged the parties to make every effort to find a commercially practical solution to this issue in a prior hearing and endorsement. The motion was adjourned on September 28 because, I was advised, the parties were still exchanging proposals and were close to an agreement on many items. As it turned out, the parties agreed on most issues (the interim holdback resolution) but were still apart on several implementation and related issues. All parties filed *with prejudice* offers to resolve the holdback issue. All parties agreed that, in the circumstances, argument would be restricted to a general overview of the areas of agreement and the applicable law but that the focus would be on the disputed items and the arguments for against the competing proposals, such that the court could accept, reject or vary the disputed terms of the proposed resolution in order to conclude the interim holdback resolution.

Background

Under the terms of the respective collective agreements, an amount not to exceed $2,000 may be withheld by QSG to cover any back charges or deficiencies arising out of work performed by each installer hired to perform flooring services on QSG projects. The withheld funds must be recorded and accounted for on a monthly basis. These funds may be with withheld for a period not to exceed six months from the date of commencement of the work or three months from the time that the installer no longer works for QSG.

The Unions both maintain that on a proper interpretation of the language of the relevant collective agreement, the holdback funds are subject to a trust for the benefit of the installers and do not form part of the estate of QSG. The Unions have brought, or wish to bring, grievances against QSG, the purpose of which is to seek an interpretation of the language of the collective agreements and a determination of whether the holdback amounts are funds held in trust or not. In aid of these arbitration proceedings, the Unions moved for a court order in these CCAA proceedings for the interim preservation of the holdback funds pending arbitral resolution of this dispute and for an order lifting the stay for the purpose of bringing, or proceeding with, the necessary grievances before an arbitrator under the collective agreements. The pre-filing holdback amounts are not in material dispute: LIUNA, $97,083.41; and Carpenters' Union, $95,028.

There is a complicating factor involving LIUNA which becomes relevant to one of the disputed items discussed below. While QSG was bound to a collective agreement with LIUNA from May 1, 2022 to April 30, 2025, LIUNA abandon these bargaining rights in May 2023. In response, QSG brought an application to the OLRB, which was resolved in minutes of settlement. Under this Settlement Agreement, QSG is permitted to complete tile work on "existing projects" until April 30, 2024 without LIUNA seeking to enforce subcontracting out provisions. In exchange, QSG agreed to continue to apply the terms and conditions of the collective agreement, including the holdback provisions. The parties agreed in the Settlement Agreement that Vice-Chair Kugler of the OLRB "remains seized [of] any issues arising from the settlement." LIUNA has raised an issue about whether a successor to QSG (e.g., the purchaser in these CCAA proceedings) is entitled to the benefit of the Settlement Agreement with LIUNA.

I will also add that important context for the holdback and other, collateral issues raised on these motions, concerns the current status of all employee compensation payments. The evidence is not disputed that, with the benefit of DIP financing provided by the purchaser and ongoing collection of accounts receivable owed to the applicants, there is no unpaid employee compensation which is due and owing. The applicants are current with all employee payments. In addition, funds sufficient to pay all holdback refunds are available. Further, as pointed out by counsel for the purchaser, it is a term of the purchaser's offer that all employee compensation be kept current pending closing of the sale transaction. It is also the purchaser's stated intention to continue payment of compensation for installers on all ongoing projects. As I have noted before in a prior endorsement, the applicants' most significant asset is their ongoing projects and the accounts receivable from ongoing work done on those projects. To complete those projects, the applicants need to have installers working; the installers naturally will not be working if they are not being paid. It is also the stated intention of the applicants and the purchaser, and the objective of this proposed interim resolution of the holdback issue, that all holdback refunds will be paid in accordance with the terms of the relevant collective agreement as they become due and owing. It is entirely possible that there may never be any priority dispute concerning the status of the holdback amounts in these proceedings because, if the sale closes, the intention would be that the amounts will ultimately be paid in full.

