
No. S-230255
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

# APPLICATION RESPONSE

**APPLICATION RESPONSE OF:** Waygar Capital Inc. ("**Waygar**" or the "**Application Respondent**")

**THIS IS A RESPONSE TO** the Notice of Application of CAFO Inc., filed June 10, 2025, which application is scheduled for hearing at the courthouse at 800 Smithe Street, Vancouver, BC V6Z 2E1, on June 23, 2025, at 10:00 a.m.

The Respondent estimates that the application will take **1 day**.

## PART 1 ORDER(S) CONSENTED TO

1. Waygar consents to the granting of **none** of the orders set out in Part 1 of the Notice of Application.

## PART 2 ORDER(S) OPPOSED

1. Waygar opposes the granting of **all** of the orders set out in Part 1 of the Notice of Application.

## PART 3 ORDERS ON WHICH NO POSITION IS TAKEN

1. Waygar takes no position on the granting of **none** of the orders set out in Part 1 of the Notice of Application.

## PART 4 FACTUAL BASIS

1. Waygar adopts the facts as provided for in the Agreed Statement of Facts of the Receiver and CAFO Inc. ("**CAFO**"). All capitalized terms herein which are otherwise not defined shall have the same definition as in the Agreed Statement of Facts.

2. Pursuant to the Loan Agreement dated June 7, 2021 between Waygar and The Very Good Food Company ("**VGFC**"), VGFC was required to:

   a. provide all originals, or copies, and endorsements to all of its insurance policies to Waygar;

   b. name Waygar as loss payee or as an additional insured in all insurance policies; and

   c. provide security over all rights and claims in intangibles, including unearned premiums relating to insurance policies, to Waygar.

   Agreed Statement of Facts; Exhibit 1

3. By May 21, 2021, Waygar had taken all necessary steps under the *Personal Property Security Act*, RSBC 1996, c 359 ("***PPSA***") to perfect its security interest in the D & O Policies held by VGFC and, *inter alia*, the unearned premiums relating to those D & O Policies (the "**Unearned Premiums**").

   Agreed Statement of Facts, Paragraph 5; Exhibits 2 and 3

4. Waygar had no knowledge that VGFC had entered into a continuous premium instalment contract (a "**PIC**") with CAFO for the financing of the premiums required under the D & O Policies or that VGFC had granted an assignment of the Unearned Premiums to CAFO until after the appointment of the Receiver.

   First Affidavit of Don Rogers, dated June 18, 2025 (the "**Waygar Affidavit**") at para 4

5. Waygar has never been provided with the D & O Policies and does not have any knowledge of whether they contain any language regarding a PIC with CAFO.

   Waygar Affidavit at para 5

6. As of May 29, 2025, Waygar is owed in excess of $7,779,388.00 from VGFC.

   Waygar Affidavit at para 6

## PART 5 LEGAL BASIS

7. This dispute involves competing priorities between a prior perfected security interest taken by Waygar in all present and after-acquired personal property of VGFC under the *Personal Property Security Act*, RSBC 1996, c 359 ("***PPSA***"), including in the Unearned Premiums and the operating bank accounts used to pay for the D & O Policies, and a subsequent interest in the Unearned Premiums granted to CAFO and arising from a PIC related to the D & O Policies ("**CAFO's Interest**").

8. The assignment of Unearned Premiums is an interest that has been found to be excluded from the scope of the *Personal Property Security Act*, RSBC 1996, c 359 ("***PPSA***") under subsection 4(c), which states:

> **Exclusions from scope of Act**
> **4** Except as otherwise provided in this Act, this Act does not apply to the following:
> **(a)** a lien, charge or other interest given by a rule of law or by an enactment unless the enactment contains an express provision that this Act applies;
> ...
> **(c)** the creation or transfer of an interest or claim in or under a policy of insurance except the transfer of a right to money or other value payable under a policy of insurance as indemnity or compensation for loss of or damage to collateral;
>
> **(e)** the transfer of an interest in an unearned right to payment under a contract to a transferee who is to perform the transferor's obligations under the contract;
>
> *Stelco Inc. (Bankruptcy), Re*, 2005 CanLII 13192 (ON CA) ("**Stelco**") at para 15

9. Section 19 of the *Insurance Act*, RSBC 2012, c 1 (the "***Insurance Act***") addresses assignments of Unearned Premiums:

> **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 a contract 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.
>
> (2) If the condition in the contract dealing with cancellation or termination by the insurer provides that the refund must accompany the notice of cancellation or termination, the insurer must include in the notice a statement that in place of payment of the refund in accordance with the condition the refund is being paid to the assignee under this section.

