

Court of Appeal File No.: 23-CV-1357 / M54775
Court File No.: CV-23-00004031-0000

COURT OF APPEAL FOR ONTARIO

BETWEEN:

PEAKHILL CAPITAL INC.

Applicant
(Respondent on Appeal)

- and -

1000093910 ONTARIO INC.

Respondent
(Appellant)

**IN THE MATTER OF AN APPLICATION UNDER SUBSECTION 243(1) OF THE
BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED, AND
SECTION 101 OF THE COURTS OF JUSTICE ACT, R.S.O. 1990, c. C.43, AS AMENDED**

**APPEAL BOOK AND COMPENDIUM OF THE RESPONDENT ON
APPEAL**

(Appeal Returnable April 2, 2024)

March 8, 2024

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Court File No.: CV-23-00004031-0000

**ONTARIO
SUPERIOR COURT OF JUSTICE**

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- and -

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Respondent

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SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED**

**FACTUM OF THE RECEIVER
(Motion Returnable December 20, 2023)**

December 18, 2023

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and not in its personal capacity

TO: THE SERVICE LIST

Court File No.: CV-23-00004031-0000

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

PEAKHILL CAPITAL INC.

Applicant

- and -

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PART I: OVERVIEW

1. On September 13, 2023, the Court granted an order (the “**Receivership Order**”) pursuant to subsection 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, as amended (the “**BIA**”) and section 101 of the Ontario *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the “**CJA**”), appointing KSV as Receiver over 1000093910 Ontario Inc. (the “**Debtor**”) and all of the Property (as that term is defined in the Receivership Order), including the property municipally known as 20 Regina Road, Vaughan, Ontario (the “**Real Property**”). The Receivership Order and the Receiver’s appointment became effective on October 2, 2023.

2. The Debtor’s senior secured creditor is Peakhill Capital Inc. (“**Peakhill**”) who made a secured loan to the Debtor in the principal amount of \$19 million (the “**Peakhill Loan**”). The Debtor is indebted to Peakhill for approximately \$20 million, plus interest, costs and expenses which are continuing to accrue.

3. The Receiver brings the within motion seeking an order (the “**Bidding Procedures and Stalking Horse APS Approval Order**”), among other things:
 - (a) approving the sale process in respect of the Real Property (the “**Sale Process**”) and the bidding procedures appended as Schedule “A” to the proposed Bidding Procedures and Stalking Horse APS Approval Order (the “**Bidding Procedures**”);
 - (b) approving the agreement of purchase and sale dated as of November 13, 2023 (the “**Stalking Horse APS**”), among the Receiver, as vendor, and 2557004 Ontario Inc. (“**255 Ontario**”), as purchaser, solely for the purposes of acting as the stalking horse bid in the Sale Process;
 - (c) authorizing and empowering the Receiver to enter into a listing agreement (the “**Listing Agreement**”) by and between the Receiver and Jones Lang LaSalle (“**JLL**”);
 - (d) terminating the Original APS (as defined below) and any related agreements;
 - (e) directing Ren/Tex Realty Inc. (“**Ren/Tex**”) to forthwith transfer the Original APS Deposit (as defined below) to 255 Ontario; and

(f) approving the Break Fee and Expense Reimbursement (each as defined below).

4. The Receiver submits that the proposed Bidding Procedures and Stalking Horse APS Approval Order is the next logical step in these receivership proceedings and is in the best interest of the Debtor's stakeholders.

5. If granted, the relief proposed under the Bidding Procedures and Stalking Horse APS Approval Order will allow for a flexible, efficient and competitive process for canvassing the market for potential buyers of the Real Property. The relief proposed is supported by Peakhill.

PART II: FACTS

6. The facts underlying this motion are more fully set out in the First Report of the Receiver dated December 13, 2023 (the "**Report**").¹ All capitalized terms used but not defined herein have the meanings ascribed to them in the Report.

A. Background and Overview

7. The Debtor is an Ontario corporation, with its principal asset being the Real Property.²

8. The Real Property is an industrial property where two non-arm's length tenants and one tenant whose relationship to the Debtor is unknown to the Receiver operate businesses (collectively, the "**Regina Tenants**"). None of the Regina Tenants have paid rent since the commencement of these receivership proceedings despite several requests and demands by the Receiver.³

9. As previously noted, Peakhill is the Debtor's senior secured creditor and holds a first mortgage on the Real Property (the "**Peakhill Mortgage**"). In addition to Peakhill, Zaherali Visram has a \$4 million charge registered on the Real Property subordinate to the Peakhill Mortgage.⁴

¹ First Report of the Receiver dated December 13, 2023 [First Report].

² *Ibid* at section 2.0 paras 1-3.

³ *Ibid* at section 2.0 paras 3-5.

⁴ *Ibid* at section 3.1 paras 1-2.

10. According to the Company, as of October 11, 2023, the Debtor's only unsecured creditor was in respect of property taxes owing to the City of Vaughan for \$162,786. These amounts remain unpaid.⁵

11. The Receivership Order was sought and obtained by Peakhill as a result of the Debtor defaulting and breaching the terms of the Peakhill Loan and related security, including the Peakhill Mortgage, by among other things:

- (a) failing to repay the outstanding amount owing on the Peakhill Loan on its maturity date on May 1, 2023; and
- (b) failing to pay the full monthly interest payments owing on the Peakhill Loan for the month of August 1, 2022.⁶

12. The Receivership Order was obtained on consent and only became effective once the Debtor breached the terms of the Terms for Consent Order for Appointment of Receiver which was appended to the Endorsement of the Honorable Justice S. Lavine dated September 13, 2023.⁷

B. The Original APS and the Stalking Horse APS

13. Six (6) days prior to the Receivership Order being granted by the Court, the Debtor and 255 Ontario entered into an Agreement of Purchase and Sale dated September 7, 2023 (the “**Original APS**”) which contemplated the sale of the Real Property. In connection with the Original APS, 255 Ontario paid a cash deposit of \$1 million to the Debtor's realtor, Ren/Tex (the “**Original APS Deposit**”).⁸

14. As a result of the intervening receivership proceedings (of which the Company was already on notice at the time of entering into the Original APS), the Original APS could not be closed on its terms because, among other things, the closing mechanics are different in a receivership than in an ordinary course real estate transaction. In light of the foregoing, following the commencement of the receivership proceedings, the Receiver approached 255 Ontario seeking to

⁵ *Ibid* at section 3.2 para 1.

⁶ The Affidavit of Remy Caruso sworn August 29, 2023 at para 13.

⁷ First Report, *supra* note 1 at section 1.0 para 1.

⁸ *Ibid* at section 5.0 paras 1-2.

amend the Original APS to, among other things: (i) add a mutual condition that the Original APS was conditional on the Receiver obtaining an Approval and Vesting Order vesting title in the Real Property to 255; and (ii) contemplate the closing mechanics required in a receivership sale. 255 Ontario advised the Receiver that it was not prepared to agree to such amendments and, as a result, the Receiver was unable to close the transaction contemplated by the Original APS.⁹

15. The Receiver then entered into discussions with 255 Ontario to determine whether 255 Ontario was still interested in acquiring the Real Property. 255 Ontario advised the Receiver that it was prepared to purchase the Real Property at a significantly reduced purchased price. However, the Receiver was not prepared to recommend a transaction for Court approval at a reduced price that would not provide for a market test in order to determine if a better bid could be found.¹⁰

16. Following consultation with Peakhill and negotiations with 255 Ontario, the Receiver entered into the Stalking Horse APS which agreement is proposed to act as the stalking horse bid in the Sale Process.¹¹

17. The key terms and conditions of the Stalking Horse APS are as follows:

- (a) the Purchased Assets include all of the Debtor's title and interest in and to, among other things, the Real Property;
- (b) the Purchase Price for the Purchased Assets is \$24,255,000, subject to adjustments on closing for property taxes and other adjustments standard for a real estate transaction;
- (c) 255 Ontario will acquire the Real Property on an 'as is, where is' basis, with limited representations and warranties;
- (d) closing of the transaction contemplated under the Stalking Horse APS is conditional upon, among other things, receipt of Court approval;

⁹ *Ibid* at section 5.0 para 3.

¹⁰ *Ibid* at section 6.1 para 1.

¹¹ *Ibid* at section 6.1 para 1.

- (e) the Stalking Horse APS contemplates a break fee of \$200,000 (inclusive of HST) (the “**Break Fee**”) if 255 Ontario is not the Successful Bidder in the Sale Process; and
- (f) the Stalking Horse APS also contemplates an expense reimbursement of up to \$50,000 (inclusive of HST) (the “**Expense Reimbursement**”) in respect of legal, diligence and other costs incurred by 255 Ontario in respect of the Sale Process.¹²

(i) Termination of Original APS and Return of Original APS Deposit

18. On November 20, 2023, in accordance with the terms of the Stalking Horse APS, counsel for 255 Ontario delivered an irrevocable direction to Ren/Tex directing Ren/Tex to transfer the Original APS Deposit to the Receiver (the “**Direction**”). The Direction was not complied with as Ren/Tex expressed concerns of a breach of trust claim as a result of the Confirmation of Cooperation and Representation that was entered into with 255 Ontario’s brokerage as a part of the Original APS.¹³

19. In light of the proposed Sale Process and the Stalking Horse APS, the Receiver is seeking relief terminating the Original APS and directing Ren/Tex to return the Original APS Deposit to 255 Ontario.¹⁴

C. Sale Process and Bidding Procedures

20. The purpose of the proposed Sale Process is to maximize value for the Real Property. The Receiver has engaged JLL, subject to Court approval of the Listing Agreement, to conduct the Sale Process. In the event the Real Property sells for no more than the Stalking Horse purchase price, JLL will receive a work fee of \$140,000, plus HST (the “**Work Fee**”). In the event the Real Property sells for a higher purchase price, JLL will receive the Work Fee plus 5% of additional proceeds above the purchase price amount contemplated in the Stalking Horse Agreement.¹⁵

¹² *Ibid* at section 6.1 para 2 and at section 6.2 paras 1-2.

¹³ *Ibid* at section 6.3 paras 1-2.

¹⁴ *Ibid* at section 6.3 para 3.

¹⁵ *Ibid* at section 6.4 para 1.

