

COURT OF APPEAL FOR ONTARIO

B E T W E E N

PEAKHILL CAPITAL INC.

Applicant
(Respondent)

and

1000093910 ONTARIO INC.

Respondent
(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**

**FACTUM OF THE APPLICANT (RESPONDENT),
PEAKHILL CAPITAL INC.**

Date: July 18, 2024

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PART I – OVERVIEW

1. The appellant, 2557904 Ontario Inc. (“**255**” or “**Appellant**”) appeals from the Decision of the Honourable Justice Sutherland (“**Motion Judge**”) dated July 4, 2024, the Decision and Order of Justice Sutherland dated July 9, 2024, and the Decision of Justice Sutherland dated July 15, 2024 (collectively, the “**Sutherland Orders**”).¹ The Motion Judge heard the following two motions:

- (a) the receiver’s, KSV Restructuring Inc. (“**KSV**”), motion for, *inter alia*, an approval and vesting order for the sale of 1000093910 Ontario Inc.’s (the “**Debtor**”) assets, namely real property, carried out in accordance with sale process approval order of Justice Vallee dated December 2023 (“**Sale Approval Motion**”); and
- (b) the Debtor’s motion² to, *inter alia*, permit it to redeem Peakhill Capital Inc.’s (“**Peakhill**”) mortgage (the “**Peakhill Mortgage**”).

2. The Motion Judge denied KSV’s motion and granted the Debtor an order allowing, among other things, the Debtor to redeem the Peakhill Mortgage.³

3. The respondent, Peakhill, takes no position on the issues set out in paragraph 7 of the Endorsement of the Honourable Brown J.A. dated July 11, 2024 (the “**Brown Endorsement**”).⁴ However, if this appeal is granted, Peakhill respectfully requests that this Honourable Court issue, *inter alia*, an approval and vesting order as KSV previously sought at the Sale Approval Motion pursuant to section 134(1) (a) of the *Courts of Justice Act* (the “**CJA**”)⁵ to allow for the sale transaction and subsequent repayment of the Peakhill Mortgage to occur without further delay.

¹ Peakhill’s Compendium, Tabs 1-6; see also Amended Appeal Book and Compendium of the Appellant (Intervener), 2557905 Ontario Inc. (“**ABC**”), Tabs 2-5.1.

² In addition to the Debtor, the other moving parties in the Debtor’s cross-motion included, Ravi Aurora, Akash Aurora and Nick Aurora (collectively, the “**Guarantors**”) and Countertop Solutions Inc. and Grafo International Laminating Inc. (together with the Guarantors and Debtor, the “**Moving Parties**”).

³ Peakhill’s Compendium, Tab 1 (Sutherland J. Decision dated July 15, 2024); see ABC, Tab 5.1.

⁴ Peakhill’s Compendium, Tab 2 (Brown Endorsement); see also ABC, Tab 28.

⁵ *Courts of Justice Act*, R.S.O. 1990, c. C.43, [section 134\(1\)\(a\)](#).

PART II – SUMMARY OF RELEVANT FACTS

4. The relevant facts are summarized in paragraphs 8-38 of the Brown Endorsement.

5. Peakhill is the Debtor’s senior secured creditor with the Peakhill Mortgage being a first mortgage on the real property located at 20 Regina Road, Vaughan, Ontario (the “**Property**”).⁶

PART III – PEAKHILL’S POSITION

6. Peakhill takes no position on the issues under appeal. Peakhill’s only concern is to be promptly repaid in full, including its fees and expenses. Peakhill is owed over \$22.4 million plus interest, costs and expenses which continue to accrue.⁷ Peakhill took no position before the Motion Judge in respect of whether the Sale Approval Motion or the Debtor’s motion to redeem the Peakhill Mortgage ought to have been granted as it was economically neutral to either outcome.⁸

PART IV – ADDITIONAL ISSUES AND LAW

Powers of the Court of Appeal

7. In addition to the issues set out in the Brown Endorsement, the following issue is relevant only if this Honourable Court grants 255’s appeal – should this Honourable Court exercise its authority under section 134(1) (a) of the *CJA* to make an order granting KSV the relief sought at the Sale Approval Motion and set out in subparagraphs (a) to (e), and (g) of the Amended Amended Notice of Appeal.⁹

⁶ Peakhill’s Compendium, Tab 10, Second Report of KSV Restructuring Inc. as Receiver of 1000093910 Ontario Inc. dated May 31, 2024 (“**KSV’s Second Report**”), section 3.1 at para 1.

⁷ Peakhill’s Compendium, Tab 11, Supplement to the Second Report of KSV Restructuring Inc. as Receiver of 1000093910 Ontario Inc. dated July 14, 2024 (“**KSV’s Supplement Report**”), section 3.0; see Peakhill’s Compendium, Tab 10, KSV’s Second Report, section 3.1 at para 1.

