

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

B E T W E E N:

MARSHALLZEHR GROUP INC.

Applicant

- and -

LA PUE INTERNATIONAL INC.

Respondent

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

**AIDE MEMOIRE OF BUTTCON LIMITED
(April 15, 2025)**

1. This Aide Memoire is being filed on behalf of Buttcon Limited (“**Buttcon**”), who also relies on its Case Conference Brief of April 4, 2025, which is attached as **Tab 1**.
2. Buttcon’s position remains that the lien issues involve disputes between the lien claimants and MarshallZehr Group Inc. (“**MarshallZehr**”) and thus do not require and are not assisted by the continuing involvement of the Receiver. The Receiver’s proposed course of action only partially deals with the holdback issue, and will delay the adjudication of all the disputed issues.
3. One such issue is the priority claimed by MarshallZehr with respect to its mortgage. MarshallZehr, having brought its motion, should either abandon it, or should proceed with it and have it scheduled.



Fernando Souza,
Counsel for Buttcon Limited

TAB 1

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**CASE CONFERENCE BRIEF OF BUTTCON LIMITED
(April 4, 2025)**

Overview

1. This Case Conference was scheduled by Your Honour on March 7, 2025, to allow the lien claimants to provide further documentation¹ and for the Receiver to provide its report to the Court. As Your Honour's endorsement states:

At the return of the Case Conference, with the benefit of the Receiver's report, the court may make procedural directions regarding whether the priority issue shall be determined first, or whether both issues (the priority issue and the quantum of lien holdback issue) shall be heard together.

¹ Buttcon provided the documentation requested to the Receiver on March 13, 2025. On Friday, March 28, 2025 at 7:30 p.m., Receiver's counsel asked for further information. Buttcon is assembling the further documentation to provide to the Receiver.

2. Unfortunately, the Receiver's Report, served on March 31, 2025, is only of partial and limited assistance in relation to the quantum holdback issue, and is silent as to Receiver's opinion on the priority issue.

Receiver's Eighth Report

3. From Buttcon Limited's ("**Buttcon**") perspective, the Receiver's Report raises a number of concerns:
 - (a) At page 2, section [1.3.1](#), the Receiver states that it relied on information from MarshallZehr Group Inc. ("**MarshallZehr**"). This information has not been provided to the lien claimants, though it seems to be the basis for the comment, at page 9, [6.1.8.b](#), that MarshallZehr alleges that the lien claimants have billed for work that was not fully completed. This lack of transparency is of concern. The lien claimants cannot respond to information that is not provided to them.
 - (b) As noted above, the Report fails to provide a position as to the priority issue, or even indicate that the Receiver examined the issue. There is a reference to the issue at page 5, [5.0.1](#). There, the Receiver states that the issue is determined by [section 78\(5\)](#) of the *Construction Act*, which deals with subsequent mortgages. This fails to acknowledge that [section 78\(2\)](#) of the *Construction Act* is also engaged as there is an issue of whether any of the mortgages are building mortgages. A building mortgage, regardless of when it was registered, would also provide priority to the lien claimants with respect to the holdback.
 - (c) The Receiver does not indicate that it reviewed the extensive documentation filed on MarshallZehr's priority motion. Nor does it seem to have asked for further

information and documentation from any of the lien claimants on the issue. For example, no further documentation on the issue was requested from Astro Excavating Inc. who, like Buttcon, commenced its work prior to the registration of the MarshallZehr mortgage.

- (d) Turning to the holdback issue, the Receiver's current assessment of holdback is not really fully developed. It is also of concern that the Receiver fails to take into account that Buttcon's preliminary assessment of the holdback is \$1,437,450.20. It is not totally clear how the Receiver arrives at the amounts in its Report.
- (e) This would not be of immediate concern, save that the Receiver seems on intent to reducing further the sale proceeds. The Receiver is seeking to make a further disbursement of \$339,000 to MarshallZehr from the remaining \$1.7 million proceeds. The Receiver also advises that it may retain a cost consultant to review and value the work of the lien claimants. These additional costs, together with the costs of the Receiver and its counsel, would reduce the holdback amounts available to the lien claimants. The concern is that the remaining \$1.4 million would be further reduced by these additional costs.