The Core Agreed Provisions

The parties have agreed on the core features of preserving the holdback funds and the payment of these funds as they become due and owing. QSG, the purchaser and the Unions have agreed that:

a. a $2,000 holdback refund claimed by one pieceworker (designated MRAD) will be paid forthwith by the applicants.
b. the Unions' holdback motions will be adjourned without fixed day.
c. The issue of whether the holdback provision in the Residential Tile Contractors Association and LIUNA collective agreement dated May 1, 2022 to April 30, 2025 creates an obligation to hold the holdback amounts in trust shall be dealt with in the pending grievance arbitrations relating to the holdback provision and/or by way of fresh or amended grievance as required.
   Similarly, the issue of whether the Residential Carpet, Hardwood, Laminate and Floor Coverings Collective Agreement, dated May 1, 2019 to April 30, 2022 creates an obligation to hold the holdback amounts in trust and whether that trust obligation continues under the Residential Floorlayers Collective Agreement, dated May 1, 2022 to April 30, 2025 shall be dealt with by way of fresh grievance by the Carpenters.
   In both cases, the stay shall be lifted and the grievance arbitrations shall be allowed to proceed. If jurisdiction over the holdback issue is declined and/or otherwise not allowed in the arbitration and/or by the OLRB, then the holdback issue may be dealt with by way of motion in the CCAA proceedings or any subsequent insolvency proceedings which may be established.

d. The sum of $95,083.41 regarding the LIUNA holdback amount shall be paid forthwith by the applicants to the Monitor and held segregated and separate from other funds held by the Monitor as the LIUNA reserve in accordance with the terms of the agreement.
The sum of $95,028.00 regarding the Carpenters holdback amount shall be paid forthwith by the applicants to the Monitor and held segregated and separate from other funds held by the Monitor as the Carpenters reserve in accordance with the terms of the holdback resolution.
The LIUNA holdback amount and the Carpenters' holdback amount shall not form part of the assets of the applicants' estate while being held as a reserve, and the reserve shall be maintained pending either (i) a determination of whether any portion of the funds should be paid to any installers, (ii) the mutual agreement of the parties, or (iii) a court order.

e. It also appears to be agreed in concept that the reserve shall be transferred to the purchaser if the sale transaction closes and that holdback refunds from the reserve shall be paid by the purchaser post-closing to installers as refunds become due and owing under the terms of the collective agreements. However, some of the terms and conditions dealing with implementation and certain contingencies are in dispute. I will address the three most significant disputed issues below.

I will say at the outset that I accept, and approve, these features of the parties' proposed resolution (which I will refer to as the holdback resolution). I find it is appropriate in the circumstances for the stay to be lifted to permit the prosecution of the holdback trust issue before the appropriate arbitral tribunal.

Resolution of the Disputed Issues

*1. The Transition to the Purchaser*

Much of the concern of the Unions, particularly LIUNA, is focused on the transition, if the sale transaction is approved and closes, from the applicants (and Monitor) to the purchaser and how that will affect the ongoing existence of the two reserves and their availability to pay holdback refunds to the installers.

As noted earlier, the purchaser's stated intention is to step into the shoes of the applicants and to honour all ongoing obligations to the installers. This specifically includes honouring the status of the reserve and using the reserve to pay holdback refunds as they come due.

Under the applicants' proposal, supported by the purchaser and the Monitor, on the closing of the sale transaction, the purchaser will give a unilateral undertaking to the applicants, LIUNA and the Court, that it will comply with the Settlement Agreement and continued to deal with the LIUNA reserved in accordance with the terms of the collective agreement. Upon giving this undertaking, the LIUNA reserve will be released to the purchaser.

The situation with the Carpenters holdback and reserve is not complicated by a prior abandonment or a settlement agreement. Regarding the Carpenters reserve, the purchaser's undertaking to the applicants, Carpenters and the Court will be that the purchaser will continue to deal with the Carpenters holdback and reserve post-closing in accordance with the Carpenters collective agreement, and to pay holdback refunds from the Carpenters reserve as they come due.

As I understand it, LIUNA objects to this formulation of the transfer if the sale closes on two grounds: 1) it questions the reliability and enforceability of the purchaser's undertaking; and, 2) it is not prepared to concede that the purchaser will, post-closing, enjoy any of the benefits of the Settlement Agreement since the purchaser is not a party to that agreement.

