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**

# FACTUM OF THE RESPONDING PARTY, THE RECEIVER

**(Motion for Leave to Appeal and a Stay of the Order of Vallee J.)**

January 15, 2024

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TO: **THE SERVICE LIST**

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## PART I: OVERVIEW

1. The Receiver files this factum in response to the Debtor's motion: (a) for directions as to whether leave to appeal under section 193 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (the "**BIA**") is required, or there is an appeal as of right, and (b) as to whether leave, if required, should be granted, in respect of a December 20, 2023 order (the "**Order**") of Justice Valee (the "**Motion Judge**"). The challenged Order approved a property sales process, including a stalking horse bid, in a BIA receivership proceeding, and declined to address a motion served by the Debtor the afternoon before the hearing seeking to amend the original receivership order. The Receiver asserts that leave to appeal under the BIA *is* required, and that leave should not be granted.

2. By way of background, on September 13, 2023 the Ontario Superior Court granted a consent order (the "**Receivership Order**") pursuant to subsection 243(1) of the BIA and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, appointing KSV Restructuring Inc. as receiver and manager (in such capacity, the "**Receiver**") over 1000093910 Ontario Inc. (the "**Debtor**") and all of its Property (as defined in the Receivership Order), including the real property known as 20 Regina Road, Vaughan, Ontario (the "**Real Property**").

3. On December 20, 2023, the Motion Judge granted the Order which, among other things, approved: (i) a sale process (the "**Sale Process**") and bidding procedures (the "**Bidding Procedures**"); and (ii) the agreement of purchase and sale dated November 13, 2023 (the "**Stalking Horse APS**"), among the Receiver, as vendor, and 2557004 Ontario Inc. ("**255 Ontario**"), as purchaser, solely for the purpose of acting as the stalking horse bid in the Sale Process. The Order was accompanied by an endorsement dated December 20, 2023 (the "**Endorsement**").

4. Contrary to very well-settled authority of this Court,[1] the Debtor improperly sought to commence an appeal of the Order as of right. On January 3, 2024, following receipt of a letter from counsel to the Receiver advising that leave to appeal is required, the Debtor brought the within motion seeking the following relief:

(a) the advice and directions of this Court as to whether leave to appeal the Order is required under section 193 the BIA; and

(b) assuming leave is required, an order granting leave to appeal; and

5. The Receiver submits that the relief sought should be denied as:

(a) leave to appeal is necessary in light of the well-settled authority of this Court interpreting subsection 193(c) of the BIA; and

(b) the standard for leave to appeal under subsection 193(e) is not met.

## PART II: SUMMARY OF FACTS

### A. Background

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

7. The Real Property is an industrial property where certain non-arm's length tenants operate a variety of businesses. None of the tenants have paid rent since the commencement of the receivership proceedings, despite several requests and demands by the Receiver.[3]

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[1] Recently affirmed in *Hillmount Capital Inc. v. Pizale,* 2021 ONCA 364 (CanLII) [*Hillmount*].
[2] Motion Record of the Receiver dated December 13, 2023 [Receiver's MR] at page 60, section 2.0, para 1, Motion Record of the Moving Party dated January 3, 2024 [MPMR] at Tab 4.
[3] Receiver's MR at pages 60 and 61, section 2.0, paras 3-5, MPMR at Tab 4.

8. Peakhill Capital Inc. ("**Peakhill**"), who advanced a secured loan to the Debtor in the principal amount of $19 million (the "**Peakhill Loan**"), 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]

## B. The Receivership Order

9. 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 amounts 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.

10. The Receivership Order was obtained *on consent* of the Debtor and became effective on October 2, 2023 when the Debtor breached the terms of the Consent Order for Appointment of Receiver, which was appended to the Endorsement of Justice S. Lavine dated September 13, 2023.[5]

[4] Receiver's MR at page 61, section 3.0, paras 1 and 2, MPMR at Tab 4.
[5] Receiver's MR at pages 58 and 59, section 1.0, paras 1-3, MPMR at Tab 4.