Buttcon's Recommendations

- 4. Stepping back, now that the debtor's property has been sold, it is not clear whether there is a need for the Receivership to continue. The remaining issues involve competing claims of the lien claimants amongst themselves, and priority issue between the lien claimants and MarshallZehr as to the holdback. The Receiver's continued involvement only reduces the amounts available for any of these creditors. If there was no Receivership, these types

of complex issues could be addressed in a reference before an Associate Justice in Toronto.

5. The Receiver's recommendation of continuing its investigations, and then having the issues dealt with sometime in the future on a further case conference, and a motion, is not workable or efficient.
6. The logic of having the priority issue dealt with first remains unassailable, regardless of whether that issue is dealt with in a Reference in the Commercial List. The Receiver's report does not provide any basis as to why this should not be the case.
7. The priority issue and the holdback issue are discrete issues. They involve different timeframes and legal issues.
8. The assessment of the holdback issue involves consideration of the entirety of the services and materials provided to an improvement or construction project. In particular, the holdback is 10 per cent of the value of services and materials provided to the improvement or construction project under the contract between Buttcon and La Pue.²
9. In contrast, the priority issue involves a determination of whether labour and materials were first supplied to an improvement or construction project giving rise to a lien prior to

² The obligations created by "Basic holdback" are provided under [section 22 \(1\)](#) of the *Construction Act* which reads as follows:

22. (1) Each payer upon a contract or subcontract under which a lien may arise shall retain a holdback equal to 10 per cent of the price of the services or materials as they are actually supplied under the contract or subcontract until all liens that may be claimed against the holdback have expired as provided in Part V, or have been satisfied, discharged or provided for under section 44 (payment into court). R.S.O. 1990, c. C.30, s. 22 (1).

the registration or advances of any mortgage or whether any mortgage was in whole or in part a building mortgage.³ The two issues are completely different and the decision on one issue will not give rise to inconsistent finding of fact with respect to the other issue. In fact, if MarshallZehr established it was a prior mortgage, then it has priority with respect to the holdback and there will not be a need to determine the quantum of the holdback.⁴

10. The priority issue can thus be determined without the need to deal with the factual issues that related to the holdback.
11. Based on the foregoing, Buttcon requests the following:
 - (a) For the reasons stated above, the Receiver should not distribute \$339,000 to MarshallZehr at this time.
 - (b) Either by way of a motion before an Associate Justice or on the Commercial List, the priority motion of MarshallZehr should be scheduled.
 - (c) If MarshallZehr intends to file reply material, and conduct cross-examinations, those

³ Specifically, the general priorities for liens and mortgagees are provided under [section 78](#) of the *Construction Act*. The overarching principle of the regime under [section 78\(1\)](#) is that liens arising in respect of labour and materials supplied with respect to the improvement of a property, will have priority over mortgages, subject to exceptions specified in the remaining subsections. The subsequent mortgagee must qualify for one of the specified exceptions to the general priority of a lien claim, upon the lien arising.

⁴ For sake of completeness, [subsection 78\(3\)](#) of the *Construction Act* deals with prior mortgages and prior advances, or mortgages that were registered and advanced "prior to the time when the first lien arose in respect of an improvement". A mortgagee can thus only benefit by exception provided under [subsection 78\(3\)](#) it can establish that no work or supplies have been provided to the improvement such a to give rise to a lien. But even this priority, is further circumscribed, [subsection 78\(3\)](#) such that if the actual value of the property at the time when the first lien arose is less than the amount of the mortgage advances, then the lender's priority is limited to the value of the property at the time when the first lien arose.

should be scheduled. If it does not, the hearing of the motion can be scheduled.

April 3, 2025

A handwritten signature in blue ink, consisting of a stylized 'F' and 'S' intertwined.

Fernando Souza,
Counsel for Buttcon Limited

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Applicant

– and -

LA PUE INTERNATIONAL INC.
Respondent

Court File No. CV-23-00700695-00CL

ONTARIO
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(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

**CASE CONFERENCE BRIEF OF BUTTCON
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