21. Stage 1 of the Sale Process, which includes mass market introduction and qualified prospect reach out, is proposed to commence on January 8, 2024 (i.e., after the holiday period). The proposed Bid Deadline is February 8, 2024 with an Auction, if any, to be held within five (5) business days of the Bid Deadline. The Sale Approval Motion and Closing is proposed to occur within ten (10) days of any Auction, subject to Court availability.¹⁶

22. To be considered a Qualified Bid, a bid must, among other things, contemplate a cash purchase price equal to or greater than \$24,555,000, which is the amount of the Stalking Horse Bid, plus \$300,000 (i.e. a Break Fee of \$200,000, an Expense Reimbursement of up to \$50,000 and an overbid amount of \$50,000).¹⁷

23. The Bidding Procedures proposed in connection with the Sale Process are summarized at a high level below:

- (a) the Receiver and JLL will prepare marketing materials including, but not limited to, a marketing brochure and a Confidential Information Memorandum (collectively, the “**Marketing Materials**”);
- (b) potential bidders will be required to execute and return a Confidentiality Agreement prior to being provided with any confidential Marketing Materials or access to an online data room;
- (c) in order to be a Qualified Bid, the bid must meet various requirements, all of which are more particularized in the Bidding Procedures;
- (d) if one or more Qualified Bids is received by the Bid Deadline, the Receiver will advise all Qualified Bidders of the Leading Bid and invite all Qualified Bidders to participate in an Auction on a date that is not more than five (5) business days following the Bid Deadline;

¹⁶ *Ibid* at section 6.4 para 2.

¹⁷ *Ibid* at section 6.5.1 para 1.

- (e) completion of any transaction contemplated by the Sale Process will be subject to the Court's approval, upon a further motion by the Receiver in these receivership proceedings; and
- (f) if no Qualified Bids (other than the Stalking Horse APS) are received by the Bid Deadline, then, subject to Court approval, the Receiver and 255 Ontario shall proceed to complete the transaction contemplated by the Stalking Horse APS.¹⁸

PART III: ISSUES

24. The issues to be considered on this motion are whether this Court should:
- (a) approve the Sale Process and related Bidding Procedures;
 - (b) terminate the Original APS and direct the return of the Original APS Despoit; and
 - (c) approve the Stalking Horse APS, including the Expense Reimbursement and Break Fee, for the purposes of serving as the Stalking Horse Bid in the Sale Process.

PART IV: LAW AND ANALYSIS

A. The Sale Process and Related Bidding Procedures

25. Section 243(1) of the BIA provides the Court with broad discretion with respect to the powers it grants receivers to exercise control over the property of a company in a receivership and in making orders generally:¹⁹

Court may appoint receiver

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

¹⁸ *Ibid* at section 6.5.

¹⁹ [Bankruptcy and Insolvency Act](#), RSC 1985, c B-3 s. 243(1).

- (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
- (c) take any other action that the court considers advisable.

26. The Receivership Order was granted pursuant to subsection 243(1) of the BIA and Section 101 of the CJA and explicitly authorizes and empowers the Receiver to market any and all of the property of the Debtor, which includes the Real Property, including advertising and soliciting offers in respect of the Real Property and negotiating such terms and conditions to sale as the Receiver in its discretion may deem appropriate.²⁰ In accordance with the Receivership Order, the Receiver has developed the Sale Process to solicit bids by the Bid Deadline with a view to identifying and closing a transaction that maximizes value for the Debtor's stakeholders.²¹

27. The Ontario Court of Appeal has recognized that the purpose of a receivership is to enhance and facilitate the preservation and realization of receivership assets for the benefit of creditors, and that this purpose is generally achieved through a liquidation of the debtor's assets.²² Sale processes are routinely approved and undertaken in receivership proceedings to facilitate such sales.²³

28. While the decision to approve a sale process is distinct from the decision to approve the ultimate sale, the Court has held that the reasonableness and adequacy of any sales process proposed by a court-appointed receiver must be assessed in light of the factors that the Court will later take into account when considering the approval of the proposed sale resulting from that sale process.²⁴

29. In the case of *Royal Bank v. Soundair*, the Ontario Court of Appeal held that a court was to consider the following factors when deciding whether to approve the sale of property subject to a receivership:

- (a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;

²⁰ [*In the Matter of the Receivership Proceedings of 1000093910 Ontario Inc.* \(September 13, 2023\), Newmarket, CV-23-00004031-0000](#) (Order Appointing Receiver) at para 3(k).

²¹ First Report, *supra* note 1 at section 6.4 para 1.

²² [*Third Eye Capital Corp v Dianor Resources Inc.*, 2019 ONCA 508](#) at para 73.

²³ [*2056706 Ontario Inc v Pure Global Cannabis Inc.*, 2021 ONSC 5533](#) at para 11.

²⁴ [*CCM Master Qualified Fund v blutip Power Technologies*, 2012 ONSC 1750](#) at para 6 [CCM]; citing [*Royal Bank of Canada v Soundair*, 1991 CanLII 2727 \(ONCA\)](#) at para 16 [Soundair].

- (b) the efficacy and the integrity of the process by which offers are obtained;
- (c) whether there has been unfairness in the working out of the process; and
- (d) the interests of all parties.²⁵

30. In *CCM Master Qualified Fund Ltd v blutip Power Technologies Ltd*, the Court held that the criteria identified in *Soundair* also informs the determination of whether to approve a court appointed receiver's proposed sale process. Specifically, the Court is to assess:

- (a) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver;
- (b) the fairness, transparency and integrity of the proposed process; and
- (c) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.²⁶

31. A proposed sale process need only be reasonable and not perfect. Courts generally defer to the business expertise of the court-appointed receiver and are encouraged not to intervene or "second guess" the receiver's recommendations.²⁷

32. Each of the factors outlined in *Soundair* and *CCM* support the approval of the Sale Process at this time:

- (a) *Whether the Sale Process is commercially efficient* - The Sale Process is proposed to be overseen and conducted by the Receiver and JLL, who is a reputable broker and familiar with the Real Property. The involvement and assistance of JLL will ensure that the Sale Process is efficient and value maximizing.²⁸

²⁵ *Soundair*, *Ibid* at para 16.

²⁶ *CCM* *supra* note 24 at para 6.

²⁷ See *Marchant Realty Partners Inc. v. 2407553 Ontario Inc.*, 2021 ONCA 375 at para. 15 citing *Regal Constellation Hotel Ltd.*, [2004] O.J. No. 2744 (C.A.) at para. 23. See also *Ontario Securities Commission v. Bridging Finance Inc.*, 2022 ONSC 1857 at paras. 43-45.

²⁸ First Report, *supra* note 1 at section 6.5.3 para 1.

- (b) *Whether the Sale Process is fair and transparent* – The proposed Sale Process is a fair, open and transparent process that contemplates a broad marketing of the Real Property where the Receiver and JLL will engage with potential purchasers who, subject to the execution of a Confidentiality Agreement, will be provided with detailed information including a Confidential Information Memorandum and access to a virtual data room. The proposed Sale Process includes clear guidance on what will be considered a Qualified Bid. Any Successful Bid and the related transaction will be subject to Court approval at the Sale Approval Motion. The proposed Sale Process is consistent with many other sale processes approved by the Court for real property.²⁹
- (c) *Whether the Sale Process optimizes the changes of securing the best possible price* – The proposed Sale Process is structured to ensure that JLL is best positioned to market the Real Property as broadly as possible. The timelines contemplated in the proposed Sale Process will ensure that the Real Property is canvassed for the appropriate amount of time while also ensuring that it is adequately succinct so as to provide interested buyers with transaction certainty. Importantly, the Sale Process is not proposed to launch until the new year following the holiday season so as to ensure that the opportunity receives as much market attention as possible.

30

B. The Original APS Should be Terminated and the Original APS Deposit Should Be Returned

33. It is well established that the Court has jurisdiction to direct a receiver to terminate or disclaim purchase agreements.³¹ Many recent instances in the real estate industry have related to pre-sale purchase agreements, however, the Receiver submits that these circumstances are analogous and warrants the Court's exercise of its jurisdiction pursuant to subsection 243(1)(c) of the BIA.

²⁹ *Ibid* at section 6.5.3 para 1.

³⁰ *Ibid* at section 6.5.3 para 1.

³¹ [*Forjay Management Ltd v 0981478 BC Ltd*, 2018 BCSC 527](#) at para 36 and paras 131-132; [*Peoples Trust Company v Censorio Group \(Hastings & Carleton\) Holdings Ltd*, 2020 BCSC 1013](#) at para 25 and 57.

34. The Receiver and its legal counsel have engaged extensively with the Debtor and its legal counsel regarding the Original APS. The Debtor advised the Receiver that it intends to either: (i) repay Peakhill and bring a motion terminating the receivership proceedings; or (ii) bring a motion to amend the Receivership Order to allow the Debtor to close the Original APS. Notwithstanding the foregoing, as at the time of finalizing this factum, the Receiver has yet to receive a commitment letter to repay Peakhill nor motion materials from the Debtor.³²

35. The Original APS is not capable of being closed by the Receiver and, accordingly ought to be terminated so that the proposed Sale Process can be undertaken without any uncertainty as to the status of the Original APS.³³

36. If the Court grants the relief terminating the Original APS, it reasonably follows that the Original APS Deposit be returned to 255 Ontario.³⁴

C. The Stalking Horse APS Should be Approved

37. Pursuant to the proposed Bidding Procedures and Stalking Horse APS Approval Order, the Receiver is seeking approval of the Stalking Horse APS, including the Expense Reimbursement and Break Fee, solely for the purposes of approving it as the stalking horse bid in the Sale Process. If the bid contemplated in the Stalking Horse APS is the Successful Bid in the Sale Process, the Receiver will seek approval of the transaction contemplated by the Stalking Horse APS at the Sale Approval Motion.³⁵ The Court has jurisdiction to approve a stalking horse agreement pursuant to section 101 of the CJA and section 243 of the BIA.

38. Stalking horse agreements are frequently employed in “insolvency proceedings to facilitate sales of businesses and assets and [...] establish a baseline price and transactional structure for any superior bids”.³⁶ As this Court has previously held, the “use of a sale process that includes a

³² First Report, *supra* note 1 at section 6.3 para 4.

³³ *Ibid* at section 6.5.3 para 1(e).

³⁴ *Ibid* at section 6.3 para 3.

³⁵ *Ibid* at section 6.1 para 1-2.