## A. The Original APS and the Stalking Horse APS

11. Six days prior to the Receivership Order being granted, 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 for $31 million. [6]

12. As a result of the intervening receivership proceedings (of which the Debtor was already on notice at the time of entering into the Original APS), the Original APS could not be closed on its terms primarily because 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 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 Ontario; 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.[7]

13. The Receiver then entered into discussions with 255 Ontario to determine whether it was still interested in acquiring the Real Property. 255 Ontario advised the Receiver that it was prepared to purchase the Real Property at a reduced purchased price. However, the Receiver was not prepared to, nor could it in good faith, 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.[8]

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[6] Receiver's MR at page 62, section 5.0, para 1, MPMR at Tab 4.
[7] Receiver's MR at page 63, section 5.0, para 3, MPMR at Tab 4.
[8] Receiver's MR at page 63, section 6.1, para 1, MPMR at Tab 4.

14. Following consultation with Peakhill and negotiations with 255 Ontario, the Receiver entered into the Stalking Horse APS with 255 Ontario at a price of $24.255 million, which agreement is to act as the stalking horse bid in the Sale Process.[9] The Receiver and its legal counsel, however, continued to engage extensively with counsel to the Debtor regarding the Original APS.[10] The Receiver's legal counsel, on multiple occasions, advised counsel to the Debtor that the Receiver had no ability to close the transaction the Debtor had entered into, absent the consent of 255 Ontario.[11]

15. On November 20, 2023, counsel to the Receiver advised the Debtor's counsel again that the Receiver could not enforce the Original APS, and again suggested that the Debtor bring a motion to vary the Receivership Order to allow the Debtor to close the transaction itself if it thought appropriate. The Receiver further advised that it would consider its position once it had the benefit of the Debtor's motion materials, or at least its fulsome proposal.[12]

16. On December 6, 2023, counsel to the Debtor advised the Receiver that it intended to bring a motion on the December 20, 2023 date reserved by the Receiver to either: (i) seek the discharge of the Receiver; or (ii) vary the Receivership Order to allow the Debtor to complete the transaction contemplated by the Original APS.[13] At all times the Debtor was aware of the Receiver's intention to seek the relief provided for in the Order.[14]

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[9] Receiver's MR at page 63, section 6.1, paras 1 and 2, MPMR at Tab 4.
[10] Receiver's MR at page 67, section 6.3, para 4, MPMR at Tab 4.
[11] Respondent's Cross-Motion Record dated December 19, 2023 [Respondent's CMR] at page 328, MPMR at Tab 5.
[12] Respondent's CMR at page 327 and 328, MPMR at Tab 5.
[13] Affidavit of Aiden Nelms sworn January 15, 2023 [Affidavit] at page 13, Responding Motion Record of the Receiver dated January 15, 2023 [RPMR] at Tab 1.
[14] Affidavit at page 10, RPMR at Tab 1.

17. The Receiver, in its First Report dated December 13, 2023 (the "**First Report**"), noted as follows:

> "Counsel to the Company has advised that prior to the return of this motion, the Company intends to either: (a) repay Peakhill and bring a motion to terminate the receivership proceedings; or (b) bring a motion to amend the receivership order to allow the Company to close the Original APS. In connection with the foregoing, the Receiver has been advised by counsel to the Company that the Company is negotiating a commitment letter to repay Peakhill. As of the date of this Report, the Receiver has not seen a copy (including any drafts) of any such commitment letter, despite multiple requests therefor.
>
> **As the Receiver has not seen any commitment letter and the Company has not filed its materials as of the date of this Report, the Receiver intends to file a supplemental report with its views on any motion brought by the Company. The supplemental report may or may not include revised recommendations for the Court**."[15] [Emphasis added]

18. At no point in time did the Receiver try to dissuade the Debtor from bringing forward an alternative solution to the Stalking Horse APS and the Sale Process – in fact, the Receiver recommended a specific alternative to the Debtor on multiple occasions.[16]

19. Following months of discussions on the subject, and despite its confirmation in writing on December 6, 2023 that motion materials were forthcoming, the Debtor did not serve its Cross-Motion until December 19, 2023 at 3:56 p.m. (ET) – less than 24 hours before the return of the Receiver's motion.[17] The Cross-Motion was not properly scheduled and was not served on requisite notice (or any reasonable notice), nor was it accompanied by any law to support the relief sought.

