COURT OF APPEAL FOR ONTARIO

CITATION: Marshallzehr Group Inc. v. La Pue International Inc., 2025 ONCA 124
DATE: 20250219
DOCKET: M55745 & M55769 (COA-25-CV-0063)

MacPherson J.A. (Motions Judge)

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

BETWEEN

Marshallzehr Group Inc.

Applicant
(Respondent/Responding Party/Responding Party by way of cross-motion)

and

La Pue International Inc.

Respondent
(Appellant/Responding Party/Moving Party by way of cross-motion)

Miranda Spence and Adrienne Ho, for the respondent/moving party (M55745)/responding party by way of cross-motion (M55769), KSV Restructuring Inc., in its capacity as receiver of La Pue International Inc.

Maya Poliak, for the respondent/responding party (M55745)/responding party by way of cross-motion (M55769), Marshallzehr Group Inc.

Howard F. Manis and Daniel Litsos, for the appellant/responding party (M55745)/moving party by way of cross-motion (M55769), La Pue International Inc.

Mitch Lightowler and Piper Mckerlie, for 1000835091 Ontario Inc.

Fernando Souza, for Buttcon Limited and as agent for counsel for HC Matcon Inc.

Jason Wadden, for Anthony Defrancesco

Heard: February 7, 2025

ENDORSEMENT

[1] KSV Restructuring Inc. ("KSV"), in its capacity as court appointed receiver of all the assets, undertakings and properties of La Pue International Inc., including the real property known as 5528 Ferry Street, Niagara Falls, brings a motion seeking, *inter alia*:

(a) a declaration that the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, (the "*BIA*") governs the appeal by the debtor La Pue International Inc. from the Approval and Vesting Order of Dietrich J. of the Superior Court of Justice dated January 7, 2025 (the "AVO");

(b) a declaration that there is no automatic right of appeal from the AVO pursuant to subsections 193(a)-(d) of the *BIA* and that leave to appeal is required pursuant to subsection 193(e) of the *BIA*;

(c) an Order declining to grant leave to appeal from the AVO; and

(d) an Order sealing the confidential appendices of the fifth report of the Receiver dated January 20, 2025 (the "Fifth Report").

[2] In response to the receiver's motion, the debtor La Pue International Inc. brings a cross-motion relating to the same subject matter and issues.

[3] In her decision authorizing the sale by the receiver of the subject property, the motion judge concluded, at paras 29-32:

> [W]hat should be considered is the information available to the Receiver at the time it made a decision to proceed with the Transaction. At that time, the Transaction represented the best offer in terms of purchase price that it had received.
>
> …
>
> As set out by the Ontario Court of Appeal in *Marchant Realty Partners Inc. v. 2407553 Ontario Inc.*, 2021 ONCA 375 at para 15, courts will generally defer to a court appointed receiver's business expertise in reviewing a sale and will not second guess their recommendation absent exceptional circumstances.
>
> …
>
> Accordingly, I would approve the Transaction.

[4] The debtor seeks to appeal the motion judge's decision, asserting that she erred by failing to properly consider the interests of all parties and by preferring the interests of the purchaser over the interest of the debtor and its right to redeem.

[5] Appeals under the *BIA* are dealt with in s. 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;
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> (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.

[6] The debtor asserts that it has a right to appeal under s. 193(a) of the *BIA*.[1] It says that the AVO affects its future rights as well as those of 359 pre-sale purchasers that entered into pre-sale construction agreements with the debtor and the lien claimants with more than $12,000,000 in security registered against title to the property.

[7] I do not accept this submission. In *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225, Brown J.A. said, at paras. 21-23:

> Although the category of "future rights" increasingly seems an anachronistic and confusing basis upon which to ground appeal rights, courts have attempted to cloak the term "future rights" with some practical meaning. In *Re Ravelston Corp.*, Doherty J.A. stated, at para. 18:
>
> > The meaning of the phrase "future rights" is not obvious. Caselaw holds that it refers to future legal rights and not to procedural rights or commercial advantages or disadvantages that may accrue from the order challenged on appeal … Rights that presently exist, but may be exercised in the future or altered by the order under appeal are present rights and not future rights … [Citations omitted.]

