

Court File No. S2030255
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

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

PETITIONER

AND:

THE VERY GOOD FOOD COMPANY INC., 1218158 B.C. LTD., 1218169
B.C. LTD., THE CULTURED NUT INC., THE VERY GOOD BUTCHERS
INC., LLOYD-JAMES MARKETING GROUP INC., and VGFC
HOLDINGS LLC

RESPONDENTS

WRITTEN SUBMISSIONS RE UNEARNED PREMIUMS

Submitted on Behalf of CAFO Inc.

(Application returnable June 23, 2025 before Justice Masuhara)

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PART I: OVERVIEW

1. There are two related applications before the court as follows:
 - (1) **CAFO's APPLICATION**: an application by CAFO Inc. ("CAFO") for an order compelling BDO Canada Limited (the "**Receiver**") – the receiver over the assets and undertaking of The Very Good Food Company Inc. ("VGFC") - to deliver to CAFO an insurance premium refund which the Receiver is holding pending the outcome of this application in the amount of **US\$180,000.00** and defined below as the Trisura Premium Refund. The Trisura Premium Refund arose from the cancellation of a policy of D&O insurance issued to VGFC by Trisura Insurance Company; and
 - (2) **THE RECEIVER'S APPLICATION**: an application by the Receiver for an order compelling CAFO to remit to the Receiver the amount of **US\$576,438.35** which is an amount equal to the aggregate of premium refunds CAFO had received in 2023 in respect of the cancellation of two policies of D&O insurance issued to VGFC (defined below collectively as the Lloyd's Premium Refunds").
2. For the grounds set out below, CAFO respectfully requests that its application be granted and the Receiver's application be dismissed.

PART II: BRIEF STATEMENT OF FACTS

3. While the two cross-applications before the court are between CAFO and the Receiver, at its core the contest is a priority dispute between CAFO and VGFC's senior secured creditor Waygar Capital Inc. ("**Waygar**"). Waygar supports the Receiver in these applications.

A. CAFO AND WAYGAR - THE TWO CREDITORS

1. CAFO – A Premium Finance Company

4. CAFO is a finance company with offices in Toronto, Ontario. Its business is focussed solely on providing financing to its clients across Canada for the purchase of commercial policies of insurance.¹

5. CAFO provides financing pursuant to a standard form of contract called a Continuous Premium Instalment Contract (a PIC for short). Pursuant to such agreements, CAFO remits the premium owing under a policy or policies of insurance to insurers on the borrower's behalf and the borrower agrees to pay the loan back to CAFO in monthly instalments.²

6. As security for the instalment payments, and pursuant to the terms of the financing agreement, the borrower (among other things) explicitly (i) appoints CAFO as its Attorney-in-Fact with the right, upon a payment default by the borrower, to cancel the policies financed under the financing agreement; and (ii) assigns to CAFO the unearned premium arising from the early cancellation of the financed policies.³

7. CAFO does not register its interest in the unearned premiums in the PPSA registry as such an interest is explicitly excluded from the PPSA's application but rather perfects its interest in the unearned premium pursuant to the terms of the *Insurance Act*.

2. Waygar – A Traditional PPSA-Based Secured Lender

8. Waygar is a traditional secured lender. It takes security over the assets (including all present and after acquired assets) of its borrowers and registers its security interest in the appropriate PPSA registry. In this case its loan agreement gave it a security interest in future unearned insurance premiums.

¹ Affidavit of Jayson R. Thompson sworn June 11, 2025 (“**Thompson Affidavit**”), paragraph 4.

² Thompson Affidavit, paragraph 4

³ Thompson Affidavit, paragraph 6

B. THE TWO LOAN AGREEMENTS AND THEIR COLLATERAL

1. CAFO

(i) *The PIC*

9. In 2022, VGFC purchased the following three policies of insurance with an aggregate premium owing in the amount of US\$1,100,000.00 from three separate insurers (the “**Insurers**”):⁴

Insurer	Type	Premium
Lloyds Rising Edge Ltd.	DO	US\$500,000.00
Trisura Guarantee Insurance Company	XSDO	US\$300,000.00
Lloyds Syndicate 2786 Everest	XSDO	US\$300,000.00

10. Each of the policies had a 12-month term commencing on October 13, 2022 and ending on October 13, 2023.

11. The Insurers required that the policies premiums be fully paid within a month or so of being bound. After the policies were bound, VGFC sought and obtained financing from CAFO to fund the premiums owing under the three policies.⁵

12. Pursuant to a Continuous Premium Instalment Contract dated October 17, 2022 (the “**PIC**”), VGFC borrowed US\$896,099.85 from CAFO to finance the premiums payable to the insurers in respect of the three policies (hereinafter, the “**Financed Policies**”).