10. The *Insurance Act* only speaks to what steps must be taken by an assignee where unearned premiums are assigned by the insured. The *Insurance Act* does not contain any language that speaks to perfection of an interest in unearned premiums generally, nor does it state that an

insurance financier's assignment of unearned premiums has priority over a prior-registered interest in unearned premiums that was previously registered in accordance with the *PPSA*.

11. Waygar is a secured creditor with a perfected security interest in, *inter alia*, the Unearned Premiums pursuant to the *PPSA*. Waygar did not require a specific assignment of any interest in the Unearned Premiums as Waygar already held a direct, secured interest in all intangibles of VGFC, which included the present and future unearned premiums of VGFC. Any interest that VGFC could have assigned to CAFO in the Unearned Premiums was subject to Waygar's perfected security interest.

12. At no time was Waygar an assignee of the Unearned Premiums and it was not required to take any of the assignment steps outlined in the *Insurance Act* in the same way that CAFO did in order to acquire an interest in the Unearned Premiums.

**No clear, unambiguous statutory language as to priority**

13. Interests in property excluded from the application of the *PPSA* as a result of s. 4 ("**Excluded Interest(s)**") require clear, unambiguous statutory language to that effect for them to be prioritized over security interests captured by the *PPSA* (the "**PPSA Interests**"). As stated by the Ontario Court of Appeal in *GE Canada*:

> [43] First, the concepts of priority and salvage are not the same. Statutory condition 6(7) does not refer to priorities, the interests of secured creditors, or the PPSA. It refers to the right to salvage in respect of a total loss insured vehicle. A plain reading of statutory condition 6(7) offers no support for ING's contention that it is intended, alone or in combination with s. 4(1)(c) of the PPSA, to extinguish a creditor's pre-existing perfected security interest in a vehicle that becomes the subject of a total loss claim. For example, statutory condition 6(7) does not contain the words "notwithstanding any security interest in the vehicle". It is, of course, open to the legislature to create a right that extinguishes or subordinates the pre-existing perfected security interests of third parties. But if this were the intent of statutory condition 6(7), it could easily have been accomplished by the use of explicit priorities language. [emphasis added]
>
> [44] This conclusion is fortified by the decision of the Supreme Court of Canada in Sparrow. In that case, Iacobucci J., writing for a majority of the court, confirmed at paras. 106 and 112, that clear and unambiguous language is required to extinguish the rights of a secured creditor in respect of collateral:
>
> > Parliament has shown that it knows how to assert priority over rival security interests . . . All that is needed to overtake a fixed and specific charge is clear language to that effect.
>
> *GE Canada Equipment Financing G.P. v. ING Insurance Company of Canada*, 2009 ONCA 171 ("***GE Canada***") at paras 43-44.

14. Below are examples of where this has occurred and the language used in the applicable legislation to do so:

a. Section 32 of the *PPSA* speaks to a lien for materials or services:

> A lien on goods that arises as a result of the provision, in the ordinary course of business, of materials or services in respect of the goods, has priority over a perfected or unperfected security interest unless the lien arises under an enactment that gives priority to the security interest.

b. Section 31.1(b) of the PPSA provides:

> The interest of a protected purchaser of a security under the *Securities Transfer Act* takes priority over an earlier security interest, even if perfected, to the extent provided in that Act.

c. Section 428 of the *Bank Act*, SC 1991, c 46 provides:

> All the rights and powers of a bank in respect of the property mentioned in or covered by a warehouse receipt or bill of lading acquired and held by the bank, and the rights and powers of the bank in respect of the property covered by security given to the bank under section 427 that are the same as if the bank had acquired a warehouse receipt or bill of lading in which that property was described, have, subject to subsection 427(4) and subsections (3) to (6) of this section, priority over all rights subsequently acquired in, on or in respect of that property, and also over the claim of any unpaid vendor or of any person who has a security interest in that property that was unperfected at the time the bank acquired its security in the property. [emphasis added]

d. Section 227(4) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp)

> Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.

15. It has only been found in limited contexts that Canadian courts will recognized equitable priorities where there is otherwise no statutory language that grants an Excluded Interest priority over a PPSA Interest. One example of such equitable priority is a solicitors' charging lien. The policy objectives for the a solicitor's charging lien to have priority is to ensure that clients do not defraud their solicitors and to keep open access to justice for those with fewer financial means.