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[15] Receiver's MR, *supra* note 2 at page 67, section 6.3, paras 4 and 5, MPMR at Tab 4.
[16] Respondent's CMR, *supra* note 11 at page 328, MPMR at Tab 5.
[17] Endorsement of the Honourable Madam Justice Vallee dated December 20, 2023 [Endorsement] at page 36, MPMR at Tab 3.

## B. The December 20, 2023 Order and Endorsement

20. On December 20, 2023, the Motion Judge granted the Order and refused to consider the Debtor's Cross-Motion for the following reasons:

> "The receiver brings a motion for various relief relating to an agreement of purchase and sale dated November 13, 2023. As of late yesterday, the motion was unopposed. At 3:56 p.m. the respondent served a cross-motion. For several reasons, I will not consider the cross-motion.
>
> Motions require 7 days' notice to give other parties an opportunity to respond and to give the court an opportunity to read the materials. The cross motion was served at 3:56 p.m. yesterday, which is essentially no notice.
>
> A cross motion cannot be piggybacked on to a motions list. It has the effect of adding a motion to what might be an already full list.
>
> The facts on which the cross-motion is based have been known for some time. A motion could have been brought earlier.
>
> The cross-motion has little chance of success. It concerns a different real estate transaction entered into six days before the receivership order. The closing date is tomorrow. The receiver states that it could not close this transaction because of certain terms that it contains. Another agreement of purchase and sale entered into by the receiver and 2557004 Ontario Inc. dated November 13, 2023, referred to as the stalking horse agreement is now in play. The receiver's motion concerns this transaction. The purchaser states that it would refuse to close the earlier transaction, which it considers to be null and void.
>
> The relief sought by the receiver is granted."[18]

21. On December 21, 2023, the Original APS did not close in accordance with its terms, despite the Debtor purporting to tender on the purchaser (which it did not have the authority to do given the Receivership Order).

[18] Endorsement at page 36 and 37, MPMR at Tab 3.

### C. The Debtor Purports to Commence an Appeal

22. On December 29, 2023, the Debtor served and filed a Notice of Appeal purporting to rely on subsection 193(c) and section 195 of the BIA and Rule 31 of the *Bankruptcy and Insolvency General Rules* (C.R.C., c. 368).[19]

23. On January 2, 2024, the Receiver wrote to the Debtor's counsel advising, among other things, that leave to appeal was required pursuant to subsection 193(e) of the BIA.[20]

24. Subsequently, on January 3, 2024, the Debtor brought the within motion.[21]

## PART III: ISSUES

25. The issues to be determined on this motion are:

(a) whether the Debtor is required to obtain leave to appeal under section 193 of the BIA; and

(b) if leave to appeal is required, whether leave should be granted under subsection 193(e) of the BIA.

[19] Notice of Appeal of 1000093910 Ontario Inc. dated December 28, 2023 [Notice of Appeal] pages 15 – 17, MPMR at Tab 1.
[20] Affidavit, *supra* note 13 at page 24 - 42, RPMR at Tab 1.

## PART IV: LAW AND ARGUMENT

### A. The Debtor's Appeal is Properly Governed by the *Bankruptcy and Insolvency Act*

26. Where, as here, a receiver is appointed pursuant to both subsection 243(1) of the BIA and section 101 of the CJA, this Court has held that the "more restrictive appeal provisions in the *BIA* govern the rights of appeal and appeal routes".[22]

### B. The Debtor's Appeal Requires Leave of this Court

27. Subsections 193(a)-(d) of the BIA enumerate the circumstances in which an appeal from an order under the BIA lies to the Court of Appeal as of right:

> **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.