As to the first point, the sale requires court approval. If a term of the Court approval of the sale is that the purchaser will take over and maintain the reserve, and give an undertaking to the parties and the Court that it will continue to maintain the reserve and to deal with the reserve in accordance with the relevant collective agreements, that is, in my view, a powerful commitment, the breach of which would attract appropriate remedial action by the Court.

The second point, concerning a possible dispute over the status of the Settlement Agreement vis-à-vis the purchaser, involves a potentially complex application of the law of successor rights for which recourse to the Vice Chair of the OLRB, in accordance with the terms of the Settlement Agreement, seems likely to be the most appropriate path to resolution. The law is clear that CCAA proceedings do not abrogate collective agreements or collective bargaining rights – at most CCAA proceedings may temporarily suspend certain specific actions pending further court order. In a scenario in which there is a dispute about the ongoing status of the Settlement Agreement post-sale, paragraphs 14 to 17 of the ARIO would come into play. In order to ensure an orderly resolution of such a dispute, if in fact it actually arises, this issue will have to return to the CCAA court to clear the path to a resolution, in much the same way as the parties propose to deal with the question of whether the holdback provisions of the collective agreements create a trust.

As I understand it, LIUNA's real complaint arises from its view that the language of the applicants' proposal would somehow preclude LIUNA for making the argument that the purchaser is not a party to, and cannot derived benefit from, the Settlement Agreement such that LIUNA could somehow be "held hostage" by the purchaser threatening to withhold payment of otherwise due and owing holdback rebates. I find that the proposed language cannot reasonably be interpreted in that way. The contemplated undertaking is unilateral. It is for the benefit of the installers. LIUNA is not giving up anything. It is simply receiving the unilateral commitment of the purchaser to hold the LIUNA reserve and to pay it out as rebates come due, as contemplated by the terms of the collective agreement. LIUNA cannot reasonably complain about that.

LIUNA also proposes language in its version of the proposed holdback resolution that would preserve its right to argue that the Settlement Agreement does not survive the sale of the business by the applicants. While I agree that this concept can usefully be reflected in the holdback resolution, I find that LIUNA's specific drafting creates ambiguity and is weighted, in what is effectively an advocacy piece, overtly in favour of LIUNA's position. It is sufficient, in my view, that the holdback resolution simply state that its terms are without prejudice to parties' positions in any subsequent challenge to the applicability of the Settlement Agreement following the closing of the sale transaction.

On the basis of this analysis, if the sale closes and the purchaser gives the undertaking, the reserve will have been preserved; the reserve may be transferred to the purchaser. The Unions' argument that the holdback amounts constitute a trust will not be prejudiced by other priority claims because the holdback amounts will have effectively been isolated, pending final resolution, from the applicants' estate.

Also related to this question of the transition from the applicants to the purchaser if the sale transaction closes, is a proposal by both Unions to include a provision by which both the Unions and the purchaser must "advise the Court within 30 days of the closing that they are bound to a Collective Agreement which provides that the purchaser may maintain a holdback account". Following that "advice", the reserve "shall be paid to the Purchaser who shall then hold such monies and pay them out to the Pieceworkers in accordance with the terms of such Collective Agreement".

The purpose and need for this provision, or indeed even what it means, were not explained or justified to my satisfaction. The provision seems to once again enter the realm of successor rights which, subject to the temporary limit on certain collective bargaining rights arising out of the ARIO pending the applicants' attempt to restructure their business and/or further court order, is the exclusive preserve of the OLRB. On its face, s.

69(2) of the *Labour Relations Act* dealing with successor rights on the sale of a business appear to be declaratory and self-determining. The existence of successor rights, for example, does not appear to require any "advice" by the purchaser or by the Unions.

From the perspective of the applicants, the purchaser and the Monitor, this *proviso* merely sets up an unknown or ambiguous condition subsequent which introduces an unacceptable level of transaction risk into the proposed sale. The purchaser in particular was as clear as a bell on this: this provision is unnecessary and its meaning and purpose are highly ambiguous; the inclusion of this provision is a "dealbreaker".