13. The amount borrowed by VGFC pursuant to the PIC is particularized as follows:⁶

Premiums (and Fees)	US\$1,105,000.00
Down Payment (by VGFC)	(US\$225,000.00)
Financing Charge	US\$16,099.85
Total Borrowed	US\$896,099.85

⁴ Agreed Statement of Facts, Paragraph 8.

⁵ Thompson Affidavit, Paragraphs 11, 12 and 13.

⁶ Agreed Statement of Facts, Paragraph 14.

14. Pursuant to the terms of the PIC, VGFC was obligated to repay the loan to CAFO in nine consecutive monthly instalments each of US\$99,566.65 on the 13th of each month commencing on November 13, 2022 and ending on July 13, 2023.⁷

15. As indicated above, the Financed Policies are fully funded at the outset. As such, the premium held by the insurers is largely unearned at the outset and becomes earned with each passing day of the policy term. If a fully funded policy is cancelled before the end of its term, the insurer is required to refund to the insured the unearned portion of the paid premium.⁸ The PIC assigned to CAFO the unearned premiums in the Financed Policies.

16. More specifically, pursuant to paragraph 3 of the PIC, VGFC:⁹

- (1) irrevocably appointed CAFO as its attorney-in-fact with the full authority to cancel the Financed Policies in the event of a payment default by VGFC; and
- (2) assigned to CAFO, among other things, any and all unearned premiums which may become payable for any reason under the Financed Policies.

17. CAFO's only security is in the unearned premiums in the Financed Policies. CAFO did not take security in the proceeds of the Financed Policies (i.e. indemnification for losses) or of the assets that may have been insured by the Financed Policies.

18. Moreover, CAFO did not take security in any other of VGFC assets.

19. Relying on an exemption in the PPSA, CAFO did not register its security interest in the PPSA registry relying on the explicit exemption contained in the PPSA related to a transfer of an interest in or to a policy of insurance.

⁷ Agreed Statement of Facts, Paragraph 15.

⁸ Thompson Affidavit, Paragraph 5.

⁹ Agreed Statement of Facts, Paragraph 16.

20. On October 28, 2022, and as required by the PIC, VGFC remitted a down payment of US\$225,000.00 to its broker (the “**Broker**”) as payment for a portion of the premiums due under the Financed Policies.¹⁰

21. By separate Notices of Financed Premium dated October 31, 2022, CAFO provided written notice to each of the Insurers that VGFC had assigned to CAFO any and all unearned premiums which may become payable under the Financed Policies should they be cancelled before the end of their term. Each Notice of Unearned Premium provides as follows in that regard:¹¹

TO THE INSURER:

CAFO Inc has agreed to advance the premium on the policy described above subject to the conditions herein. **The insured has assigned to CAFO Inc. any and all unearned premiums which may become payable under the policy** and given CAFO Inc. Power of Attorney to cancel the policy upon default of any payment. [Emphasis added]

22. On November 14, 2022, CAFO advanced the balance of the premium owing under the Financed Policies on VGFC’s behalf by remitting US\$880,000.00 to the Insurers (via the Broker).¹² The Financed Policies were thus fully paid a month after the commencement of their policy terms.

(ii) VGFC’S Payment Default

23. VGFC’s first monthly instalment required by the PIC - US\$99,566.65 - was due on November 13, 2022. VGFC remitted that instalment to CAFO on November 23, 2022.¹³

24. VGFC’s second monthly instalment required by the PIC – US\$99,566.65 - was due on December 13, 2022. VGFC failed to remit that second monthly instalment

¹⁰ Agreed Statement of Facts, Paragraph 18.