28. This Court has repeatedly held that each of paragraphs 193 (a)-(d) are to be construed narrowly given the broad nature of the stay imposed by section 195 of the BIA.[23] Where

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[22] *Buduchnist Credit Union Limited v 2321197 Ontario Inc.*, 2019 ONCA 588 (CanLII) at para 10.
[23] *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225 (CanLII) (Chambers) at paras 47-53 [*Bending Lake*]; *Enroute Imports Inc., Re*, 2016 ONCA 247 (CanLII) at para 5.

subsections 193(a)-(d) of the BIA are inapplicable, subsection 193(e) dictates that leave to appeal is required.

29. The Debtor takes the position that its appeal falls within subsection 193(c) of the BIA on the basis that the property involved in the appeal exceeds ten thousand dollars in value. The Debtor's position is contrary to the very well established case law that there are three types of orders that do not fall within 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; and (iii) an order that is procedural in nature. In such situations, leave to appeal is required.[24]

30. In *Re Harmon International Industries Inc.* ("***Harmon***"), which was decided on essentially identical facts as the present case for the purpose of the question in issue on this motion, the Saskatchewan Court of Appeal found, among other things, that an order approving a sale process is procedural in nature and therefore not within the ambit of subsection 193(c). The Court of Appeal found that all the order in question did was "[…] establish a process for the sale of the property" with any future transaction still requiring Court approval and confirmation. As a result, the Court found that any claim of loss was without any foundation and that the order did not "[…] directly have an impact on the proprietary or monetary interests of Harmon or crystallize any loss". Leave to appeal was required under subsection 193(e) of the BIA.[25] *Harmon* was cited with approval by a panel of this Court in *Hillmount Capital* (2021).[26]

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[24] *Hillmount, supra* note 1 at para 25 citing *Bending Lake* at para 53.
[25] *Re Harmon International Industries Inc.*, 2020 SKCA 95 (CanLII) at paras 34 and 35 [*Re Harmon*].
[26] *Hillmount, supra* note 1 at para 40.

31. The Order in the present case: (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 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 (as defined in the Order) and that any sale and vesting of such assets is to be considered by the Court on a subsequent motion.[27] Similar to the order in *Harmon*, the Order does not and cannot *directly* have an impact on the proprietary 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 does not involve property exceeding $10,000 in value.

32. While acknowledging that the Order "appears to involve procedure", the Debtor submits that "the true substance and effect of the Order affected substantive rights" as it did not terminate the Original APS which had the effect of "leaving this transaction on the table". The Debtor's position is incorrect. Nothing in the Order had any substantive effect on the Original APS. Furthermore, in light of the Receivership Order, the Debtor did not have the ability to close or even tender under the Original APS.[28] For the reasons set forth in paragraph 31 of this factum, the Order was purely procedural as it merely established a process for the sale of the Purchased Assets. Any argument otherwise is without merit or evidence.

33. The Debtor is therefore required to seek leave to appeal in accordance with subsection 193(e) of the BIA and meet the stringent test thereunder. As set out below, it has not met the test.

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[27] Order of the Honourable Madam Justice Vallee dated December 20, 2023 [Order] at pages 20 – 34, MPMR at Tab 2.
[28] Receiver's MR, *supra* note 2 at pages 73-89, MPMR at Tab 4.

