

Court Motion No. M55745  
Court of Appeal File No.: COA-25-CV-0063  
Court File No.: CV-23-00700695-00CL

***COURT OF APPEAL FOR ONTARIO***

B E T W E E N:

**MARSHALLZEHR GROUP INC.**

Applicant  
(Respondent)

- and -

**LA PUE INTERNATIONAL INC.**

Respondent  
(Appellant)

**FACTUM OF THE APPELLANT**

**DATE:** February 5, 2025

**MANIS LAW**  
2300 Yonge Street, Suite 1600  
Toronto, Ontario M4P 1E4

**Howard F. Manis** (LSO#: 34366V)  
Tel: (416) 364-5289  
[hmanis@manislaw.ca](mailto:hmanis@manislaw.ca)

**Daniel Litsos** (LSO#: 79628V)  
[dlitsos@manislaw.ca](mailto:dlitsos@manislaw.ca)

Lawyers for the Appellant,  
La Pue International Inc.

**TO: SERVICE LIST**

## PART I- STATEMENT IDENTIFYING PARTIES AND APPEAL

1. This cross-motion is brought by La Pue International Inc. (the “**Company**”), for relief arising from the approval and vesting order of the Honourable Justice Dietrich (the “**Motion Judge**”), dated January 7, 2025 (the “**AVO**”) in the Superior Court of Justice (Commercial List).
2. KSV Restructuring Inc. (“**KSV**”) was appointed as receiver (in such capacity, the “**Receiver**”), without security, of all of the assets, undertakings and properties of the Company, including the real property municipally known as 5528 Ferry Street, Niagara Falls (the “**Property**”).
3. The Receiver seeks the following relief of this Court of Appeal:
  - A. a Declaration that the *Bankruptcy and Insolvency Act* RSC 1985, c. B-3, as amended, (the “**BIA**”) governs the appeal by the Appellants from 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; and
  - C. an Order declining to grant leave to appeal from the AVO;
4. The relief sought by the Receiver is opposed on the basis that the Company’s appeal falls within section 193(a) and 193(c) of the BIA. However, out of an abundance of caution, and not because the Company agrees with the position set out by the Receiver, the Company seeks the following relief, of this Court of Appeal, if deemed necessary:
  - A. If necessary, an order abridging the time for service and filing of the Appellant’s Cross-Motion Record;
  - B. Directions of this Honourable Court as to whether leave to appeal to the Court of

Appeal and stay of the AVO is necessary, in light of the provisions of sections 193 and 195 of the BIA;

C. If leave to appeal is required, an Order granting leave to appeal the AVO; and

D. If necessary, a stay of the AVO pending the hearing of the appeal.

## **PART II: CONCISE SUMMARY OF THE FACTS RELEVANT TO THE ISSUES ON APPEAL**

5. The Company generally accepts the facts as summarized by the Receiver in its Factum dated February 3, 2025.

**Reference:** Factum of the Receiver, dated February 3, 2025.

6. In the Motion Judge's endorsement, Her Honour notes that the Company requested to redeem the mortgage indebtedness owed to the Applicant, Marshallzehr Group Inc. ("**Marshallzehr**"), and this request was supported by construction lien claimants, Buttcon Limited and HC Matcon Inc., as this "would leave their claims intact".

**Reference:** Endorsement of Justice Dietrich, dated January 7, 2025 (the "**Endorsement**"), at para 4.

7. Buttcon Limited and HC Matcon Inc. have collectively registered construction liens against title to the Property in excess of \$12,000,000.00, as particularized at Schedule "C" of the AVO. The entirety of those liens will be deleted and expunged if the AVO transaction is completed.

**Reference:** AVO at para 3, Schedule C.

8. The Receiver has been provided with evidence that the Company has the necessary funds required to exercise its right of redemption and cover the indebtedness owed to Marshallzehr, and the additional costs related to this receivership proceeding.

## **PART III: SPECIFIC QUESTIONS BEFORE THIS COURT**

9. The Company submits the following specific questions before this Court:

**A. Issue A: Leave to Appeal and Stay Questions**

- i. Does the Company have an automatic right of appeal pursuant to sections 193(a) or 193(c) of the BIA?
- ii. If leave to appeal is required, should leave be granted and if so, should a stay be granted pending the Company’s leave application?

**B. Issue B: Substantive Appeal Questions**

- i. Did the learned Motion Judge err by failing to consider, or properly consider, the interests of all parties as required pursuant to the governing principles set out in case law;
- ii. Did the learned Motion Judge err by preferring the interests of the Purchaser over the interest of the Company and its right to redeem; and
- iii. Should the AVO be stayed pending the appeal?