¹¹ Agreed Statement of Facts, Paragraph 19 and Exhibit 5.

¹² Agreed Statement of Facts, Paragraph 22.

¹³ Agreed Statement of Facts, Paragraph 23.

when due (or at all). VGFC has therefore been default of its payment obligation under the PIC since December 13, 2022.¹⁴

25. By Notice of Intent to Cancel dated January 3, 2023, CAFO advised VGFC that its instalment due on December 13, 2022 had not been made and that as a result the Financed Policies would be cancelled unless the payment default was cured by January 13, 2023.¹⁵

26. VGFC did not cure its payment default by January 13, 2023 or at all. Moreover, it has failed to make any subsequent monthly instalments payable under the PIC.

(iii) *The Receivership*

27. By order of the Honourable Mr. Justice Walker of the Supreme Court of British Columbia dated January 16, 2023 (the “**Receivership Order**”), on petition by Waygar, the Receiver was appointed as receiver and manager of all of the assets, undertakings and properties of VGFC (and related companies). Paragraphs 10 and 11 of the Receivership Order imposed a stay of proceedings against VGFC and its property.

28. CAFO was not served with the application materials or the Receivership Order at that time and so it was initially unaware of either the receivership proceedings or of the Receivership Order.

(iv) *The Cancellation of the Financed Policies*

29. On January 19, 2023, (being unaware of the Receivership Order or proceedings at that time) CAFO exercised its right as Power of Attorney for VGFC to cancel the Financed Policies by sending separate Notices of Cancellation to the insurers on that date (including Trisura).¹⁶

¹⁴ Agreed Statement of Facts, Paragraph 24.

¹⁵ Agreed Statement of Facts, Paragraph 25 and Exhibit 6.

¹⁶ Agreed Statement of Facts, Paragraph 28 and Exhibit 7.

30. On January 24, 2023, CAFO became aware from public news sources that VGFC was subject to the within proceedings and that the Receiver had been appointed. Through its legal counsel, CAFO requested and obtained a copy of the Receivership Order from the Receiver on that date.¹⁷

31. CAFO then sought the Receiver's consent to cancel the Financed Policies and to receive the unearned premiums that arise from that cancellation.¹⁸

32. On January 30, 2023, the Receiver confirmed to CAFO in writing that it consented to the cancellation of the Financed Policies. The Receiver was silent as to the return of the unearned premiums.¹⁹

33. Each of the Insurers (including Trisura) cancelled the Financed Policies effective January 19, 2023 (the cancellation date in each of CAFO's Notices of Cancellation).²⁰

(v) The Refunded Unearned Premiums

34. CAFO received the premium refunds from the cancellation of the two Lloyds Policies in the aggregate amount of US\$576,438.35 (the "**Lloyds Premium Refunds**") on May 31, 2023 and July 24, 2023, respectively. The Receiver did not object to CAFO receiving the Lloyds Premium Refunds at that time.²¹

35. The refund arising from the cancellation of the Trisura policy (the "**Trisura Premium Refund**") was issued much later than the Lloyds Premium Refunds.²² By the time that the Trisura Premium Refund was ready to be issued, the Receiver had indicated for the first time that it not only resisted CAFO's claim on the Trisura Premium Refund on the grounds that it believes that Waygar has a first ranking

¹⁷ Agreed Statement of Facts, Paragraph 29.

¹⁸ Agreed Statement of Facts, Paragraph 31 and Exhibit 8.

¹⁹ Agreed Statement of Facts, Paragraph 33 and Exhibit 9.

²⁰ Agreed Statement of Facts, Paragraph 34.

²¹ Agreed Statement of Facts, Paragraphs 35 and 36.

²² Agreed Statement of Facts, Paragraph 40.

interest in the premium refunds but also that CAFO was obligated to return the Lloyds Premium Refunds to the Receiver.