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[1] In its notice of appeal, the debtor asserts that it has a right of appeal under s. 193(b) of the *BIA*; however, this submission was not pursued at the hearing of this motion. Instead, the debtor relies on ss. 193(a) and (c) of the *BIA* to submit that it has a right of appeal to this court.

> Doherty J.A. went on to adopt, at para. 19, the view expressed in *Elias v. Hutchison*, at paras. 100-101, that s. 193(a) of the *BIA* "must refer to rights which could not at the present time be asserted but which will come into existence at a future time."
>
> More recently, Blair J.A., in *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, stated, at para. 15:
>
> > "Future rights" are future legal rights, not procedural rights or commercial advantages or disadvantages that may accrue from the order challenged on appeal. They do not include rights that presently exist but that may be exercised in the future.

[8] In my view, the debtor cannot bring itself within the definitions set out in these authorities. Its rights that may be in issue in the bankruptcy proceedings may be in issue now, not in the future.

[9] The debtor's second submission is that it has a right of appeal under s. 193(c) of the *BIA*. It says that if the transaction contemplated by the AVO is completed, it is certain that there will be a loss exceeding $10,000 suffered by the company, its principal and the lien claimants. The debtor points out that in its factum the receiver acknowledges that the debtor's indebtedness to the applicant continues to accrue interest at $14,181.37 per day and the underlying debt already exceeds $20,000,000.

[10] I am not persuaded by this submission. In *Bending Lake Iron Group, supra*, Brown J.A. said, at para. 53:

> [C]ontextual factors militate against employing an expansive application of the automatic right of appeal contained in s. 193(c) and, instead, point to the need for an approach which is alive to and satisfies the needs of modern, "real-time" insolvency litigation. I shall employ such an approach in applying the following three principles that have emerged from the jurisprudence: s. 193(c) does not apply to (i) orders that are procedural in nature, (ii) orders that do not bring into play the value of the debtor's property, or (iii) orders that do not result in a loss.

[11] In my view, the AVO in this case fits precisely into the three parameters set out by Brown J.A. in this passage, and the appeal does not meet the threshold in s. 193(c) of the *BIA*. I agree with the receiver that the AVO is procedural in nature, does not bring into play the value of the debtor's property, and does not result in a direct loss to any interested party.

[12] The debtor's third submission is that, if it does not have an automatic right of appeal under either or both s. 193(a) and s. 193(c) of the *BIA*, it should nevertheless be granted leave under the discretionary s. 193(e) of the *BIA*.

[13] The test for leave to appeal under s. 193(e) of the *BIA* is well established. In *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, Blair J.A. said, at para 29:

> Beginning with the overriding proposition that the exercise of granting leave to appeal under s. 193(e) is discretionary and must be exercised in a flexible and contextual way, the following are the prevailing considerations in my view. The court will look to whether the proposed appeal,

(a) raises an issue that is of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole, and is one that this Court should therefore consider and address;
(b) is *prima facie* meritorious, and
(c) would unduly hinder the progress of the bankruptcy/insolvency proceedings.

[14] The debtor cannot establish any of these factors.

[15] The proposed appeal does not raise an issue of general importance to insolvency practice or to the administration of justice as a whole. I agree with the receiver that the proposed appeal is rooted in the specifics of the dealings among the receiver, the debtor and the potential purchaser.

[16] The proposed appeal is not *prima facie* meritorious. The motion judge's reasons are clear, comprehensive and, in my view, obviously correct.

[17] The proposed appeal would delay and "unduly hinder" the progress of the bankruptcy proceedings. The sooner the receiver can proceed with and finalize its professional steps, the better.

[18] The receiver's motion is granted. The debtor's cross-motion is dismissed.

[19] A sealing Order is granted with respect to Confidential Appendices 1 to 6 of the receiver's Fifth Report to the Court dated January 20, 2025.

[20] The receiver is entitled to its costs of the motion and cross-motion fixed at $25,000, inclusive of disbursements and HST.

J.G. MacPherson J.A.