³⁶ *Re Danier Leather Inc, 2016 ONSC 1044* at para 20 [*Danier*]; *Cannapiece Group Inc v Carmela Marzili, 2022 ONSC 6379* at paras 4-8 [*Cannapiece*]; *CCM, supra* note 24 at para 7; *Re Brainhunter Inc (2009), OJ No. 5578*, at para 13 [*Brainhunter*].

stalking horse agreement maximizes value of a business for the benefit of its stakeholders and enhances the fairness of the sale process”.³⁷

39. Given their benefits, stalking horse agreements, break fees and/or expense reimbursements, have been approved by Courts concurrently with a sale process in numerous receivership proceedings.³⁸ When assessing bid protections such as break fees and expense reimbursements – which “are frequently approved in insolvency proceedings”³⁹ – Courts have recognized that:

- (a) in addition to compensating a stalking horse bidder for the time and resources expended and the risks taken in developing a stalking horse agreement, bid protections also reflect the price of stability; and
- (b) bid protections are subject to business judgement, provided that they lie within a range of reasonable alternatives – often between 1.8% to 5% of the value of the stalking horse bid.⁴⁰

40. Approval of the Stalking Horse APS, including the Expense Reimbursement and Break Fee, is appropriate given that:

- (a) the Stalking Horse APA will serve as an appropriate backstop and valuable floor for bids in the proposed Sale Process;
- (b) the Receiver believes that: (i) the consideration provided under the Stalking Horse APS is fair and reasonable; and (ii) the Expense Reimbursement and the Break Fee are fair and reasonable in view of the benefits of having a stalking horse bid capable of assuring a sale, the expenses incurred and to be incurred by 255 Ontario in connection with its Stalking Horse APS, and the risks attending 255 Ontario’s participation in the Sale Process;

³⁷ [Danier](#), *ibid.*

³⁸ See generally [In the Matter of the Receivership Proceedings of 11157353 Canada Corporation](#) (February 21, 2023), Toronto, CV-23-00694886-00CL (Order Approving Sale Process, Stalking Horse SPA and KERP) and [In the Matter of the Receivership Proceedings of Nimbus Environmental Solutions Inc. et al.](#) (September 13, 2021), Toronto, CV-21-00667395-00CL (Order Approving SISP).

³⁹ [Danier](#), *supra* note 37 at para 41; [In the Matter of a Plan of Compromise or Arrangement of Green Growth Brands](#), 2020 ONSC 3565, at paras 51-52.

⁴⁰ [Danier](#), *ibid* at paras 41-42; [Cannapiece](#), *supra* note 37 at para 5; [CCM](#), *supra* note 24 at para 13; [Brainhunter](#), *supra* note 37 at para 20.

- (c) the amount of the Expense Reimbursement and the Break Fee represent approximately 1% of the aggregate consideration provided under the Stalking Horse APS, which is well within a range of reasonableness;
- (d) the Receiver believes that: (i) the Expense Reimbursement and Break Fee are reasonable; and (ii) the Stalking Horse APS' approval is in the best interests of the Debtor's stakeholders as it will protect downside risk while facilitating the submission of potentially superior bids in the Sale Process; and
- (e) Peakhill is supportive of the approval of the Stalking Horse APS (for the purposes of acting as the stalking horse bid in the Sale Process), the Expense Reimbursement and the Break Fee.⁴¹

PART V: RELIEF REQUESTED

41. The Receiver submits that the relief sought on the within motion is appropriate in the circumstances and consistent with prior orders of this Court, and respectfully request that the proposed form of Bidding Procedures and Stalking Horse APS Approval Order be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 18TH DAY OF DECEMBER 2023

Bennett Jones LLP

BENNETT JONES LLP

⁴¹ First Report, *supra* note 1 at section 6.1 paras 1-2, at section 6.2 paras 1-4 and section 6.5.3 para 1.

SCHEDULE A – LIST OF AUTHORITIES

Cases Cited

1. [2056706 Ontario Inc v Pure Global Cannabis Inc, 2021 ONSC 5533](#)
2. [Cannapiece Group Inc v Carmela Marzili, 2022 ONSC 6379](#)
3. [CCM Master Qualified Fund Ltd v blutip Power Technologies Ltd, 2012 ONSC 1750](#)
4. [Forjay Management Ltd v 0981478 BC Ltd, 2018 BCSC 527](#)
5. [In the Matter of a Plan of Compromise or Arrangement of Green Growth Brands, 2020 ONSC 3565](#)
6. [Marchant Realty Partners Inc. v. 2407553 Ontario Inc., 2021 ONCA 375](#)
7. [Ontario Securities Commission v. Bridging Finance Inc., 2022 ONSC 1857](#)
8. [Peoples Trust Company v Censorio Group \(Hastings & Carleton\) Holdings Ltd, 2020 BCSC 1013](#)
9. [Re Brainhunter Inc \(2009\), OJ No. 5578](#)
10. [Re Danier Leather Inc, 2016 ONSC 1044](#)
11. [Regal Constellation Hotel Ltd., Re., \[2004\] O.J. No. 2744 \(C.A.\)](#)
12. [Royal Bank of Canada v Soundair, 1991 CanLII 2727 \(ONCA\)](#)
13. [Third Eye Capital Corp v Dianor Resources Inc, 2019 ONCA 508](#)

Other Materials

1. [In the Matter of the Receivership Proceedings of 1000093910 Ontario Inc. \(September 13, 2023\), Newmarket, CV-23-00004031-0000 \(Order Appointing Receiver\)](#)
2. [In the Matter of the Receivership Proceedings of 11157353 Canada Corporation \(February 21 2023\), Toronto, CV-23-00694886-00CL \(Order Approving Sale Process, Stalking Horse SPA and KERP\)](#)
3. [In the Matter of the Receivership Proceedings of Nimbus Environmental Solutions Inc. et al. \(September 13, 2021\), Toronto, CV-21-00667395-00CL \(Order Approving SISP\)](#)

SCHEDULE B – STATUTES AND REGULATIONS RELIED ON

Bankruptcy and Insolvency Act, R.S.C. 1985, c C-36

Court may appoint receiver

243(1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
- (c) take any other action that the court considers advisable.

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

- (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
- (b) the court considers it appropriate to appoint a receiver before then.

Definition of receiver

(2) Subject to subsections (3) and (4), in this Part, receiver means a person who

- (a) is appointed under subsection (1); or
- (b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under
 - (i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or
 - (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

Definition of receiver — subsection 248(2)

(3) For the purposes of subsection 248(2), the definition receiver in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Orders respecting fees and disbursements

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

Meaning of disbursements

(7) In subsection (6), disbursements does not include payments made in the operation of a business of the insolvent person or bankrupt.

Courts of Justice Act, R.S.O. 1990, c. C.43

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

Terms

(2) An order under subsection (1) may include such terms as are considered just.

PEAKHILL CAPITAL INC.

-and-

1000093910 ONTARIO INC.

Applicant

Respondent

Court File No.: CV-23-00004031-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceedings commenced at Newmarket

FACTUM OF THE RECEIVER
(Motion Returnable December 20, 2023)

BENNETT JONES LLP

One First Canadian Place
Suite 3400, P.O. Box 130
Toronto, Ontario
M5X 1A4

Sean Zweig (LSO# 57307I)

Tel: (416) 777-6254

Email: zweigs@bennettjones.com

Aiden Nelms (LSO#: 74170S)

Tel: (416) 777-4642

Email: nelmsa@bennettjones.com

Lawyers for KSV Restructuring Inc., solely in its
capacity as Court-appointed Receiver and not in
its personal capacity

TAB 2

Court of Appeal Court File No.: 23-CV-1357 / M54775
Court File No. CV-23-00004031-0000

COURT OF APPEAL FOR ONTARIO

BETWEEN:

PEAKHILL CAPITAL INC.

Applicant (Respondent on Appeal)

- and -

1000093910 ONTARIO INC.

Respondent (Appellant)

**IN THE MATTER OF AN APPLICATION UNDER SUBSECTION 243(1) OF THE
BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED, AND
SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990 c. C. 43, AS AMENDED**

**MOTION RECORD OF THE RESPONDING PARTY, THE RECEIVER
((Motion for Leave to Appeal and a Stay of the Order of Vallee J.))**

January 15, 2024

BENNETT JONES LLP

One First Canadian Place
Suite 3400, P.O. Box 130
Toronto, Ontario
M5X 1A4

Richard Swan (LSO# 32076A)
Email: swanr@bennettjones.com

Sean Zweig (LSO# 57307I)
Email: zweigs@bennettjones.com

Aiden Nelms (LSO# 74170S)
Email: nelmsa@bennettjones.com

Tel: (416) 863-1200
Fax: (416) 863-1716

Lawyers for KSV Restructuring Inc.,
the Receiver/Respondent

TO: SERVICE LIST

I N D E X

INDEX

TAB		DESCRIPTION
1.		Affidavit of Aiden Nelms sworn January 15, 2024
	A.	Exhibit “A” - Email exchange between Howard Manis of Manis Law LLP, Barry Polisuk of Friedman Law Professional Corporation, Sean Zweig and Aiden Nelms of Bennett Jones LLP, and others, from November 29, 2023 to December 11, 2023
	B.	Exhibit “B” - Letter to Gary M. Caplan of Scalzi Caplan LLP from Sean Zweig of Bennett Jones LLP dated January 2, 2024

**T
A
B

1**

Court of Appeal Court File No.: 23-CV-1357 / M54775
Court File No. CV-23-00004031-0000

COURT OF APPEAL FOR ONTARIO

BETWEEN:

PEAKHILL CAPITAL INC.

Applicant (Respondent on Appeal)

- and -

1000093910 ONTARIO INC.

Respondent (Appellant)

**IN THE MATTER OF AN APPLICATION UNDER SUBSECTION 243(1) OF THE
BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED, AND
SECTION 101 OF THE COURTS OF JUSTICE ACT, R.S.O. 1990 c. C. 43, AS AMENDED**

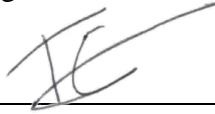
AFFIDAVIT OF AIDEN NELMS

I, AIDEN NELMS, of the City of Toronto, in the Province of Ontario, **MAKE OATH AND
SAY:**

1. This Affidavit is made in connection with the Debtor's (as defined below) motion returnable January 19, 2024 at 10:00 a.m. in the above-noted proceedings.
2. I am an associate at the law firm of Bennett Jones LLP, counsel for KSV Restructuring Inc. in its capacity as court-appointed receiver and manager (in such capacity, the "**Receiver**") of the Respondent, 1000093910 Ontario Inc. (the "**Debtor**"), and all the assets, undertakings and properties of the Debtor. As such, I have personal knowledge of the matters to which I hereinafter depose in this Affidavit. Where I do not have personal knowledge of the matters set out herein, I have stated the source of my information and, in all cases, believe it to be true.

3. Attached as **Exhibit “A”** to this affidavit is an email exchange between Howard Manis of Manis Law LLP, Barry Polisuk of Friedman Law Professional Corporation, Sean Zweig and Aiden Nelms of Bennett Jones LLP, and others, from November 29, 2023 to December 11, 2023.
4. Attached as **Exhibit “B”** to this affidavit is a letter to Gary M. Caplan of Scalzi Caplan LLP from Sean Zweig of Bennett Jones LLP dated January 2, 2024.
5. I swear the Affidavit in connection with of the Debtor’s motion and for no other purpose.

