

Court File No. CV-23-00703292-00CL
Court File No. CV-23-00703933-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

WAYGAR CAPITAL INC., as agent for NINEPOINT CANADIAN SENIOR
DEBT MASTER FUND L.P.

Applicant

– and –

QUALITY RUGS OF CANADA LIMITED, MALVERN CONTRACT
INTERIORS LIMITED, WESTON HARDWOOD DESIGN CENTRE INC.,
ONTARIO FLOORING LTD., TIMELINE FLOORS INC., AND QUALITY
COMMERCIAL CARPET CORPORATION

Respondents

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
OTHER COMPANIES**

Applicants

NOTICE OF MOTION

Boa-Franc SENC/GP, Ceratec Inc., Lauzon – Planchers De Bois Exclusifs Inc.,
Metropolitan Hardwood Floors (Eastern), Inc. and Torlys Inc. (collectively, the “**Moving
Parties**”) will make a motion to a Judge presiding over the Commercial List on Friday,
November 24, 2023 at 10:00 a.m., or as soon after that time as the motion can be heard.

PROPOSED METHOD OF HEARING: The motion is to be heard:

By video conference.

at the following location:

330 University Avenue, Toronto ON, at a videoconference link to be provided.

THE MOTION IS FOR:

1. An order (the “**Trust and Lien Regularization Order**”), in a form to be advised by counsel, among other things:
 - a) declaring that all funds owing to or received by the Respondents in the Receivership Application/CCAA Applicants (the “**Respondents**”) on account of the contract or subcontract price of an improvement constitute a trust fund for the benefit of suppliers and subcontractors (the “**Suppliers**”) with a Proven Trust Claim (as defined below);
 - b) granting a super-priority charge (the “**Trust and Lien Charge**”) over all of the property of the Respondents (the “**Property**”) to secure all amounts owing in respect of: (i) any Proven Lien Claim (as defined below) to the extent of any applicable holdbacks; and (ii) any Proven Trust Claim that existed as of August 4, 2023, where the Debtors converted trust funds over the course of the CCAA Proceeding (as defined below);

- c) ordering that the Trust and Lien Charge shall rank in priority to all charges or security interests attaching to the Property with the exception of the Administration Charge and Receiver's Charge;
 - d) directing the Receiver to hold all accounts receivable and all funds received in respect of any construction project in a separate account for the benefit of Suppliers with a Proven Trust Claim;
 - e) directing the Receiver to retain all holdback funds received in respect of any construction project in a separate account, to be paid out in respect of Proven Lien Claims; and
 - f) directing the Receiver to keep an accounting of all amounts received so that funds can be traced on a per-project basis;
2. Such further and other relief as this Honourable Court may determine to be just.

THE GROUNDS FOR THE MOTION ARE:

3. The Moving Parties are Suppliers to construction projects of the Respondents. But for the intervention of certain court orders discussed below, the Moving Parties would have been entitled to trust and lien rights under Ontario's *Construction Act*, RSO 1990, c C-30 or any applicable equivalent provincial legislation ("**Provincial Lien Legislation**"). The Moving Parties are supported in this motion by an ad-hoc group of Suppliers to the Respondents.

4. The aggregate amount of lien claims that have been submitted by the ad-hoc Suppliers group to RSM Canada Limited in its capacity as Monitor is \$4,886,212.38 (the “**Asserted Lien Claims**”). The aggregate amount of the trust claims made by the ad-hoc Suppliers group, which includes the Asserted Lien Claims, is \$12,268,117.42
5. On August 3, 2023, without notice to any of the Suppliers, Waygar Capital Inc. swept the funds in certain bank accounts held by the Respondents. The swept funds included funds impressed with a trust under the Provincial Lien Legislation, for the benefit of the Suppliers.