**PART IV: STATEMENT OF EACH ISSUE RAISED AND STATEMENT OF LAW**

10. It is well established that a single Justice dealing with motions involving orders made under the BIA has the authority to determine whether a party has a right of appeal under s. 193(a) – (d) of the BIA, or whether a party requires leave to appeal under s.193(e) of the BIA, and if leave is required, whether leave should be granted.

**Reference:** *Cardillo v Medcap Real Estate Holdings Inc.*, 2023 ONCA 852 at para 25 (“Medcap”).

**Issue A: Leave to Appeal is not Required**

11. Section 193 of the BIA provides that:

**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.

**Reference:** *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, section 193.

### **The AVO Impacts Future Rights**

12. Pursuant to section 193(a) of the BIA, an appeal lies to the Court of Appeal if the matters at issue involves future legal rights. These are rights “which could not at the present time be asserted but which will come into existence at a future time”.

**Reference:** [\*Elias v. Hutchinson\*, 1981 ABCA 31 \(“Elias”\)](#), at [para 23](#).

13. In *Elias*, the Alberta Court of Appeal defined future rights as “A right in a legal sense exists when one is entitled to enforce a claim against another or to resist the enforcement of a claim advanced by another. A present right exists presently; a future right is inchoate in that while it does not now exist, it may arise in the future”.

**Reference:** [\*Elias\*](#), at [para 22](#).

14. The AVO affects the future rights of the Applicant, Marshallzehr, the Company, its principal, 359 pre-sale purchasers that entered into pre-sale construction agreements with the Company and the lien claimants with more than \$12,000,000.00 in security registered against title to the Property.

**Reference:** Endorsement, at paras 3, 4, 8, 12, 17, 21, 33, 34, 35.

**Reference:** AVO, at para 3, Schedule C.

15. Marshallzehr’s future legal right to enforce the personal guarantee of the Company’s principal will arise if there is a shortfall on the payout of the mortgage indebtedness owed. Conversely, no such future right would exist if the Company redeems the mortgage

indebtedness owed to Marshallzehr.

**Reference:** Endorsement, at paras 3, 4, 21.

16. The AVO jeopardizes the future rights of lien claimants with security registered against title to the Property. The priority of the lien claimants' security and Marshallzehr's security remains in dispute.

**Reference:** Endorsement, at paras 36-39.

17. The Receiver has established a holdback reserve of \$1.4 million, which exceeds 10% of the total liens registered against title to the Property. A motion is scheduled for March 7, 2025 to determine the priority dispute between Marshallzehr and the lien claimants.

**Reference:** Endorsement, at paras 36-39.

18. The future rights of 359 purchasers that entered into pre-sale construction contracts with the Company are also at stake. Those pre-sale construction contracts grant purchasers various legal rights which may be exercised in the future.

**Reference:** Endorsement, at paras 8, 12, 13, 15, 27.

19. There is \$31 million dollars in deposits being held in trust plus accrued interest earned thereon on behalf of these pre-sale purchasers, and there is no certainty as to whether the Purchaser will be assuming these pre-sale construction contracts or have to disclaim same.

**Reference:** Endorsement, at paras 8, 12, 13, 15, 27.

20. The Purchaser may only assume these pre-sale construction contracts if and when it obtains Home Construction Regulatory Authority approval, which thereby leaves the rights of pre-sale purchaser's in limbo.

**Reference:** Endorsement, at paras 8, 12, 13, 15, 27.

### **The Property Involved Exceeds \$10,000.00**

21. An appeal lies as of right under section 193(c) if the property involved in the appeal exceeds

in value of \$10,000.00.

**Reference:** *BIA*, section 193(c).

22. This Court has previously interpreted section 193(c) narrowly and restricted the automatic right of appeal so that it does not apply to orders or decisions that: are procedural in nature; do not bring into the play the value of the debtor's property; or, orders that do not result in a loss of more than \$10,000.

**Reference:** *Peakhill Capital Inc. v. 1000093910 Ontario Inc.*, 2024 ONCA 59 (“*Peakhill*”), at para 27, citing *Cardillo v. Medcap Real Estate Holdings Inc.*, 2023 ONCA 852.

23. However, in assessing whether an automatic right of appeal exists under s. 193(c), the court must “make a critical examination of the effect of the order sought to be appealed”.

**Reference:** *Peakhill Capital Inc. v. 1000093910 Ontario Inc.*, 2024 ONCA 59, at para 31 citing *Comfort Capital Inc. v. Yeretsian*, 2023 ONCA 282 at paras. 20 and 21, citing *Hillmount Capital Inc. v. Pizale*, 2021 ONCA 364, at paras 35, 42 and 45.