SWORN BEFORE ME over)
 videoconference on this 15th day of)
 January, 2024. The affiant was located in)
 the City of Toronto, in the Province of)
 Ontario and the Commissioner was located)
 in the City of Toronto, in the Province of)
 Ontario. This affidavit was commissioned)
 remotely as a result of COVID-19 and the)
 declaration was administered in accordance)
 with Ontario Regulation 431/20.)



A Commissioner for Oaths in and for the
 Province of Ontario
 Thomas Gray

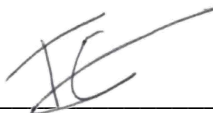


AIDEN NELMS

**T
A
B

A**

**THIS IS EXHIBIT "A" REFERRED TO IN THE
AFFIDAVIT OF AIDEN NELMS SWORN
THE 15TH DAY OF JANUARY, 2024**



A Commissioner for taking affidavits, etc.

Thomas Gray

From: Howard Manis <hmanis@manislaw.ca>
Sent: Monday, December 11, 2023 10:58 AM
To: Sean Zweig; Aiden Nelms; Barry Polisuk
Cc: Noah Goldstein (ngoldstein@ksvadvisory.com); Ben Luder; Daniel Litsos
Subject: RE: Peakhill and 1000093910 Ontario Inc. [BJ-WSLegal.FID6244094]

Understood!!



Howard F. Manis
MANIS LAW
 • Bankruptcy & Insolvency • Commercial & Civil Litigation • Corporate Law
 (416) 417-7257
hmanis@manislaw.ca
www.ManisLaw.ca
 2300 Yonge Street, Suite 1600, Toronto, Ontario, M4P 1E4 Canada

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From: Sean Zweig <ZweigS@bennettjones.com>
Sent: Monday, December 11, 2023 9:45 AM
To: Howard Manis <hmanis@manislaw.ca>; Aiden Nelms <NelmsA@bennettjones.com>; Barry Polisuk <BP@friedmans.ca>
Cc: Noah Goldstein (ngoldstein@ksvadvisory.com) <ngoldstein@ksvadvisory.com>; Ben Luder <bluder@ksvadvisory.com>; Daniel Litsos <dlitsos@manislaw.ca>
Subject: RE: Peakhill and 1000093910 Ontario Inc. [BJ-WSLegal.FID6244094]

Ok, thanks. In the meantime, given the uncertainty as to what the debtor is going to do, we are continuing to prepare materials in respect of the stalking horse transaction. Assuming your client is actually going to pay out Peakhill, it should do so asap to limit the additional costs being incurred by KSV and Bennett Jones.

Sean Zweig

Partner*, Bennett Jones LLP

*Denotes Professional Corporation

3400 One First Canadian Place, P.O. Box 130, Toronto, ON, M5X 1A4

T. 416 777 6254 | F. 416 863 1716

BennettJones.com



From: Howard Manis <hmanis@manislaw.ca>
Sent: Monday, December 11, 2023 9:42 AM

To: Sean Zweig <ZweigS@bennettjones.com>; Aiden Nelms <NelmsA@bennettjones.com>; Barry Polisuk <BP@friedmans.ca>

Cc: Noah Goldstein (<ngoldstein@ksvadisory.com> <ngoldstein@ksvadisory.com>; Ben Luder <bluder@ksvadisory.com>; Daniel Litsos <dlitsos@manislaw.ca>

Subject: RE: Peakhill and 1000093910 Ontario Inc. [BJ-WSLegal.FID6244094]

I will seek instructions in that regard.



Howard F. Manis

MANIS LAW

• Bankruptcy & Insolvency • Commercial & Civil Litigation • Corporate Law

(416) 417-7257

hmanis@manislaw.ca

www.ManisLaw.ca

2300 Yonge Street, Suite 1600, Toronto, Ontario, M4P 1E4 Canada

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From: Sean Zweig <ZweigS@bennettjones.com>

Sent: Monday, December 11, 2023 9:26 AM

To: Howard Manis <hmanis@manislaw.ca>; Aiden Nelms <NelmsA@bennettjones.com>; Barry Polisuk <BP@friedmans.ca>

Cc: Noah Goldstein (<ngoldstein@ksvadisory.com> <ngoldstein@ksvadisory.com>; Ben Luder <bluder@ksvadisory.com>; Daniel Litsos <dlitsos@manislaw.ca>

Subject: RE: Peakhill and 1000093910 Ontario Inc. [BJ-WSLegal.FID6244094]

Can you please send us the commitment letter?

Sean Zweig

Partner*, Bennett Jones LLP

*Denotes Professional Corporation

3400 One First Canadian Place, P.O. Box 130, Toronto, ON, M5X 1A4

T. 416 777 6254 | F. 416 863 1716

BennettJones.com



From: Howard Manis <hmanis@manislaw.ca>

Date: Monday, Dec 11, 2023 at 9:22 AM

To: Sean Zweig <ZweigS@bennettjones.com>, Aiden Nelms <NelmsA@bennettjones.com>, Barry Polisuk <BP@friedmans.ca>

Cc: Noah Goldstein (<ngoldstein@ksvadisory.com> <ngoldstein@ksvadisory.com>, Ben Luder <bluder@ksvadisory.com>, Daniel Litsos <dlitsos@manislaw.ca>

Subject: RE: Peakhill and 1000093910 Ontario Inc. [BJ-WSLegal.FID6244094]

Sean,

We have the payout statement from Peakhill and the Commitment from the new lender.

I will confirm our client's intentions today and circle back to you.

Howard



Howard F. Manis

MANIS LAW

• Bankruptcy & Insolvency • Commercial & Civil Litigation • Corporate Law

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From: Sean Zweig <ZweigS@bennettjones.com>

Sent: Sunday, December 10, 2023 9:30 PM

To: Howard Manis <hmanis@manislaw.ca>; Aiden Nelms <NelmsA@bennettjones.com>; Barry Polisuk <BP@friedmans.ca>

Cc: Noah Goldstein (<ngoldstein@ksvadvisory.com> <ngoldstein@ksvadvisory.com>; Ben Luder <bluder@ksvadvisory.com>; Daniel Litsos <dlitsos@manislaw.ca>

Subject: RE: Peakhill and 1000093910 Ontario Inc. [BJ-WSLegal.FID6244094]

Howard,

Can we please get an update with respect to your client's intentions? You have the payout statement from Peakhill now.

Sean Zweig

Partner*, Bennett Jones LLP

*Denotes Professional Corporation

3400 One First Canadian Place, P.O. Box 130, Toronto, ON, M5X 1A4

T. 416 777 6254 | F. 416 863 1716

BennettJones.com



Bennett Jones

From: Howard Manis <hmanis@manislaw.ca>

Sent: Wednesday, December 6, 2023 1:46 PM

To: Aiden Nelms <NelmsA@bennettjones.com>; Barry Polisuk <BP@friedmans.ca>

Cc: Noah Goldstein (ngoldstein@ksvadvisory.com) <ngoldstein@ksvadvisory.com>; Ben Luder <bluder@ksvadvisory.com>; Sean Zweig <ZweigS@bennettjones.com>; Daniel Litsos <dlitsos@manislaw.ca>; Ravi Aurora <ravi@aurora-group.ca>
Subject: RE: Peakhill and 1000093910 Ontario Inc. [BJ-WSLegal.FID6244094]

Thanks for the email Aiden.

We are working on finalizing our plans but are awaiting the payout statement from Peakhill. The receipt of this Statement is urgent.

In any event, we will require the time on December 20 to either seek the discharge of the Receiver or to vary the Receivership Order as discussed on Monday to allow the Debtor to complete the transaction contemplated by the \$31M APS.

We will provide additional information later today but if you can speed up Peakhill at all that would be most helpful.

Howard



Howard F. Manis
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 • Bankruptcy & Insolvency • Commercial & Civil Litigation • Corporate Law
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www.ManisLaw.ca
 2300 Yonge Street, Suite 1600, Toronto, Ontario, M4P 1E4 Canada

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From: Aiden Nelms <NelmsA@bennettjones.com>
Sent: Wednesday, December 6, 2023 1:29 PM
To: Howard Manis <hmanis@manislaw.ca>; Barry Polisuk <BP@friedmans.ca>
Cc: Noah Goldstein (ngoldstein@ksvadvisory.com) <ngoldstein@ksvadvisory.com>; Ben Luder <bluder@ksvadvisory.com>; Sean Zweig <ZweigS@bennettjones.com>
Subject: RE: Peakhill and 1000093910 Ontario Inc. [BJ-WSLegal.FID6244094]

Howard/Barry,

Can you please let us know by **the end of the day** what the plan is and if part of that plan is in fact to pay out Peakhill? We will of course need to see a Term Sheet evidencing your clients ability to facilitate same.

We are willing to work cooperatively and consensually but, as you know, we have Court time booked on December 20th and absent an alternative plan we intend to finalize our materials for the relief previewed for you earlier this week.

Best,

Aiden Nelms

Associate, Bennett Jones LLP
 3400 One First Canadian Place, P.O. Box 130, Toronto, ON, M5X 1A4
 T. 416 777 4642 | F. 416 863 1716 | M. 416 671 3090

BennettJones.com



Bennett Jones

From: Howard Manis <hmanis@manislaw.ca>
Sent: Wednesday, December 6, 2023 6:19 AM
To: Sean Zweig <ZweigS@bennettjones.com>
Cc: Barry Polisuk <BP@friedmans.ca>; Aiden Nelms <NelmsA@bennettjones.com>; Noah Goldstein
 (<ngoldstein@ksvadvisory.com>) <ngoldstein@ksvadvisory.com>
Subject: Re: Peakhill and 1000093910 Ontario Inc.

The plan would be to deal with Peakhill and bring a motion to seek the discharge of the Receiver

Sent from my iPhone

On Dec 5, 2023, at 10:35 PM, Sean Zweig <ZweigS@bennettjones.com> wrote:

Barry,

You should reach out to Dom Michaud to get that. He acts for Peakhill.

As an aside, we will be interested to understand your client's intentions if it can take out Peakhill. As Howard will tell you, paying out Peakhill does not automatically end the receivership.

Sean Zweig

Partner*, Bennett Jones LLP
 *Denotes Professional Corporation
 3400 One First Canadian Place, P.O. Box 130, Toronto, ON, M5X 1A4
 T. 416 777 6254 | F. 416 863 1716

BennettJones.com

<image001.png>

From: Barry Polisuk <BP@friedmans.ca>
Sent: Tuesday, December 5, 2023 9:52 PM
To: Sean Zweig <ZweigS@bennettjones.com>; Howard Manis <hmanis@manislaw.ca>
Cc: Aiden Nelms <NelmsA@bennettjones.com>
Subject: Re: Peakhill and 1000093910 Ontario Inc.