36. Given the dispute, CAFO and the Receiver have agreed that the Trisura Premium Refund – which amounts to US\$180,000.00 - would be held by the Receiver pending the outcome of these applications. The Receiver has been holding that amount since January 2025.²³

(vi) CAFO’s Outstanding Loan Amount

37. As at the date of this application, CAFO is owed the principal sum of US\$220,094.85 under its PIC. If successful on these applications, the Trisura Premium Refund will be applied to VGFC’s outstanding balance leaving a shortfall of US\$40,094.85.²⁴

2. WAYGAR – GSA AND PPSA REGISTRATION

(i) The Waygar Loan Agreement

38. Waygar (as agent for Ninepoint Senior Debt Master Fund L.P.) advanced funds to VGFC in connection with two credit facilities (a revolving credit loan and a term loan) pursuant to a loan agreement dated June 7, 2021 between Waygar as lender and VGFC as borrower (the “**Waygar Loan Agreement**”).²⁵

39. As part of the consideration for the Waygar Loan Agreement, Waygar required VGFC to have in place policies of directors and officers insurance.²⁶ The Financed Policies met that requirement. As such, the Financed Policies were purchased by VGFC both for the benefit of VGFC and Waygar.

²³ Agreed Statement of Facts, Paragraph 40.

²⁴ Agreed Statement of Facts, Paragraphs 36 to 38.

²⁵ Agreed Statement of Facts, Paragraph 2 and Exhibit 1.

²⁶ Agreed Statement of Facts, Paragraph 7.

40. Despite requiring that VGFC purchase the Financed Policies, the Waygar Loan Agreement did not provide financing for their purchase. As such, VGFC financed those policies through CAFO (as set out in the section above).

41. In any event, pursuant to the Waygar Loan Agreement, VGFC's obligations were secured by all of VGFC's Collateral which includes, among other things, after acquired property explicitly including "all unearned premiums" which it properly describes as "intangible" property.²⁷

42. Waygar and VGFC also entered into a General Security Agreement dated June 7, 2021.²⁸

(ii) Waygar's PPSA Registration

43. On May 21, 2021 (that is approximately 2 weeks before entering into the Waygar Loan Agreement and the General Security Agreement with VGFC), Waygar registered its security interest over all of VGFC's "present and after acquired personal property" in the PPSA Registry.²⁹

(iii) Waygar's Outstanding Loan Amount

44. As of the date of these applications, VGFC owes Waygar the amount of \$7,779,388.00 pursuant to the Waygar Loan Agreement.

PART 3: LAW AND ARGUMENT

A. ISSUE

45. Who between CAFO (a premium financier) and Waygar (a traditional PPSA creditor) has a priority interest in the unearned premiums. That is the principal issue to be determined by this Honourable Court.

²⁷ Agreed Statement of Facts, Paragraph 3 and Exhibit 1.

²⁸ Agreed Statement of Facts, Paragraph 4 and Exhibit 2.

²⁹ Agreed Statement of Facts, Paragraph 5 and Exhibit 3.

B. STATUTORY REGIME

46. The issues raised by this application touch on two provisions contained in two statutes as follows:

- (1) section 4(c) of the *Personal Property Security Act*, R.S.B.C. 1996, c.359 (the “*PPSA*”); and
- (2) section 19(1) of the *Insurance Act*, R.S.B.C. 2012, c.1 (the “*Insurance Act*”).

1. *PPSA* – Section 4(c) – Exclusion Provision

47. Section 4(c) of the *PPSA* (the “**PPSA Exclusion Provision**”) enumerates an exclusion to its application relevant to these applications. It provides as follows:

Exclusions from scope of Act

4. *Except as otherwise provided in this Act, **this Act does not apply to** the following:*

....

(c) *the creation or **transfer of an interest or claim in or under a policy of insurance** except the transfer of a right of money or other value payable under a policy of insurance as indemnity or compensation for loss of or damage to collateral; **[Emphasis added]***

48. As set out below, the Court of Appeal for Ontario held in the 2005 decision in *Re Stelco, supra* that the *PPSA* Exclusion Provision in the Ontario *PPSA* excludes a transfer of an interest in unearned insurance premiums from the *PPSA*’s application.