## C. Leave to Appeal Pursuant to Subsection 193(e) of the BIA Should Not be Granted

34. Under the well-established test, in addressing a motion for leave to appeal under subsection 193(e) of the BIA, this Court must consider the following: (i) does the proposed appeal raise an issue that is of general importance to the practice or the administration of justice as a whole; (ii) is the proposed appeal *prima facie* meritorious; and (iii) would the appeal unduly hinder the progress of the proceedings.[29]

35. This Court recently noted that "[t]he inquiry into whether leave to appeal should be granted must, however, begin with some consideration of the merits of the proposed appeal" because "[i]f the appeal cannot possibly succeed, there is no point in granting leave to appeal regardless of how many other factors might support the granting of leave to appeal".[30]

### (i) Is the proposed appeal *prima facie* meritorious?

36. The Receiver submits that the proposed grounds of appeal raised by the Debtor are not tenable and therefore the proposed appeal lacks *prima facie* merit.

37. The Debtor argues that: (i) the Motion Judge erred in failing to hear the Debtor's Cross-Motion (filed less than 24 hours before the hearing and never scheduled with the court); (ii) the Receiver preferred the interests of 255 Ontario over that of the Debtor when it sought the Order; and (iii) the Motion Judge misapplied or failed to apply the *Royal Bank of Canada v. Soundair*[31] ("***Soundair***") principles.[32] None of these three grounds has merit.

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[29] *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282 (CanLII) at para 29.
[30] *Ravelston Corp., Re,* 2005 CanLII 63802 (ON CA) at para 28.
[31] *Royal Bank of Canada v. Soundair*, 1991 CanLII 2727 (ON CA).
[32] Notice of Appeal, *supra* note 19 page 16, paras 1-8, MPMR at Tab 1.

38. *First,* as noted in the Endorsement, and in accordance with Rule 37.07, a notice of motion must be served at least seven (7) days before the hearing date.[33] Further, paragraph 33 of the Receivership Order provides that "[…] any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Receiver and to any other party likely to be affected by the order sought upon such other notice, if any, as this Court may order".[34]

39. Until 3:56 p.m. (ET) on December 19, 2023 (i.e., the late afternoon before the hearing of the Receiver's motion), the Receiver's motion was unopposed. At that time, on the eve of the motion, the Debtor served its Cross-Motion – service was effected less than 24 hours before its proposed return. Moreover, the Cross-Motion was never scheduled and simply sought to "piggyback" off of the Receiver's scheduled motion.[35] The Cross-Motion was never properly in front of the Motion Judge under the *Rules of Civil Procedure* (Ontario) or pursuant to the Receivership Order. The Receiver had no meaningful opportunity to prepare responding materials to the Cross-Motion. It would have been improper for the Motion Judge to rule on it.

40. Moreover, despite its non-compliance, the Motion Judge did *consider* the Cross-Motion, finding that: "[t]he cross-motion has little chance of success".[36] The Cross-Motion brought by the Debtor sought to amend the Receivership Order.[37]

41. The Debtor purports to rely upon *King et al v Urban & Country Transport Ltd. et al* ("***King***"), a 1973 decision of this Court, for the proposition that the Court could have fixed a new

[33] Endorsement, *supra* note 17 at page 36, MPMR at Tab 3.
[34] Receiver's MR, *supra* note 2 at page 85, para 33, MPMR at Tab 4.
[35] Endorsement, *supra* note 17 at page 36, MPMR at Tab 3.
[36] Endorsement at page 36, MPMR at Tab 3.
[37] Respondent's CMR, *supra* note 11 at pages 240 and 241, at paras 1-4, MPMR at Tab 5.

closing date for the Original APS. [38] This issue was not before the Court; such relief was not sought and therefore reliance on this case is misplaced. In any event, *King* is not applicable.