24. In doing so, the court must undertake a fact-specific, evidence-based inquiry to “discern the operative effect of the order ... does the order result in a loss or gain, or put in jeopardy value of property, in excess of \$10,000”.

**Reference:** *Peakhill Capital Inc. v. 1000093910 Ontario Inc.*, 2024 ONCA 59, at para 31 citing *Comfort Capital Inc. v. Yeretsian*, 2023 ONCA 282 at paras. 20 and 21, citing *Hillmount Capital Inc. v. Pizale*, 2021 ONCA 364, at paras 35, 42 and 45.

25. For 193(c) to apply, “the order in question must contain some element of a final determination of the economic interests of a claimant in the debtor”.

**Reference:** *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225 (“*Bending Lake*”), at para 61.

26. In *Peakhill*, the Court found an automatic right of appeal because there was a likelihood of a loss exceeding \$10,000.00 caused by the lower court's decision to approve a sale and investment solicitation process and stalking horse purchase in the face of an alternative pre-filing purchase agreement.

**Reference:** [Peahill Capital Inc. v. 1000093910 Ontario Inc., 2024 ONCA 59.](#)

27. The facts in *Peahill* are similar to the case at bar. Here, the Motion Judge approved the AVO in the face of the Company seeking to exercise its right of redemption. The Company's right of redemption would have undoubtedly resulted in a greater net recovery for all stakeholders, including the Applicant, Marshallzehr, the lien claimants and the pre-sale purchasers.

**Reference:** Endorsement, at para 32.

28. Similar to *Peahill*, the difference between the purchase price offered in support of the AVO and the Company's right of redemption would result in a loss exceeding \$10,000.00, thereby putting into play the value of the Company's Property. It is respectfully submitted that Justice Simmons' findings in *Peahill* equally apply to the case at bar, such that the Company has an automatic right of appeal pursuant to section 193(c).

**Reference:** [Peahill Capital Inc. v. 1000093910 Ontario Inc., 2024 ONCA 59.](#)

29. If the transaction contemplated by the AVO is completed, it is certain that there will be a loss exceeding \$10,000.00 suffered by the Company, its principal and the lien claimants. The Receiver confirms at paragraph 44 of its Factum that the "Debtors' indebtedness to MarshallZehr continues to accrue interest at a rate of \$14,181.37 per day, and the underlying debt already exceeds \$20,000,000.00".

**Reference:** Factum of the Receiver, dated February 3, 2025, at para 44.

30. Any shortfall suffered by Marshallzehr will become a liability incurred by the principal of the Company who personally guaranteed the indebtedness owed. Similarly, the transaction contemplated by the AVO will result in construction liens exceeding \$12,000,000.00 being deleted and discharged from title to the Property.



**Reference:** Approval and Vesting Order, issued January 7, 2025 (the “AVO”), at para 3, Schedule C.

31. It is respectfully submitted that the Company’s right of redemption is a substantive right, not a procedural one, and the Company was denied that substantive right, thereby resulting in an element of final determination of the economic interests of the Company, as contemplated in *Bending Lake*.

**Reference:** [\*2403177 Ontario Inc. v. Bending Lake Iron Group Limited\*, 2016 ONCA 225](#), at [para 61](#).

### **If Leave is Required, it Should be Granted**

32. In the event the Company requires leave, it applies under section 193(e) of the BIA.

**Reference:** *BIA*, section 193(e).

33. It is trite law that the overriding proposition is 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:

- A. the appeal 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. the appeal is *prima facie* meritorious;
- C. the appeal would unduly hinder the progress of the bankruptcy/insolvency proceedings; and
- D. the question whether the point raised is of significance to the action itself.

**Reference:** [\*Casa Nova Fashions Ltd. v The Midas Investment Corporation\*, 2021 ONCA 581](#) at [para 37](#).

34. In the event it is determined that the Company requires leave to appeal, such relief should be granted simply because this appeal raises issues of general importance to bankruptcy/insolvency matters and the administration of justice as a whole.

**Reference:** *Casa Nova Fashions Ltd. v The Midas Investment Corporation*, 2021 ONCA 581 at para 37.

35. The Company's right of redemption was denied, despite the overriding prejudice suffered by stakeholders such as the lien claimants and pre-sale home purchasers. If transaction contemplated by the AVO is completed, it will result in a loss exceeding \$12,000,000.00 for lien claimants.

**Reference:** Endorsement, at paras 3, 4, 8, 12, 17, 21, 33, 34, 35.

**Reference:** AVO, at para 3, Schedule C.

36. Similarly, the 359 pre-sale purchasers that contracted with the Company for condominium units may not get what they've bargained for. While a return of the pre-sale purchaser's deposits may appear to be an adequate remedy, this contingent resolution fails to consider the interests of pre-sale purchasers that bargained for a condominium and may not get what they purchased.