2. *Insurance Act* – Section 19(1) – Unearned Premiums

49. The second relevant statutory provision is found in the *Insurance Act*.

50. Section 19(1) of the *Insurance Act* provides that if an insured assigns the right to a refunded premium to an assignee and the assignee provides notice of that

assignment to the insurer, the insurer must pay the refund to the assignee. The section provides as follows:

Payment of refund to assignee

19. (1) ***If an insured assigns the right to refund of premium that may accrue by reason of the cancellation or termination of insurance under the terms of it and notice of the assignment is given by the assignee to the insurer, the insurer must pay any refund to the assignee, despite any condition in the contract, whether prescribed under this Act or not, requiring the refund to be paid to the insured or to accompany any notice of cancellation or termination to the insured.***
[Emphasis added]

51. Note that the two provisions (PPSA Exclusion Provision and *Insurance Act* re unearned premiums) are substantially the same across every Canadian jurisdiction. A table of concordance related to those provisions is attached hereto as **TAB 3** to CAFO's casebook.

C. PREMIUM FINANCING; THE PPSA; AND THE INSURANCE ACT

1. The PPSA Does Not Apply

52. The PPSA Exclusion Provision provides that the PPSA does not apply to "a transfer of an interest or claim in or under a policy of insurance".

53. Relying on that exclusion, premium finance companies (including CAFO) had historically taken the view that PPSA Exclusion Provision exempted them from the PPSA and thus as a matter of practice they did not register their interest in PPSA registries.

54. The premium finance industry's interpretation of the PPSA Exclusion Provision was first challenged by debtors in Ontario in the early 2000s. That led to a number of cases culminating in the 2005 decision of the Court of Appeal for Ontario in *Re Stelco Inc.*, 2005 CanLII 13192 which confirmed the premium finance industry's

interpretation.³⁰ The transfer of unearned insurance premiums were exempted from the PPSA and exempted from registration thereunder.

55. As such, CAFO has not registered a financing statement in the PPSA registry in respect to its interest in the unearned premiums.

56. While the Ontario Court of Appeal in *Re Stelco* considered the *Ontario* version of the PPSA Exclusion Provision, the Ontario version is substantially similar to the version in the BC *PPSA*. The two provisions are set out in the chart attached hereto at **TAB 2** to CAFO's casebook.

57. Recognizing that the Supreme Court of British Columbia is not bound by a decision of the Ontario Court of Appeal, it is respectfully submitted that a decision of an appellate court of a different province is certainly persuasive and ought to be followed considered in light of principles of inter-provincial comity. See, for example, *GMAC Commercial Credit Corp.-Canada v. TCT Logistics*, 2004 CanLII 11415 (Ont. C.A.) at paras. 20 and 21 re PPSA legislation.³¹

58. Following the principles confirmed in *Re Stelco*, CAFO submits that the PPSA has no application in respect of transfers of interests in unearned premiums.

59. As such, (i) the fact that CAFO did not register a financing statement in the PPSA registry is not fatal to its claim (and such filing would have been ineffective in any case); and (ii) the fact that Waygar did register its interest in the PPSA registry has no bearing on whether it has a perfected interest in the unearned premiums.

2. The Insurance Act Governs

60. Priorities in unearned premiums are governed by the *Insurance Act*. More specifically, to have an interest (and therefore priority) in the unearned premiums a creditor would have to comply with the provisions of the *Insurance Act*. At its most

³⁰ *Re Stelco Inc.*, 2005 CanLII 13192 (Ont. C.A.) – CAFO's Casebook – **TAB 1**

³¹ *GMAC Commercial Credit Corp.-Canada v. TCT Logistics*, 2004 CanLII 11415 (Ont. C.A.) – CAFO's Casebook – **TAB 4**

general, the first creditor to give notice to the insurer that its insured had assigned the unearned premiums to has a first ranking priority.

61. Professor Richard R. McLaren set out the law succinctly in his text *Secured Transactions in Canada*, 3d Edition, (2019, Carswell)³² as follows:

§ 3:54. Insurance and Annuities

Section 4(1)(c) provides that the Act does not apply “to a transfer of an interest or claim in or under any policy of insurance or contract of annuity.” The result of this exclusion from the Act is that priority for these interests is not determined in accordance with the Act. Priority is instead determined in accordance with the non-Act law, which depends on giving notice to the insurer.....