**Unearned Premiums at Common Law**

*Stelco (ONCA)*

16. This particular priority issue has not been the subject of an authoritative Canadian judicial decision. In the analogous case of *Stelco*, the Ontario Court of Appeal was asked to make a determination on priority between the Ontario *Personal Property Security Act,* RSO 1990, c P.10 ("**ON *PPSA***") and the *Insurance Act,* RSO 1990, c I.8 (which are substantially identical to the British Columbia-equivalent legislation). Due to the insurance policy at issue expiring before the hearing date, the Court in *Stelco* did not make a determination on the priority issue. The Court in *Stelco* stated:

> [17] I agree with the application judge that Canadian courts should not simply follow American courts when interpreting similar legislative provisions. That said, I do not agree with him that the difference in wording between s. 4(1)(c) and the corresponding language in the American U.C.C.'s article 9-104(g) is significant. Article 9-104(g) provides: [emphasis added]
>
> ...
>
> [22] This is not to say that s. 138 gives CAFO the right to priority over other secured lenders. To determine priorities, resort to the common law or to the provisions of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, would be necessary and that issue awaits another day. I do note, however, that in *Re Maplewood Poultry Co.*, *supra*, the court held that a transfer of the insurance policies in question there could not be accomplished without placing the transferee on notice of the existence of a premium finance agreement because the policies contained explicit references to the premium finance agreements. Thus the exemption from registration under Art. 9 of the U.C.C. did no harm to public policy. [emphasis added]
>
> [23] CAFO argues that no harm is done to public policy in any event because it is the proceeds of any insurance policy rather than the unearned premiums that form part of a lender's security. Clearly, however, the lender would have an interest in knowing if the insurance policy could be cancelled and unearned premiums remitted to the financier of a PIC. The exemption from the PPSA and its policy of providing notice to lenders about the state of the assets in which they will take security should not to be taken as a licence to keep lenders in the dark about the actual state of affairs. It behooves CAFO, and those who finance premium insurance contracts, to ensure that the policies contain explicit references to the insurance premium finance agreement itself and to the right of cancellation. In any event, when a judge decides whether to exercise his or her discretion to lift the stay under the CCAA and allow a premium financing company to obtain a refund of unearned premium, one consideration would

be whether the policy clearly contained an explicit reference to the premium finance agreement. [emphasis added]

17. The Ontario Court of Appeal in *Stelco* indicated that the priority dispute should be governed by the common law and the *Bankruptcy and Insolvency Act.* Further, consideration should be had as to whether Waygar had any knowledge of the PIC related to the D & O Policies and whether the D & O Policies contained any language about a PIC or CAFO's ability to terminate the policies.

18. The D & O Policies have never been produced to Waygar, notwithstanding Waygar making repeated requests for them. Waygar has never had any notice of the contents of the D & O Policies, the PIC, or of CAFO's interest in the Unearned Premiums. CAFO has not provided any evidence that the D & O Policies contain explicit reference to a PIC or a right for CAFO to cancel the policies.

*GE Canada*

19. While an insurance financier may obtain an interest in unearned premiums from a debtor, which unearned premiums may already be secured by another creditor, the insurance financier should perform due diligence to ensure it is taking that interest free and clear of any security interests. If the interest is not free and clear, the insurer then has an opportunity to make arrangements with the secured creditor through a priority or subordination agreement.

*GE Canada* at paras 81-84

20. The Ontario Court of Appeal in *GE Canada* was asked to determine a priority dispute between a secured creditor and an insurer that was entitled to salvage rights. This priority dispute involved a purchase money security interest and an interest in property that was exempt under s. 4(c) of the Ontario *Personal Property Security Act,* RSO 1990, c P.10 ("**ON *PPSA***"). The secured creditor financed two vehicles for a debtor and perfected its security interest in those vehicles pursuant to the ON *PPSA*. The debtor leased those vehicles to third parties who obtained insurance under a policy with ING Insurance. The vehicles were stolen. The debtor made false claims on the insurance claim forms, was paid insurance proceeds for the vehicles, and transferred title to the trucks to ING Insurance to allow ING to pursue its salvage rights. The debtor defaulted on its loan agreement with GE Canada, who then sought to exercise its enforcement rights.