History of CCAA Proceedings

6. On August 4, 2023, the Court made an order, among other things, imposing a stay of proceedings, staying any proceeding or enforcement process against the Respondents or affecting the Respondents’ business or property (the “**Stay of Proceedings**”).
7. On August 25, 2023, the Court made an order, amongst other things:
 - a) continuing the Stay of Proceedings and providing other customary protections under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”) in respect of the Respondents (the “**CCAA Proceeding**”);
 - b) appointing RSM Canada Limited as Monitor; and

- c) staying the rights of suppliers of services and/or materials to the Respondents, including the ad-hoc Suppliers group, from seeking to preserve, perfect or otherwise enforce any lien claim available to them in accordance with the usual protocols under the applicable Provincial Lien Legislation and requiring that they instead deliver a notice of such lien claim to the Monitor.
8. On September 5, 2023, the Court made the Amended and Restated Initial Order (the “**ARIO**”). The ARIO continued the stay with respect to the enforcement of lien rights set out in the Initial Order, and further ordered that any lien claim that had been preserved by registration against the owner’s property be vacated and that such claimant be deemed to have filed a notice of their lien claim with the Monitor. Under the ARIO, any lien claimant who delivered a timely notice of its lien claim is deemed to have preserved and perfected its lien for the purpose of the Provincial Lien Legislation.
9. On October 31, 2023, the Court made an order appointing Fuller Landau LLP as court-appointed receiver and manager of the property, assets and undertakings of the Respondents (the “**Receiver**”).
10. The Receiver has advised the Suppliers that it will bring a motion for an order instituting a process for the determination and quantification of all claims for a lien (if accepted, a “**Proven Lien Claim**”) or a trust (if accepted, a “**Proven Trust Claim**”) in the Receivership Proceeding.

Suppliers trust rights have been substantively prejudiced

11. The Respondent's accounts received and receivable, and existing project funds, are impressed with a trust in favour of the Moving Parties.
12. During the course of the CCAA Proceeding, the Respondents dissipated these trust assets by, among other things, collecting accounts receivable and converting the funds to other property, such that it cannot be traced. But for the CCAA Proceeding, those funds would have been available to the Moving Parties as beneficiaries of Provincial Lien Legislation trusts.

Supplier Lien rights have been substantively prejudiced

13. The endorsement accompanying the ARIO, also dated September 5, 2023, confirmed that the lien stay was imposed "to deal with the preservation of the claimants' rights between now and the lien restructuring order that will be requested at a hearing on September 12, 2023." Hearing dates for a motion seeking a lien regularization order were scheduled and adjourned by the Respondents several times, and ultimately never brought before the court.
14. In the meantime, the time for preserving the Moving Parties' lien rights under the applicable Provincial Lien Legislation has expired, meaning that although the Moving Parties have preserved and perfected their construction liens in accordance with the ARIO, it is no longer possible for them to register a lien claim against the project properties and the holdback held by the owners under

the Provincial Lien Legislation. The Moving Parties have thereby been deprived of the substantive rights afforded under the Provincial Lien Legislation.

15. The relief sought is just and appropriate to remedy the prejudice to the suppliers.
16. Section 11 of the CCAA, section 243 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, and section 101 of the *Courts of Justice Act*, RSO 1990, c. C-43; and
17. Sections 8, 8.1, 13, 14, 21, 22 and 24 of the *Construction Act*, RSO 1990, c C-30.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used on the motion:

18. The affidavit of Paul Raiche, sworn October 3, 2023.
19. The affidavit of Marco Gagné, sworn October 2, 2023.
20. The affidavit of Francisco Monroy, sworn October 2, 2023.
21. The affidavit of Marc Boucher, sworn October 3, 2023.
22. The affidavit of Jim Combatti, sworn October 3, 2023.
23. The affidavit of Jorge Da Silva, sworn November 8, 2023.
24. The affidavit of Shelane Wiseman, sworn November 8, 2023.
25. The affidavit of Victor Liu, sworn November 9, 2023.
26. The affidavit of Francis D’Almeida, sworn November 6, 2023.

27. The affidavit of Phillip ten Kortenaar, sworn November 9, 2023.
28. The affidavit of Derek Motley, sworn November 10, 2023.
29. Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

Date: November 10, 2023

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TO: THE SERVICE LIST

WAYGAR CAPITAL INC.
Applicant

QUALITY RUGS OF CANADA LIMITED et al
Respondents

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**ONTARIO
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT
TORONTO

NOTICE OF MOTION

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