Outside of Ontario, the exclusion of insurance policies is substantially the same..... [Emphasis added]

62. The *non-Act law* that Professor McLaren refers to in the above excerpt is the Insurance Acts of the various provinces.³³

63. Professor McLaren indicates that priority between creditors over an interest created by the transfer of an interest in a policy of insurance “*depends on giving notice to the insurer*”. That conclusion is based upon the explicit wording of the relevant provisions contained in the provincial *Insurance Acts*.

64. As indicated above, the relevant section of the BC *Insurance Act* is section 19(1) which we repeat here for convenience:

Payment of refund to assignee

19. (1) ***If an insured assigns the right to refund of premium that may accrue by reason of the cancellation or termination of insurance under the terms of it and notice of the assignment is given by the assignee to the insurer, the insurer must pay***

³² See **TAB 5** of CAFO’s case book for a reproduction of the full text of §3.54 Insurance and Annuities from Professor McLaren’s text.

³³ Professor McLaren specifically cites the various provincial Insurance Acts to support his argument that priority depends on giving notice to the insurer.

any refund to the assignee, despite any condition in the contract, whether prescribed under this Act or not, requiring the refund to be paid to the insured or to accompany any notice of cancellation or termination to the insured. [Emphasis added]

65. Section 19(1) of the *Insurance Act*, therefore, requires a creditor to satisfy two conditions in order to have an interest in the refund of unearned premiums:

- (1) **ASSIGNMENT:** the creditor has to have received an assignment of the right to the refund; and
- (2) **NOTICE:** the creditor has to have given notice of that assignment to the insurer.

66. If either of those conditions are lacking, the creditor does not have a right to the refund of unearned premium.

67. CAFO has satisfied each of those two conditions; Waygar has satisfied neither.

(i) CAFO – Both Conditions Satisfied

ASSIGNMENT CONDITION - Satisfied

68. VGFC has absolutely and unconditionally assigned the unearned premiums to CAFO pursuant to section 3 of the PIC which section provides in part as follows:

(3) SECURITY INTEREST AND POWER OF ATTORNEY

Insured assigns....(a) any and all unearned Premiums....which may become payable for any reason under all insurance policies financed by CAFO.

69. CAFO has thus satisfied the *Assignment* condition in section 19(1) of the *Insurance Act*.

NOTICE CONDITION

70. CAFO has also satisfied the *Notice* condition contained in section 19(1) of the *Insurance Act* by having provided written notice to each of the Insurers by separate Notice of Financed Premium dated October 31, 2022 which contained the following statement:

TO THE INSURER:

CAFO Inc has agreed to advance the premium on the policy described above subject to the conditions herein. **The insured has assigned to CAFO Inc. any and all unearned premiums which may become payable under the policy** and given CAFO Inc. Power of Attorney to cancel the policy upon default of any payment. [Emphasis added]

(ii) Waygar – Neither Condition Satisfied

ASSIGNMENT CONDITION – Not Satisfied

71. While VGFC has granted to Waygar a *security interest* in unearned premiums (pursuant to both the Waygar Loan Agreement and the General Security Agreement), *VGFC did not assign the unearned premiums to Waygar* pursuant to those or any other documents.

72. A security interest is not an assignment. Professor Bruce MacDougall sets out the distinction between the two in his text *Canadian Personal Property Security Law, 3rd Edition* (2023: LexisNexis) by explaining the difference between a conditional and an unconditional assignment at page 62:³⁴

An assignment can be unconditional (“outright” or often called “absolute”) or conditional (i.e. by way of a charge).

³⁴ See **TAB 6** of CAFO’s casebook for a reproduction of pages 62 and 63 of Professor MacDougall’s text. Professor McDougall cites **356522 B.C. Ltd., 2003 BCSC 639** to support his conclusion. That case can be found at **TAB 7** of CAFO’s case book.

The conditional transfer of property interest is a hallmark of a secured transaction.

If the assignment is not unconditional, but is for the purposes of giving a conditional interest in collateral, such as being conditional on default under a security agreement, then it operates as a security interest only....