Sean, we may be in a position to payout Peakhill. Can you please provide us with a discharge statement.
 Thank you, Barry

<image004.jpg>

From: Sean Zweig <ZweigS@bennettjones.com>
Sent: Tuesday, December 5, 2023 5:40:48 PM
To: Howard Manis <hmanis@manislaw.ca>; Barry Polisuk <BP@friedmans.ca>
Cc: Aiden Nelms <NelmsA@bennettjones.com>
Subject: RE: Peakhill and 1000093910 Ontario Inc.

Advised by who? I'm not aware of the \$31M APS being terminated.

Sean Zweig

*Partner**, Bennett Jones LLP

*Denotes Professional Corporation

3400 One First Canadian Place, P.O. Box 130, Toronto, ON, M5X 1A4

T. 416 777 6254 | F. 416 863 1716

[BennettJones.com](https://www.bennettjones.com)
m

<image001.png>

From: Howard Manis <hmanis@manislaw.ca>
Sent: Tuesday, December 5, 2023 5:39 PM
To: Sean Zweig <ZweigS@bennettjones.com>; Barry Polisuk <BP@friedmans.ca>
Cc: Aiden Nelms <NelmsA@bennettjones.com>
Subject: RE: Peakhill and 1000093910 Ontario Inc.

Please confirm that the Receiver has not terminated the \$31M APS as you stated yesterday as I was advised otherwise this afternoon

<image008.png>

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From: Sean Zweig <ZweigS@bennettjones.com>
Sent: Tuesday, December 5, 2023 5:38 PM
To: Howard Manis <hmanis@manislaw.ca>; Barry Polisuk <BP@friedmans.ca>
Cc: Aiden Nelms <NelmsA@bennettjones.com>
Subject: RE: Peakhill and 1000093910 Ontario Inc.

Ok, thanks. Before 11:30am tomorrow would be greatly appreciated. We are speaking with the Receiver at that time.

Sean Zweig

*Partner**, Bennett Jones LLP

*Denotes Professional Corporation

3400 One First Canadian Place, P.O. Box 130, Toronto, ON, M5X 1A4

T. 416 777 6254 | F. 416 863 1716

BennettJones.co
m

<image001.png>

From: Howard Manis <hmanis@manislaw.ca>
Sent: Tuesday, December 5, 2023 5:34 PM
To: Barry Polisuk <BP@friedmans.ca>; Sean Zweig <ZweigS@bennettjones.com>
Cc: Aiden Nelms <NelmsA@bennettjones.com>
Subject: RE: Peakhill and 1000093910 Ontario Inc.

Sean,

As to our discussion of yesterday, I have had several discussions today with various parties and I will get back to you tomorrow.

Howard

<image009.png>

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From: Barry Polisuk <BP@friedmans.ca>
Sent: Tuesday, December 5, 2023 5:32 PM
To: Sean Zweig <ZweigS@bennettjones.com>; Howard Manis <hmanis@manislaw.ca>
Cc: Aiden Nelms <NelmsA@bennettjones.com>
Subject: Re: Peakhill and 1000093910 Ontario Inc.

Sean, I'm discussing the claim with the clients. I'm advised that it's without merit but I'm waiting for documentation. I will get back to you in the next day or so. Thanks, Barry

<image004.jpg>

From: Sean Zweig <ZweigS@bennettjones.com>
Sent: Tuesday, December 5, 2023 4:10:42 PM
To: Howard Manis <hmanis@manislaw.ca>
Cc: Barry Polisuk <BP@friedmans.ca>; Aiden Nelms <NelmsA@bennettjones.com>
Subject: RE: Peakhill and 1000093910 Ontario Inc.

Howard,

Any update further to our call yesterday? I know you were hoping to get back to us yesterday.

Sean Zweig

Partner*, Bennett Jones LLP

*Denotes Professional Corporation

3400 One First Canadian Place, P.O. Box 130, Toronto, ON, M5X 1A4
T. 416 777 6254 | F. 416 863 1716

BennettJones.co
m

<image001.png>

-----Original Appointment-----

From: Sean Zweig

Sent: Wednesday, November 29, 2023 5:42 PM

To: Sean Zweig; Howard Manis

Cc: Barry Polisuk; Aiden Nelms

Subject: Peakhill and 1000093910 Ontario Inc.

When: Monday, December 4, 2023 11:00 AM-11:30 AM (UTC-05:00) Eastern Time (US & Canada).

Where: Microsoft Teams Meeting

Microsoft Teams meeting

Join on your computer, mobile app or room device

[Click here to join the meeting](#)

Meeting ID: 289 007 664 986

Passcode: mnT5Lc

[Download Teams](#) | [Join on the web](#)

Join with a video conferencing device

bennettjones@m.webex.com

Video Conference ID: 111 848 608 0

[Alternate VTC instructions](#)

Or call in (audio only)

[+1 647-498-9015,,783463969#](#) Canada, Toronto

[\(833\) 780-1773,,783463969#](#) Canada (Toll-free)

Phone Conference ID: 783 463 969#

[Find a local number](#) | [Reset PIN](#)

[Learn More](#) | [Meeting options](#)

From: Howard Manis <hmanis@manislaw.ca>

Sent: Wednesday, November 29, 2023 5:39 PM

To: Sean Zweig <ZweigS@bennettjones.com>
Cc: Barry Polisuk <BP@friedmans.ca>
Subject: RE: Peakhill and 1000093910 Ontario Inc.

Monday at 11 am works for me

<image010.png>

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From: Sean Zweig <ZweigS@bennettjones.com>
Sent: Wednesday, November 29, 2023 5:26 PM
To: Howard Manis <hmanis@manislaw.ca>
Cc: Barry Polisuk <BP@friedmans.ca>
Subject: RE: Peakhill and 1000093910 Ontario Inc.

Sometime Monday morning between 9:30am and noon works for me.

Sean Zweig

*Partner**, Bennett Jones LLP

*Denotes Professional Corporation

3400 One First Canadian Place, P.O. Box 130, Toronto, ON, M5X 1A4

T. 416 777 6254 | F. 416 863 1716

[BennettJones.com](https://www.bennettjones.com)

<image001.png>

From: Howard Manis <hmanis@manislaw.ca>
Sent: Wednesday, November 29, 2023 4:22 PM
To: Sean Zweig <ZweigS@bennettjones.com>
Cc: Barry Polisuk <BP@friedmans.ca>
Subject: RE: Peakhill and 1000093910 Ontario Inc.

Enjoy your travels.

I will do my best to make myself available so let me know your preferred times as I don't want to press you first thing as soon as you are back

<image011.png>

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From: Sean Zweig <ZweigS@bennettjones.com>
Sent: Wednesday, November 29, 2023 4:15 PM
To: Howard Manis <hmanis@manislaw.ca>
Cc: Barry Polisuk <BP@friedmans.ca>
Subject: RE: Peakhill and 1000093910 Ontario Inc.

Howard,

Nice to hear from you. Hope all is well with you too.

I am travelling through the rest of the week. Please let me know your availability early next week.

Thanks

Sean Zweig

*Partner**, Bennett Jones LLP

*Denotes Professional Corporation

3400 One First Canadian Place, P.O. Box 130, Toronto, ON, M5X 1A4

T. 416 777 6254 | F. 416 863 1716

[BennettJones.com](https://www.bennettjones.com)

<image001.png>

From: Howard Manis <hmanis@manislaw.ca>
Sent: Wednesday, November 29, 2023 3:20 PM
To: Sean Zweig <ZweigS@bennettjones.com>
Cc: Ravi Aurora <ravi@aurora-group.ca>; Barry Polisuk <BP@friedmans.ca>
Subject: Peakhill and 1000093910 Ontario Inc.

Sean,

Hope all is well.

I have been retained as counsel for the Respondent.

Please let me know when we can have a discussion about this matter as I understand that certain matters are pressing.

I await hearing from you.

Howard

<image012.png>

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B

B

**THIS IS EXHIBIT "B" REFERRED TO IN THE
AFFIDAVIT OF AIDEN NELMS SWORN
THE 15TH DAY OF JANUARY, 2024**



A Commissioner for taking affidavits, etc.

Thomas Gray

**Bennett Jones**

Bennett Jones LLP

3400 One First Canadian Place, PO Box 130

Toronto, Ontario, Canada M5X 1A4

Tel: 416.863.1200 Fax: 416.863.1716

Sean H. Zweig
Partner
Direct Line: 416.777.6254
e-mail: zweigs@bennettjones.com

January 2, 2024

DELIVERED VIA EMAIL

Scalzi Caplan LLP
20 Caldri Road, Unit 2
Vaughan, Ontario
L4K 4N8

Attention: Gary M. Caplan

Dear Sir:

Re: Peakhill Capital Inc. v 1000093910 Ontario Inc. (the “Debtor”) (Court File No. CV-00004031-0000)

As you know, we are counsel to KSV Restructuring Inc. (“**KSV**”) in its capacity as court-appointed receiver (in such capacity, the “**Receiver**”) in connection with the above captioned proceedings. We write to you in response to your correspondence dated December 28, 2023 (the “**December 28 Letter**”) which enclosed, among other things, the Debtor’s purported Notice of Appeal (the “**Notice of Appeal**”) in respect of the reasons and Order of the Honourable Madam Justice Vallee dated December 20, 2023 (the “**Order**”). Terms used but not otherwise defined herein have the meaning ascribed to them in the Order. A copy of the Order is enclosed with this letter for ease of reference.

On September 13, 2023, the Ontario Superior Court of Justice (the “**Court**”) granted an order (the “**Receivership Order**”) pursuant to subsection 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, as amended (the “**BIA**”) and section 101 of the Ontario *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended, which, among other things, appointed KSV as the Receiver over the Debtor, without security, and all of the Property, including the property municipally known as 20 Regina Road, Vaughan, Ontario. The Receivership Order and the Receiver’s appointment became effective on October 2, 2023.

The Notice of Appeal provides that the basis for the Debtor’s appeal of the Order is subsection 193(c) of the BIA. Further, the December 28 Letter advises that it is the Debtor’s view that the Order is stayed, presumably pursuant to Section 195 of the BIA, pending the hearing of the appeal. The Receiver respectfully disagrees with the Debtor’s position. As has been confirmed on multiple occasions by this Country’s appellate courts: (i) this appeal is not properly brought within the ambit

of subsection 193(c); (ii) any appeal of the Order requires leave in accordance with subsection 193(e) of the BIA; and (iii) the Order is not stayed pursuant to Section 195 of the BIA.