21. The facts of *GE Canada* are not analogous to this case but the Court's considerations and analysis of the priority dispute between a PPSA Interest and an Excluded Interest under s. 4(c) of the *PPSA* are helpful (the parties are clarified in brackets for ease of reference):

> [31] The effect of s. 4(1)(c) in this case, therefore, was to relieve ING [*insurer*] of the obligation to protect its interests under the ING policies by providing notice of those interests in the PPSA registry. But s. 4(1)(c) did no more. It did not relieve ING of the requirement to be mindful of the PPSA-protected interests of secured creditors.

Nothing in the language of s. 4(1)(c) suggests that it is intended to resolve priority disputes between creditors, including priority competitions between a creditor with a perfected security interest under the PPSA (like GE [*secured creditor*]) and a creditor whose interest in collateral is exempt from the notice and registration requirements of the PPSA (like ING). [emphasis added]

[32] Indeed, a consideration of the language of s. 4(1)(c) in the context of its purpose indicates that s. 4(1)(c) is not concerned with priorities at all. The words of Professors Ziegel and Denomme at p. 116 of their above-cited text, although addressing another exclusion from the PPSA under s. 4(1)(a), apply with equal force to s. 4(1)(c):

> [Section] 4(1)(a) means not only that the Act has nothing to say about the creation and perfection of non-consensual security interests but also that it does not regulate priorities between PPSA security interests and non-PPSA interests. [emphasis added]

[33] Accordingly, since s. 4(1)(c) of the PPSA does not address priorities, it does not operate to oust the priority otherwise conferred on GE's PMSIs by s. 9(1) of the PPSA. [emphasis added]

...

[80] On the other hand, measures were available to both parties that might have avoided this dispute. GE did not require that Brampton [*debtor/insured*] cause its third-party lessees to name GE as an insured, a loss payee or a beneficiary under any third- party insurance policy obtained on the Trucks. Nor did GE require Brampton to provide it with copies of any third-party insurance policies. These options were available to GE. However, their success was dependent on the reliability of Brampton and its lessees.

[81] For its part, ING did not conduct any PPSA searches in this case. It defends this omission by pointing to what it describes as standard insurance industry practice: in reliance on s. 4(1)(c) of the PPSA, no PPSA searches are performed by insurers or insurance brokers prior to the issuance of automobile insurance policies. But, as I have said, the effect of s. 4(1)(c) of the PPSA is to relieve an insurer from the necessity of protecting its own interests in respect of an insurance policy by providing notice of those interests in the PPSA registry. Section 4(1)(c) does not insulate insurers from the PPSA-protected claims of third-party secured creditors. [emphasis added]

[82] And the means of ascertaining the existence of GE's PMSIs in the Trucks were readily available to ING by the simple device of conducting a PPSA search before issuing the ING policies, before paying the ING insurance proceeds, before requesting and receiving the Transfer from Brampton and, in the case of the 2005 Truck, before disposing of the insured collateral. Notice of GE's security interests was also provided in the used vehicle information packages available from the Ministry of Transportation. ING did not avail itself of any of these opportunities to determine if its interests would

be subject to the protected priority position of another claimant. Unlike the preventative options available to GE, which I have described above, the measures available to ING to protect its interests were not dependent on the reliability of its insured or a third party. [emphasis added]

[83] I note also that the potential existence of secured creditors with claims regarding the insured collateral was within ING's contemplation. The ING policies provided for the identification of lienholders and the protection of their interests on payment of the ING insurance proceeds. This record is silent as to what steps ING took, if any, to determine if secured claims existed in respect of the Trucks prior to settling Brampton's claim for indemnification under the ING policies. [page344] [emphasis added]

[84] In these circumstances, I view it as unreasonable that a creditor in GE's position should lose its priority in secured collateral because it failed to foresee that its debtor would actively mislead its involved insurers. To hold otherwise would impose a protectionist obligation on GE and similarly situated secured lenders that could undermine normal good faith collateral financings.

22. It is clear from the Waygar Loan Agreement and GSA that Waygar specifically contemplated having a security interest in intangibles, including the Unearned Premiums.

23. VGFC did not provide Waygar with copies of the D & O Policies nor did VGFC inform Waygar that it has entered into a PIC with CAFO for the Unearned Premiums. Waygar had no knowledge that there was another party that could have an interest in the Unearned Premiums or that another party could cancel the D & O Policies. The only way Waygar could have found this information out was through the voluntary disclosure of VGFC, CAFO, or the insurer.

Waygar Affidavit at paras 4-5

24. CAFO made no disclosures to Waygar about the PIC or any interest it may have in the Unearned Premiums and now asserts that it has priority to the Unearned Premiums.