73. With that legal distinction in mind, it is clear from a review of the terms of the Waygar Loan Agreement and the General Security Agreement that VGFC did not assign unearned premiums to Waygar but only granted Waygar a security interest in same.

74. First, the Waygar Loan Agreement does not contain any provisions pursuant to which VGFC expressly assigned unearned premiums to Waygar. While that in itself is not fatal given that these things ought to be determined on substance over form, the provisions in the Waygar Loan Agreement do not evidence an intention by VGFC to assign the unearned premiums to Waygar. Rather they demonstrate that Waygar's interest in unearned premiums is triggered (i.e. conditional) upon an event of default and therefore only creates a security interest and not an assignment of the unearned premiums.

75. The relevant provisions of the Waygar Loan Agreement in that regard are:

- (1) **Section 1.4** – indicates that all of VGFC's loan obligations are secured by all of the Collateral;
- (2) **Schedule A – Definitions** - the definition of Collateral includes “*intangibles*” whether “*now owned or after acquired*”;
- (3) **Schedule A – Definitions** - the definition of Intangibles means all “*intangibles as defined in the PPSA*” and explicitly includes “*all unearned premiums*”;
- (4) **Section 7.1(a) – Remedies** – if an event of default should occur, Waygar may “*exercise any rights and remedies provided to the Lender under the Loan Documents or at law or equity, including all remedies provided under the PPSA*”;

- (5) **Section 7.1(b) – Remedies** – upon the occurrence of and event of default, Waygar may “*collect, receive, assemble, process and appropriate and realize upon the Collateral*”;

76. Similarly, there is no term in the General Security Agreement pursuant to which VGFC expressly assigned unearned premiums to Waygar nor is there any provision therein that suggests an intention of any such assignment.

77. Given that unearned premiums have not been assigned to Waygar, Waygar’s claim to both the Trisura Premium Refund and the Lloyds Premium Refunds must fail as it has not met the Assignment condition in section 19(1) of the *Insurance Act*.

NOTICE CONDITION – Not Satisfied

78. Leaving aside the Assignment Condition, Waygar also failed to satisfy the second condition required by section 19(1) of the *Insurance Act* – by failing to give notice to the Insurers who issued the Financed Policies that it had obtained an assignment of the unearned premiums from VGFC.

79. Since Waygar did not actually obtain an assignment, it stands to reason that it could not have provided notice to the Insurers of such assignment.

80. Moreover, as set out in paragraph 21 of the Agreed Statement of Facts, “*Waygar did not provide notice of Waygar’s interest in the unearned premiums directly to the insurers which issued the Financed Policies, nor did it provide direct notice to those insurers of the security interest granted by VGFC to Waygar pursuant to the Waygar Loan Agreement and GSA*”. As such, Waygar’s claim to the unearned premiums must fail.

3. CANADIAN COURT ORDERS

81. While the priority issue in the case at bar has not been litigated in a contested proceeding in a Canadian court, courts across Canada have repeatedly issued

consent orders since the *Re Stelco* decision ordering that refunded premiums be paid to the premium finance company (over traditional secured creditors) as follows:³⁵

- (1) In *Re St. Mary's Paper Corp.* (Receivership) – Justice Colin Campbell of the Ontario Superior Court of Justice (Commercial List) – Order dated May 8, 2012;
- (2) In *Re Landrill International Inc.* (CCAA) – New Brunswick Court of Queens Bench – Order dated May 30, 2013;
- (3) In *Re Moloney Electric Inc.* (Bankruptcy) – Justice Frank Newbould of the of the Ontario Superior Court of Justice (Commercial List) – Order dated August 19, 2016.

82. Also, where CCAA applicants or receivers determined that it was necessary to keep financed policies in place, courts across Canada have issued consent orders directing debtors (or Receivers) to continue to make instalment payments under the PICs or financing agreements failing which the financed policies could be cancelled and the refunded premiums paid to the to premium finance company follows:³⁶

- (1) In *Re TBS Acquireco Inc.* (CCAA) – Justice David Brown of the Ontario Superior Court of Justice (Commercial List) – Order dated April 9, 2013;
- (2) In *Re Essar Steel* (CCAA) – Justice Frank Newbould of the of the Ontario Superior Court of Justice (Commercial List) – Order dated January 13, 2016;
- (3) In *Re Groupe Selection Inc.* (CCAA) – Justice Michel A. Pinsonnault of the Superior of Quebec – Order dated January 16, 2023;
- (4) In *Re South Shore Seafoods Ltd.* (CCAA) - New Brunswick Court of Kings Bench – Order dated October 26, 2023;

³⁵ Each reproduced at **TAB 8** of CAFO's casebook.