42. In *King*, the purchaser was not *ready* to close on the closing date, however, the vendor was also in default and not entitled to rely on the time of the essence provision in the contract. In that instance, the Court opted to resolve the stalemate by applying two propositions:

(a) when time is of the essence and neither party is ready to close on the agreed date, the agreement remains in effect; and

(b) either party may reinstate time is of the essence by setting a new date for closing and providing reasonable notice to the other party.[39]

43. The foregoing principle was expressed in *Fortress Carlyle Peter St. Inc.* (ONSC 2019) as follows:

> "when both contracting parties breach the contract, the contract remains alive with time no longer of the essence but either party may restore time of the essence by giving reasonable notice to the other party of a new date for performance".[40]

44. Recently, in *2174372 Ontario Ltd. v. Dharamshi*[41] ("***Dharamshi***"), Charney J. reasoned that the principle in *King* was not applicable because, notwithstanding the fact that the purchaser repudiated the agreement of purchase and sale in question, the vendor refused to accept such termination. In light of the foregoing, the purchaser in *Dharamshi* remained ready to close but, due to default under the agreement of purchase and sale, the vendor could not. As a result, both

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[38] *King et al v Urban & Country Transport Ltd. et al*, 1973 CanLII 740 (ON CA).
[39] *2174372 Ontario Ltd. v. Dharamshi*, 2021 ONSC 6139 (CanLII) at para 95 [*Dharamshi*].
[40] *Fortress Carlyle Peter St. Inc. v. Ricki's Construction and Painting Inc*, 2019 ONSC 1507 (CanLII) at para 18.
[41] *Dharamshi*, supra note 39.

parties were obligated to abide by the original terms of the agreement of purchase and sale and no new closing date could be set. [42]

45. When considering the case at hand in the context of *Dharamshi,* while 255 Ontario did not want to close the Original APS, it remained able to do so. Conversely, and critically for present purposes, as a result of the Receivership Order, despite its posturing that it tendered, the Debtor was not merely unready or unprepared to close, but was *legally unable* to close the Original APS.[43] As a result, time remained of the essence and the parties were required to abide by the terms of the Original APS, with closing thereunder legally impossible in view of the Receivership Order. It follows then that the Debtor is not entitled to set a new closing date under the Original APS and the principle in *King* does not apply.

46. *Second,* the Debtor's allegation that the Receiver preferred the interests of 255 Ontario when seeking the Order is incorrect, but more importantly is irrelevant to the question whether an appeal of that Order is *prima facie* meritorious. While the Receiver denies that it preferred one party by seeking the Order, that does not result in any *prima facie* error made by the Motion Judge.

47. Moreover, the record is clear that the Receiver did make all reasonable efforts to amend the Original APS such that the transaction could be closed within the context of the Receivership Proceeding.[44] In connection with such efforts, the Receiver on a number of occasions suggested that the Debtor bring a motion seeking to allow it to close the Original APS.[45] Notwithstanding the Debtor's submissions that the Receiver ought to have proceeded differently, the Receiver, in light of its efforts in connection with the Original APS and in the discretion expressly afforded to

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[42] *Dharamshi, supra* note 39 at paras 98-100.
[43] Receiver's MR, *supra* note 2 at pages 73-89, MPMR at Tab 4.
[44] Receiver's MR at page 63, section 5.0, para 3, MPMR at Tab 4.
[45] Respondent's CMR, *supra* note 11 at page 328, MPMR at Tab 5.

it pursuant to paragraph 3(k) of the Receivership Order, believed it was in the best interests of the Debtor's stakeholders to move matters forward towards the best possible outcome available by seeking the Order and pursuing the Bidding Procedures and Stalking Horse APS.[46]

48. *Third*, the Debtor's submission that the Motion Judge erred in failing to consider the principles set forth in *Soundair* is factually incorrect. The *Soundair* principles, along with the factors outlined in *CCM Master Qualified Fund Ltd v. blutip Power Technologies Ltd.,*[47] were canvassed by the Receiver in its First Report[48] and highlighted in the Receiver's Factum (dated December 18, 2023) for the December 20th motion. These materials were before the Motion Judge when granting the Order.