Section 193 of the BIA provides as follows:

Court of Appeal

193 *Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:*

- (a) if the point at issue involves future rights;*
- (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;*
- (c) if the property involved in the appeal exceeds in value ten thousand dollars;*
- (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and*
- (e) in any other case by leave of a judge of the Court of Appeal.*

The Ontario Court of Appeal (the “**ONCA**”) advocates for a restrictive interpretation of subsection 193(c) based on the economic impact of the order. In *Hillmount Capital Inc. v. Pizale*, 2021 ONCA 364 (“**Hillmount**”), the ONCA, referencing its decision in 2403177 *Ontario Inc. v. Bending Lake Iron Group Ltd.*, 2016 ONCA 225, reiterated that the case law holds that there are three types of orders that do not fall within the ambit of subsection 193(c): (i) an order that does not result in a loss or does not “directly involve” property exceeding \$10,000 in value; (ii) an order that does not bring into play the value of the debtor’s property; or (iii) an order that is procedural in nature. The ONCA in *Hillmount* concluded that:

“[w]hile the cases under s. 193(c) have explained the interpretative task using differing language (as is to be expected in a body of jurisprudence under a national statute), at their core the cases share common ground in attempting to discern the operative effect of the order sought to be appealed: does the order result in a loss or gain, or put in jeopardy value of property, in excess of \$10,000”. [emphasis added]

The Saskatchewan Court of Appeal (the “**SKCA**”) decision in *Re Harmon International Industries Inc.*, 2020 SKCA 95 (“**Harmon**”) dealt with a subsection 193(c) appeal in respect of a sale process order – a situation which is analogous to the Notice of Appeal in respect of the Order. In *Harmon*, the debtor sought to appeal a sale process order which, among other things, authorized the receiver to enter into two listing agreements to effect a sale of the debtor’s assets and also set a listing price. In its decision, the SKCA noted that: “[w]hat the Court has before it is an Order that authorizes a list price of \$3.8 million for the Millar Avenue Building. It does not propose a sale price of \$3.8 million. All that the Order does is establish a process for the sale of the property. Any proposed sale must still be confirmed”. The SKCA goes on to conclude that:

“At this point, the claim of loss is without any foundation at all. It is, as such, entirely speculative. It assumes that the listing agent will not market the property to its fullest



*potential or that the receiver will place an improvident sale before the Court of Queen's Bench to be confirmed and the Court will confirm it. It is possible that Harmon will apply to Elson J. under s. 185(7) of the BIA or wait until it is determined that the property is proposed to be sold for less than what Harmon believes it is worth and place the Brunsdon Appraisal before Elson J. at that time. It is also possible that Harmon will obtain other financing so as to permit it to buy the property at the list price or the property will sell for an amount acceptable to Harmon. **In my view, the Order does not directly have an impact on the proprietary or monetary interests of Harmon or crystallize any loss at this time. It concerns a matter of procedure only. It is merely an order as to manner of sale, as was the case in Dominion Foundry Co. (Re) (1965), 1965 CanLII 596 (MB CA), 52 DLR (2d) 79 (Man CA). No value is in jeopardy, and no party can claim a loss as a result. In my view, the property involved in the proposed appeal does not exceed in value \$10,000 as those words are used in s. 193(c) of the BIA. Thus, I conclude it was necessary for Harmon to apply for leave to appeal". [emphasis added]***

The Order, among other things: (i) approved the Bidding Procedures and authorized the Receiver and its advisors to carry out the Bidding Procedures; and (ii) authorized and empowered the Receiver to, *nunc pro tunc*, enter into the Stalking Horse APS for the sole purpose of it acting as the stalking horse bid. The Order is explicit that nothing therein approves the sale and vesting of the Purchased Assets to the Stalking Horse Purchaser and that any sale and vesting of such assets is to be considered by the Court on a subsequent motion.

Similar to the sale process order in *Harmon*, the Order does not directly have an impact on the propriety or monetary interests of the Debtor – it concerns a matter of procedure only as it seeks to establish a process for the sale of the Purchased Assets. With no value in jeopardy, no party can claim a loss and, as a result, the proposed appeal contemplated in the Notice of Appeal does not exceed \$10,000 in value. Moreover, it is clear from the jurisprudence that the Order is purely one that is procedural in nature and is therefore outside of the scope of subsection 193(c) of the BIA.

As a result, any appeal of the Order must be based in subsection 193(e) of the BIA which requires leave and, as a result, the Order is not stayed pursuant to Section 195 of the BIA.

This letter sets out a summary of the relevant jurisprudence and Receiver's position only. Nothing in this letter shall constitute or be deemed to be a waiver by the Receiver and the Receiver specifically reserves all of its rights and remedies at law or in equity.

For clarity, the Receiver intends to proceed with the sale process contemplated by the Order unless and until the Debtor obtains leave of the ONCA and a stay of the Order.



January 2, 2024
Page 4

Yours truly,

BENNETT JONES LLP



Sean H. Zweig

cc: the Service List in the proceedings bearing Court File No. CV-00004031-0000
encl: the Order of the Honourable Madam Justice Vallee dated December 20, 2023





Court File No. CV-23-00004031-0000

**ONTARIO
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE

)

WEDNESDAY, THE 20th

JUSTICE VALLEE

)

DAY OF DECEMBER, 2023

)

PEAKHILL CAPITAL INC.

Applicant

- and -

1000093910 ONTARIO INC.

Respondent

**IN THE MATTER OF AN APPLICATION UNDER SUBSECTION 243(1) OF THE
BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED, AND
SECTION 101 OF THE COURTS OF JUSTICE ACT, R.S.O. 1990, c. C.43, AS AMENDED**

ORDER

(Bidding Procedures and
Stalking Horse APS Approval)

THIS MOTION, made by KSV Restructuring Inc. in its capacity as Court-appointed receiver and manager (in such capacity, the “**Receiver**”), without security, over the Respondent, 1000093910 Ontario Inc. (the “**Debtor**”), and all of the assets, undertakings and properties of the Debtor, including the property municipally known as 20 Regina Road, Vaughan, Ontario (the “**Property**”), for an order, among other things: (i) abridging the time for service of the Notice of Motion and Motion Record herein, if necessary, and validating service thereof; (ii) approving the bidding procedures substantially in the form attached as Schedule “A” hereto (the “**Bidding Procedures**”); and (iii) approving the Stalking Horse APS (as defined below) for the purpose of acting as stalking horse bidder, was heard this day by videoconference due to the COVID-19 pandemic.

ON READING the Notice of Motion of the Receiver, the First Report of the Receiver dated December 13, 2023 (the “**Report**”), filed, and on hearing the submissions of counsel for the Receiver and counsel for those other parties appearing as indicated by the counsel sheet, no one

else appearing although properly served, as appears from the affidavit of Aiden Nelms, sworn and filed:

SERVICE AND DEFINITIONS

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

2. **THIS COURT ORDERS** that all capitalized terms used in this Order and not otherwise defined shall have the meanings ascribed to them in the Report, the Bidding Procedures or the Stalking Horse APS, as applicable.

BIDDING PROCEDURES

3. **THIS COURT ORDERS** that the Bidding Procedures (subject to any amendments thereto that may be made in accordance therewith) are hereby approved.

4. **THIS COURT ORDERS** that the Receiver and its advisors are hereby authorized and directed to carry out the Bidding Procedures and to take such steps and execute such documentation as may be necessary or incidental to the Bidding Procedures.

5. **THIS COURT ORDERS** that the Receiver and its affiliates, partners, directors, employees, advisors, agents and controlling persons shall have no liability with respect to any and all losses, claims, damages or liability of any nature or kind to any person in connection with or as a result of the Bidding Procedures, except to the extent of such losses, claims, damages or liabilities resulting from the gross negligence or willful misconduct of the Receiver in performing its obligations under the Bidding Procedures (as determined by this Court).

6. **THIS COURT ORDERS** that, in carrying out the Bidding Procedures, the Receiver shall have all of the benefits and protections granted to it under the *Bankruptcy and Insolvency Act*. R.S.C. 1985, c. B-3, as amended, the Order (Appointing Receiver) dated September 13, 2023 and any other Order of this Court in the within proceeding.

7. **THIS COURT ORDERS** that the Receiver is hereby authorized and empowered to enter into the Listing Agreement in the form attached as Appendix “H” to the Report which, among

other things, engages Jones Lang LaSalle Real Estate Services, Inc. to act as the listing agent to market and sell the Real Property in accordance with the Bidding Procedures.

STALKING HORSE APS

8. **THIS COURT ORDERS** that the Receiver is hereby authorized and empowered, *nunc pro tunc*, to enter into the Agreement of Purchase and Sale dated as of November 13, 2023 (the “**Stalking Horse APS**”) among the Receiver and 2557004 Ontario Inc. (the “**Stalking Horse Purchaser**”) in the form attached as Appendix “F” to the Report with such minor amendments as may be acceptable to each of the parties thereto; provided that nothing herein approves the sale and the vesting of the Purchased Assets to the Stalking Horse Purchaser pursuant to the Stalking Horse APS and that the approval of the sale and vesting of such assets shall be considered by this Court on a subsequent motion made to this Court following completion of the sale process pursuant to the terms of the Bidding Procedures if the Stalking Horse Bidder is the Successful Bidder.

EXPENSE REIMBURSEMENT AND BREAK FEE

9. **THIS COURT ORDERS** that the Expense Reimbursement and Break Fee are hereby approved and the Receiver is hereby authorized and directed to pay the Expense Reimbursement and Break Fee to the Stalking Horse Purchaser (or as it may direct) in the manner and circumstances described in the Bidding Procedures out of the proceeds from and upon completion of any Successful Bid with any party other than the Stalking Horse Purchaser.

GENERAL

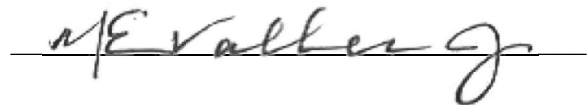
10. **THIS COURT ORDERS** that the Report and the activities of the Receiver referred to therein be and are hereby approved; provided, however, that only the Receiver, in its personal capacity and only with respect to its own liability, shall be entitled to rely upon or utilize in any way such approval.

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

12. **THIS COURT ORDERS** that the Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder or under the Bidding Procedures.

13. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Receiver and its 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 Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order, or to assist the Receiver and its agents in carrying out the terms of this Order.

14. **THIS COURT ORDERS** that the Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

A handwritten signature in cursive script, appearing to read "M. E. Valter", is written over a horizontal line.