As noted earlier, it is the purchaser's stated intention to step into the shoes of the applicants, including compensation obligations under the collective agreements. It is in the economic interests of the purchaser and the installers that the installers receive ongoing compensation, including holdback refunds as they come due.

The Unions have not satisfied me as to the purpose of, much less the need for, this *proviso*. I agree with the applicants, the purchaser and the Monitor that the Union *proviso* need not and should not be included in the interim holdback resolution. To the extent the Unions have successor rights concerns, subject to paragraphs 14 to 17 of the ARIO these can be taken up with the OLRB. This would appear to be, in principle at least, a situation where an order lifting the stay in order to seek direction from the OLRB could easily be sought if it became necessary to do so (again, along the same lines as has been done in the holdback resolution itself).

2. *If the Transaction Does Not Close*

Another issue around which the parties did not entirely agree is what happens to the reserve if the sale transaction does not close. In my view, this issue is best addressed if and when that happens.

The parties agree that the holdback funds will be held as a reserve by the Monitor pending closing. If the sale does not close, the Monitor will continue to hold the reserve until further order of the Court. Whatever ultimately happens, or whatever comes next, will be on notice to all stakeholders. The status of the reserve in the hands of the Monitor can be addressed at that time. Even in the event of a liquidation, the Unions will have the opportunity to address the question of priorities if the funds have not yet been paid out to the installers as holdback refunds. If they have, of course, the issue becomes moot.

3. *Potential Claims Against Directors*

The Unions object to a provision in the applicants' proposal for the interim holdback resolution which, they say, purports to limit the Unions' right to make common law trust or other statutory claims against the applicants' directors on account of potential unpaid wages. I do not read the provision as limiting the installers right to seek indemnity from the applicants' directors for unpaid compensation in appropriate circumstances.

What the proposed language is meant to do is to acknowledge that claims against directors for unpaid prefiling holdback amounts are going to be limited to the amount of the reserve, provided the reserve remains in place. Counsel for the Unions accept that the reserve contains the prefiling holdback amounts and that the number is known and materially accurate; there is no "other" prefiling holdback amount. Counsel for the applicants clarified that the premise for the proposed language is that, as long as the holdback reserve is available, any claims against directors for holdback refunds could not, by definition, exceed the reserve. The applicants accept that if, for some unforeseen reason, the reserve ceased to be available, claims for unpaid holdback refunds could not, logically, be limited to the amount of the reserve since the reserve, in that scenario, would not exist. With that concession (that the reserve must continue to subsist and be available for the payment of holdback refunds), the language proposed by the applicants makes sense and is in accord with the underlying intent of the interim holdback resolution.

Any other issues related to potential claims against directors are, in my view, premature. All parties agree that there are no known employee claims against directors for unpaid compensation at this time. Installers are being paid. If and when the potential for such claims arises, the matter be can be addressed by motion to the court on a proper record. There is no need, or justification, at this time to make pronouncements about when and in what circumstances the stay might be lifted to permit pursuit of claims against directors for statutory or other compensation claims.

Conclusion

In conclusion, I find that the motions shall be determined by the interim holdback resolution on the basis of the agreed provisions and the determinations made in these reasons on the disputed items. This shall be generally in accordance with the form of the applicants' proposed holdback resolution, subject to the qualifications and clarifications set out earlier in this endorsement. I am confident the parties can, with the benefit of these reasons, prepare the appropriate form of interim holdback resolution and order. I may be spoken to if there are any outstanding matters.[1]

Penny J.

[1] The Monitor, at the end of oral submissions, pointed out that the holdback amount is a rolling number because work has continued on many of the applicants' projects post-filing. No one else commented on this issue explicitly. The principal focus of the motions and during oral submissions was on the pre-filing amounts, the calculation of which was not subject to any material controversy. The parties have proposed language in the holdback resolution which applies to post-filing holdbacks as well. If there are any unique issues about the post-filing holdbacks, I sure they will be addressed in future attendances.

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

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

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

collectively, The Applicants

**ONTARIO**
**SUPERIOR COURT OF JUSTICE**
**(COMMERCIAL LIST)**
Proceeding commenced at Toronto

**ORDER**

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