**Reference:** Endorsement, at paras 3, 4, 8, 12, 17, 21, 33, 34, 35.

**Reference:** AVO, at para 3, Schedule C.

37. The overriding prejudice suffered by third party stakeholders was not considered when the Motion Judge exercised discretion in granting the AVO, in the face of the Company's request to redeem. The redemption request would have resulted in a far better recovery for all stakeholders.

38. It is respectfully submitted that, for the foregoing reasons, the proposed appeal is *prima facie* meritorious and a stay is warranted.

### **Issue B: Substantive Appeal Questions**

39. The Company's proposed appeal raises substantive issues as outlined in the Notice of Appeal appended as Tab 3 to the Company's Cross-Motion Record. In summary, the Company will submit on appeal that:

- A. The learned Motion Judge erred in law and fact by failing to consider, or properly consider, the interests of all parties, as required pursuant to the governing principles set out in case law and applicable to the Court's approval of sales transactions;
- B. The learned Motion Judge erred in law and fact by preferring the interests of the Purchaser over the interests of the Company and its right to redeem and payout the indebtedness owed to Applicant Marshallzehr;
- C. The learned Motion Judge failed to consider evidence supporting the Company's financial ability to exercise its right of redemption; and
- D. The learned Motion Judge erred in fact by finding that the purchase price submitted by the Purchaser is superior to the offer submitted by the Company.

**Reference:** Cross-Motion Record of La Pue International Inc., dated February 3, 2025, at Tab 3.

#### **PART V: ORDERS REQUESTED**

40. The Company respectfully requests:

- A. If required, an Order extending the time for service of the Company's Cross-Motion Record, and this Factum, validating service of its Cross-Motion Record and this Factum, in the manner effected, abridging time for service thereof, and/or dispensing with service thereof on any party other than the parties served;
- B. An Order that the Company has a right of appeal, without leave, to the Court of Appeal, and that the Order of the Honourable Madam Justice Dietrich be stayed pending the hearing of that Appeal;
- C. in the alternative, an Order granting leave to appeal the Order of the Honourable Madam Justice Dietrich;
- D. Costs of this motion on a substantial indemnity basis, or to be determined by the

panel hearing the Appeal; and

E. such further relief as counsel may advise and this Honourable Court may deem just.

**ALL OF WHICH IS RESPECTUFLY SUBMITTED**, this 5<sup>th</sup> day of February, 2025.



---

**HOWARD MANIS**

**MANIS LAW**

Lawyers  
2300 Yonge Street, Suite 1600  
Toronto, Ontario M4P 1P4

**Howard F. Manis** LSO # 34366V  
Tel: (416) 417-7257  
Email: [hmanis@manislaw.ca](mailto:hmanis@manislaw.ca)

**Daniel Litsos** LSO# 79628V  
Email: [dlitsos@manislaw.ca](mailto:dlitsos@manislaw.ca)

Lawyers for the Appellant, La Pue  
International Inc.

**SCHEDULE “A”  
LIST OF AUTHORITIES**

1. *Cardillo v Medcap Real Estate Holdings Inc.*, 2023 ONCA 852
2. *Elias v. Hutchinson*, 1981 ABCA 31
3. *Peakhill Capital Inc. v. 1000093910 Ontario Inc.*, 2024 ONCA 59
4. *Comfort Capital Inc. v. Yeretsian*, 2023 ONCA 282
5. *Hillmount Capital Inc. v. Pizale*, 2021 ONCA 364
6. *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225
7. *Casa Nova Fashions Ltd. v The Midas Investment Corporation*, 2021 ONCA 581

**SCHEDULE “B”**  
**TEXT OF STATUTES, REGULATIONS & BY-LAWS**

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

**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.

**Stay of proceedings on filing of appeal**

195 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.

**MARSHALLZEHR GROUP INC.**  
Applicant (Respondent on Appeal)

- and -

**LA PUE INTERNATIONAL INC.**  
Respondent (Appellant)

Court Motion No. M55745  
Court of Appeal File No.: COA-25-CV-0063  
Court File No.: CV-23-00700695-00CL

---

***COURT OF APPEAL FOR ONTARIO***

Proceedings Commenced at TORONTO

---

**APPELLANT'S FACTUM**

---

**MANIS LAW**

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

**Howard Manis** (LSO # 34336V)

Email: [hmanis@manislaw.ca](mailto:hmanis@manislaw.ca)

Phone: (416)364-5289

**Daniel Litsos** (LSO #79628V)

Email: [dlitsos@manislaw.ca](mailto:dlitsos@manislaw.ca)

Lawyers for the Appellant,  
La Pue International Inc.