Schedule “A”

BIDDING PROCEDURES

Introduction

On September 13, 2023, the Superior Court of Justice (the “**Court**”) made an order (the “**Receivership Order**”) appointing KSV Restructuring Inc. (“**KSV**”) as receiver and manager (KSV, in such capacity, the “**Receiver**”) of 1000093910 Ontario Inc. (the “**Debtor**”), and all of the assets, undertakings and properties of the Debtor, including the land known as 20 Regina Road, Vaughan, Ontario, together with all buildings, improvements and structures thereon and the fixtures affixed thereto, as well as all plans, designs and specifications in connection therewith (the “**Property**”).

The Receiver intends to bring a motion before the Court for an order (the “**Bidding Procedures Order**”), and such motion the (“**Bidding Procedures Approval Motion**”), among other things, approving: (i) the agreement of purchase and sale (the “**Stalking Horse Bid**”) made as of November 13, 2023, between the Receiver and 2557904 Ontario Inc. (the “**Stalking Horse Bidder**”) pursuant to which the Stalking Horse Bidder has agreed to purchase the Property; (ii) the payment of a Break Fee and Expense Reimbursement (each as defined below) by the Receiver to the Stalking Horse Bidder in accordance with the provisions of the Stalking Horse Bid; and (iii) the procedures as described in this document (the “**Bidding Procedures**”).

This document contains the Bidding Procedures to be followed by the Receiver in connection with the sale (the “**Sale**”) of the Property. The Receiver will conduct the Bidding Procedures in accordance with the Bidding Procedures Order. All amounts specified herein are in Canadian dollars.

Assets to Be Sold

The Receiver is offering for sale all the Debtor’s right, title and interest in and to the Property.

The Bidding Procedures

The Bidding Procedures Order approves the retention of Jones Lang LaSalle Real Estate Services, Inc. (the “**Broker**”) to act as real estate broker and listing agent for the Property, and the entry into a retention agreement with the Broker by the Receiver, among other things.

Interested parties may be provided by the Receiver with such access to due diligence materials and information relating to the Property as the Receiver deems appropriate in its reasonable business judgment. In the Receiver’s sole discretion, this may include the provision of access to an electronic data room of due diligence information. The Receiver shall require interested parties to execute a form of non-disclosure agreement in form and substance satisfactory to the Receiver prior to the provision of any such access.

The Receiver shall have the right to adopt such other rules for the Bidding Procedures (including rules that may depart from those set forth herein) that in its reasonable business judgment will better promote the goals of the Bidding Procedures and/or achieving a Sale. The Receiver may seek Court approval of an amendment to the Bid Procedures that it considers material. The extension of any deadline by up to two weeks shall not be considered material.

Bid Deadline

An interested party that desires to make a bid shall deliver written copies of its bid (including the Required Bid Terms and Materials) to the Broker, with a copy to the Receiver, by 5:00 p.m. (Toronto time) on the date that is one month after the Court approves the Bidding Procedures or the following business day (the “**Bid Deadline**”).

Bid Requirements

All bids (other than the Stalking Horse Bid) must include, unless such requirement is waived by the Receiver in its sole discretion, the following:

- (i) A base cash purchase price equal to or greater than \$24,555,000, which is the amount of the Stalking Horse Bid plus \$300,000, being a break fee of \$200,000 (the “**Break Fee**”), an expense reimbursement of up to \$50,000 (the “**Expense Reimbursement**”) and \$50,000;
- (ii) A provision stating that the bidder’s offer is irrevocably open for acceptance until the first business day after the Property has been sold pursuant to the closing of the Sale that is approved by the Court pursuant to the Sale Approval Order (as defined below);
- (iii) Disclosure of the identity of each entity (including its ultimate shareholders and/or sponsors) that will be bidding for the Property or otherwise participating in such bid and the complete terms of any such participation;
- (iv) Written evidence of a firm, irrevocable commitment for financing or other evidence of an ability to consummate the proposed transaction comprising such bid, that will allow the Receiver to make a determination as to the bidder’s financial and other capabilities to consummate the proposed transaction;
- (v) Written evidence, in form and substance reasonably satisfactory to the Receiver, of authorization and approval from the bidder’s board of directors (or comparable governing body) with respect to the submission, execution, delivery and closing of the transaction contemplated by the bid;
- (vi) An acknowledgment and representations of the bidder that: (A) it has had an opportunity to conduct any and all due diligence regarding the Property prior to making its bid; (B) it has relied solely upon its own independent review, investigation and/or inspection of the Property (including, without limitation, any documents in connection therewith) in making its bid; and (C) it did not rely upon any written or oral statements, representations, warranties, or guarantees whatsoever, whether express, implied, statutory or otherwise, regarding the Property or the completeness of any information provided in connection therewith, except as expressly stated in the definitive transaction agreement(s) executed by the Receiver and approved by the Court;

- (vii) An executed copy of a proposed purchase agreement and a redline of the bidder's proposed purchase agreement reflecting any variations from the Stalking Horse Bid; and
- (viii) A cash deposit in the amount of 10% of the purchase price in the form of a wire transfer, certified cheque or such other form acceptable to the Receiver (the "**Bid Deposit**"), which shall be held by the Receiver in an escrow account (the "**Escrow Account**"). Funds shall be disbursed from the Escrow Account only as follows: (i) if the Qualified Bidder is the Successful Bidder, its Bid Deposit will be applied without interest to the purchase price payable by it under its bid on the closing thereof or as otherwise provided for in the purchase agreement; and (ii) if the Qualified Bidder is not the Successful Bidder, then its Bid Deposit shall be returned without interest to it forthwith following the expiration of its offer;

provided, however, that a bid shall not be subject to further due diligence, financing, bid protections, expense reimbursement, third party approvals or any other conditions or conditions precedent except those that are customary in a transaction of this nature (collectively, the "**Required Bid Terms and Materials**").

A bid received from a bidder that includes all of the Required Bid Terms and Materials and is received by the Bid Deadline is a "**Qualified Bid**", and such bidder is a "**Qualified Bidder**". Notwithstanding the bid requirements detailed above, the Stalking Horse Bid shall be deemed a Qualified Bid and the Stalking Horse Bidder shall be deemed a Qualified Bidder.

The Receiver may waive strict compliance with the Bid Deadline or any one or more of the Required Bid Terms and Materials and deem such non-compliant bid to be a Qualified Bid, provided that doing so shall not constitute a waiver by the Receiver of the Bid Deadline or the Required Bid Terms and Materials or an obligation on the part of the Receiver to designate any other bid as a Qualified Bid. At any time during the Bidding Procedures, the Receiver may, in its reasonable business judgment, eliminate an interested party, a bidder or a Qualified Bidder (other than the Stalking Horse Bidder) from the Bidding Procedures, in which case such party will no longer be an interested party, bidder or a Qualified Bidder for the purposes of the Bidding Procedures.

Credit Bids

No person shall be permitted to credit bid the indebtedness owed to them by the corporation in connection with the making of a Qualified Bid or in the conduct of the Auction.

"As Is, Where Is, With All Faults"

The sale of the Property shall be on an "as is, where is" and "with all faults" basis and without representations, warranties, or guarantees, express, implied or statutory, written or oral, of any kind, nature, or description by the Receiver or its agents, counsel, representatives, partners or employees, or any of the other parties participating in the procedures outlined in these Bidding Procedures, except as may otherwise be provided in a definitive purchase agreement with the Receiver. Any party (including, without limitation, a Qualified Bidder) shall be deemed to

acknowledge and represent that it has had an opportunity to conduct any and all due diligence regarding the Property prior to making its bid, that it has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the Property in making its bid, and that it did not rely upon any written or oral statements, representations, warranties, or guarantees, express, implied, statutory or otherwise, regarding the Property, or the completeness of any information provided in connection therewith or the Auction, except as expressly stated in these Bidding Procedures or as set forth in a definitive purchase agreement with the Receiver.

Free of Any and All Liens

Except as otherwise provided in the Stalking Horse Bid or another Successful Bidder's purchase agreement, all of the Debtor's right, title and interest in and to the Property shall be sold free and clear of all liens and encumbrances pursuant to the Sale Approval Order except for Permitted Encumbrances (as defined in the Stalking Horse Bid).

Selection of Successful Bidder

If one or more Qualified Bids is received by the Bid Deadline or so designated by the Receiver, all such Qualified Bidders shall proceed to an auction with the Stalking Horse Bidder (an "**Auction**"), which shall proceed according to the Auction Procedures set out in Schedule "A" hereto (the "**Auction Procedures**") to identify the Successful Bidder. In such event, the Receiver shall determine, in its reasonable business judgment, which Qualified Bid is the highest and/or best bid (the "**Lead Bid**"). In determining the Lead Bid, the Receiver may consider, without limitation: (i) the amount and nature of the consideration; (ii) the proposed assumption of any liabilities and the related implied impact on recoveries for creditors; (iii) the Receiver's assessment of the certainty of the Qualified Bidder to close the proposed transaction; (iv) the likelihood, extent and impact of any potential delays in closing; and (v) the net economic effect of any changes from the Stalking Horse Bid; and (vi) such other considerations as the Receiver deems relevant in its reasonable business judgment.

If no Qualified Bid is submitted by the Bid Deadline or all Qualified Bids that have been submitted have been withdrawn prior to the Bid Deadline, then the Stalking Horse Bid shall be the Successful Bid, and the Stalking Horse Bidder shall be the Successful Bidder.

The "**Successful Bid**" will be either (i) the Stalking Horse Bid if no Qualified Bid is received by the Bid Deadline or so designated by the Receiver; (ii) in the event of an Auction, the highest and best bid as determined by the Receiver at the Auction; or (iii) a bid that is so designated by the Receiver in the event that the closing of the Sale that is approved by the Court pursuant to the Sale Approval Order (as defined below) does not occur by the required date pursuant to the Successful Bid (or such date that may otherwise be mutually agreed upon between the Receiver and the Successful Bidder). The party that submitted the Successful Bid is referred to herein as the "**Successful Bidder**".

Break Fee and Expense Reimbursement

To provide an incentive and to compensate the Stalking Horse Bidder for performing the substantial due diligence and incurring the expenses necessary in entering into the Stalking Horse

Bid with the knowledge and risk that arises from participating in the sale and subsequent bidding process, the Receiver has agreed to pay the Stalking Horse Bidder, under the conditions outlined herein and in the Stalking Horse Bid, the Break Fee in the amount of \$200,000 and an Expense Reimbursement on account of its reasonable and documented fees and expenses up to a maximum of \$50,000. The Receiver will take into account the Break Fee and Expense Reimbursement in each round of bidding with respect to the Stalking Horse Bidder. The Break Fee and Expense Reimbursement were material inducements for, and a condition of, the Stalking Horse Bidder's entry into the Stalking Horse Bid. The Break Fee and Expense Reimbursement, if payable in accordance with the Stalking Horse Bid, shall be paid in accordance with the Stalking Horse Bid and the Bidding Procedures Order.