49. It is trite that a court's reasons need not set out all cases considered and that "[…] the absence of reasons cannot be a ground for appellate review when the finding is otherwise supportable on the evidence or where the basis of the finding is apparent from the circumstances".[49] There is therefore no basis on which to state the Motion Judge did not consider *Soundair* or its principles in granting the Order. The Receiver's motion for the relief contemplated in the Order was the only relief properly in front of the Court, the Order was supportable on the evidence and, as is evidenced by the Endorsement, the basis for the Order was apparent in light of the circumstances.[50]

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[46] Receiver's MR, *supra* note 2 at page 71, section 7.0, para 1, MPMR at Tab 4.
[47] *CCM Master Qualified Fund v. blutip Power Technologies,* 2012 ONSC 1750 (CanLII).
[48] Receiver's MR, *supra* note 2 at page 70, section 6.5.3, para 1, MPMR at Tab 4.
[49] *R. v. Sheppard*, 2022 SCC 26 at para 36 citing to *R. v. Barrett*, 1995 CanLII 129 (SCC), [1995] 1 SCR 752 at para 1.
[50] Endorsement, *supra* note 17 at page 36 and 37, MPMR at Tab 3.

50. Overlaying the above is that "[b]ankruptcy and insolvency matters stand apart from other forms of secured debt collection and are governed by their own standard of review, which accords considerable deference to the Chambers judge".[51]

51. The grounds upon which the Debtor seeks to appeal the Order, an Order which attracts significant deference in the circumstances, do not meet the threshold of *prima facie* meritorious.

**(ii) Does the proposed appeal raise an issue that is of general importance to the practice or the administration of justice as a whole?**

52. The proposed appeal does not raise any issue of general importance; the Order is a standard sale process approval order designed to market for sale the Purchased Assets that was supported by the fulcrum creditor which sought and obtained the appointment of the Receiver and is backstopped by a Stalking Horse APS.[52]

53. In addition, the grounds of the Debtor's proposed appeal are without merit – as set forth in paragraphs 37–52 of this factum – and, as a result, the Debtor's appeal cannot raise issues of general importance.[53]

**(iii) Would the appeal unduly hinder the progress of the proceeding?**

54. The proposed appeal would undoubtedly hinder the progress of the receivership to the detriment of stakeholders generally.[54] It would directly impede the Receiver's ability to execute the Sale Process and realize on the Property. As this Court has concluded in similar cases,[55] in

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[51] *Re Harmon*, *supra* note 25 at para 40.
[52] Order, *supra* note 27 at pages 19 – 34, MPMR at Tab 2.
[53] *Royal Bank of Canada v. Ten 4 System Ltd.*, 2023 ONCA 839 (CanLII) at para 20.
[54] *Ibid* at para 21.
[55] *B&M Handelman Investments Limited v. Drotos*, 2018 ONCA 581 (CanLII) at para 47.

light of the indebtedness owing to, among others, Peakhill, which amounts remain outstanding with interest and other costs continuing to accrue daily, any further delay would unduly prejudice the Debtor's stakeholders, further erode value and fail to serve the interests of justice.

## PART V: RELIEF REQUESTED

55. The Receiver requests this Court dismiss the Debtor's motion, with costs on a full indemnity basis in view of the indemnity entitlement in the Peakhill loan agreement and the Receivership Order, to the extent applicable.

56. The Receiver estimates that it will require 30 minutes for oral argument.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 15th DAY OF JANUARY 2024**

Aiden Nelms

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## SCHEDULE A – LIST OF AUTHORITIES