⁸ See Peakhill’s Compendium, Tab 11, KSV’s Supplement Report, section 3.0.

⁹ Peakhill’s Compendium, Tab 7 (KSV’s Notice of Motion), Tab 8 (KSV’s draft Approval and Vesting Order), Tab 9 (KSV’s draft Distribution and Discharge Order); see ABC, Tabs 10-12.

8. Section 134(1) (a) of the *CJA* gives this Honourable Court unconditional authority to make any order or decision that ought to or could have been made by the Motion Judge's order appealed from. The guiding force, as it invariably is and must be, is the interests of justice.¹⁰

9. Peakhill remains neutral on this appeal and takes no position as to whether this Court:

- (a) affirms the Sutherland Orders and allows the Debtor to, among other things, redeem the Peakhill Mortgage; or
- (b) grants this appeal and approves the sale transaction to 255 (as contemplated in the Sale Approval Motion and sought by 255 on this appeal).

10. Peakhill requires finality and prompt repayment of its indebtedness. The Brown Endorsement¹¹ succinctly recites the history of these proceedings, including the significant delays caused by the Debtor. Accordingly, if 255's appeal is granted, the evidence filed on this appeal is sufficient for this Honourable Court to make an order as set out in the Amended Amended Notice of Appeal at subparagraphs (a) to (e), and (g) without further delay.

11. Peakhill submits that it is in the interests of justice for this Honourable Court to make an Order to bring finality to the receivership proceedings as any further delay will lead to increased cost to the detriment of the stakeholders in the receivership. Specifically, Peakhill will suffer substantial prejudice if it is not repaid by either redemption of the Peakhill Mortgage or the proceeds from the sale to 255. Any further delay significantly increases the likelihood of Peakhill incurring a shortfall after the completion of either transaction. This prejudice is real and immediate.

¹⁰ *Courts of Justice Act, R.S.O. 1990, c. C.43*, s. 134; *D'Costa v. Mortakis*, [2000 CanLII 5676](#) (Ont. C.A.) at para 46; *Dasham Carriers Inc. v. Gerlach*, [2013 ONCA 707](#) at para 36.

¹¹ Peakhill's Compendium, Tab 2 at paras 8-38 (Brown Endorsement); see also ABC, Tab 28.

PART V – ORDER SOUGHT

12. For the foregoing reasons and only in the event that this Honourable Court grants 255's appeal, Peakhill supports the approval of any transaction that seeks the immediate repayment of the Peakhill Mortgage, including any costs, expenses and fees.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Date: July 18, 2024



Dominique Michaud



Joey Jamil

COURT OF APPEAL FOR ONTARIO

B E T W E E N

PEAKHILL CAPITAL INC.Applicant
(Respondent)

and

1000093910 ONTARIO INC.Respondent
(Respondent)

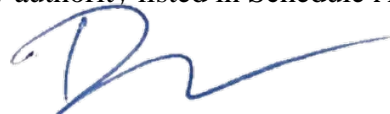
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 SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED**

CERTIFICATE

I, Dominique Michaud, counsel for the Applicant (Respondent), Peakhill Capital Inc.
 (“**Peakhill**”), certify:

- 1) An order under subrule 61.09(2) is not required; and
- 2) Counsel for the Applicant (Respondent), Peakhill, estimates that 5 minutes will be required for their oral argument.
- 3) This factum complies with subrule 61.12(5.1) and the Endorsement of Brown J.A. dated July 11, 2024;
- 4) Parts I to V of this factum contains 769 words;
- 5) I am satisfied as to the authenticity of every authority listed in Schedule A hereto.

Date: July 18, 2024


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Lawyers for the Applicant (Respondent),
 Peakhill Capital Inc.

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SCHEDULE “A” - CASES

1. *D'Costa v. Mortakis*, [2000 CanLII 5676](#) (Ont. C.A.)
2. *Dasham Carriers Inc. v. Gerlach*, [2013 ONCA 707](#)

SCHEDULE “B” - STATUTES & REGULATIONS

[*Courts of Justice Act, R.S.O. 1990, c. C.43*](#), s. 134

Powers on appeal

134 (1) Unless otherwise provided, a court to which an appeal is taken may,

- (a) make any order or decision that ought to or could have been made by the court or tribunal appealed from;
- (b) order a new trial;
- (c) make any other order or decision that is considered just.

PEAKHILL CAPITAL INC. - and - 1000093910 ONTARIO INC.

Applicant (Respondent)

Respondent (Respondent)

Court of Appeal File No.: COA-24-CV-0671

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

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT NEWMARKET

**FACTUM OF THE APPLICANT (RESPONDENT),
PEAKHILL CAPITAL INC.**

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