Agreed Statement of Facts at para 20

25. CAFO had every ability to do a search of the British Columbia personal property registry ("**PPR**") to determine if there were any security creditors of VGFC that may have any interests in insurance policies of VGFC. CAFO also had the ability to request the Waygar Loan Agreement and the GSA from VGFC or Waygar to determine what interests Waygar held security over. Further, as Waygar was required to be named as a first payee or an additional beneficiary under any insurance policies held by VGFC, CAFO would have been able to identify that there was another interested party of which they should be aware. CAFO should have performed all of this due diligence prior to advancing funds to VGFC for the D & O Policies.

26. Waygar submits that it would be unreasonable for it to lose priority in its secured collateral when it had perfected its security interest in the Unearned Premiums.

*Insolvency-Related*

27. While not specifically relevant to this case, it is worth noting that courts have refused to lift the stay of proceedings in insolvency proceedings to allow an insurance financier to cancel insurance policies and collect the unearned premiums. This has been viewed as having the effect of giving an "unsecured creditor" an "inappropriate leg up on the other unsecured creditors, not to mention a leg up over secured creditors with priority".

*Alignvest Private Debt Ltd v Surefire Industries Ltd.*, 2015 ABQB 148 at para 47 citing *Re Ivaco Inc.*, 2003 CanLII 64275 at para 7;

*Cases provided by CAFO*

28. In support of its application, CAFO provided a number of court orders where the court granted the insurance financier the ability to collect the unearned premiums. There are no endorsements or reasons that accompany these orders and there is nothing in CAFO's materials that speaks to any specific facts that would suggest these orders are relevant to the priority issue.

29. CAFO also included a series of court orders where the debtor required its insurance policies to continue operating during an insolvency proceeding and/or consent orders

30. This is not a case where an insurance policy was necessary for the debtor to continue operating during insolvency proceeding. In a scenario where an insurance policy would be necessary for the continued operation of the business, it is possible that an insurer or insurance financier would negotiate for a critical supplier-like position and/or negotiate a more favourable priority position. The Receiver in this case was agreeable with the D & O Policies being terminated upon CAFO's request.

31. In *Re Groupe Selection Inc.*, the payment of the unearned premiums to CAFO was in dispute. The parties came to a settlement where CAFO agreed to take a lesser amount than what was owed to it under the PIC. Paragraph 10 of the consent order also provides that CAFO shall only have an unsecured claim against the debtors for the difference between the settlement amount and the amount outstanding to CAFO under the PIC.

*US Authorities*

32. The United States case law suggests that an insurance financier's interest in a PIC is akin to a purchase money security interest ("**PMSI**"). The Court in *Stelco* did consider, *inter alia*, *Re U.S. Repeating Arms Co.*, 67 B.R. 990, 998 (Bankr. D. Conn. 1986) and *Re Big Squaw Mountain Corp.*, 122 B.R. 831, 838-39 (Bankr. D. Me. 1990) but there is nothing in the decision that suggests that Canadian Courts would accept this approach.

33. Viewing a PIC as a PMSI is inappropriate. Under a PMSI, the *PPSA* provides a number of perfection steps that includes, *inter alia*: (i) attachment in the collateral, (ii) registration at PPR, and (iii) providing notice to prior-registered secured creditors. Only after notice is provided to the creditors with an interest in the same collateral does a PMSI-creditor obtain the benefit of a super-priority to that collateral.

*PPSA*, s. 34

*Summary*

34. Imposing what is effectively a super-priority position in favour of any party with an Excluded Interest should come from the legislature through a statutory amendment. While it may be more appropriate for some property interests to have a separate regime outside of the PPSA regime, it should be clear how the different regimes interplay with each other. This is particularly so where creditors in one regime are negatively impacted by the other regime.

35. Waygar submits that this Honourable Court should grant the Receiver's application.

**PART 6 MATERIAL TO BE RELIED ON**

1. Application of BDO Canada Limited, filed June 10, 2025.

2. Application of CAFO Inc., filed June 10, 2025.

3. Agreed Statement of Facts.

4. Affidavit of Don Rogers, sworn on June 18, 2025.

5. Affidavit of Jay Thompson, filed June 12, 2025.

6. Such further and other materials as the parties may submit and this Honourable Court may admit.

Date: June 18, 2025

Signature of William E. J. Skelly
☒ lawyer for Respondent

**Respondent's address for service:**

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