***Cases Cited***

1. *2174372 Ontario Ltd. v. Dharamshi*, 2021 ONSC 6139 (CanLII)
2. *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225 (CanLII) (Chambers)
3. *B&M Handelman Investments Limited v. Drotos*, 2018 ONCA 581 (CanLII)
4. *Buduchnist Credit Union Limited v 2321197 Ontario Inc.*, 2019 ONCA 588 (CanLII)
5. *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282 (CanLII)
6. *CCM Master Qualified Fund v. blutip Power Technologies*, 2012 ONSC 1750 (CanLII)
7. *Enroute Imports Inc., Re*, 2016 ONCA 247 (CanLII)
8. *Fortress Carlyle Peter St. Inc. v. Ricki's Construction and Painting Inc*, 2019 ONSC 1507 (CanLII)
9. *Hillmount Capital Inc. v. Pizale*, 2021 ONCA 364 (CanLII)
10. *King et al v Urban & Country Transport Ltd. et al*, 1973 CanLII 740 (ON CA)
11. *Ravelston Corp., Re*, 2005 CanLII 63802 (ON CA)
12. *Re Harmon International Industries Inc.*, 2020 SKCA 95 (CanLII)
13. *Royal Bank of Canada v. Soundair*, 1991 CanLII 2727 (ON CA)
14. *Royal Bank of Canada v. Ten 4 System Ltd.*, 2023 ONCA 839 (CanLII)
15. *R. v. Barrett*, 1995 CanLII 129 (SCC), [1995] 1 SCR 752
16. *R. v. Sheppard*, 2022 SCC 26

## SCHEDULE B – STATUTES AND REGULATIONS RELIED ON

***Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3**

**Section 193**

**Court of Appeal**

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.

**Section 195**

**Stay of proceedings on filing of appeal**

Except to the extent that an order or judgment appealed from is subject to provisional execution notwithstanding any appeal therefrom, all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it appears that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper.

**Section 243 (1)**

**Court may appoint receiver**

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.

***Bankruptcy and Insolvency General Rules*, C.R.C. c. 368**

**Section 31**

**Appeal to Court of Appeal**

(1) An appeal to a court of appeal referred to in subsection 183(2) of the Act must be made by filing a notice of appeal at the office of the registrar of the court appealed from, within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates.

(2) If an appeal is brought under paragraph 193(e) of the Act, the notice of appeal must include the application for leave to appeal.

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

**Section 101**

**Injunctions and receivers**

(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. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

**Terms**
(2) An order under subsection (1) may include such terms as are considered just. R.S.O. 1990, c. C.43, s. 101 (2).

**R.R.O. 1990, Reg. 194: *Rules of Civil Procedure***

**Rule 37.07**

**Service of Notice**
***Required as General Rule***

**37.07** (1) The notice of motion shall be served on any party or other person who will be affected by the order sought, unless these rules provide otherwise. R.R.O. 1990, Reg. 194, r. 37.07 (1); O. Reg. 260/05, s. 9 (1).

***Where Not Required***

(2) Where the nature of the motion or the circumstances render service of the notice of motion impracticable or unnecessary, the court may make an order without notice. R.R.O. 1990, Reg. 194, r. 37.07 (2).

(3) Where the delay necessary to effect service might entail serious consequences, the court may make an interim order without notice. R.R.O. 1990, Reg. 194, r. 37.07 (3).

(4) Unless the court orders or these rules provide otherwise, an order made without notice to a party or other person affected by the order shall be served on the party or other person, together with a copy of the notice of motion and all affidavits and other documents used at the hearing of the motion. O. Reg. 219/91, s. 3; O. Reg. 260/05, s. 9 (2).

***Where Notice Ought to Have Been Served***

(5) Where it appears to the court that the notice of motion ought to have been served on a person who has not been served, the court may,

(a) dismiss the motion or dismiss it only against the person who was not served;

(b) adjourn the motion and direct that the notice of motion be served on the person; or

(c) direct that any order made on the motion be served on the person. R.R.O. 1990, Reg. 194, r. 37.07 (5).

***Minimum Notice Period***

(6) Where a motion is made on notice, the notice of motion shall be served at least seven days before the date on which the motion is to be heard.

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

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

**COURT OF APPEAL FOR ONTARIO**

Proceedings commenced in Toronto

# FACTUM OF THE RESPONDING PARTY, THE RECEIVER

**(Motion for Leave to Appeal and a Stay of the Order of Vallee J.)**


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