³⁶ Each reproduced at **TAB 9** of CAFO's casebook.

- (5) In *Re Skeena Sawmills Ltd.* (Receivership) – Justice Lauren Blake of the Supreme Court of British Columbia – Order dated October 30, 2023;

4. THE UCC and US CASE LAW

83. While the statutory basis of CAFO’s claim to the unearned premium is clear, this court could also look south of the border for guidance.

84. Canadian courts have long recognised that the various PPSA statutes across Canada are modelled on the Article 9 of the United States’ *Uniform Commercial Code* (the “UCC”).³⁷

85. As such it has been held that it would be desirable for the interpretation of PPSA provisions to be interpreted in a manner consistent with the UCC.³⁸

86. While the US states do not have statutes like our *Insurance Act*, they come to the same conclusions being advanced by CAFO herein on the basis of the common law. CAFO relies on the following US cases – which hold that a premium finance creditor has a priority interest in unearned premiums over the unperfected interests in the same premiums held by traditional secured creditors, where, as here, the insurance premium finance lender obtained an assignment of the policies and the right to cancel them upon a default and provided notice to insurance carriers issuing the financed policies: See *In re U.S. Repeating Arms Co.*, 67 B.R. 990, 998 (Bankr. D. Conn. 1986) (lien of insurance premium finance lender in nature of enabling loan that has priority over traditional secured lender with after acquired property clause);³⁹ *In re Big Squaw Mountain Corporation*, 122 B.R. 831, 838-39 (Bankr. D. Me. 1990) (interest of premium finance lender superior to third parties where premium finance lender held premium

³⁷ See, for example, *Gimli Auto Ltd. v. BDO Dunwoody Ltd.* (1998), 160 D.L.R. (4th) 373 (Alta C.A.) at para. 16 [TAB 10 of CAFO’S casebook]; *Toronto-Dominion Bank v. RNG Group* (2002), 61 O.R. (3d) 567 (Ont. S.C.J.) at para. 34 [TAB 11 of CAFO’S casebook]; *Re Rektor* (1983), 47 C.B.R. 267 [TAB 12 of CAFO’S casebook]. See also, *Report No. 3 of the Ontario Law Reform Commission on Personal Property Security Legislation*, (1965: Department of the Attorney General) [TAB 13 of CAFO’S casebook].

³⁸ See *Toronto-Dominion Bank v. RNG Group* (2002), 61 O.R. (3d) 567 (Ont. S.C.J.) at para. 34 [TAB 11 of CAFO’S casebook].

³⁹ CAFOs casebook – TAB 14

finance agreement and provided notice to insurance carriers);⁴⁰ *In re Silver State Helicopters, LLC*, 403 B.R. 849, 863-63 (Bankr. D. Nev. 2009) (surveying existing U.S. law and holding that insurance premium finance lender, who obtains valid assignment and right to cancel policies and provides notice of assignment to carrier, has superior right to unearned premium “over any other creditor of insured that does not meet these requirements”).⁴¹

PART IV – ORDER REQUESTED

87. For the foregoing reasons, CAFO respectfully requests that this Honourable Court issue an order:

- (1) declaring that CAFO has a first raking priority interest in the Lloyds Premium Refunds and the Trisura Premium Refund;
- (2) ordering that the Receiver deliver up the Trisura Premium Refund to CAFO;
- (3) dismissing the Receiver’s application; and
- (4) awarding costs of these applications to CAFO.

All of which is respectfully submitted this
13th day of June, 2025 by

Gustavo F. Camelino
of counsel for CAFO Inc.

⁴⁰ CAFOs casebook – **TAB 15**

⁴¹ CAFOs casebook – **TAB 16**