Sale Approval Motion

Subject to the availability of the Court, within ten (10) business days following the conclusion of the Auction, the Receiver shall bring a motion (the “**Sale Approval Motion**”) for an order of the Court authorizing and approving the Sale of the Property to the Successful Bidder (such order, as approved, the “**Sale Approval Order**”). At the hearing of the Sale Approval Motion, the Receiver shall, among other things, seek approval from the Court to consummate the Successful Bid. Notwithstanding the foregoing, as part of the Bidding Procedures Order, the Receiver may seek approval to proceed with the Stalking Horse Bid without the need for the Sale Approval Motion in the event the Stalking Horse Bid is the Successful Bid.

Acceptance of Qualified Bids

The sale of the Property to any Successful Bidder by the Receiver is expressly conditional upon the approval of the Successful Bid by the Court. The Receiver's presentation of the Successful Bid to the Court for approval does not obligate the Receiver to close the transaction contemplated by such Successful Bid unless and until the Court approves the Successful Bid. All of the Qualified Bids other than the Successful Bid, shall be deemed rejected by the Receiver on and as of the date of the closing of the Sale that is approved by the Court.

In the event that the closing of the Sale that is approved by the Court does not occur by the required date pursuant to the Successful Bid (or such date that may otherwise be mutually agreed upon between the Receiver and the Successful Bidder), the Receiver shall be authorized, but not required, to: (a) exercise such rights and remedies as are available to the Receiver under the Successful Bid including, if applicable, deeming that the Successful Bidder has breached its obligations pursuant to the Successful Bid and that the Successful Bidder has forfeited its Deposit to the Receiver; (b) accept any Qualified Bid or other bid of a Qualified Bidder, including, without limitation, a bid made at the Auction, in which case such bid and bidder shall be a Successful Bid and Successful Bidder, respectively, for the purposes of these Bidding Procedures, and close the transaction under such bid; and/or (c) take such other steps as it deems advisable. The Receiver reserves its right to seek all available damages and remedies, including specific performance, from any defaulting Successful Bidder.

Miscellaneous

The Receiver will oversee, in all respects, the conduct of the Bidding Procedures and, without limitation, the Receiver will participate in the Bidding Procedures in the manner set out in these Bidding Procedures and the Bidding Procedures Order. All discussions or inquiries regarding the Bidding Procedures should be directed to the Receiver.

The Sale Process and these Bidding Procedures are solely for the benefit of the Receiver and nothing contained in the Bidding Procedures Order or these Bidding Procedures shall create any rights in any other person (including, without limitation, any bidder or Qualified Bidder, and any rights as third party beneficiaries or otherwise) other than the rights expressly granted to a Successful Bidder under the Bidding Procedures Order. Other than as specifically set forth in the Broker's retention agreement, the Stalking Horse Bid or in a definitive agreement between the Receiver and another Successful Bidder, the Bidding Procedures do not, and will not be interpreted to create any contractual or other legal relationship among the Receiver, the Broker, any interested party, any bidder, and Qualified Bidder, the Successful Bidder, or any other party.

The Receiver may consult with any other parties with a material interest in the receivership proceedings regarding the status and material information and developments relating to the Bidding Procedures to the extent considered appropriate by the Receiver; provided that such parties may be required to enter into confidentiality arrangements satisfactory to the Receiver.

Subject to the terms of the Receivership Order, participants in the Bidding Procedures are responsible for all costs, expenses and liabilities incurred by them in connection with the submission of any bids, participation in the Auction, due diligence activities, and any further negotiations or other actions whether or not they lead to the consummation of a transaction.

Except as provided in the Bidding Procedures Order and Bidding Procedures, the Court shall retain jurisdiction to hear and determine all matters arising from or relating to the implementation of the Bidding Procedures Order and the Bidding Procedures.

Schedule “A”

Auction Procedures

1. If the Receiver determines to conduct an Auction pursuant to the Bidding Procedures, the Receiver will notify the Qualified Bidders who made a Qualified Bid that the Auction will be held either virtually or at the offices of Bennett Jones LLP at 10:00 a.m. (Toronto time) on date that is determined by the Receiver, provided that that is not later than five business days after the Bid Deadline, or such other place and time as the Receiver may advise. Capitalized terms used but not defined have the meaning given to them in the Bidding Procedures.
2. The Auction shall be conducted in accordance with the following procedures:
 - (a) Participation At The Auction. Only a Qualified Bidder is eligible to participate in the Auction. The Receiver shall provide all Qualified Bidders with the amount of the Leading Bid, a copy thereof and a blackline to the Stalking Horse Bid by 5:00pm (Toronto Time) two business days before the scheduled date of the Auction. Each Qualified Bidder must inform the Receiver whether it intends to participate in the Auction no later than 12:00 p.m. (Toronto time) on the business day prior to the Auction. Only the authorized representatives of each of the Qualified Bidders, the Receiver, the Receiver, Peakhill Capital Inc., Zaherali Visram and their respective counsel and other advisors shall be permitted to attend the Auction.
 - (b) Bidding at the Auction. Bidding at the Auction shall be conducted in rounds. The Leading Bid shall constitute the “Opening Bid” for the first round and the highest Overbid (as defined below) at the end of each round shall constitute the “Opening Bid” for the following round. In each round, a Qualified Bidder may submit no more than one Overbid. Any Qualified Bidder who bids in a round (including the Qualified Bidder that submitted the Opening Bid for such round) shall be entitled to participate in the next round of bidding at the Auction.
 - (c) Receiver Shall Conduct The Auction. The Receiver and its advisors shall direct and preside over the Auction. At the start of each round of the Auction, the Receiver shall provide the terms of the Opening Bid to all participating Qualified Bidders at the Auction. The determination of which Qualified Bid constitutes the Opening Bid for each round shall take into account any and all factors that the Receiver reasonably deems relevant to the value of the Qualified Bid, including, among other things, the following: (i) the amount and nature of the consideration; (ii) the proposed assumption of any liabilities and the related implied impact on recoveries for creditors; (iii) the Receiver’s assessment of the certainty of the Qualified Bidder to close the proposed transaction; (iv) the likelihood, extent and impact of any potential delays in closing; (v) the net economic effect of any changes from the Opening Bid of the previous round; and (vi) such other considerations as the Receiver deems relevant in its reasonable business judgment (collectively, the “**Bid Assessment Criteria**”). All Bids made after the Opening Bid shall be Overbids, and shall be made and received on an open basis, and all material terms of the

highest and best Overbid shall be fully disclosed to all other Qualified Bidders that are participating in the Auction. The Receiver shall maintain a record of the Opening Bid and all Overbids made and announced at the Auction.

- (d) Terms of Overbids. An “**Overbid**” is any Bid made at the Auction subsequent to the Receiver’s announcement of the Opening Bid. To submit an Overbid, in any round of the Auction, a Qualified Bidder must comply with the following conditions:
- (i) *Minimum Overbid Increment:* Any Overbid shall be made in such increments as the Receiver may determine in order to facilitate the Auction (the “**Minimum Overbid Increment**”). The amount of any Overbid shall not be less than the amount of the Opening Bid, plus the Minimum Overbid Increment(s) at that time, plus any additional Minimum Overbid Increments.
 - (ii) *The Bid Requirements same as for Qualified Bids:* Except as modified herein, an Overbid must comply with the Bid Requirements, provided, however, that the Bid Deadline shall not apply.
 - (iii) *Announcing Overbids:* At the end of each round of bidding, the Receiver shall announce the identity of the Qualified Bidder and the material terms of the then highest and/or best Overbid and the basis for calculating the total consideration offered in such Overbid based on, among other things, the Bid Assessment Criteria.
 - (iv) *Consideration of Overbids:* The Receiver reserves the right to make one or more adjournments in the Auction to, among other things: (A) allow individual Qualified Bidders to consider how they wish to proceed; (B) consider and determine the current highest and/or best Overbid at any given time during the Auction; and (C) give Qualified Bidders the opportunity to provide the Receiver with such additional evidence as it may require that the Qualified Bidder has obtained all required internal corporate approvals, has sufficient internal resources, or has received sufficient non-contingent debt and/or equity funding commitments, to consummate the proposed transaction at the prevailing Overbid amount. The Receiver may have clarifying discussions with a Qualified Bidder, and the Receiver may allow a Qualified Bidder to make technical clarifying changes to its Overbid following such discussions.
 - (v) *Failure to Bid:* If at the end of any round of bidding a Qualified Bidder (other than the Qualified Bidder that submitted the then highest and/or best Overbid or Opening Bid, as applicable) fails to submit an Overbid, then such Qualified Bidder shall not be entitled to continue to participate in the Auction.

- (e) Additional Procedures. The Receiver may adopt rules for the Auction at or prior to the Auction that will better promote the goals of the Auction, including rules pertaining to the structure of the Auction, the order of bidding provided they are not inconsistent with any of the provisions of the Bidding Procedures (including these Auction Procedures) and provided further that no such rules may change the requirement that all material terms of the then highest and/or best Overbid at the end of each round of bidding will be fully disclosed to all other Qualified Bidders.
- (f) Closing the Auction. The Auction shall be closed after the Receiver has: (i) reviewed the final Overbid of each Qualified Bidder on the basis of financial and contractual terms and the factors relevant to the sale process, including those factors affecting the speed and certainty of consummating the proposed sale; and (ii) identified the Successful Bid and advised the Qualified Bidders participating in the Auction of such determination.
- (g) Finalizing Documentation. Promptly following a bid of a Qualified Bidder being declared the Successful Bid, the Qualified Bidder shall execute and deliver such revised and updated definitive transaction agreements as may be required to reflect and evidence the Successful Bid.

PEAKHILL CAPITAL INC.

-and-

1000093910 ONTARIO INC.

Applicant

Respondent

Court File No.: CV-23-00004031-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceedings commenced at Newmarket

**BIDDING PROCEDURES AND STALKING
HORSE APS APPROVAL ORDER**

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its personal capacity

PEAKHILL CAPITAL INC.
Applicant (Respondent on Appeal)

- and -

1000093910 ONTARIO INC.
Defendant (Appellant)

COURT OF APPEAL FOR ONTARIO

Proceedings commenced in Toronto

Affidavit of Aiden Nelms

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- and -

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Defendant (Appellant)

COURT OF APPEAL FOR ONTARIO

Proceedings commenced in Toronto

**MOTION RECORD OF THE RESPONDING PARTY,
THE RECEIVER
((Motion for Leave to Appeal and a Stay of the Order
of Vallee J.))**

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Court File No.: CV-23-00004031-0000

PEAKHILL CAPITAL INC. - and - **1000093910 ONTARIO INC.**
Applicant (Respondent on Appeal) Respondent (Appellant)

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

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